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Cartel Criminalization in Europe: Addressing Deterrence and Institutional Challenges

Francesco Ducci^{*}

ABSTRACT

This Article analyzes cartel criminalization in Europe from a deterrence and institutional perspective. First, it investigates the idea of criminalization by putting it in perspective with the more general question of what types of sanctions a jurisdiction might adopt against collusive behavior. Second, it analyzes the institutional element of criminalization by (1) discussing the compatibility of administrative enforcement with the potential de facto criminal nature of administrative fines under European law and (2) evaluating the trade-offs between an administrative and a criminal model of enforcement. Although a “panoply” of sanctions against both corporations and individuals may be necessary under a deterrence perspective, this Article suggests that individual sanctions are unlikely to become a priority in Europe without a prior willingness to reform the current model of enforcement to increase the levels of due process. The debate concerning the right to a fair trial in antitrust proceedings and reforms to improve the efficiency–due process trade-off could be leveraged to open the door to the introduction of individual sanctions at the European level.

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I. INTRODUCTION

The global trend against cartels, driven by the widespread consensus about the harmfulness of such practices for economies and consumers, has resulted in the introduction of criminal offenses in many competition law regimes around the world.¹

In many jurisdictions, like Canada and the United States, a number of antitrust provisions fall within a criminal law regime. In Canada, by virtue of Sections 45 and 47 of the Competition Act, hard-core cartels and bid rigging are subject to criminal sanctions and considered *per se* illegal, unless the parties accused can prove that the agreement in question is ancillary to a broader or separate principal agreement that includes the same parties and is reasonably necessary for the implementation of the principal agreement.² Following a bifurcated judicial model for criminal violations, the Competition Bureau investigates criminal offenses and remits the

1. ORG. FOR ECON. COOPERATION & DEV., RECOMMENDATION OF THE COUNCIL CONCERNING EFFECTIVE ACTION AGAINST HARD CORE CARTELS (1998), <http://www.oecd.org/daf/competition/2350130.pdf> [https://perma.cc/RZJ7-GZLS] (archived Nov. 7, 2017).

2. Competition Act, R.S.C. 1985, c C-34 (Can.) [hereinafter Competition Act].

prosecution of criminal cases to the Federal Director of Public Prosecution. Cases are heard in ordinary criminal courts.³

In the United States, violation of the Sherman Act is a felony. Both corporations and individuals can be sanctioned and individuals can be sentenced to prison.⁴ The Antitrust Division of the Department of Justice is in charge of prosecuting criminal actions in the federal courts of general jurisdiction.

On the other side of the Atlantic, the European antitrust regime does not contain criminal sanctions. The European Commission can impose only administrative fines on undertakings but cannot impose criminal punishment on individuals.⁵ However, in line with international trends, the Commission has recognized anti-cartel policies as one of its priorities, leading to a significant increase in the level of fines imposed on undertakings, wider use of leniency regimes, and settlement procedures.⁶

At the same time, there has been a significant debate over whether competition law fines should be treated as de facto criminal under the autonomous definition contained in Article 6(1) of the European Convention for the Protection of Human Rights (ECHR).⁷ Many concerns have been raised as to whether the current enforcement model with an administrative body in charge of investigative, adjudicative, and enforcement functions is adequate to ensure a right to a fair trial.⁸ To date, the European Court of Human Rights (ECtHR) has confirmed the compatibility of the current integrated agency model with due process requirements, indicating that an integrated agency model is compatible with Article 6 as long as strong procedural guarantees are in place and a body with “full jurisdiction” exercises sufficient judicial control.⁹ Despite the

3. Eleanor M. Fox & Michael J. Trebilcock, *The Design of Competition Law Institutions and the Global Convergence of Process Norms: The Gal Competition Project* 24–25 (N.Y.U. Law and Econ., Working Paper No. 304, 2012).

4. Donald I. Baker, *Punishment for Cartel Participants in the US: A Special Model?*, in CRIMINALISING CARTELS: CRITICAL STUDIES OF AN INTERNATIONAL REGULATORY MOVEMENT 27 (Caron Beaton-Wells & Ariel Ezrachi eds., 2011).

5. Council Regulation 1/03/EC on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, 2003 O.J. (L1) 1.

6. See Press Release, European Commission, *Fighting Against Cartels: A Priority for the Present and for the Future* (Apr. 3, 2014) (declaring that the fight against cartels is a priority for the Commission and describing anti-cartel policy measures).

7. The term “criminal” has its own distinct meaning in ECHR case law. See *Case of Engel and Others v. The Netherlands*, 22 Eur. Ct. H.R. (ser. A) at 4 (1976) (distinguishing “criminal” from “disciplinary” law).

8. Ian Forrester, *Due Process in EC Competition Cases: A Distinguished Institution with Flawed Procedures*, 34 EUR. L. REV. 817, 821 (2009); Wouter P.J. Wils, *The Increased Level of EU Antitrust Fines, Judicial Review and the European Convention on Human Rights*, 33(1) WORLD COMPETITION 1 (2010).

9. See *A. Menarini Diagnostics S.R.L. v. Italy*, No. 43509/08, Eur. Ct. H.R. (2011), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-106438> [<https://perma.cc/3UNP-KKSS>] (archived Nov. 7, 2017).

numerous criticisms surrounding the margin of appreciation that the EU courts extend to the Commission's "complex and factual economic assessments," the standards of judicial review have been recognized as ECHR standards compliant.¹⁰

This Article addresses the question of cartel criminalization on two interrelated levels. First, it analyzes the deficiencies of a sanction regime based solely on administrative fines on corporations as a policy instrument to effectively deter collusive behavior. In doing so, it discusses possible theoretical justifications for introducing criminal sanctions, and it evaluates a variety of antitrust sanctions that a jurisdiction may impose on firms and individuals. Second, it addresses the institutional design aspect of criminalization. In particular, it asks whether an administrative integrated agency model is compatible with current high levels of administrative monetary fines, which have been categorized as *de facto* criminal in nature. Finally, it analyzes the trade-offs entailed in switching from an administrative to a criminal system of enforcement.

This Article argues that despite the high desirability of introducing sanctions against both firms *and* individuals at the European level in order to ensure sufficient deterrence of cartels, such policy is unlikely to be acceptable as a stand-alone reform. Conversely, the focus should be on current shortcomings and possible reforms to the current institutional system of enforcement. Although changes in institutional design may also prove politically and legally daunting and subject to issues of path dependence,¹¹ the present shortfalls in terms of procedural fairness and the potential improvement of the efficiency–due process trade-off that could arise from switching to a bifurcated judicial model¹² may provide strong justifications for a deeper institutional change. As it is argued below, only the desirability of such broader reform at the institutional level¹³ could bring about the possibility of introducing individual sanctions against cartels.

10. See, e.g., *id.*; *KME Germany AG v. European Commission*, 2011 C.M.L.R. 275, 279.

11. See generally Mariana M. Prado & Michael J. Trebilcock, Path Dependence, Development, and the Dynamics of Institutional Reform (Univ. of Toronto, Legal Studies Working Paper No. 09-04, 2009), <https://ssrn.com/abstract=1415040> [<https://perma.cc/MAV2-J4SW>] (archived Nov. 8, 2017) (chronicling challenges in prior efforts toward reforms).

12. See Michael J. Trebilcock & Edward M. Iacobucci, *Designing Competition Law Institutions: Values, Structures, and Mandate*, 41 LOY. U. CHI. L. J. 455, 461–63 (2010).

13. For a discussion on the institutional structure and performance of the European competition law regime, see Ioannis Lianos & Arianna Andreangeli, *The European Union: The Competition Law System and the Union's Norms*, in *THE DESIGN OF COMPETITION LAW INSTITUTIONS, GLOBAL NORMS, LOCAL CHOICES* 384 (Eleanor M. Fox & Michael J. Trebilcock eds., 2013).

Part II begins by discussing the two main rationales for criminalization of cartels¹⁴—retribution and deterrence.¹⁵ Starting from the recognition that it would be virtually impossible to increase monetary fines to a high enough level to match the marginal benefits of entering into a cartel agreement, Part III analyses the potential deterrent effect of various civil and criminal sanctions on both corporations and individuals. Part IV discusses the potential *de facto* nature of monetary fines in antitrust cases, the institutional reforms required to comply with a criminal law system by identifying the advantages and disadvantages of a bifurcated judicial model compared to an integrated agency model, and the trade-off between administrative efficiency and due process. Part V concludes.

II. CRIMINALIZING CARTELS

Two main justifications are relevant for antitrust criminalization—retribution theory and deterrence theory.¹⁶ Retribution theory generally justifies criminal sanctions on the basis of the moral wrong committed by individuals. Deterrence theory, on the other hand, has been widely used to justify criminal sanctions in order to achieve optimal deterrence and prevention of future criminal activities.¹⁷

Most of the academic debate justifying criminalization of hard-core antitrust offenses has generally been based on deterrence.¹⁸ Nonetheless, the two rationales are not mutually exclusive. In fact, the identification of cartel activity with a “morally wrongful” behavior and the wider public’s awareness of the inherent harmfulness of price-fixing and similar practices would strongly increase the argument in favor of criminalization. Further, finding some grounds for criminalization of cartels on the basis of retribution may, at the same time, enhance the deterrent effect of antitrust criminal

14. See generally Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968); Gregory J. Werden & Marilyn J. M. Simon, *Why Price Fixers Should Go to Prison*, 32 ANTITRUST BULL. 917 (1987).

15. See Case T-329/01, *Archer Daniels Midland v. Comm’n*, 2006 E.C.R. II-3255, ¶ 141 (“Both the deterrent effect and the punitive effect of the fine are reasons why the Commission should be able to impose a fine.”).

16. See generally PETER WHELAN, *THE CRIMINALIZATION OF EUROPEAN CARTEL ENFORCEMENT* 25–111 (2014). But see Brent Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S. CAL. L. REV. 1141, 1145 (1983).

17. Becker, *supra* note 14, at 45; For earlier work of classical philosophers, see CESARE BECCARIA, *ON CRIMES AND PUNISHMENT* 14 (New York: Macmillan, 1963).

18. See Donald I. Baker, *The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging*, 69 GEO. WASH. L. REV. 693, 696 (2001) [hereinafter Baker, *Use of Criminal Law Remedies*]; Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Sanctions*, 6 COMPETITION POL’Y INT’L 3, 4 (2010).

sanctions by enhancing the moral stigma associated with cartels. Finally, aligning cartel activity with fraud, cheating, or stealing would also increase the argument for a criminal rather than an administrative model of enforcement. This Part discusses these theories, the validity and limitations of their application to cartel activity, and the efficacy of antitrust fines for deterrent purposes.

A. Retribution

Theories of criminal law based on retribution, rather than prevention of crimes, adopt a backward-looking approach, which focuses on the moral wrongs committed by individuals, irrespective of the impact of sanctions upon future level of crimes.¹⁹ Retribution theories see human beings as responsible for their actions and require offenders to receive what they deserve when engaging in wrongful behavior.²⁰ The moral content is composed by elements of culpability, social harmfulness, and moral wrongfulness.²¹ Retribution requires that punishment should be proportional to the offense and to the culpability of the offender.²² Criminalization based on retribution theories would start from a recognition that cartels are different and more harmful compared to other anti-competitive practices. Of all behaviors that may negatively affect competition, cartels strongly contradict the principles of free market economy and create harmful consequences for consumers and society. In contrast to many unilateral practices and to mergers, cartels are “naked” restraints of trade: they restrict competition without producing any objective countervailing positive effect. Accordingly, it may be argued that they deserve the same moral condemnation associated with other fraudulent practices. Retribution theory could therefore justify cartel criminalization by association with some form of culpability, social harmfulness, and moral wrongfulness.²³ Cartels may be considered to create a social harm stemming from undermining the operation of competitive markets; cartels may be thought of as a form of criminal behavior analogous to theft, fraud, or cheating.

