Anti-Cartel Enforcement in Community Law Context: Considerations on Sanctions and Leniency

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Abstract

This paper discusses how cartels within the Community should be dealt with, thereby focussing solely on two already applied enforcement tools: sanctions and leniency.

Since Commission's current sanctioning practice is regarded to neither deter undertakings, nor corporate actors, adjustments should be considered in order to maximize the effectiveness of enforcement. It will be concluded that corporate fines should increase in order to counter undertakings' pro-collusive incentives. However, merely increasing corporate costs is not likely to effectively deter undertakings in every circumstance. After all, corporate actors could have conflicting incentives. Tackling these perverse personal motives requires more far-reaching changes for Community's current sanctioning system. It will therefore be argued, that personal sanctions should be included in Commission's 'armament' to truly dissuade corporate actors from conducting these unlawful practices. Different types of personal sanctions are considered on their merits.

It will be concluded that simply increasing the personal threat will not always bring about the expected enforcement benefits, as other sanctioning characteristics also play a determinant role for the attainment of effective enforcement. As will be established, sanctions are likely to affect leniency applications. Therefore, the anticipated effects on leniency programmes should be considered when developing Community's sanctioning systems. When specific personal sanctions – although effectively deterring corporate actors - would negatively affect operated leniency programmes, overall enforcement might not benefit.

Part I

Enforcement characteristics and optimal sanctioning within the Community

Introduction

The "Leniency Notice"[1] aims - amongst others - at increasing the level of transparency and certainty in Commission's policy of providing immunity from and reduction of fines in cartel cases[2] in comparison to the "1996 Notice",[3] its predecessor. Since prospective applicants will more easily be able to calculate the concomitant benefits of application, undertakings are facilitated (or even: stimulated) to defect from their cartels. Commission's Leniency Notice has, in practice, proven to be an effective tool for the destabilization of cartels.[4]

By institutionalizing this clement treatment, together with its Guidelines on the method of setting fines[5] (the "Guidelines"), the Commission has considerably curtailed its discretionary powers in sanctioning cartel offenders, a competency delegated to it by ways of a Council Regulation (currently Reg. 1/2003[6]). Both Commission documents combined, provide for certain and transparent sanctioning procedures, enabling undertakings to calculate the benefits of making a leniency application.[7] If the costs of possibly being fined are sufficiently high, and the benefits of leniency are considerable and certain, early cartel defection is stimulated and, hence, likely to occur.

To date, Community's leniency policy (operative under Community's more comprehensive sanctioning policy) provides for considerable monetary gains and has become increasingly transparent and certain. Taking into consideration that the Commission can only impose

[1] Commission notice on immunity from fines and reduction of fines in cartel cases. OJ 2002/C 45/03.
[2] *Ibid*, paragraph 5.
[3] OJ 1996/C 207.
[4] See: e.g. Van Barlingen, 'The European Commission's 2002 Leniency Notice after one year of operation', [2003] *Competition Policy Newsletter* 2, pp. 16-22.
[5] Guidelines on the method of setting fines imposed pursuant to Article 15 (2) of Regulation No 17 and Article 65 (5) of the ECSC Treaty. OJ 1998/C 9/03.
[6] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. OJ 2003/L 1/1.
[7] Costs of collusion other than imposed sanctions must also be observed, e.g. averse publicity upon disclosure. Similarly, also costs attached to leniency (contrary to benefits) must be regarded. Besides the obvious costs of no longer generating cartel gains, retaliation by co-conspirators (e.g. through fierce competition) constitutes an important cost-element of collaboration. Both must (and in practice will) be considered before filing a leniency application.

corporate fines, undertakings are granted good possibilities to file rational leniency applications for Community competition law infringements.

In the current decentralized enforcement system - where national sanctioning systems differ greatly – Community competition law infringements arenot solely pursued by the Commission, however. Undertakings' unlawful conduct can equally be scrutinized by national authorities and punished in accordance with their national sanctioning provisions.[8] With different sanctioning systems come about different leniency policies. Parallel to Commission's Leniency Notice different national leniency schemes are therefore operative. (Not all Member States currently apply a leniency programme, however).[9] Since the Commission is not obliged to pursue a cartel (neither on complaint, nor *ex officio*) - and undertakings will therefore possibly be prosecuted and sanctioned successively by different national competition authorities ("NCAs") under their respective sanctioning schemes - undertakings are 'required' to file multiple national leniency applications (if possible). Multiple leniency programmes to apply for, with as many sets of criteria to fulfil, inevitably hampers transparency and certainty.

Further to the problems stemming from multiple leniency applications, the existence of different sanctions, in itself, brings about another complication for a successful leniency policy. In this constellation of sanctioning systems, where cartel costs significantly differ per Member State, the total costs of *multi-national* cartels become increasingly difficult to estimate. This becomes even more apparent considering that custodial sanctions for cartel infringements have made their appearance within the Community.

Applying different sanctioning systems (inevitably leading to different leniency schemes) therefore diminishes the possible success leniency policies could have.

This paper deals with the enforcement against cartels within the Community, thereby making a distinction between prevention and destabilization of cartels. More specifically this paper will focus on the correlation between leniency and custodial sanctions. Before being able to establish the effects of this 'interplay' in Community context (Part II), some general characteristics of effectively dealing with cartels, together with Community competition law properties, need to be regarded first (remainder of Part I).

[8] This, after all, was the prime objective for decentralizing competition law enforcement; to relief Commission's resources.

[9] Member States currently operating a leniency programme are: Belgium, Cyprus, The Czech Republic, Estonia, Finland, France, Germany, Hungary, Ireland, Latvia, Lithuania, Luxembourg, The Netherlands, Poland, Slovakia, Sweden, and The United Kingdom.
See: http://europa.eu.int/comm/competition/antitrust/legislation/authorities_with_leniency_programme.pdf

Ratio current sanctioning system

To impose sanctions upon undertakings for operating prohibited cartels, can be characterized as punishment. Punishment in general can serve different aims, for instance: incapacitation, rehabilitation, retribution or deterrence.[10] In competition law context, the main purpose of sanctioning cartel participants is deterrence;[11] dissuading prospective offenders from conducting anti-competitive practices. As can be concluded from Feinberg's survey in the 1980s,[12] disregard for the law in pursuit of corporate gain is regarded to be the main source of operating hardcore cartels. If this conclusion is indeed true (as the author will assume), operating a sanctioning system based on deterrence is probably the best option for the maintenance of competitive markets.[13] Operating a deterring sanctioning policy must therefore be the prime objective of every anti-cartel enforcement authority, including the Commission.