Although valid in their own terms, these are somewhat problematic interpretations. For instance, the harm of collusion is usually diluted among many victims, as each affected party bears only a fraction of the harm, which in some cases may be very small.

19. See generally DAVID BOONIN, *THE PROBLEM OF PUNISHMENT* (2008); Alison Jones & Rebecca A. Williams, *The UK Response to the Global Effort Against Cartels: Is Criminalization Really the Solution?*, J. ANTITRUST ENFORCEMENT 1 (2014).

20. Werden & Simon, *supra* note 14, at 930–31.

21. WHELAN, *supra* note 16, at 83.

22. Proportionality can be ordinal (a comparison between the punishment to offenses of like gravity) or cardinal (where the severity of punishment is determined according to the gravity of the offence).

23. WHELAN, *supra* note 16, at 84.

Cartel activity may therefore be considered similar to a “victimless crime,” where the aggregate harm is significant but the impact on individual victims may be minimal and victims may not even be aware of the crime. In addition, the viability of a retributive justification for criminalization depends also on the social perception of these collusive interferences with competitive market mechanisms as morally reprehensible and worthy of criminal punishment. The historical differences in the acceptance of the idea of free markets between the two sides of the Atlantic provide some explanation for the different legal treatment of cartels. North American legal systems appear to reflect a general moral reprobation associated with naked collusive practices that explicitly prevent market mechanisms from operating and are perceived as a fraud operated by producers to the detriment of consumers and society at large. On the other hand, the different legal tradition in Europe reflects a morally neutral perception of cartel activity and skepticism to applying criminal law to market-related distortions. The lack of adequate strong societal perception against certain market behavior carries with it strong limitations and potential counterproductive effects associated with the criminalization process. In this regard, institutional efforts to raise awareness in the wider public of the harmfulness of such collusive activities may foster the strength of a retribution-based theory of criminalization. Despite these limitations, retribution may still provide a valid theoretical justification for associating cartels with similar forms of criminal behavior.

B. Deterrence

The rationale for deterrence theory can be traced back to utilitarianism, which assumes that punishment can be justified only if its imposition increases social benefit or utility.²⁴ This approach, consequentialist in nature, justifies punishment only if it prevents or reduces future crimes and considers punishment as a way to maximize social utility or welfare to be employed only when the utility of imposing a criminal punishment is higher than the disutility of its application.²⁵

Becker, in the seminal work *Crime and Punishment: An Economic Approach*,²⁶ introduced the application of economic analysis to criminal punishment, which can be seen as a variant of classic utilitarianism, where happiness is substituted by maximization of

24. See generally JEREMY BENTHAM, INTRODUCTION TO THE PRINCIPLE OF MORALS AND LEGISLATION (Jonathan Bennett ed., 2017) (1781) (outlining the theoretical foundations of utilitarianism).

25. Deterrence may be distinguished between ‘general’ and ‘special.’ In the context of cartels, general deterrence is the most significant one.

26. Becker, *supra* note 14.

wealth.²⁷ A theory of economic deterrence assumes that individuals and undertakings are rational actors acting in their own self-interest in order to maximize their own welfare and that the main social goal to be achieved is the maximization of economic efficiency.²⁸ Accordingly, social welfare is achieved when the marginal benefit of punishment equals the marginal cost.²⁹

Two variants of deterrence theory can be found in the literature.³⁰ The first approach (gain-based deterrence)³¹ sets deterrence at the point where punishment equals at least the gain of the offender. Accordingly, the optimal fine exceeds the gain of the offender multiplied by the inverse of the probability of apprehension, or:

$$F^* \geq G_{\text{Offender}} \times \frac{1}{p_{\text{Apprehension}}}$$

This model assumes that cartel behavior can never be efficient or beneficial to society³² and therefore aims at eliminating all violations.³³ The second variant (harm-based deterrence)³⁴ would instead compare punishment to the harm to society, rather than the gains of the offender, as a way to internalize the externality inflicted on society. According to this second approach, not all harmful activities must be deterred, but only inefficient ones.³⁵

Although these two variants of the deterrent model have been debated in the literature, the difference between them is not relevant for the purpose of the analysis that follows, since in both cases the resulting monetary penalties would be at risk of being ineffective and could justify at least theoretically the imposition of criminal sanctions. As explained in more detail below, the reason for this is that fines calculated using overcharge proxies that are adopted in

27. See Richard Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 104–05 (1979).

28. See generally Michael J. Trebilcock, *The Lessons and Limits of Law and Economics*, in *IN THE EYE OF THE BEHOLDER* 113 (Pierre Nadeau ed., 2007).

29. ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 497, 510, 513 (4th ed. 2003).

30. Becker, *supra* note 14; William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 UNIV. CHI. L. REV. 652 (1983); Wouter P.J. Wils, *Optimal Antitrust Fines: Theory and Practice*, 29 WORLD COMPETITION 183 (2006).

31. See generally Mitchell Polinsky & Steven Shavell, *Should Liability Be Based on the Harm to the Victim or the Gain to the Injurer?* 10 J. L. ECON. & ORG. 427 (1994).

32. Karen Yeung, *Quantifying Regulatory Penalties: Australian Competition Law Penalties in Perspective*, 23 MELB. U. L. REV. 440, 448 (1999).

33. Wils, *supra* note 30, at 191.

34. This approach was advocated for by Becker, *supra* note 14, at 5.

35. See WILLIAM BREIT & KENNETH G. ELZINGA, *ANTITRUST PENALTY REFORM: AN ECONOMIC ANALYSIS* 5 (1986) ("Efficient enforcement does not imply deterrence of all antitrust violations when there are enforcement costs"); Landes, *supra* note 30, at 655 ("The purpose of penalties, following Becker's model of crime and punishment, is to deter inefficient offenses, not efficient ones.").

many fining guidelines are usually significantly below the actual overcharge. In addition, the possibility of increasing fines to achieve optimal deterrence is often limited by corporations' inability to pay.

Under a deterrence perspective, therefore, criminalization may be justified on the ground that monetary fines imposed on corporations are inadequate in preventing or reducing cartel activity. In fact, most of the legal debate relating to the criminalization of cartels has been based on deterrence,³⁶ on the ground that the amount of impossible fines, often capped at a maximum, and the lack of strong social stigma that is usually associated with criminal sanctions are in practice insufficient to deter illegal behavior, as the gains of cartels often exceed the risk of getting caught and the amount of fines. As some authors have pointed out, collusion is often a lucrative business from an *ex post* perspective.³⁷

When monetary fines are the only available policy instrument, a low probability of detection could be offset by an increase in the amount of the fine imposed in order to avoid under-deterrence and to reduce the costs of punishment and enforcement. Alternatively, deterrence may be achieved by raising the probability of detection.³⁸ However, increasing the level of fines creates problems associated with over-deterrence, proportional justice, and constraints imposed by companies' ability to pay. At the same time, neither corporate fines nor a higher probability of detection can, by themselves, satisfactorily address the specific incentives that operate at an individual level. In this regard, individual sanctions can reduce problems related to firms' inability to pay, principal-agent relations, lack of moral stigma, and incentives to cooperate through leniency programs. Among them, criminal sanctions would have the advantage of significantly increasing the social moral stigma associated with cartels while introducing individual criminal liability, which appears to be a forceful source of deterrence especially for white-collar crimes.

A deterrence approach toward criminalization has two major limitations. First, deterrence theory is based on the assumptions that individuals act rationally and that undertakings are risk-neutral, rather than risk-averse or risk-preferring. Proving the validity of these conditions may complicate the analysis, as robust empirical evidence regarding these assumptions is often lacking. The other major shortfall is that applying criminal law to what a society considers a morally neutral behavior may pose the risk of delegitimizing criminal law through its excessive use.

36. Ginsburg & Wright, *supra* note 18, at 7.

37. Florian Smuda, *Cartel Overcharges and the Deterrent Effect of EU Competition Law*, 10 J. COMPETITION L. ECON. 63, 64 (2014).

38. John M. Connor & Robert Lande, *Cartels as Rational Business Strategy: Crime Pays*, 34 CARDOZO L. REV. 427, 479 (2012); Mitchell Polinsky & Steven Shavell, *The Optimal Tradeoff Between the Probability and Magnitude of Fines*, 69 AM. ECON. REV. 880, 885 (1979).

Despite such problematic aspects, an argument can be made in favor of criminalization from a deterrence perspective by acknowledging that a system of enforcement that relies exclusively on monetary penalties on corporations must set the amount of fines at a level that often exceeds the ability to pay by corporations and fails to effectively deter cartels. In this regard, Wils,³⁹ assuming a “gain to the offender” rather than a “harm to society” standard, argued that the optimal fine in Europe would be, at minimum, 150 percent of the firm’s annual turnover in the product market affected by the violation, and subsequent studies yield estimates even higher than 200 percent.⁴⁰ The 150 percent amount was obtained by setting the size of the gain to 5 percent,⁴¹ the average cartel length to five years, and the probability of detection at one-sixth. Multiplying the gain by the duration, and dividing it by the probability of getting caught, the result is an optimal fine of 150 percent of annual turnover.

C. Empirical Data

A survey of empirical studies on price-fixing overcharges indicates that the amount of the penalties required to achieve deterrence may be even higher than the one suggested by Wils.⁴² This challenges the fact that many jurisdictions fine illegal cartels using penalty guidelines that assume an arbitrary 10 percent overcharge.⁴³ Smuda reports that in Europe, in a sample of 191 overcharge estimates, the mean and median overcharge rates were 20.70 percent and 18.37 percent of the selling price, and the average cartel duration was 8.35 years,⁴⁴ whereas Connor and Lande⁴⁵ find that the average overcharge was between 28 to 54 percent, and the lifespan of a cartel was between seven and eight years. Connor,⁴⁶ in a 2014 study on international price-fixing, surveyed more than seven hundred

39. WOUTER P.J. WILS, OPTIMAL ENFORCEMENT OF EC ANTITRUST LAW: A STUDY IN LAW AND ECONOMICS 22–28, 203–04 (2001).

40. See *id.* at 203–04; Gregory J. Werden, *Sanctioning Cartel Activity: Let the Punishment Fit the Crime*, 5 EUR. COMPETITION J. 19, 30 (2009) (noting that most businesses would not be able to pay the optimal fine).

41. The size of the estimated mark-up was 10 percent, but because demand elasticity was set at zero, the increase in profit was set at 5 percent.

42. Peter G. Bryant & Edwin Eckhard, *Price Fixing: The Probability of Getting Caught*, 73 REV. ECON. STAT. 531, 535 (1991); John M. Connor, *Private International Cartels: Effectiveness, Welfare, and Anti-Cartel Enforcement* (Dep’t. of Agric. Econ., Purdue Univ., Staff Paper No. 03-12, 2003).

43. JOHN M. CONNOR, PRICE-FIXING OVERCHARGES: REVISED THIRD EDITION 1 (2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2400780 [<https://perma.cc/7MPR-FR33>] (archived Nov. 8, 2017).

44. Smuda, *supra* note 37.

45. John M. Connor & Robert Lande, *How High Do Cartels Raise Prices? Implications for Reform of the Antitrust Sentencing Guidelines*, 80 TUL. L. REV. 513, 535 n.123 (2005).

46. CONNOR, *supra* note 43.

published economic studies containing 2,041 quantitative estimates of the overcharges by hard-core cartels. The study found that the median average long-run overcharge for all types of cartels over all time periods is 23 percent, the mean average is at least 49 percent, and the median overcharges of international cartels are 38 percent, higher than those of domestic cartels. Another 2014 study,⁴⁷ which takes into account data for the years 1990–2013, reports that in the past four years, seventy new cartels were uncovered each year, gross cartel overcharges exceeded USD 1.6 trillion, of which global cartels accounted for 60 percent, and a total of nominal affected sales reached USD 1.5 to USD 1.7 trillion. Moreover, according to an earlier paper by Connor and Lande,⁴⁸ the probability of cartel detection was estimated between 25 percent and 30 percent and the probability of conviction at 80 percent, so that the probability of a cartel being detected and convicted then becomes 20 percent to 24 percent.

Interestingly, recent studies also estimate that the propensity for cartelization in Europe, where criminal sanctions are not in place, is roughly triple the rate per dollar of GDP that it is in North America (United States and Canada).⁴⁹ These results implicate an undertaking's limited ability to pay for fines, a limit that is exacerbated by the fact that the profits from cartel activity would probably have been paid out in taxes, dividends, and salaries by the time the fine is imposed.⁵⁰

D. Deterrence and Calculation of Fines

In Europe, although the case law seems at least theoretically to recognize that “both the deterrent effect and the punitive effect of the fine are reasons why the Commission should be able to impose a fine,”⁵¹ deterrence is considered the predominant justification of the laws against cartels.⁵² The EU Fining Guidelines⁵³ calculate a basic

47. JOHN M. CONNOR, THE PRIVATE INTERNATIONAL CARTELS (PIC) DATA SET: GUIDE AND SUMMARY STATISTICS, 1990–2013 (2014), <http://ssrn.com/abstract=2478271> [<https://perma.cc/62M3-3XLX>] (archived Oct. 30, 2017).

48. Connor & Lande, *Cartels as Rational Business Strategy*, *supra* note 38, at 468.

49. John M. Connor, *International Cartel Stats: A Look at the Last 26 Years*, LAW360 (Aug. 12, 2016), <https://www.law360.com/articles/827868/international-cartel-stats-a-look-at-the-last-26-years> [<https://perma.cc/3MPU-PFY7>] (archived Nov. 8, 2017).

50. Werden & Simon, *supra* note 14, at 928.

51. Case T-329/01, *Archer Daniels Midland v. Comm'n*, 2006 E.C.R. II-3255, ¶ 141.

52. Werden, *supra* note 40; Press Release, European Commission, Antitrust and State Aid Control—The Lessons Learned (September 24, 2009).

53. European Commission, Guidelines on the Method of Setting Fines Imposed Pursuant to Article 23(2)(a) of Regulation 1/2003, 2006 O.J. (C210/02).

minimum amount from the value of the undertaking's sales of goods and services related to the relevant geographic market. The proportion of the value of sales taken into account will range from 0 to 30 percent. Such a wide range of possible percentages is necessary in order to cover different types of infringement, depending on their gravity. Generally, for cartels, the relevant percentage tends to be in the range of 15–20 percent.⁵⁴

The proportion is then multiplied by the number of years of participation in the violation, with an additional “entry fee” of 15 to 25 percent of the value of sales in the case of cartels. The result obtained is the basic amount of the fine, which regulators will increase or decrease according to aggravating or mitigating circumstances. For deterrence purposes, the Commission may also impose higher fines on firms that have a particularly high turnover beyond the relevant value of sales.⁵⁵ However, Regulation 1/2003 imposes a limit of 10 percent of total annual global turnover in order to ensure that the fines imposed are not disproportionate to the size of the firm.⁵⁶ This limitation suggests that the applicable fines on cartels may often be below the optimal level,⁵⁷ since the optimal fine—the product of the activity's the harm or gain and the duration of cartels, discounted by the probability of detection—would be significantly above the limit of 10 percent of the annual turnover.

Looking at other jurisdictions, Canadian competition law also recognizes deterrence as the objective of criminal fines imposed on price-fixing conspiracies.⁵⁸ Penalties for price-fixing include a maximum fine of CAD 25 million, a maximum imprisonment of fourteen years, or both.⁵⁹ Canada does not have formal sentencing guidelines for Competition Act offenses, but the general sentencing principles can be found in the *Criminal Code*, in the case law, and in the Bureau's Leniency Bulletin.⁶⁰ The Leniency Bulletin contains sentencing recommendations, which set out the criteria for determining the amount of fines, using a proxy of 20 percent of the cartel participant's affected volume of commerce in Canada, adjusted to the circumstances of specific cases. The starting point for this

54. EUROPEAN COMM'N, FINES FOR BREAKING EU COMPETITION LAW (2011), http://ec.europa.eu/competition/cartels/overview/factsheet_fines_en.pdf [<https://perma.cc/D2JQ-GFRZ>] (archived Oct. 30, 2017).

55. Pietro Manzini, *European Antitrust in Search of the Perfect Fine*, 31 WORLD COMPETITION 3–17 (2008).

56. Case No. 100-3/80, *Musique Diffusion Française v. Comm'n*, 1983 E.C.R. 1831, ¶ 118.

57. WILS, *supra* note 39, at 75.

58. See MICHAEL J. TREBILCOCK ET AL., THE LAW AND ECONOMICS OF CANADIAN COMPETITION POLICY 756 (2002); CAN. COMPETITION BUREAU, LENIENCY PROGRAM BULLETIN (2010), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03288.html> [<https://perma.cc/T9ZP-V4DE>] (archived Oct. 30, 2017).

59. Competition Act, *supra* note 2.

60. CAN. COMPETITION BUREAU, *supra* note 58.

percentage is a 10 percent estimated overcharge. However, the Bureau considers this 10 percent often insufficient, since some consumers are also excluded from the market as a result of higher prices.⁶¹ Accordingly, the Bureau uses 20 percent of the volume of commerce affected as a proxy of economic harm.⁶²

Similarly, in the United States, optimal deterrence theory has strongly influenced the guidelines for price-fixing fines.⁶³ Criminal penalties for violation of the Sherman Act amount to a maximum of USD 100 million for a corporation, and USD 1 million for a natural person, and imprisonment for a maximum of ten years.⁶⁴ The section of the US Sentencing Commission Guidelines (USSG), which applies to antitrust offenses, uses an estimated average gain from price-fixing of 10 percent of the selling price as a presumption for calculating fines for price-fixing,⁶⁵ and 20 percent of the value of commerce as a proxy for economic harm.⁶⁶ The Guidelines also explain that the purpose of specifying a percent of the volume of commerce is to avoid the time and expense that would be required for a court to determine the actual gain or loss.⁶⁷

Critics consider these percentages to be arbitrary and unfair proxies for harm, calling for the use of actual economic harm rather than presumptions.⁶⁸ The 10 percent overcharge estimate has also been criticized for not being consistent with empirical evidence. Interestingly, the abovementioned 2014 study by Connor⁶⁹ concludes that 79 percent of cartel overcharges have been above the USSG's 10 percent presumption, and 56 percent have been above the 20 percent presumption. Connor and Lande also conclude that US cartel sanctions have been only 9 percent to 21 percent as large as they should be and that fines should be quintupled or detection rates

61. ELISA KEARNEY, *THE COMPETITION BUREAU'S 20 PERCENT SOLUTION: DOES THE PUNISHMENT FIT THE CRIME?* 2 (2009).

62. *Competition Bureau Submission to the OECD Global Forum on Competition Roundtable on Sanctions in Antitrust Cases*, COMPETITION BUREAU (Oct. 19, 2016), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04150.html> [<https://perma.cc/NJR4-DHBR>] (archived Oct. 30, 2017).

63. See Eleanor M. Fox, *Cartels: A United States Story, and a Research Program for the World*, in *CRIMINALIZATION OF COMPETITION LAW ENFORCEMENT* 239 (Katalin J. Cseres et al. eds., 2006); John M. Connor, *Global Antitrust Prosecution of Modern International Cartels*, 4 *J. INDUSTRY, COMPETITION & TRADE* 239 (2004).

64. Sherman Antitrust Act, 15 U.S.C. §§ 1–7 (1890).

65. U.S. GUIDELINES SENTENCING MANUAL § 2R1.1 (U.S. SENTENCING COMM'N 2016), http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2013/manual-pdf/2013_Guidelines_Manual_Full.pdf [<https://perma.cc/A7GQ-CEFN>] (archived Oct. 30, 2017).

66. *Id.* at 302.

67. *Id.*

68. NAT'L COMPETITION LAW SECTION, CANADIAN BAR ASS'N, *DRAFT INFORMATION BULLETIN ON SENTENCING AND LENIENCY ON CARTEL CASES* (2008), <https://www.cba.org/CMSPages/GetFile.aspx?guid=9adccbf4-dece-4fbf-935f-076c8a13c5ec> [<https://perma.cc/4DVP-4F9F>] (archived Nov. 9, 2017).

69. Connor, *supra* note 43.

should be increased.⁷⁰ In light of the empirical data and the legal limitations in the amount of imposable fines, a clear conclusion, also supported by the OECD Competition Committee,⁷¹ follows. The way fines are calculated, in practice, leads to suboptimal deterrence and sets a level of fines that is often below the actual benefit obtained by cartelists.

III. ANTITRUST SANCTIONS AGAINST CARTELS

This Article shares the view expressed by Canada in the OECD roundtable, *Cartels: Sanctions against individuals*, that “no single sanction is a sufficient deterrent, but it [is] important that a panoply of sanctions is available to combat cartels. Even the threat of class actions or civil actions can be an effective deterrent.”⁷² This Part discusses both corporate and individual liability. It discusses the sanctions that can be imposed on corporations and/or individuals, ranging from monetary fines to imprisonment, and recognizes the virtues of combining public enforcement with a more central role for private actions. It then explains why some form of individual liability may be necessary to ensure cartel deterrence.

A. Corporate Liability

Historically, corporate liability found a more fertile field in common law jurisdictions, in part influenced by earlier industrial development, than in civil law countries.

There are different attribution rules to identify conduct of individuals that can be regarded as acts of the collective entity. In particular, the literature identifies various approaches for corporate criminal liability in common law jurisdictions, most importantly the “identification principle” and “vicarious liability.”⁷³ According to the 1972 English case *Tesco Supermarkets Ltd. v. Natrass*⁷⁴ regarding the responsibility of a shop manager for selling advertised discounted products at a higher price, the founding case for the identification theory, the actor must be capable of being identified as the “directing

70. Connor & Lande, *Cartels as Rational Business Strategy*, *supra* note 38, at 428.

71. See ORG. FOR ECON. COOPERATION & DEV. COMPETITION COMMITTEE, *CARTELS: SANCTIONS AGAINST INDIVIDUALS* (2005), <http://www.oecd.org/competition/cartels/34306028.pdf> [<https://perma.cc/RYP2-9UKV>] (archived Oct. 30, 2017) [hereinafter OECD, *CARTELS: SANCTIONS AGAINST INDIVIDUALS*].

72. *Id.* at 105.

73. BRUCE WARDHAUGH, *CARTELS, MARKETS AND CRIME: A NORMATIVE JUSTIFICATION FOR THE CRIMINALISATION OF ECONOMIC COLLUSION* 52–87 (Cambridge U. Press 2014).