Before truly being able to establish both the type and the level of effectively deterring sanctions in Community context, it is necessary to consider *who* should be deterred from conducting these unlawful practices. Only after perceiving whose (and which) incentives need to be countered, effectively deterring sanctions can be 'designed'. First, however, some characteristics of Commission's sanctioning system will be elaborated on to establish which enforcement flaws have to be dealt with.

Sanctioning restrictive agreements

Article 81 (1) EC-Treaty prohibits as incompatible with the common market, all agreements between undertakings, decisions by associations of undertakings and concerted practices, which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market (and which do not fulfil the criteria of article 81 (3) EC-Treaty) (hereinafter referred to as "restrictive agreements" or "cartels"). Prohibiting cartels forms one of three pillars constituting

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[10] See: Rosochowicz, 'The Appropriateness of Criminal Sanctions in the Enforcement of Competition Law', [2004] *E.C.L.R.* 12, p. 752.

[11] See: OECD Report on the nature and impact of hard core cartels and sanctions against cartels under national competition laws, [2002].

[12] See: Wils, *The Optimal Enforcement of EC Antitrust Law*, [2002] European Monographs, p. 194, referring to: Feinberg, 'The Enforcement and Effects of European Competition Policy: Results of a Survey of Legal Opinion', [1985] 23 *Journal of Common Market Studies* 373.

[13] See: Rodger, 'The Competition Act and the Enterprise Act Reforms: Sanctions and Deterrence in UK Competition Law', in: Dannecker/Jansen, *Competition Law Sanctioning in the European Union*, [2004], p. 119.; and Wils, [2002], p. 195.

Community's competition regulating policy. The other two, being prohibition of abusive conduct by dominant undertakings and *ex ante* control of concentrations, are not relevant for the purpose of this paper and will therefore not be discussed.

As can be concluded from the wording of article 81 (1) EC-Treaty, Community's cartel prohibition services the establishment and maintenance of the common market. This objective is in accordance with the general purpose of Community competition policy, namely preventing private parties (undertakings) from constructing barriers to trade. Within the Community, the collusive conduct itself is not so much considered unlawful, but rather the effects it has on competition. This is an important characteristic of Community's cartel prohibition.

Article 23 (par. 2) of Reg. 1/2003 grants the Commission the power to impose fines on undertakings where they infringe article 81 EC-Treaty. For each undertaking this fine shall not exceed 10% of its total turnover in the preceding business year. Fines thus imposed, are of an administrative law nature (par. 5). In fixing the amount of the fine, the Commission shall take into account both the gravity and the duration of the infringement (par. 3). The exact calculation is determined by the Guidelines, which provide the following method: after the basic amount is established based on gravity and duration of the infringement, this amount can be increased or reduced in case of aggravating or attenuating circumstances, respectively. The specific economic context in which the infringements took place, the economic and financial benefits derived from the unlawful behaviour, the specific characteristics of the undertaking concerned and undertaking's ability to pay, are all further determinant elements for adjusting the level of the fine. In any way, the definitive amount may not exceed 10% of the worldwide turnover of the undertaking concerned.

Another important element of Commission's fining policy, which is also acknowledged in the Guidelines, is the possibility to grant lenient treatment. This element was deliberately ignored above, since leniency will be the object of more thorough elaboration below. Although implemented through a separate legislative document - the Leniency Notice - it should not be forgotten in which context its application takes place, namely during the more comprehensive assessment provided for in the Guidelines.

Commission's Leniency Notice

Under the Leniency Notice, undertakings fulfilling certain specified requirements can benefit from fine reductions or complete immunity when they defect from their cartels by informing the Commission of the unlawful practices. Leniency can only be granted to undertakings participating in so-called hardcore cartels: cartels aimed at fixing prices, production or sales quotas, sharing markets including bid-rigging or restricting imports or exports.[14] These hardcore cartels concern horizontal agreements (agreements between competitors) and are considered to be most harmful to competition (and therefore very profitable for participating undertakings). Since these cartels are by their very nature hard to detect and, for the harm inflicted on society, important to unravel by all means, it is considered desirable to grant offending undertakings clement treatment when they provide the Commission with useful information on these cartels. For all other cartels, which by their nature may be less difficult to detect and punish,[15] immunity and large fine reductions were not considered to be outweighed by enforcement benefits.[16] Since lenient treatment does not serve altruistic purposes, enforcement benefits must clearly outweigh the drawbacks of not being able to punish every single perpetrator. Leniency was therefore only considered desirable for the enforcement against hardcore cartels. It could even be argued that providing lenient treatment to undertakings participating in cartels that are easy to detect and punish, would have opposite effects since this could stimulate undertakings to participate in cartels, as estimated costs (imposed fines) would diminish.[17] [18]

According to the Leniency Notice, the Commission grants immunity to an undertaking when it is the first to provide evidence that enables the Commission to carry out an on-the-spot investigation[19] *and* the Commission - at that time - is still unaware of cartel's existence. If the Commission is already aware of the restrictive practices, undertakings are still eligible for immunity when they are the first to provide the Commission with information enabling it to find an infringement of article 81 EC-Treaty. In any way, only a single undertaking (the first) submitting information about the cartel can be granted immunity. However, not before three

[14] Paragraph 1 Leniency Notice.
[15] Not only can market effects be more clearly allotted to these cartels, also consumers will be more aware of (more openly confronted with) the existence of these restrictive agreements. Both *ex officio* investigations and complaints can therefore warrant a high detection rate.
[16] See: Wils, [2002], p. 54.
[17] The same argument is, however, used by some authors as negative aspect of leniency policy in general. See: e.g. Motta/Polo, *Leniency programs and cartel prosecution*, [1999] EUI Working Paper ECO, No 99/23.
[18] Cooperative undertakings in non-hardcore cartels can of course be rewarded with a reduction of the fine under the Guidelines' attenuating circumstances. Fine reductions will then, however, be less considerable and certain.
[19] Currently provided for in article 20 Reg. 1/2003.

additional (and cumulative) criteria have been met. Applying undertakings must cooperate fully and on a continuous basis, must terminate their cartel involvement, and should not have coerced other undertakings to participate in the cartel.[20]

Second and subsequent undertakings coming forward, providing the Commission with information about the cartel, may benefit from a reduction of the fine otherwise imposed. Complete immunity is, however, no longer available. In order to be granted leniency, the provided information should represent 'significant added value' with respect to the evidence already in Commission's possession. Moreover, applying undertakings must terminate their cartel involvement. The level of reduction granted is dependant on the quality of the information. Different ranges are applicable for subsequent applicants.[21]

Granting second and subsequent applicants lenient treatment can be useful for the collection of sufficient evidence to prove an infringement. However, seen from an enforcement perspective, first applicants are of most value to the Commission. Cartels which prior to the application were still unnoticed, can be unravelled when a participating undertaking blows the whistle, after which co-conspirators can be punished for their part in the cartel. For a successful leniency programme considerably destabilize cartels, Community's sanctioning system should provide a 'good deal' to first (and subsequent) applicants.