74. *Tesco Supermarkets Ltd. v. Natrass*, [1971] UKHL 31, [1971] 2 WLR 1166 (appeal taken from Eng.).

mind” of the company, irrespective of the gravity of the offense.⁷⁵ Since corporations can only act through their employees and agents, a company can be guilty of a crime only if its “directing mind” committed the prohibited act to benefit the corporation, by having the necessary state of mind and by having the authority to set policies rather than simply manage, so that the person can be considered the alter ego or “soul” of the corporation.

Vicarious liability, instead, provides a broader test for identifying individual behavior that may bind the corporation, based on employees’ actions within the scope of their employment, in accordance with the principle of *respondeat superior*.⁷⁶ Vicarious liability is the standard adopted in the United States.⁷⁶ Under this test, any person within the corporation, regardless of his or her position, and therefore beyond those at the top of the corporate hierarchy, may trigger corporate liability when he or she intends to benefit the organization, even when the corporation explicitly forbids their action.⁷⁷

Historically, Canada based corporate criminal liability on the identification doctrine. The Canadian Supreme Court developed its “directing mind” test in *Canadian Dredge & Dock, Co. v. The Queen*,⁷⁸ which involved bid rigging in the context of tenders for dredging operations. In that decision, the Court held that the directing mind is any person exercising “the governing executive authority of the corporation,” acting within the assigned field of operation, and with the purpose of benefitting the company.⁷⁹ The Court then restrictively interpreted the concept of “governing executive authority” in *Rhône v. The Peter AB Widener* as requiring “an express or implied delegation of executive authority to design and supervise the implementation of corporate policy rather than simply to carry out such policy.”⁸⁰

Then, in 2004, Section 22.2 of the Canadian *Criminal Code* came into force and broadened the scope of corporate liability.⁸¹ According to this new section, corporations may be criminally responsible for fault-based offenses, including criminal conspiracy under Section 45 of the Canadian Competition Act, when three conditions are met:

- (i) a “senior officer” had the intent, at least in part, to benefit the corporation;

75. In that decision, it was concluded that the shop manager’s mind could not be identified with the company Tesco, on the basis that a shop manager was too low in Tesco’s corporate hierarchy for his or her actions to be attributed to the company.

76. See *New York Central & Hudson River Railroad Co. v. United States*, 212 U.S. 481 (1909).

77. WARDHAUGH, *supra* note 73, at 71

78. *Canadian Dredge & Dock Co. v. The Queen*, [1985] 1 S.C.R. 662 (Can.).

79. *Id.* at 668.

80. *The Rhône v. The Peter A.B. Widener*, [1993] 1 S.C.R. 497 (Can.).

81. An Act to Amend the Criminal Code (Criminal Liability of Organizations), R.S.C. 2003, c. 21 (Can.).

(ii) the senior officer, acting within the scope of his or her authority, was a party to the offense; and,

(iii) the senior officer had the required *mens rea*, was acting within the scope of his or her authority, and directed the work of other representatives, including employees, agents, or contractors of the corporation to perform the *actus reus* of the offense; or knowing that a representative of the corporation is or is about to be a party to the offense, the senior officer fails to take all reasonable measures to stop her from being a party to the offense.⁸²

“Senior officer” is defined in Section 2 of the *Criminal Code* and is not limited to individuals appointed by the board of directors. Specifically, a senior officer is a director, chief executive officer, chief financial officer, partner, employee, member, agent, or contractor “who plays an important role in the establishment of a corporation’s policies or is responsible for managing an important aspect of the corporation’s activities.”⁸³

In the 2013 antitrust case *R v Les Pétroles Global Inc.*, three employees of a retail gasoline station were charged under the criminal conspiracy provision in Section 45(1)(c) of the Competition Act for conspiring to prevent or restrict competition in the sale of retail gasoline in two Quebec markets.⁸⁴ By abandoning the dichotomy between employees designing and supervising the implementation of corporate policy and those who simply carry out such policy, the Court’s interpretation of Section 22.2 seems to extend the scope of criminal corporate responsibility down to those who operationalize and implement corporate policies set by others.⁸⁵ Such expansion of responsibility is particularly significant in the context of cartel offenses.

In contrast to common law jurisdictions, civil law regimes have been more reluctant to recognize criminal liability of corporations, mostly on the grounds of the Roman-Germanic principle *societas delinquere et puniri non potest*. Criminal liability of legal entities, for example, is unknown under German criminal law.⁸⁶ Nevertheless, many European countries have now introduced some form of corporate liability, often in the form of administrative offenses. At the European level, there is no harmonized criminal corporate liability and no competency to impose criminal penalties either on corporations or individuals involved in price-fixing activities. The conduct of employees, directors, and officers that infringes competition law can result only in administrative fines for the

82. Canada Criminal Code, R.S.C. 1985, c C-46, § 22.2.

83. *Id.* § 2.

84. *R. v. Les Pétroles Global, Inc.*, 2013 Q.C.C.S. 4262 (Can.).

85. *Id.* ¶¶ 42, 185.

86. See Edward B. Diskant, *Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine Through Comparative Criminal Procedure*, 118 YALE L. J. 126, 142 (2008).

undertaking imposed by the European Commission according to Regulation 1/2003.⁸⁷ The Commission's anxiety to deter cartels with the imposition of costly fines clearly emerges from statistical reports. Fines imposed by the European Commission⁸⁸ increased from EUR 539,691,550 between 1990 and 1994 to EUR 8,930,678,674 between 2010 and 2014. Breaking down this second timeframe, fines almost tripled between 2011 (EUR 614,053,000) and 2014 (EUR 1,689,497,000).⁸⁹

There are potentially other available sanctions that may be imposed on corporations, including disqualification from bidding on public contracts if a corporation is convicted of conspiracy or bid rigging and adverse publicity orders. Both measures may have a powerful effect in discouraging collusive practices, not only by causing a negative direct financial effect but also by having an impact on non-financial dimensions such as corporate prestige and future employment prospects of managers.⁹⁰

Corporations may also face civil liability from private enforcement⁹¹ and class actions.⁹² In the United States, private litigation is the predominant mode of enforcing antitrust laws. Recent studies show a 10:1 ratio of private/public enforcement.⁹³ In 1977, the ratio was even greater than 20:1.⁹⁴ To ensure that private parties have an adequate economic incentive to undertake antitrust litigation, US federal laws authorize the award of treble damages and attorneys' fees.⁹⁵

The experience in Canada and Europe is somewhat different. In Canada, the level of private enforcement activity remains low, even after the introduction of Section 36 for private damages in the

87. ALISON JONES & BRENDA SUFRIN, EU COMPETITION LAW 994 (2014).

88. Amount not adjusted for changes after court judgements.

89. EUROPEAN COMM'N, CARTEL STATISTICS (2017), <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf> [<https://perma.cc/UY5C-DDP5>] (archived Nov. 9, 2017). The highest fine for a cartel in Europe (to date) was imposed on a TV and computer monitor tubes cartel in 2012 and totalled €1,470,515,000 and the highest fine imposed on an individual corporation was € 715,000,000 in 2008 to a company operating in the car glass sector. *Id.*

90. BRENT FISSE & JOHN BRAITHWAITE, THE IMPACT OF PUBLICITY ON CORPORATE OFFENDERS 34–35 (1983).

91. Kent Roach & Michael J. Trebilcock, *Private Enforcement of Competition Laws*, 34 OSGOODE HALL L. J. 461, 508 (1996).

92. See generally Margaret Sanderson & Michael J. Trebilcock, *Competition Class Actions: An Evaluation of Deterrence and Corrective Justice Rationales*, in LITIGATING CONSPIRACY, AN ANALYSIS OF COMPETITION CLASS ACTIONS 81 (Stephen G.A. Pitel ed., 2006).

93. Daniel Crane, *Technology and Antitrust*, 86 TEX. L. REV. 1159, 1179 (2008).

94. Steven C. Salop & Lawrence J. White, *Economic Analysis of Private Antitrust Litigation*, 74 GEO. L. J. 1001, 1002 (1986).

95. Bill Baer, Assistant Attorney Gen., Anti-Trust Div., U.S. Dep't of Justice, Remarks as Prepared for Delivery to European Competition Forum 2014 (2014), <https://www.justice.gov/atr/file/517756/download> [<https://perma.cc/Y3L5-WDSK>] (archived Oct. 30, 2017).

Competition Act in 1976. Similarly, competition law in Europe has been dominated primarily by public enforcement. However, some measures have been taken recently in order to promote private enforcement, most notably the EU Damages Directive signed into law in November 2014, which includes both direct and indirect purchasers as victims of antitrust infringements⁹⁶ and represents a positive development in antitrust enforcement.⁹⁷

The relationship between private and public enforcement of competition law has been widely debated in the law and economics literature.⁹⁸ Starting from the work of Becker and Stigler,⁹⁹ followed by Landes and Posner¹⁰⁰ and subsequently by Polinsky,¹⁰¹ law and economic scholars have highlighted the complementary role of private and public enforcement, while also recognizing potential risks of over-enforcement from private individuals' uncoordinated attempts to deter undesirable behavior.¹⁰²

There are many advantages to private enforcement. Firstly, private enforcement fulfills corrective justice rationales. Secondly, private plaintiffs often have more information than public officials and stronger incentives to enforce public laws affecting their interests. Further, private enforcement can also compensate for the weaknesses of public enforcement and enhance public accountability.¹⁰³ Moreover, private enforcement has a strong deterrent role because it increases the probability of detection and the costs of illegal activities.¹⁰⁴

In relation to deterrence, the question is how to modify fines to account for the private-public enforcement duality. The optimal sanction is the product of the amount of the fine and probability of detection. However, with private enforcement, these two variables cannot be set independently: if a high sanction is associated with low probability of enforcement, it may encourage excessive enforcement activity by private parties motivated to capture fines or damages. This would increase the probability of detection beyond socially

96. Council Directive 14/014, 2014 O.J. (L349/1), http://ec.europa.eu/competition/antitrust/actionsdamages/damages_directive_final_en.pdf [<https://perma.cc/6E76-6MM9>] (archived Oct. 30, 2017).

97. For an analysis of the EU reform package to encourage private enforcement, see Alison Jones, *Private Enforcement of EU Competition Law: A Comparison with, and Lessons from, the US*, in HARMONISING EU COMPETITION LITIGATION: THE NEW DIRECTIVE AND BEYOND 15 (Bergström et al. eds., 2016).

98. Roach & Trebilcock, *supra* note 91, at 475.

99. See generally Gary S. Becker & George J. Stigler, *Law, Enforcement, Malfeasance and Compensation of Enforcers*, 3 J. LEGAL STUD. 1 (1974).

100. See generally William Landes & Richard Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1 (1975).

101. See generally Mitchell A. Polinski, *Private Versus Public Enforcement of Fines*, 9 J. LEGAL STUD. 105 (1980).

102. See, e.g., Landes and Posner, *supra* note 100.

103. Roach & Trebilcock, *supra* note 91, at 482–83.

104. Sanderson & Trebilcock, *supra* note 92, at 18.

optimal levels and result in over-enforcement.¹⁰⁵ On the contrary, with only public enforcement in place, resources can be fixed at a constant level. With a mixed and uncoordinated system of public and private enforcement, setting the sanction and probability of detection in a systematic way is therefore extremely complex.¹⁰⁶

In addition, the availability of class actions may exacerbate the *ex ante* unpredictability of penalties. Class actions are not currently available in the European regime, but any reform in that direction would necessarily entail an analysis of coordination with public enforcement and the effects on the probability of detection and the amount of the total penalty. Although the deterrent role of private enforcement is partially limited by the same problem of “inability to pay,” its importance for deterrence cannot be overstated. For instance, in their study on the role of private enforcement, Lande and Davis argue that private actions enabled deterrence of anticompetitive behavior in the United States more effectively than criminal cartel proceedings.¹⁰⁷ Within the current system of enforcement, enhancing the role of private actions and fostering harmonization at the European level appears to be a priority for European antitrust enforcement.