Addressees

Within Community law the sole addressees of the competition regulating provisions are undertakings. Hence, only undertakings are punished for cartel participation.[22] Since liabilities can only be imposed on natural or legal persons (and therefore not on the undertaking itself), the burden of the fine shall be carried by the person(s) which can be 'identified' with the undertaking concerned. In competition law practice, affected undertakings will generally be operated through incorporated companies. These companies are owned by shareholders and operated by boards of directors (and other management bodies within the companies), which always (directly, or indirectly via another company) consist of natural persons. These individuals ("corporate actors") determine company's policy and strategy and are formally leading the undertaking. Although large shareholders could be represented in the board of directors (or in other ways influence undertaking's conduct), in practice ownership and

[20] The arrangement for first applicants is provided by paragraphs 8-19 Leniency Notice.
[21] The arrangement for second and subsequent applicants is provided by paragraphs 20-23 Leniency Notice.
[22] See: article 23 (par. 2) Reg. 1/2003, "The Commission may by decision impose fines on undertakings".

management shall often be highly dispersed in companies identified with infringing (and sanctioned) undertakings.

Generally, dependant on national corporate law, directors will be under a moral or statutory duty to act in the best interest of the company, its foremost interest being: generating wealth.[23] In attaining this (likely by the shareholders demanded) goal, companies (represented by corporate actors) may decide – in their capacity of operating the undertaking - to conclude restrictive agreements. After all, collusion potentially reduce costs or increase turnover.[24] (For this reasoning it is assumed that undertakings are amoral calculators, an assumption which is, however, not uncontested).[25] When the cost-benefit analysis between collusion on the one hand, and (fierce) competition on the other is positive, meaning that monetary gain generated by cartel participation (discounted by a possibly imposed fine) outweighs gain of competition, undertakings are likely to collude. It should be stressed that this reasoning is not only based on the assumption that undertakings are amoral calculators, but also that companies' cartel gain is not outweighed by conflicting personal incentives of corporate actors.

Does current sanctioning system deter?

By operating an enforcement system in which monetary sanctions can be imposed in excess of the estimated gain and in which detection is perfect, the cost-benefit analysis which corporate actors will make before entering into a cartel shall always be negative. Undertaking's interests will never favour these unlawful practices when they are deemed to be harmful. Cartel participation could thus be effectively prevented simply by imposing fines in excess of generated gain.

It must, however, be questioned whether this conclusion would equally hold in Community practice. After all, generating corporate gain could stimulate actors to pursue personal agendas, which, in turn, would disqualify mere corporate fines as optimal sanction. Another element capable of thwarting enforcement against cartels solely through corporate fines, stems from the far-from-perfect detection rate. Both these aspects must be kept in mind when developing a successful sanctioning system for Community purposes.

As can be concluded from article 23 Reg. 1/2003, the Commission is only competent to impose *fines* of an *administrative* law nature on *undertakings* infringing article 81 EC-Treaty.

[23] The formal objectives of companies can be found in their articles of association.
[24] Attaining this understandable objective, of course, does not approve undertaking's unlawful behaviour.
[25] See: e.g. Rodger, in: Dannecker/Jansen, [2004], p. 118-119.

As argued above in a more general fashion, monetary sanctions are, in principle, capable of dissuading undertakings from concluding restrictive agreements and could therefore constitute an adequate level of deterrence for Community purposes. However, as also mentioned already, specific circumstances could hamper the effectiveness of mere corporate fines. This 'theoretical deficiency' must be feared in Community's sanctioning practice. The effectiveness of Commission's sanctions must therefore be considered. Even more important, however, than in practice deterring undertakings, is the question whether the Commission must be considered equipped to toughen its sanctioning practice, when so needed.

The main purpose served by punishing undertakings for their cartel participation is deterrence. When it is indeed correct that undertakings are amoral calculators, deterrent strategies of regulatory enforcement – stressing on detection and sanctioning of violations – are probably most effective. Commission's fining practice should therefore effectively deter prospective offenders. In order to reach this level of deterrence, fines should be based on the gain derived from of the infringement, contrary to fines based on the harm inflicted on society, which serves a more retributive purpose. Besides this theoretical ground, imposing gain-based fines also has practical reasons. Since harm inflicted on society can be less than the yielded gain of offender, only gain-based fines will under all circumstances[26] effectively deter undertakings from collusive conduct.[27] It should furthermore be noted, that gain generated by offending undertakings can be more easily established than the harm inflicted on society (of which undertakings themselves, as well as favoured stakeholders[28] are part). Since detection and prosecution of cartels is by no means perfect, imposing a fine which equals corporate gain will not constitute an effective deterrent. Gain-based fines are therefore not sufficient to prevent restrictive agreements from being concluded. Arguably, when setting the fine the generated gain should be multiplied by the chance of actually being sanctioned in order to reach a level which truly deters.[29] Although the author advocates a sanctioning system in which fines based on corporate gain are doubled, trebled or even

[26] Disregarding externalities.
[27] Possible advantages of cartels to society are not included in a gain-based assessment, which by some scholars is regarded as a flaw. However, in Community competition law, cartel advantages are being regarded under article 81 (3) EC-Treaty and can furthermore, according to the Guidelines, form an attenuating circumstance leading to a reduction of the fine. This 'flaw' of gain-based assessments is therefore - in Community context - considerably mitigated and certainly not decisive to shifts towards harm-based fines. For different reasoning, see: Wils, [2002], pp. 22-24.
[28] With the term stakeholders is not only meant the stakeholders within the company (the normal definition), but also all third parties *possibly* benefiting from undertakings' competitive benefits (suppliers, wholesalers, etc).
[29] See: e.g. Wils, [2002], p. 199.

quadrupled, multiplication of the amount with the chance of actual sanctioning is neither considered desirable, nor necessary. Not desirable, since it would seem arbitrary to punish a small group very harsh in order to deter prospective offenders,[30] unfair to allow for this small group of undertakings to become the victim of possibly low enforcement efforts, and difficult to truly perceive accurate detection rates (to determine the multiplication factor). Moreover, it would not even be necessary assuming that undertakings are risk averse. Some psychologists even suggest that people in general (and therefore corporate actors in specific) will "weigh prospective losses roughly twice as heavily as putative gains" in uncertain circumstances.[31] If this assumption is indeed correct, the chance of actually being sanctioned does not need to be completely reflected in the fine to establish an effective deterrent.