In conclusion, this subpart outlined the sanctions that may be imposed on corporations and the complementary role of civil liability and private enforcement. Both monetary and non-monetary penalties imposed on corporations play an important role in ensuring deterrence. Private enforcement and class actions, as well, are useful complementary mechanisms for the same purpose. At the same time, while recognizing those benefits, it appears that focusing exclusively on a corporate level does not enable a satisfactory resolution of many of the issues related to deterring cartels, which may require the complementary role of individual responsibility.

B. Sanctions on Individuals

One important starting point in regard to individual actors' liability is to recognize that there are both behavioral and organizational aspects of cartel activity that necessarily require joint liability of individual and corporate action.¹⁰⁸ The argument in favor of individual liability is supported by the recognition that a regime lacking individual sanctions inevitably faces a number of problems

105. Roach & Trebilcock, *supra* note 91, at 493.

106. See generally WARREN SCHWARTZ, *THE PRIVATE ENFORCEMENT OF ANTITRUST LAWS: AN ECONOMIC CRITIQUE* (1981).

107. See generally Robert H. Lande & Joshua P. Davis, *Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Law*, 2011 BYU L. REV. 315 (2011).

108. CHRISTOPHER HARDING & JULIAN JOSHUA, *REGULATING CARTELS IN EUROPE* 258–65 (2nd ed. 2011).

that, when taken into serious consideration, may justify individual liability on at least four grounds:

- (i) *Inability to pay.* In its third report on hard-core cartels, the OECD adopted the position¹⁰⁹ that corporate sanctions in the form of fines are almost never sufficiently high to be an optimal deterrent, and the threat of individual sanctions can be an important complement to corporate financial sanctions. As already mentioned, fines cannot be raised *ad infinitum*, because at some point corporations are unable to pay the amount of fines required to secure optimal or absolute deterrence. The alternative of bankruptcy would certainly be undesirable, creating high social costs and problems for the competitive process itself. Some form of complementary individual liability would overcome the problem of firms' inability to pay. In relation to criminal sanctions, some scholars recognize that even though increasing a fine to achieve optimal deterrence would cost less than imprisonment, imprisonment may be imposed as a last resort when the company and the individual are unable to pay the optimal fine.¹¹⁰
- (ii) *Principal-agent problem.* The lack of sanctions on individuals does not solve the principal-agent problem inherent in cartel offenses, and it does not enable companies to discipline employees' behavior effectively. This agency problem emerges where the managers and the individuals involved in a cartel are able to externalize the cost of the penalty, because the fine applies not to them individually but exclusively to the company. Therefore, when individuals are not accountable under the law, the risk is that the benefits of a cartel activity may accrue to both shareholders and managers, but managers may ultimately escape liability. Moreover, corporations may also be willing to incentivize cartel activity when the expected benefits outweigh the costs, and then be ready to compensate employees for their action.¹¹¹ Such a mechanism becomes less likely to succeed if individual cartelists are personally civilly or criminally liable. As reported by a corporate executive, "as long as you are only talking about money, the company can at the end of the day

109. OECD, CARTELS: SANCTIONS AGAINST INDIVIDUALS, *supra* note 71, at 7.

110. See Richard Posner, *Optimal Sentences for White-Collar Criminals*, 17 AM. CRIM. L. REV. 409, 413 (1980).

111. See generally Connor & Lande, *How High Do Cartels Raise Prices?*, *supra* note 45, at 516.

take care of me . . . but once you begin talking about taking away my liberty, there is nothing that the company can do for me.”¹¹²

- (iii) *Stronger moral stigma.* Sanctions on individuals entail a stronger social condemnation and work on the level of individuals’ moral commitment to obey the law, which is felt less stringently at a corporate level.¹¹³ Accordingly, by not holding individuals responsible, the moral force that could enhance deterrence is weaker. Criminal liability is a particularly strong deterrent,¹¹⁴ especially for individuals involved in antitrust illegal activities and white-collar crimes.
- (iv) *Incentives to cooperation and leniency programs.* The game theoretic prisoner’s dilemma introduced by leniency programs is enhanced by the presence of individual sanctions. When individuals do not face the risk of being held liable, they may not have sufficient incentives to reveal evidence about cartels and cooperate with the competition authorities. The possibility of avoiding individual sanctions provides the necessary incentive for individuals to “blow the whistle” and offer cooperation in exchange for immunity or a reduced penalty. In this way, leniency programs increase the probability of detection and effectively destabilize cartels. Therefore, the combination of individual liability and leniency programs positively deters cartel behavior.¹¹⁵

Sanctions imposed on individuals may include, for example, individuals’ disqualification from acting as directors of a company for a specific time, penal fines, and imprisonment. Disqualification orders, such as those existing under the UK Enterprise Act 2002,¹¹⁶ may be an appealing option at the EU level, because they require fewer costs of implementation and enforcement, and they are more likely to obtain the necessary political support. It may still be possible, however, that even in this case, the corporation may find a

112. Baker, *Use of Criminal Law Remedies*, *supra* note 18, at 705.

113. WHELAN, *supra* note 16, at 51.

114. Donald I. Baker & Barbara A. Reeves, *The Paper Label Sentences: Critique*, 86 YALE L. J. 619, 621 (1977).

115. OECD, CARTELS: SANCTIONS AGAINST INDIVIDUALS, *supra* note 71, at 8; see generally Jeroen Hinloopen & Adriaan R. Soetevent, *Laboratory Evidence on the Effectiveness of Corporate Leniency Programs*, 39 RAND J. ECON. 607 (2008); Nathan H. Miller, *Strategic Leniency and Cartel Enforcement*, 99 AM. ECON. REV. 750 (2009).

116. See generally Enterprise Act 2002, c. 40 (Eng.).

way to compensate the employees, who could still retain some indirect influence in the decision-making process.

An individual cartel member could also be required to pay a penal fine. Despite recognizing that companies could still find a mechanism to indemnify and compensate employees, the risk of being individually liable to pay criminal fines represents a very strong deterrent, both in terms of financial consequences and stigma associated with being criminally convicted as an individual.

The strongest deterrent against cartels is imprisonment. Many law and economics commentators, relying on the conclusions drawn from Becker's model, rejected the idea that such criminal sanctions should be imposed on individuals for antitrust infringements.¹¹⁷ As the argument goes, the imposition of fines imposes little cost compared to imprisonment, and their amount is easier to compute.¹¹⁸ Moreover, other reasons for excluding individual liability are based on the fact that the corporation theoretically has the tools needed to force and correct the behavior of employees, through mechanisms such as corporate compliance, and that it would be very difficult to identify the individual liability of each person involved in a cartel.

However, as other authors have argued,¹¹⁹ in the context of hard-core cartels this conclusion may have some limitations, including corporations' inability to pay very high fines. Further, the fact that offenses like price fixing are always harmful to society suggests they should be completely eliminated rather than optimally deterred.¹²⁰ The gravity of cartel offenses is confirmed by the adoption across jurisdictions of *per se* rules and by an overall consensus among antitrust scholars that hard-core conspiracies almost never benefit society.¹²¹ This view is shared even among generally non-interventionist "Chicago school" commentators.¹²²

Those that argue in favor of imprisonment usually also suggest that the stigma associated with criminal imprisonment is arguably high no matter how long an individual is sentenced and that the marginal cost to society for additional incarceration increases. Therefore, they conclude that short imprisonment terms may be the adequate policy prescription.¹²³ The Canadian and American antitrust regimes currently can impose imprisonment of fourteen and ten years, respectively.

117. Becker, *supra* note 14, at 43–45.

118. Werden & Simon, *supra* note 14, at 922.

119. *Id.* at 934–37.

120. *Id.* at 933–34. This position is in line with absolute deterrence or with the 'gain to the offender' approach.

121. See generally Presley L. Warner & Michael J. Trebilcock, *Rethinking Price-Fixing Law*, 38 MCGILL L. J. 680 (1993).

122. RICHARD POSNER, *ANTITRUST LAW* 4 (2d ed. 2001); see ROBERT H. BORK, *THE ANTITRUST PARADOX* 429 (2d ed. 1993).

123. Werden & Simon, *supra* note 14, at 937.

In Canada, the imposition of jail sentences has been rare.¹²⁴ For instance, eleven individuals were sentenced for participating in cartels between 1998 and 2008, but only two were sentenced to prison and the remaining nine were only required to pay fines.¹²⁵ On the contrary, in the United States, twenty-one individuals were sentenced to serve time in jail for cartel offences in 2014 (fiscal year). The average number of individuals sent to prison each year and the average length of sentences respectively increased during the years from thirteen individuals and eight month sentences (1990–1999) to twenty-nine individuals and twenty-five month sentences (2010–2014).¹²⁶ The number of individuals sentenced to prison rose during those periods from 37 percent (1990–1999) to 70 percent (2010–2013).¹²⁷ A significant number of European member states also adopted criminal sanctions for some competition law infringements at the national level.¹²⁸ Many US commentators argue that the most effective deterrent for hard-core cartel activity is prison sentences, and that the use of criminal law against individual cartelists has been one of the most successful and important features of US antitrust enforcement.¹²⁹

The introduction of jail sentences for cartelists is a complex issue for criminal policy-making, as the individual and social costs associated with incarceration and risks of type I errors are extremely high. Jail sentences for individuals involved in price fixing and bid rigging must necessarily follow from a socially accepted view of the moral wrongfulness of such collusive practices and from a general acceptance of their criminal nature. Arguing for imprisonment solely on the basis of deterrence in a social context where the phenomenon of cartels is seen as morally neutral contains high risks of delegitimizing criminal law, undermining not only its ability to provide an effective deterrent but also its moral-signaling function.¹³⁰ Therefore, imprisonment may be introduced only if there is a socially accepted idea that cartel activity is a serious criminal behavior

124. See CAN. COMPETITION BUREAU, PENALTIES IMPOSED BY THE COURTS (2017), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01863.html> [https://perma.cc/43JS-ALR7] (archived Oct. 23, 2017).

125. ELISA KEARNEY & MARK KATZ, ANTI-CARTEL ENFORCEMENT IN CANADA - STILL MORE BARK THAN BITE 5 (2009).

126. See U.S. DEPT OF JUSTICE, CRIMINAL PROGRAM UPDATE 2015: DIVISION UPDATE SPRING 2015, <https://www.justice.gov/atr/division-update/2015/criminal-program-update> (last visited Oct. 23, 2017) [https://perma.cc/W3H7-XT7J] (archived Oct. 23, 2017).

127. See U.S. DEPT OF JUSTICE, CRIMINAL PROGRAM UPDATE 2014: DIVISION UPDATE SPRING 2014, <https://www.justice.gov/atr/division-update/2014/criminal-program> (last visited Oct. 23, 2017) [https://perma.cc/XVS4-V58Y] (archived Oct. 23, 2017).

128. See Peter Whelan, *Criminal Sanction: An Overview of EU and National Case Law*, E-COMPETITIONS 1, 1 (2012).

129. Baker, *Use of Criminal Law Remedies*, *supra* note 18, at 713.

130. Jones & Williams, *supra* note 19, at 16–18.

deserving such punishment. In any event, where adopted, imprisonment should be limited to extreme cases and used as only a last resort sanction. Deterrence alternatively may be served by increasing the probability of detection with a more prominent role for private actions, rather than the level of punishment.¹³¹

Concluding, the goal of this subpart was to show the importance of disincentives that work on the level of individual responsibility. Reviewing some empirical studies conducted by Connor,¹³² it seems to emerge that almost half of the sampled cartels operated exclusively in Europe, that roughly two-thirds of all international cartels fixed prices in Western Europe, and that, by contrast, only 12 percent of all international cartels operated exclusively in North America, and global cartels with North American operations increased the percentage to 25 percent.¹³³ As a result, Connor concludes that the propensity for cartelization in Europe is roughly triple the rate per dollar of GDP than it is in North America. If these data suggest any correlation with the different sanction mechanisms available on the two sides of the Atlantic, jurisdictions like the European Union must face the reality that high monetary fines on corporations are not in themselves an adequate instrument of enforcement and that it may be time to seek alternative solutions to the problem of cartel deterrence.

C. In Search of an Optimal Regime

The trade-off between increasing fines to a level that would make companies exit the market—raising serious concerns for the competitive process—and the problem of under-deterrence¹³⁴ requires any competition law regime preoccupied with deterring cartel activity to adopt a mix of sanctions that go beyond monetary fines at the level of the corporation. This has important implications for the current sanction and enforcement model adopted by jurisdictions like the European Union, which appears to lack a systematic analysis of the choice of available sanctions and a fine-tuning between public and private enforcement. In the light of this analysis, two major improvements appear necessary. First, the major shortfall of the current sanction regime is arguably the lack of sanctions on individuals participating in cartels. This is not to underplay the role of corporate sanctions.¹³⁵ On the contrary, corporate sanctions give corporations appropriate incentives to monitor employees' behavior

131. Becker, *supra* note 14, at 35.

132. See generally Connor, *supra* note 47.

133. *Id.* at 22.

134. JONATHAN FAULL & ALI NIKPAY, *THE EC LAW OF COMPETITION* 4, 5 (2d ed. 2007).

135. Fisse, *supra* note 16, at 1234–43.

and provide in themselves a strong, although insufficient, deterrent effect. But deterrence must necessarily act both at the corporate and individual level in order to be effective. Second, deterrence may be positively enhanced through a better calibration between public and private enforcement. As already mentioned, the role of private enforcement, a quintessential element of US antitrust law, has increased under European competition law, and efforts to expand its role are welcome. In particular, by increasing the probability of detection, private enforcement can mitigate some of the issues related to companies' inability to pay and need to resort to criminal sanctions.

The idea of introducing criminal sanctions has strong theoretical justifications, but if accepted, it would require taking into account some important caveats. While it has been explained that criminalization of cartel activity may be advantageous from a deterrence perspective, implementing such policy reform would require evaluating many other legal and cultural factors, including the role of criminal law, the general perception of antitrust rules, and the receptiveness to such reform in the implementing environment.¹³⁶ This may be one of the biggest obstacles to introducing antitrust criminal responsibility at the European level, where there has been a long history of skepticism of both corporate criminal liability and the imposition of criminal sanction on individuals involved in antitrust offenses. Further, effective introduction of criminal sanctions would require a careful drafting of the definition of the offense, to narrow it exclusively to hard-core cartel activity. Moreover, it is also important to note that, before making any prescriptive claim, the alleged deterrent effects must be supported by more robust empirical evidence on the deterrent effects of criminalization and on the impact of each type of sanction. Finally, and most importantly for the Part that follows, the costs and benefits involved in switching to a criminal law system of enforcement, compared to an administrative one, must be taken into account.

IV. CRIMINALIZATION, DUE PROCESS, AND INSTITUTIONAL DESIGN

The institutional aspect of antitrust criminalization presents a two-fold dimension. Firstly, it must be considered whether non-criminal monetary fines comply with an administrative law classification and whether their nature is *de facto* criminal. Secondly, the potential implications for the re-design of competition law institutions arising from either the *de facto* criminal law character of

136. See generally Ariel Ezrachi & Jón Kindl, *Criminalization of Cartel Activity - A Desirable Goal for India's Competition Regime*, 23 NAT'L L. SCH. INDIA REV. 9 (2011).

monetary fines or the introduction of other criminal sanctions for deterrent purposes will require further scrutiny. An administrative integrated agency model certainly would not be adequate to comply with due process criminal law requirements, and a separation of investigative, prosecutorial, and adjudicative functions would become a necessary policy reform. This will entail a contextualized analysis of the various trade-offs associated with different institutional models.¹³⁷ The next subpart explores the first institutional dimension by looking comparatively at the nature of antitrust fines under the ECHR case law in the European Union and at the constitutionality of administrative monetary penalties in Canada.

A. *De Facto Criminal Fines*

1. The ECHR's "Composite Approach" to Article 6

As explained in the previous Part, the European Commission's fining powers are not criminal according to EU law.¹³⁸ Article 23(5) of Regulation 1/2003 expressly states that fines imposed on undertakings and associations of undertakings for violation of Article 101 or 102 TFEU shall not be of a criminal law nature.¹³⁹ Antitrust fines, however, may be considered criminal for the purposes of the European Convention on Human Rights. The European Court of Human Rights in Strasbourg opted for a *sui generis* conception of "criminal,"¹⁴⁰ which is determined according to three parameters often referred to as the Engel criteria,¹⁴¹ namely: (i) the classification of the offense under domestic law, (ii) the nature of the offense, and (iii) the severity of the penalty. These criteria are not cumulative.¹⁴² The Court usually considers the first criterion only as a starting point, and therefore it is not determinative.¹⁴³ Within the second and third criteria, the Court considers various factors, most importantly, whether the norm is only addressed to a specific group or is of a generally binding character, whether the level of the sanction and the stigma attaching to the offense is important, and whether the

137. Trebilcock & Iacobucci, *supra* note 12, at 457–64.

138. Case T-276/04, *Compagnie Maritime Belge SA v. Comm'n*, 4 C.M.L.R. 21, 995 (2008); *Cimen Case C-338/00, Volkswagen v. Comm'n*, 2003 E.C.R. I-9189, ¶ 96; Case T-25/95, *Cimenteries CBR SA v. Comm'n*, 2000 E.C.R. II-508. On this basis, in *Compagnie Maritime Belge*, the General Court confirmed that antitrust fines were not of a criminal nature, as deciding otherwise would "infringe seriously on the effectiveness of Community competition law."

139. Council Regulation 1/03/EC, *supra* note 5.

140. See *Deweert v. Belgium*, 35 Eur. Ct. H.R. (ser. A) at 169, 187–90 (1980).

141. *Engel & Others v. the Netherlands*, 22 Eur. Ct. H.R. (ser. A) at 3, ¶ 82 (1976).

142. *Ezeh & Connors v. United Kingdom*, 9 Eur. Ct. H.R. ¶ 86 (2003).

143. *Öztürk v. Federal Republic of Germany*, App. No. 8544/79, 6 Eur. H.R. Rep. 409, ¶ 52 (1984).

sanctions imposed are not merely compensatory but truly punitive and meant to have a deterrent effect.¹⁴⁴ Antitrust fines have been considered “criminal” within the specific meaning of the ECHR,¹⁴⁵ based on the stigma and punitive and deterrent elements associated with them.

In particular, after the entry into force of the Lisbon Treaty in 2009, which provided for the future accession of the European Union to the ECHR, many commentators feared that the current combination of investigational, prosecutorial, and adjudicative powers within the European Commission would be incompatible with the due process requirement enshrined in Article 6 ECHR, which reads: “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.”¹⁴⁶ Nevertheless, the ECtHR so far has decided to save the current administrative law model¹⁴⁷ by making a distinction between “hard-core” criminal law and “minor criminal offenses” and by placing competition law infringements in the latter category.¹⁴⁸ Relying on this distinction, the ECtHR concluded that an administrative law system of enforcement is compatible with Article 6(1) ECHR—despite the “independent and impartial tribunal” requirement—insofar as (i) the administrative proceeding is governed by sufficiently strong procedural guarantees (such as division of tasks and functions within the Directorate-General for Competition (DG Competition), and the appointment of impartial officers supervising the fairness of the procedure), and (ii) decisions are then capable of being challenged by a judicial body with “full jurisdiction” to review the administrative decision.¹⁴⁹

This approach was adopted in *Le Compte v. Belgium*,¹⁵⁰ in which it was clarified that the Convention requires at least one of the following systems: “either the jurisdictional organs themselves comply with the requirements of Article 6, paragraph 1, or they do not so comply but are subject to subsequent control by a judicial body

144. Bendenoun v. France, 284 Eur. Ct. H.R. (ser. A) ¶ 47 (1994).

145. A. Menarini Diagnostics S.R.L v. Italy, No. 43509/08, Eur. Ct. H.R. 1 (2011), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-106438> [https://perma.cc/3UNP-KKSS] (archived Nov. 7, 2017); Case T-1/89, Rhône-Poulenc v. Comm'n, 1991 E.C.R. II-869, 885; Öztürk, 6 Eur. H.R. Rep. 409, ¶ 52.

146. EUR. CT. OF HUM. RTS., GUIDE ON ARTICLE 6 OF THE CONVENTION – RIGHT TO A FAIR TRIAL 6 (2017), http://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf [https://perma.cc/NH2M-KGAF] (archived Oct. 23, 2017).

147. Jussila v. Finland, 2006 Eur. Ct. H.R. 996, ¶ 43 (2006).

148. *Id.*

149. See generally Arianna Andreangeli, *Toward an EU Competition Court: Article-6-Proofing Antitrust Proceedings before the Commission?*, 30 WORLD COMPETITION 595, 609 (2007).

150. *Le Compte, Van Leuven & De Meyere v. Belgium*, Eur. Ct. H.R. ¶ 22 (1983).

that has full jurisdiction and does not deprive the guarantees of Article 6.” Such a “composite approach”¹⁵¹ reflects the distinction between “hard-core” criminal offenses—for which the right to a hearing before an independent tribunal is required at first instance—and minor criminal offenses—which require a less stringent approach.¹⁵² In the same judgment, the ECtHR held that “demands of flexibility and efficiency, which are fully compatible with the protection of human rights, may justify the prior intervention of administrative or professional bodies and, *a fortiori*, of judicial bodies which do not satisfy the said requirements in every respect.”¹⁵³

According to this case law, therefore, even though the Commission combines investigative, prosecutorial, and adjudicative functions, and it cannot be qualified as an independent and impartial tribunal, the current system is not incompatible with Article 6(1) ECHR,¹⁵⁴ provided that adequate checks and balances within the Commission are in place and that it is possible to subsequently submit the competition authority’s decision to full judicial review.¹⁵⁵ In order to comply with those conditions, the Commission adopted various mechanisms to reduce the risks of prosecutorial bias; for example, the introduction of a peer panel review, where DG Competition panels and Legal Service officials independently oversee draft decisions,¹⁵⁶ and an enhancement of the roles of the Hearing Officer,¹⁵⁷ the European Ombudsman,¹⁵⁸ and the Chief Competition Economist,¹⁵⁹ all of which increased the level of fairness in the procedure. Moreover, although many doubts have been raised about the compatibility of judicial review under Article 263 TFEU with the requirements of “full jurisdiction”—in particular, whether or not that

151. Andreangeli, *supra* note 149, at 609.

152. *Id.*

153. Le Compte, Van Leuven & De Meyere v. Belgium, 43 Eur. Ct. H.R. (ser. A) ¶ 51 (1981).

154. For a critique, see Donald Slater, Sébastien Thomas & Denis Waelbroeck, *Competition Law Proceedings Before The European Commission And The Right To A Fair Trial: No Need For Reform?*, 5 EUR. COMPETITION J. 97, 139–40 (2008).