As already stated, some form of multiplication is, however, deemed necessary to establish an effectively deterring fine.

Increasing the level of the fine

The reason that corporate fines should clearly exceed the gain derived from cartel participation is threefold. First of all, it is important to provide for a safety margin. For sanctions to deter undertakings from entering into cartels, the costs of collusion must outweigh the benefits. Corporate gain deriving from cartel participation should therefore be completely reallocated by imposed fines. Since it must not be deemed impossible that Commission's calculations reach less optimistic yields than was actually generated,[32] gain-based fines may not be enough to dissuade undertakings from concluding restrictive agreements. When miscalculations become more or less 'institutionalized', collusion remains beneficial for undertakings and effective deterrence will, hence, not be established. By setting the amount of the fine clearly above the estimated gain, (inevitable) miscalculations will not be detrimental for the level of deterrence.

Besides building in a safety margin, multiplication of gain-based fines is even more important (necessary) for another reason. After all, establishing a safety margin assumes that detection and punishment will be perfect. As already noted, this is currently not the case and, moreover, is unlikely to ever do become reality.[33] Although definitive figures on detection

[30] Wils, [2002], p. 41.
[31] Ibid, p. 40.
[32] This irrespective of the fact that corporate gain is more easy to calculate than the harm inflicted on society.
[33] Only *ex ante* control could make detection perfect. Prior approval of all undertakings' practices is in reality, however, impossible. Furthermore, even if deemed manageable, this would considerably curtail undertakings' entrepreneurial freedoms.

and punishment rates within the Community are absent, it is certainly not very likely that these will be more optimistic than US figures. After all, not only are US antitrust enforcers much more experienced in the unravelling of cartels, but US sanctions are also more likely to 'persuade' corporate actors to make an early leniency application (thereby disclosing restrictive agreements), as they will risk imprisonment.[34] With regard to the latter it must be acknowledged, however, that the threat of imprisonment could also provide corporate actors with incentives to take cartels even further underground. This of course would clearly hamper detection. US' figures show that there is a 13 to 17 per cent chance "that a price fixing conspiracy will be indicted by federal authorities".[35] Since it is considered that Community figures will not display a more positive detection rate (even when taking into account that US' custodial sanctions provide corporate actors with incentives to conceal cartels at great lengths), a successful sanctioning system for Community purposes, aimed at deterring prospective offenders and solely equipped with corporate fines, should therefore regard (and to some extent discount) the possibility that offenders will actually be punished when determining the level of the fine. This constitutes the second reason why fines should clearly exceed the gain derived from cartel participation. For Community practice the author considers this reason to be decisive.

The third and last distinguished reason to multiply corporate gain when setting the fine has a normative objective. When the imposed fine is a multiple of the gain obtained through operating unlawful practices, a clear punitive element is inserted in Community's cartel sanctioning system. Imposing punitive fines is likely to send a message to prospective offenders that imposed sanctions do not only reallocate unlawfully generated resources, but that cartels - not benefiting from article 81 (3) EC-Treaty - are considered as moral wrongs. Although at first sight, this normative element does serve any deterrence purposes - and would therefore not be necessary from an enforcement perspective - this thought should change if one assumes that undertakings are *not* (only) amoral calculators, but instead (or, also) are 'incompetent organisations', or (in this regard less relevant) 'political citizens'.[36] When it is indeed considered that undertakings are incompetent organisations, normative incentives could be decisive for the prevention of cartels, as this would 'educate' undertakings of the unlawfulness of cartels. As already mentioned, undertakings are

[34] This characteristic of sanctions will be the object of more thorough elaboration below.
[35] Wils, [2002], p. 39, footnote 123.
[36] For this distinction, amoral calculator, incompetent organisation or political citizen, see: Rodger, in: Dannecker/Jansen, [2004], p. 118

considered to be amoral calculators. Normative incentives will in that regard not contribute to the optimization of enforcement against cartels.

What can be concluded from this somewhat wide elaboration? Considering deterrence to be the prime objective for sanctioning cartel infringements and acknowledging that the Commission is only competent to impose fines of an administrative law nature on undertakings, it would be highly undesirable for Community competition law enforcement if the Commission would impose fines not truly deterring. As established, fines will certainly not deter undertakings when the generated cartel gain is not completely reallocated by Commission's fines.

Independent of the problems deriving from the 10%-limitation (maximum fines up to 10% of undertaking's worldwide turnover), Commission's currently operated sanctioning *practice* is not likely to effectively deter undertakings. After all, fines exceeding 15 per cent of the annual turnover in the products concerned by the violation, are still very unlikely to be imposed. [37] Moreover, depending on case-specific elements, even a fine constituting 10% of undertaking's worldwide turnover may not be sufficient to outweigh the benefits of collusion and therefore could not deter.

This observation is especially pertinent for hardcore cartels, which can generate considerable yields for participating undertakings. When it is assumed that price cartels generate a 10% price mark-up and will last for five years,[38] a fine constituting 10% of undertaking's worldwide turnover, *even if imposed*, will not be enough to make cartel participation unprofitable *in every circumstance.* Hence, effective deterrence is not established. When an autonomous 'single-product' company, solely operating within the Community, participates in a price-cartel, the profits deriving from selling its products at an increased price level can be considerable ('extra' profits exceeding 10% of undertaking's worldwide turnover may not be regarded as exceptional). In the other extreme, where a single-product company, solely operating within the Community, is a subsidiary within a 'multi-product' undertaking (consisting of several companies operating on the world market) and is participating in a price cartel, a fine constituting 10% of *undertaking's* worldwide turnover could heavily over deter.