155. *Le Compte*, 43 Eur. Ct. H.R. ¶ 51.

156. Forrester, *supra* note 8, at 823.

157. The function of the Hearing Officer (HO) is to supervise the objectivity, transparency, and efficiency of the proceedings and therefore ensure that the right of defence is respected. *Id.* at 836.

158. The European Ombudsman is an independent office created by the Maastricht Treaty in 1992 in order to guarantee good administration and receive complaint for maladministration. *Complaint to the European Ombudsman*, EUROPEAN COMMISSION, http://ec.europa.eu/justice/citizen/complaints/ombudsman/index_en.htm (last visited Oct. 23, 2017) [<https://perma.cc/98WB-4HFL>] (archived Oct. 23, 2017).

159. In 2003, the European Commission announced the appointment of a Chief Competition Economist and an office composed of ten specialized economists. LARS-HENDRIK RÖLLER & PIERRE A. BUIGUES, *THE OFFICE OF THE CHIEF COMPETITION ECONOMIST AT THE EUROPEAN COMMISSION* 6 (May 2005), http://ec.europa.eu/dgs/competition/economist/officechiefecon_ec.pdf [<https://perma.cc/XLC7-Q8FZ>] (archived Oct. 23, 2017).

would entail an appeal on the merit and the power to adopt a *de novo* decision—the 2012 decisions *Menarini Diagnostics stl v. Italy*¹⁶⁰ by the Strasbourg Court and *KME Germany AG, et. al. v. Commission*¹⁶¹ and *Chalkor AE Epexergasias Metallon v. Europea Commission*¹⁶² by the Luxembourg Court seem to put an end to this debate, at least for the time being, by confirming that judicial review by the EU courts pursuant to Article 263 TFEU can be considered compatible with Article 6 ECHR and Article 47 of the EU Charter of Fundamental Rights, as long as the EU courts are able to quash, on questions of law and facts, the challenged decision, leaving open the possibility of remitting the issue for redetermination by the same administrative body.¹⁶³

Three major observations can be made about this case law on the nature of monetary fines. First, the institutional solution adopted by the ECtHR to deal with *de facto* criminal nature of fines does not eliminate the risk of prosecutorial bias within an administrative authority in which all investigative, enforcement, and adjudicative tasks are concentrated. A case handler will naturally tend to have a bias in favor of finding a violation once proceedings have commenced, despite the checks and balances that have been put in place. The increasing importance of fundamental rights and the perceived need for higher guarantees in antitrust proceedings post-Lisbon seems to suggest that the future developments of competition law enforcement will not require simply formal compliance with due process standards but an intent to reach higher thresholds of protection from a *de iure condendo* normative prospective. In this light, it remains a concern that the same administrative body is in charge of investigative, prosecutorial, and adjudicative functions.¹⁶⁴ In addition, the condition of full jurisdiction is arguably not always respected along the spectrum of competition law cases. In particular, the European courts often adopt a deferential approach toward the Commission's analysis of "complex economic assessments."¹⁶⁵ This margin of appreciation recognized by the EU courts results in a limited review of manifest errors committed by the Commission in the appraisal of complex economic issues. Despite the apparent awareness that "the Courts cannot use the Commission's margin of discretion . . . as a basis for

160. A. Menarini Diagnostics S.R.L v. Italy, No. 43509/08, Eur. Ct. H.R. (2011), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-106438> [<https://perma.cc/3UNP-KKSS>] (archived Nov. 7, 2017).

161. Case C-272/09 P, *KME Germany AG v. Comm'n*, 2011 E.C.R. I-0000, 4 C.M.L.R. 8, ¶¶ 91–94 (2011).

162. Case C-386/10 P, *Chalkor AE Epexergasias Metallon v. Comm'n*, 2011 E.C.R. I-13085, ¶¶ 50–54 (2011).

163. *Janosevic v. Sweden*, 2002-VII Eur. Ct. H.R. 26, ¶ 81.

164. OECD, EUROPEAN COMMISSION - PEER REVIEW OF COMPETITION LAW AND POLICY 63–64 (2005), <http://www.oecd.org/eu/35908641.pdf> [<https://perma.cc/PS7A-PM67>] (archived Oct. 31, 2017).

165. Slater, Thomas & Waelbroeck, *supra*, note 154.

dispensing with the conduct of an in-depth review of the law and of the facts,"¹⁶⁶ such a deferential approach is detectable in many decisions.¹⁶⁷

Second, although the ECHR case law recognizes the criminal nature of antitrust fines, it saves the administrative model on the basis of the distinction between "hard-core" and "minor criminal offenses," which does not seem to be justified on sufficiently clear and robust theoretical grounds. In particular, classifying the whole of competition law as minor offenses does not appropriately rank and distinguish between hard-core cartels and less problematic behaviors such as unilateral abuses and vertical restraints, which in all major jurisdictions are subject to different legal tests, respectively *per se* rules and rule of reason (or their equivalents). This appears in stark contrast with the US acceptance and public willingness "to treat individuals who participate in cartels as serious criminals who should be treated in the same way as embezzlers, stock swindlers and other economic thieves."¹⁶⁸

Third, the methods used to calculate fines may reveal punitive elements that may belong to criminal law. The European Fining Guidelines for example, indicate that for cartels there is an entry fee of 15–25 percent of the volume of sales to be added to the calculation of the basic amount.¹⁶⁹ This may be seen as a mechanism to enhance deterrence, but also as a way to punish cartelists for engaging in such activity. Further, some of the aggravating circumstances, such as the mark-up for recidivists, are not *per se* economically justified or related to the harm or illegal gain attributable to the cartel activity. It may be asked whether introducing entry fees or aggravating elements that increase the level of fines without any direct link to the harm or gain arising from a cartel activity is dictated by some retributive considerations. In fact, as already mentioned, the EU courts themselves recognize that "both the deterrent effect and the *punitive effect* of the fine are reasons why the Commission should be able to impose a fine."¹⁷⁰ Those elements seem to have affinity with criminal law parlance and they fit within a retributive theory of criminal liability.

In conclusion, the status quo remains vulnerable to criticism on many levels. In the light of these considerations, the legal solution adopted by the ECtHR in relation to the shortcomings of the current administrative model seems more a temporary compromise—determined by the various legal, institutional, and political obstacles

166. Chalkor, 2011 E.C.R. ¶ 62.

167. Case T-201/04, Microsoft v. Comm'n, 2007 E.C.R. II-3619, II-3648.

168. BAKER, *supra* note 4, at 27.

169. Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, 2006 O.J. (C 210) 2, ¶ 25 (EC).

170. Case T-329/01, Archer Daniels Midland v. Comm'n, 2006 E.C.R. II-3255, ¶ 141.

to deeper reform—than a stable and satisfactory solution, which would entail a separation of the functions now all in the hands of the European Commission. Whether or not ongoing criticisms will affect future policy reforms, they are certainly an element that must be taken into account when addressing the issue of deterrence and criminal sanctions against cartels, and they may well play a role in opening the door to a more serious policy debate about the role of criminal sanctions in antitrust law and policy.

2. The Constitutionality of Administrative Monetary Penalties (AMPs) in Canada

The issue of the substantive nature of monetary fines also emerged in Canada in the context of reviewable practices. In 2009, amendments to the Competition Act¹⁷¹ introduced administrative monetary penalties (AMPs) for breach of Section 79 related to abuse of dominance. The Competition Tribunal can now impose a maximum of a CAD 10 million penalty for the first order and a maximum of CAD 15 million for subsequent orders. The amount is then adjusted according to aggravating or mitigating factors.¹⁷² Even though Section 79 (3.3) clarifies that such penalties are justified in order to promote compliance with the Competition Act and not to punish the offender, the constitutionality of administrative monetary penalties has been challenged for being *de facto* penal sanctions.¹⁷³ Some critiques have been based on the fact that, when taking into account all the aggravating factors, the penalties may go beyond what is strictly necessary to promote compliance, exceeding what would be required to internalize the costs of anti-competitive practices. The result is that the penalties play a denunciatory role more consistent with criminal law than with civil standards.¹⁷⁴ As a consequence, the constitutional protection associated with criminal matters would require a standard of proof “beyond a reasonable doubt” rather than the civil standard of “balance of probabilities.”

In *R. v. Wigglesworth*, the Supreme Court of Canada confirmed that monetary penalties may fall within Section 11 of the Charter of Rights and Freedom,¹⁷⁵ according to which any person charged with

171. Competition Act, *supra* note 2, § 79 (3.1).

172. According to section 79 (3.2) these factors include revenue and profits affected by the practice, the party's financial situation, the previous history of compliance with the Act, and any other relevant factor. *Id.* § 79(3.2).

173. Comm'r of Competition v. Gestion Lebski, Inc., 2006 Competition Trib. 32, ¶ 45 (Can.).

174. Grant Bishop, *The Economic Consequences and Constitutionality of Administrative Monetary Penalties for Abuse of Dominance*, 26 CAN. COMPETITION L. REV. 37, 40 (2013).

175. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, § 11(d).

an offense in criminal and penal matters has the right to be “presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.” In its decision, the Court rejected the argument that the penalties fell within Section 11, but it concluded that there are two distinct categories of “criminal and penal matters”: proceedings that are “criminal in nature” and proceedings that may have “true penal consequences.”¹⁷⁶ Accordingly, the Court concluded that large fines may entail penal consequences if they are imposed to redress the wrong done to society rather than to maintain internal discipline within the limited sphere of activity.¹⁷⁷ More recently, in *Rowan v. Ontario Securities Commission*, the constitutionality of administrative monetary penalties imposed for breaches of the Securities Act was also challenged.¹⁷⁸ The constitutional argument advanced by the appellants was that penalties imposed under Section 127(1)(g) are so severe as to be in effect penal sanctions. The Court rejected the argument on the ground that penalties of up to CAD 1 million were necessary to remove economic incentives for non-compliance, and that it was important that the administrative penalty would not simply be viewed as a “licensing fee” for illegal market activities. The constitutionality of administrative monetary fines then re-emerged in two cases involving Section 74.1 of the Competition Act. *Commissioner of Competition v. Gestion Lebski, Inc.*¹⁷⁹ confirmed the constitutionality of administrative monetary penalties under Section 74.1 of the Securities Act, which deals with deceptive marketing practices, on the ground that they were aimed at promoting compliance rather than denunciation. Eight years later, Section 74.1 was challenged again by Rogers Communication,¹⁸⁰ but the Ontario Supreme Court of Justice rejected the constitutional challenge, confirming that AMPs did not engage protections under Section 11 of the Charter.

By way of comparison with the ECHR case law, some clarifications seem necessary. First, when *Gestion Lebski* was decided, the maximum amount for AMP under Section 74.1(1) was only CAD 100,000 and CAD 200,000 for a second order, a considerably lower amount compared to that which can be imposed

176. The “true penal consequence test” was defined in paragraph 561 of the decision: “a true penal consequence which would attract the application of s. 11 is imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity.” *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, 559 (Can.).

177. *Id.* at 566.

178. *Rowan v. Ontario Sec. Comm'n*, 2012 O.N.C.A. 208, ¶ 4 (Can. Ont. C.A.).

179. *Comm'r of Competition v. Gestion Lebski, Inc.*, 2006 Competition Trib. 32, ¶ 104 (Can.).