In any way, imposing case-specific fines, establishing an effective deterrent for prospective offenders, is considerably hampered by this limitation based on undertaking's turnover. Since

[37] See: Wils, [2002], p. 202.
[38] As assumed to represent realistic averages, see: e.g. Wils, [2002], p. 200.

no two undertakings are completely alike, the 10%-limitation is too rigid for the Commission to adequately adapt its fines to the specific circumstances of each cartel. Reconsideration of this limitation would therefore be advised.

Abolition of the 10%-limitation

As established above, punitive fines are considered an absolute necessity for the optimization of Community's anti-cartel enforcement system.[39] This conclusion especially holds, considering that the Commission can solely impose corporate fines and undertakings are regarded to be amoral calculators. Since detection is not perfect, corporate fines should clearly exceed corporate gain to compensate for enforcement flaws.

Some scholars argue that truly deterring corporate fines are beyond undertakings' ability to pay.[40] This objection is, however, considerably mitigated assuming that undertakings are risk averse and, therefore, the actual chance of being sanctioned needs not to be fully discounted to establish an effectively deterring fine. If the imposed (punitive) fine does, however, constitute an amount which the undertaking is unable to pay, or which would be detrimental to undertaking's competitive possibilities, an 'arrangement' could be concluded in which the payment is spread over several months or years. When allowing for such arrangements to be concluded between the Commission and punished undertakings, imposing punitive fines will not have any negative (anti-competitive) side-effects.

It should be grasped that imposing effectively deterring fines, requires abolition of the rigid 10%-limitation. From a legal standpoint that are no obstacles to increasing this level. After all, the Court of Justice allows an adjustment of the level of fines when this facilitates the application of the Community competition rules.[41] However, since this limitation is provided for by a Council Regulation (Reg. 1/2003), the Commission cannot toughen its sanctioning policy independent of the Member States. Political obstacles may hamper this development.

However, even more important than being *able* to impose high fines (thereby not being curtailed by rigid limitations), is being *willing* to actually use this power. In Commission's current fining practice, a fine constituting 10% of undertaking's worldwide turnover is still a rarity. Before proposing amendments to Reg. 1/2003, the Commission is therefore advised to further toughen its fining policy within the given boundaries. Only when severe sanctions, displaying clear punitive characteristics, in practice will be imposed, abolition of the 10%-

[39] Also other scholars seem to advocate such a development. See: e.g. Azevedo, 'Crime and Punishment in the Fight Against Cartels: The Gathering Storm', [2003] *E.C.L.R.* 8, p. 405-406.
[40] See: e.g. Wils, [2002], p. 203.
[41] *Musique Diffusion Française*[1983], Joined Cases 100-103/80, para. 109. See: Wils, [2002], p. 41.

limitation can *further* facilitate the development of an effectively deterring Community sanctioning system.

As already briefly mentioned, generating corporate gain could also stimulate actors to pursue personal agendas. Therefore, simply raising the costs for undertakings concerned might not be sufficient to prevent cartels from being established in the Community. The nature of these conflicting personal will be discussed below.

Conflicting incentives

Competition law provisions will generally affect incorporated undertakings. These undertakings are factually driven by corporate actors. In practice, natural persons will thus determine whether the undertaking will compete or collude. Since Community competition law provisions are solely addressed to undertakings, responsible individuals in general remain untouched by Commission's sanctions (this could be different for an undertaking coinciding with a single trader). Knowing this, it is important to consider whether corporate actors possibly have personal incentives in conflict with undertaking's interests. If this would be the case, a sanctioning system which in theory would effectively deter its addressees from concluding restrictive agreements, could in practice turnout to be less successful.

When corporate actors hold shares in the company (which is not uncommon[42]), or in any other way personally benefit (financially or professionally) from company results, undertaking's and actor's *short-term* incentives will be considerably parallel. After all, when collusion is beneficial for the undertaking, share value will rise and shareholding directors will financially gain. Furthermore, it is possible that corporate actors will benefit professionally from operating restrictive agreements. When company results improve (due to the competitive advantageous of cartel participation), responsible actors will safeguard their position within the undertaking and could even be eligible for a promotion.[43]

In the opposite situation, where cartel participation is detrimental to the undertaking concerned, the parallel incentives between undertaking and corporate actors similarly become apparent. After all, not only will company's shareholders bear the burden of an

[42] For instance, according to a Dutch daily newspaper, directors in Dutch companies increasingly are being awarded with company shares. See: Rengers/Van Uffelen, 'Onstuitbare opmars van de beloning in aandelen', *Volkskrant*, 11 January 2005. There are no reasons to believe that this would be any different in other Member States.

[43] Since good company results will in practice always lead to professional gain (at least by safeguarding actor's current position), also directors which do not hold shares in company will benefit from corporate gain. It is not realistic that directors will *not* be judged on the company results.

imposed fine, but corporate actors taking irresponsible risks may also face internal sanctions (financial and professional).

Especially for enforcement purposes these conclusions are relevant. After all, when cartel participation increase corporate costs in the short-term, shareholding actors are not likely to have (conflicting) personal incentives favouring collusion. Arguably, it could be reasoned that 'merely' imposing effectively deterring corporate fines must be sufficient to prevent undertakings from entering into restrictive agreements. Unfortunately this conclusion does not hold.

As already stressed, personal and corporate incentives can only truly be regarded parallel for short-term purposes. Since shares will generally be transferable,[44] the likelihood that shareholding directors will take irresponsible risks to increase share value, after which immediately selling their shares, must not be disregarded. Since shareholders are generally known to disregard long term objectives for short-term benefits[45] and considering that cartels tend to be detected and punished only after being operative for some years, if unravelled at all, this risk becomes apparent. Contrary to shareholders, undertakings will particularly be well-served by long-term objectives. Corporate actors could therefore very well have personal incentives in conflict with undertaking's interests.

Although punitive fines are clearly capable of deterring rational operating undertakings from cartel participation (even if imposed years after the restrictive agreements have been concluded, the effects will still be felt), responsible actors could pursue their own agendas and opt for short-term personal benefits.

Personal deterrence

Perverse personal incentives in conflict with corporate interests must also be feared in Community context. Introducing personal sanctions (in addition to the corporate sanctions) to establish effective overall deterrence, must therefore be considered on its merits. Three types of personal sanctions, in principle usable for combating cartels, will be distinguished: personal fines, disqualification orders and custodial sanctions. All three will be scrutinized below to perceive which one is most effective for Community purposes.

[44] Shares in public companies will be easily transferable. With regard to private companies, transfer limitations could be provided for under national law.

[45] This, however, can be seen as a general flaw of awarding managers with company shares.

Implementing personal fines in Commission's armament will not effectively deter individuals in *all* circumstances. After all, responsible actors fined for their unlawful conduct, could be indemnified by the undertaking benefiting from the restrictive agreements. In Community's currently operated sanctioning system, where corporate fines are not (in all cases) likely to outweigh the benefits of cartel participation, indemnification of corporate actors by the undertakings concerned may not be disregarded. Effective personal deterrence for committing infringements of article 81 EC-Treaty can therefore, to date, not be established through the introduction of personal fines. However, since it is not likely that corporate actors will be indemnified when the undertaking is harmed by the collusive conduct (especially not when this harm derives from clearly irresponsible risks taken by these individuals), personal fines should not be rejected as ineffective *per se*. After all, personal fines would be additional to corporate fines.

By increasing the level of corporate fines (constituting a multiple of the gain derived from cartel participation), the estimated costs of collusion will simultaneously increase. As costs rise, collusive conduct will sooner be deemed irresponsible, which diminishes the likelihood that undertakings will indemnify corporate actors personally fined. Increasing corporate fines could thus not only provide rational operating undertakings with incentives to refrain from collusion, it could simultaneously increase the effectiveness of personal fines.

Whereas corporate fines themselves are not likely to deter responsible actors, a serious increase of corporate costs could indirectly improve personal fines' effectiveness. A combination of severe personal fines and punitive corporate fines could therefore increase the success of Community's anti-cartel enforcement. In determining the level of personal fines, it is important that the (personal) costs outweighs personal gain stemming from collusion. Similar as for corporate fines, personal fines should therefore constitute a multiple of the personal gain.

The second type of personal sanctions distinguished for the purpose of this paper are the so-called disqualification orders. These orders declare their addressees incompetent to operate management positions (in general) for a certain period of time. Although the nature of this sanction does not allow the undertaking to truly indemnify the addressee, personal harm could, of course, be compensated financially in numerous ways. After all, being 'ordered' incompetent to hold management positions, does not include being banned from undertaking's payroll. Disqualification orders will therefore not necessarily constitute a personal deterrent effective enough to prevent cartels from being established. However,

according to reasoning similar as for indemnification of personal fines, compensation of personal harm stemming from disqualification orders is not likely to be witnessed when undertakings are harmed by clearly irresponsible conduct of the addressee. Increasing corporate costs by imposing punitive corporate fines, could therefore (also) allow for disqualification orders to be a successful personal sanction in Community context.

The third sanctioning modality distinguished and usable to personally deter individuals from entering into cartels, is imprisonment. Contrary to the imposition of personal fines and disqualification orders, custodial sanctions are likely to effectively deter actors in *every* circumstance, irrespective of the cost *or benefits* for the undertaking concerned. After all, not many corporate actors would want to spend time in prison, not even when financially compensated.[46] Since custodial sanctions are such strong personal deterrents, the general benefits of introducing these sanctions in Community anti-cartel enforcement are considerable. The fact that individuals will be dissuaded from cartel practices, irrespective of what undertaking's interest demand, is especially important in this regard. Moreover, also personal (financial) gain will not quickly provide corporate actors with incentives to collude when they risk going to jail. Both characteristics are important differences compared to personal fines and disqualification orders.[47]

Although from enforcement perspectives custodial sanctions seem to be superior over personal fines and disqualification orders (and in that regard should be considered to be introduced within the Community), also other Community enforcement characteristics need to be regarded before the conclusion can truly be drawn.

Enforcement does not stop with prevention

The combination of punitive corporate fines and personal sanctions is likely to deter undertakings from participating in cartels. However, prevention will never be perfect, not even when a truly deterring personal sanction like imprisonment is applied.[48] That even custodial sanctions cannot prevent actors from concluding restrictive agreements can be

[46] Since imprisonment is such a strong deterrent for businessmen, a rather short prison-term is likely to deter sufficiently. The social costs of imprisonment (which are considerably higher than for monetary sanctions) can thus be kept relatively low. See: Wils, [2002], p. 221.

[47] For a thorough elaboration on the benefits of imposing custodial sanctions on individuals in addition to corporate fines, see: Wils, [2002], pp. 213-225.

[48] As can be witnessed from US practice, where cartels are still operated irrespective of the severe personal sanctions which colluding corporate actors face.

explained by the monetary gain which cartels are likely to generate,[49] combined with the far-from-perfect detection rate.[50] Especially the latter is considered decisive, since it was already argued that corporate actors are not likely to risk going to jail for personal financial gain. This detection flaw should be addressed when optimizing enforcement against cartels.

Although the monetary gain generated by (hardcore) cartels can be considerable, profitability will generally diminish over time. After all, new players or substitute products could enter the market, or consumers' preferences could change. Most cartels will, therefore, eventually be terminated by the participants themselves. Better than waiting for cartels to 'die of natural causes', this decreasing profitability can also be 'exploited' by enforcement authorities through the application of a leniency programme. After all, by granting clement treatment to collaborating cartel participants, the moment where the benefits of collusion (e.g. price mark-up) no longer outweigh the costs (possibly imposed fine), can be accelerated.

A well proven tool for the destabilization of cartels (which also has a modest preventative function), is the application of a leniency policy. Cartel participants are granted immunity from (or a reduction of) sanctions which otherwise could have been imposed, when they are the first to inform the enforcement authority on the existence of the secret cartel (or supply useful information to prove the infringement).

When a leniency policy is transparent and may be legitimately relied upon (certainty), cartel participants are granted good chances to calculate the benefits of collaboration. Even more important for a successful leniency policy than providing transparency and certainty, is providing for a better alternative. The benefits which can be obtained through application must, therefore, be substantial. Granting immunity from (and large reductions of) sanctions which otherwise could have been imposed, is therefore an absolute necessity to convince prospective applicants to come forward. However, in order for this lenient treatment to be more beneficial than upholding the - very profitable - restrictive agreements, the burden of the otherwise imposed sanctions must be considerable. Since the profitability of cartels diminishes over time, the moment where collaboration outweighs concealment can be accelerated when costs increase. For a successful leniency policy it is therefore important that deterring sanctions are imposed.

[49] And the subsequent monetary gain that undertakings (read: shareholders) will obtain.

[50] Another reason could be that custodial sanctions in practice are never imposed, even when cartels are unravelled, and that society is aware of this fact.