180. *Comm'r of Competition v. Chatr Wireless Inc.*, 2014 O.N.S.C. 1146 (Can. Ont. Sup. Ct. J.).

today,¹⁸¹ and the AMP imposed on Rogers was CAD 500,000, significantly below the maximum amount of CAD 10 and CAD 15 million.¹⁸² This may raise doubts about the possibility of extending these *dicta* to a more generalized level.

Second, for the calculation of AMPs, aggravating factors may contain punitive elements more in line with criminal law. In this regard, the decision by the Supreme Court of Canada in *Martineau v. MNR*¹⁸³ confirms that a penalty may be criminal in nature when “sentencing factors” are the basis of the calculation, rather than purely economic terms. Following the reasoning from *Wigglesworth*, and despite the recognition that the absolute magnitude of a monetary penalty is in itself not decisive to its characterization as criminal,¹⁸⁴ when the penalty exceeds the harm, or the method of calculation displays some punitive elements, issues of constitutionality may still arise. Lastly, a distinction between deterrence and compliance seems incongruent. In *Chatr Wireless*, the Court held that “an administrative monetary penalty cannot be imposed with a view to punishment or deterring others”¹⁸⁵ but can be imposed to induce compliance with the Competition Act. If deterrence-based criminal fines are set to a level that at least equals the gain or the harm caused, there seems to be no substantive difference between deterrence and compliance. Such distinction is therefore problematic.

In conclusion, the Canadian debate about the nature of administrative monetary penalties presents some similarities to the European struggle concerning the nature of antitrust fines. Besides the formal distinctions found in the case law and potential criticisms of the conclusions therein, both jurisdictions reach the same outcome in confirming the legitimacy of civil proceedings for antitrust fines that display some criminal-like elements. Nonetheless, this comparison also highlights an important difference. In Canada, a specialized Tribunal, rather than the same administrative authority in charge of investigations and enforcement, imposes administrative monetary penalties. This institutional difference makes a significant difference when comparing the two otherwise convergent policy outcomes: even discounting for the differences between the two legal traditions, having high level of fines imposed by an integrated administrative agency in charge of all procedural functions still raises

181. See Bishop, *supra* note 174, at 48.

182. Court orders \$500,000 administrative monetary penalty in *Rogers-Chatr matter*, COMPETITION BUREAU (Feb. 24, 2014), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03675.html> [<https://perma.cc/BGJ4-UMCV>] (archived Oct. 23, 2017).

183. *Martineau v. Minister of Nat'l Revenue*, [2004] 3 S.C.R. 737, 754 (Can.).

184. *Canada (Attorney General) v. U.S. Steel Corp.*, [2011] F.C. 742, ¶ 74.

185. *Comm'r of Competition v. Chatr Wireless Inc.*, 2014 O.N.S.C. 1146, ¶ 51 (Can. Ont. Sup. Ct. J.).

some questions about due process guarantees. The institutional aspect of cartel criminalization should therefore take this tension into account.

B. Trade-Offs and Institutional Models of Enforcement

So far, the discussion has been focused on the potential *de facto* criminal nature of fines and the shortfalls of the current administrative model of adjudication. The second institutional dimension of cartel criminalization concerns the different model of enforcement required to meet criminal law standards. Supposing that there was a hypothetical consensus about the criminal law nature of current administrative fines, or about the need to introduce new criminal sanctions for deterrent purposes, what would be the consequences of introducing a criminal law system of enforcement? This subpart analyzes the various trade-offs associated with different institutional models of enforcement.

Trebilcock and Iacobucci identify three basic models of competition law institutions: a bifurcated judicial model, in which specialized investigative and enforcement authorities bring formal complaints before the courts, as is the case in Canada for price-fixing conspiracies and in the United States with respect to the Department of Justice; a bifurcated agency model, in which specialized investigative and enforcement agencies bring formal complaints before separate, specialized adjudicative agencies, such as the Canadian Competition Tribunal for reviewable practices; and the integrated agency model, in which a single specialized agency undertakes investigative, enforcement, and adjudicative activities.¹⁸⁶ The European regime falls within this latter category. An integrated agency model, where the Commission acts as police, prosecutor, and judge, and EU courts review the administrative decisions, was historically influenced by the civil law's "inquisitorial" model of decision making and justified by the need to foster single market integration and create and build a stronger competition law culture within Europe.¹⁸⁷

The authors also identify various trade-offs that policy makers inevitably face when designing competition law institutions.¹⁸⁸ In particular, in relation to the balance between administrative efficiency and due process, the authors identify, on the one hand, a high level of protection of due process values but poor results in terms

186. Trebilcock & Iacobucci, *supra* note 12, at 459.

187. Lianos & Andreangeli, *supra* note 13, at 389–90.

188. Trebilcock and Iacobucci identify the following trade-offs: independence versus accountability, expertise versus detachment, transparency versus confidentiality, administrative efficiency versus due process, and predictability versus flexibility. Trebilcock & Iacobucci, *supra* note 12, at 457–59.

of timeliness and process costs associated with a bifurcated judicial model. On the other hand, in relation to the integrated agency model, the authors claim strong qualities in terms of expertise and administrative efficiency, which come at the expense of due process guarantees. This finding is consistent, for example, with the assessment of mergers in Europe, where cases must be decided within strict deadlines by a body with strong technical expertise but with serious risks of prosecutorial bias and with limited scope to challenge the Commission's findings before the EU courts, given the margin of appreciation in the analysis of economic evidence and results.

However, the same trade-off appears less stringent in non-merger cases. At first sight, an integrated agency model with the administrative body carrying out all the functions provides a significant reduction of costs and increased timeliness of decision making compared to a bifurcated judicial or agency model. Nonetheless, the internal checks and balances in the administrative phase required by the ECHR standards inevitably involve a duplication of tasks and a non-trivial increase in enforcement costs. The introduction of the peer panel review, for instance, implies that officials other than the first investigator have to acquire knowledge of the case and re-examine the assessment made by the first case-handler.¹⁸⁹ Such costs are often further increased given the frequency of application for judicial review before the EU courts.¹⁹⁰ In addition, the EU courts cannot adopt a *de novo* decision but are entitled only to annul and re-submit the case to the Commission for a new determination, which will involve an additional administrative proceeding.¹⁹¹ This specifically has happened in a price fixing investigation,¹⁹² where a fourteen year-long case, which began with a Commission decision initially reviewed by the Court of First Instance and then annulled by the Court of Justice, was subsequently readopted with the due amendments by the Commission and then re-appealed to the Court of First Instance and further appealed to the Court of Justice.¹⁹³ This back-and-forth between competition authority and reviewing courts significantly undermines the efficiency of proceedings, in terms of both costs and timeliness.

On a similar note, administrative judicial review is in principle a faster and less costly procedure compared to an appeal on the merit,

189. Wouter P.J. Wils, *The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis*, 27 *WORLD COMPETITION* 201, 219 (2004).

190. *Id.* at 222.

191. Case T-68, *Società Italiana Vetro Spa v. Comm'n*, 1992 E.C.R. II-1403, ¶ 319.

192. Joined Cases C-238/99 P, C-244/ 99, C-247/ 99, C-250/ 99, C-252/ 99 & C-254/ 99, 2002 E.C.R. I-8618, I-8628.

193. *Id.* ¶¶ 1-34.

where courts substitute their own decisions for the previous decisions. However, the ECHR standard of "full jurisdiction" requires an in-depth review of cases, including the economic assessments made by the Commission. This, coupled with the inevitable back-and-forth with the Commission, may significantly limit the advantages of judicial review and reduce administrative efficiency, ending with a lose-lose situation in regards to the abovementioned trade-off. At the same time, a significant implication for efficiency would be the necessary adoption of a stringent standard of proof required to comply with higher criminal requirements, which would necessarily entail more enforcement costs, time-consuming analysis, and lower probability of conviction. Nonetheless, even taking this element into account, it may still be argued that the burdens affecting the current administrative process make a criminal model of enforcement a potential substitute in terms of procedural efficiency.

C. *Institutional Priorities*

The European Parliament has recognized that "the issue of the compatibility of the Community's competition procedure as a whole with Article 6 ECHR will be particularly important if, as seems probable, the fines which can be imposed by the Commission come to be regarded as criminal penalties for the purpose of Article 6,"¹⁹⁴ and the EU courts confirmed that "undertakings accused of violations of the competition rules . . . must for this reason enjoy the guarantees that are provided for procedures of a penal character."¹⁹⁵

As the Article attempted to show, there is a complex interrelationship between substantial and institutional challenges that must be addressed when designing the introduction of individual antitrust sanctions. From a normative and empirical perspective, the problem of cartel deterrence justifies the introduction of a diverse set of sanction mechanisms both on corporations and individuals, in order to overcome the inherent limits of monetary fines and to address specific incentive problems that operate on an individual level. Individual sanctions can overcome corporations' inability to pay and principal-agent problems, increase the moral stigma associated with collusion, and enhance propensity to cooperate with competition authorities.

However, despite their desirability, individual sanctions are unlikely to become a priority as a stand-alone proposal, given the legal, political, and institutional consequences that would follow. On the contrary, the solution to the problem of under-deterrence of cartels appears to be ultimately conditional to the political

194. European Parliament position, 1st reading or single reading, 2002 O.J. (C 72) 236.

195. Case C-199/92 P, *Huls v. Comm'n*, 1999 E.C.R. I-4287.

desirability of improving the shortcomings of the current institutional model of enforcement more than the normative and empirical justifications for individual sanctions. In this regard, institutional challenges have already emerged from the debate concerning the potential *de facto* criminal character of monetary fines and from the risks of prosecutorial bias associated with an integrated agency model. The compatibility of the current administrative model with ECHR standards is based on a characterization of competition law under the category of “minor criminal offenses,” which, at least in relation to cartel cases, is questionable.

Further, the ECHR conditions of adequate checks and balances within the administrative phase and “full judicial review” is not satisfactorily met in all cases. In addition, the usual trade-off between administrative efficiency and due process may not necessarily apply in the context of cartel and unilateral abuse cases, given that the abovementioned ECHR conditions create a significant burden on the enforcement procedure that may nullify the advantages of an administrative model of adjudication.

In sum, while the two separate scholarly debates on criminalization—ECHR due process concerns and the desirability of increased cartel deterrence—are two faces of the same coin, this Article suggests a priority between these two important dimensions. In particular, it concludes that despite the strong justifications for the introduction of individual sanctions at the European level, such reform appears to be conditional on the political desirability of improving the due process procedural efficiency trade-offs at the institutional level, for instance by considering a possible shift toward a bifurcated judicial model. Such a shift would potentially increase the levels of due process protection, meet all the ECHR requirements, and also eliminate many of the barriers against introducing individual antitrust sanctions for deterrent purposes, while not necessarily entailing a costlier and time-consuming model of enforcement. Certainly, without the willingness to reform the current system of enforcement, individual sanctions are unlikely to become a feasible option in Europe.

V. CONCLUSION

This Article has attempted to address the question of cartel criminalization in Europe from a broad perspective that takes into account both the need to ensure deterrence and to address the institutional design questions associated with criminalization. The high levels of fines are a symptom of the inadequacies of a system that relies exclusively on monetary fines imposed on corporations to effectively deter cartels, and vice versa, under-deterrence stems from the impracticability of introducing individual sanctions within the

current institutional model. This Article argues that more attention should be paid to the shortcomings of the current form of enforcement and the desirability of introducing new institutional models, as it appears to be the only feasible way for individual sanctions to become a priority at the European level. A search for a better institutional model is therefore recommended before hoping to see an optimal sanction regime ever becoming a reality in Europe.