As with concluding the restrictive agreements, leniency applications are also filed by the ones operating the undertaking, the corporate actors. From a corporate perspective, application will be 'required' when the costs of collusion outweigh the benefits. In other words, when the possibly imposed corporate fine outweighs the estimated future cartel gain.[51] However, these 'rational' leniency applications can be thwarted by corporate actors willing to take irresponsible risks (for personal gain).

This situation must also be feared in the Community. Since the actual applicants are not personally affected by Commission's sanctions, they cannot personally gain from blowing the whistle. Hence, only personal sanctions in combination with personal leniency could truly optimize the destabilization of cartels within the Community. Moreover, some 'extra' enforcement benefits can be obtained. Even when collusion is still beneficial from undertaking's perspective - and leniency application therefore is not required, better yet, not desired - individuals may feel personally threatened by sanctions, thereby impelled to apply for personal leniency.[52] Since the threat of personal sanctions is present for all responsible actors within the cartel, the element of mutual distrust between participating undertakings is even further sharpened. This is likely to result in (very) early leniency applications.

This positive interplay between personal sanctions and destabilization of cartels, is especially present when corporate actors face custodial sanctions. Whereas managers can make conclusive assessments based on rational considerations for corporate leniency applications (cost-benefit analysis), the possibility of going to jail disqualifies any such calculation in determining the exact moment to apply for personal leniency. In order to be truly safe from public prosecution, corporate actors must apply for personal leniency at a very early stage of cartel's existence. Restrictive agreements can, therefore, no longer be optimally exploited. This diminishes the overall advantages of conducting these unlawful practices, which explains the (modest) preventative function of leniency programmes.

[51] Also when companies expect a co-conspirator to apply for leniency (which will happen when co-conspirator's estimated gain of collusion is outweighed by estimated costs), collaboration is likely to be witnessed. After all, making an early application resulting in an immunity grant is likely to be more beneficial than proceeding with the cartel for a little while, but risking that a co-conspirator will blow the whistle (after which only being eligible for a reduction of the fine).

[52] See also: Rodger, in: Dannecker/Jansen, [2004], p. 130. "If companies choose not to avail themselves of the corporate amnesty program, the may be vulnerable to individuals who seek to protect their own interests under the (...) individual leniency program."

Preliminary conclusion

Commission's currently operated sanctioning system is not likely to deter all amoral, rational operating, undertakings from concluding restrictive agreements. As long as corporate gain outweighs estimated fines, effective deterrence will never be established. Not only should the Commission therefore toughen its fining practice, but in order to truly dissuade undertakings from entering into cartels the 10%-limitation should be repealed. Being curtailed by this percentage of undertaking's turnover, the Commission cannot impose case-specific fines likely to outweigh the corporate gain derived from cartel participation in every circumstance. Since personal incentives of corporate actors can considerably depart from undertakings' interests, merely increasing the amount of corporate fines will not lead to optimal enforcement.

In order to counter these conflicting incentives, it is therefore advised that personal sanctions should be introduced in Community's sanctioning system. Besides the necessity from a preventative perspective, the success of Commission's leniency programme can also be considerably enhanced when corporate actors risk personal sanctions *and* personal leniency is provided.

Although personal fines and disqualification orders are capable of deterring corporate actors (especially when combined with punitive corporate fines), only custodial sanctions can be regarded to effectively deter corporate actors irrespective of the (corporate and personal) gain deriving from cartel participation. Since the threat for colluding corporate actors of going to jail can bring about positive effects both for prevention and destabilization purposes, in theory anti-cartel enforcement within the Community would considerably be enhanced when introducing custodial sanctions. These theoretical benefits must, however, be considered on their practical merits (and likelihood) in Community context. This assessment will be carried out in Part II.

Part II

Disadvantages of criminalization within Community context

Framework

Both seen from preventative and enforcement perspectives, the benefits of sanctioning responsible individuals for cartel conduct by ways of imprisonment, cannot be underestimated. It should be noted, however, that for the Community to make this shift - moving away from a system in which merely fines of an administrative nature can be imposed on undertakings - requires cartel conduct to be criminalized.[53] "Whereas fines can be either criminal or civil or administrative, imprisonment appears to be essentially a criminal sanction."[54] This could be problematic since criminal law competencies for EU institutions are still greatly lacking. In light of the current constitutional 'moment', it is not very likely that (in the near future) Member States will transfer a comprehensive set of criminal law competences to Community level, for this remains a political sensitive topic. Member States wishing to toughen their sanctioning systems by implementing custodial sanctions are therefore dependant on their national laws.

To date, a rising trend is clearly visible in which scholars and Member States - wishing to improve enforcement results – advocate the criminalization of cartels to provide the possibility of imposing custodial sanctions on individuals.[55] It should, however, be questioned whether conduct in breach of article 81 EC-Treaty could, and if so should, indeed be criminalized. Especially the fact that uniform custodial sanctions for Community competition law infringements are not likely to be introduced at short notice is important in this regard.

Part II of this paper considers whether the enforcement benefits deriving from the threat of imprisonment (as established in Part I) are equally present for Community purposes, where diverging national sanctioning schemes are applied in parallel. This question is especially relevant, and topical, in light of Community's current decentralized enforcement system.

[53] This in contrary to the other two distinguished personal sanctions (personal fines and disqualification orders), which can also be of an administrative law nature.
[54] Wils, [2002], p. 227.
[55] Normative motives to criminalize cartels are not considered decisive, since undertakings are regarded to be amoral calculators and anti-cartel enforcement traditions in the Community have always been more focussed on market impact than on unlawful conduct.

However, as will be established, there are also some considerations of more general nature to question the desirability of criminally enforcing Community's anti-cartel provisions.

Decentralization

With the coming into force of Reg. 1/2003 (replacing Reg. 17 after more than four decades) a truly decentralized enforcement system for Community competition rules has emerged. Outdated procedural provisions were amended, thereby establishing a system in which article 81 (3) EC-Treaty can be directly applied, restrictive agreements are relieved of prior notification, and national enforcers are required to *also* apply articles 81 and 82 EC-Treaty when applicable. Commission, NCAs and national judges - to date - therefore have parallel competences, with the Commission as *primus inter pares* having some additional powers (policy-making and supremacy).

In this currently operating enforcement system, NCAs can, and must, apply Community competition rules next to their national schemes. While Member States' competition laws were harmonized with respect to substance over recent years – both due to a process of 'spontaneous' harmonization in the old Member States and 'compulsory' harmonization in the new Member States[56] – procedural laws in general and the sanctioning systems in particular remain distinct.

In this decentralized enforcement system, NCAs can (only) impose sanctions provided for under their national laws, irrespective of the infringed provisions' origin. Sanctions of different nature can therefore be imposed for the same infringement of Community competition law, dependant on which authority pursues the cartel. Member States' sanctioning systems differ greatly, some Member States having criminalized cartels, whereas others sanction cartels under administrative laws. Although most NCAs - equally to the Commission - are merely competent to impose corporate sanctions, some Member States provide for additional personal sanctions. In the UK, corporate actors even risk going to jail.[57]

[56] The latter having the obligation to implement the *acquis communautair*.

[57] Other Member States which impose criminal sanctions on individuals for cartel conduct are, France, Greece, Switzerland, Austria, Norway, and Ireland. The three Member States mentioned last also provide for criminal sanctions on undertakings. In Germany collusive bidding is criminally sanctioned. Custodial sanctions (in the Community) are however only provided for under UK law. See Joshua, 'A Sherman Act Bridgehead in Europe, or a Ghost Ship in Mid-Atlantic? A Close Look at the United Kingdom Proposals to Criminalise Hardcore Cartel Conduct', [2002] *E.C.L.R.* 5, p. 233.

Complications of criminally enforcing Community competition law

In order to perceive that the introduction of custodial sanctions within the Community does not *only* bring about the positive effects for anti-cartel enforcement as discussed in Part I of this paper, a few disadvantageous and complications of general nature - connected to the inevitable criminalization of cartels - shall be conveyed below.

As already mentioned, agreements falling within the scope of article 81 (1) EC-Treaty, and therefore in principle competition restrictive, are exempted from prohibition upon fulfilling the conditions of article 81 (3) EC-Treaty. Restrictive agreements which contribute to the improvement of production or distribution of goods or to the promotion of technical or economic progress, while allowing consumers a fair share of the resulting benefit, can be exempted under article 81 (3) EC-Treaty. These agreements may, however, not impose restrictions on the undertakings concerned, which are not indispensable to the attainment of these objectives, nor afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Application of these exemption criteria clearly requires a highly economic assessment. Not only must company specific aspects be regarded, market characteristics also need to be scrutinized. The enforcement authority applying article 81 EC-Treaty therefore needs considerable expertise and resources to perceive whether a restrictive agreement is exempted from prohibition. Since the Court of First Instance has concluded that there are no *per se* violations of Community competition law,[58] even for the most apparent hardcore cartels this burdensome assessment has to be carried out.

Both Commission and NCAs are therefore obliged to make highly economic assessments when applying article 81 EC-Treaty. National courts deciding in criminal procedures whether an individual has acted in breach of article 81 EC-Treaty, can be heavily burdened by the economic assessment of article 81 (3) EC-Treaty. This is especially problematic for Member States were a competition agency (independent or public) is designated as competent authority in accordance with article 35 Reg. 1/2003 and national judges, therefore, cannot be regarded to have much experience in conducting these economic surveys.[59]

[58] See, e.g. *Matra Hachette S.A. v. European Commission* [1994], T-17/93, at point 85 (no presumption of Community law that any type of agreement is inherently incapable of qualifying for an exemption). In: Joshua, [2002] *E.C.L.R.* 5, p. 242.

[59] For national courts which are designated by their respective Member States as Community law enforcers anyhow, making this economic assessment must be regarded less problematic.

Similarly problematic is the legal uncertainty stemming from these economic analyses. Imposing criminal sanctions on individuals for conduct which only in specific market circumstances must be regarded as anti-competitive, seems difficult to reconcile with the general principles of criminal law (*e.g.* legal certainty).[60] Rosochowicz draws a comparable conclusion, posing that "criminal prosecution (...) cannot be subjective and thus subject to the outcome of a complex economic analysis."[61]

Another bottleneck of the obligatory economic assessment is that Community competition law's (young) enforcement history has shown that European integration aspects have been taken in account and have indeed played a considerable role when enforcing the prohibitions of article 81 EC-Treaty.[62] Market integration motives cannot be allowed in procedures where individuals face criminal sanctions. Uniform application of Community competition law therefore requires that market integration motives should be banned from article 81 EC-Treaty procedures altogether, whether enforced by specific agencies (and therefore necessarily of an administrative law nature) or independent judiciaries. Considering that market integration was the foremost reason to install a competition regulating policy in the Community, the consequences of this inevitable shift in 'cartel evaluation' are far-reaching.

It should be noted, however, that the problems of reconciling criminal sanctions with economic assessments (courts not adequately equipped to make these analyses; breach of general criminal law principles; market integration motives) can be mitigated when the direct link between the criminal offence and the infringement of article 81 EC-Treaty is broken.[63]

Besides the (possibly only theoretical) problems related to the necessary economic assessments, practical complications stemming from a possible dual function of NCAs need to be addressed when installing criminal sanctions.

Although Member States are obligated to designate the competition authority (or authorities) responsible for the application of articles 81 and 82 EC-Treaty, determination whether enforcement of competition law is entrusted to national administrative or judiciary authorities remains a prerogative of the Member States.[64] However, criminal law principles require that criminal sanctions can only be imposed by an independent judiciary. Introducing custodial

[60] For a similar conclusion, focussed on UK's recent shift towards criminalizing cartel conduct, see Harding/Joshua, *Regulating Cartels in Europe* [2003], p. 261.
[61] Rosochowicz, 'The Appropriateness of Criminal Sanctions in the Enforcement of Competition Law', [2004] *E.C.L.R.* 12, p. 754.
[62] For a thorough elaboration on this point, see Wesseling, *The Modernisation of EC Antitrust Law*, 2000.
[63] This is what has been done in the UK, where the criminal offence is defined as a *dishonest* participation in an agreement with the purpose of committing hardcore cartel activities. See e.g. Joshua, [2002] *E.C.L.R.* 5, p. 242.
[64] Article 35 Reg. 1/2003.

sanctions for collusive conduct therefore requires that investigation and prosecution are separated. In practice this will mean that neither NCAs (not being national courts), nor the Commission can impose custodial sanctions. When corporate and personal sanctioning procedures are carried out separately, undesirable outcomes must be feared (e.g. corporate actors being sanctioned while the undertaking remains untouched, or *vice versa*).

Besides the problems stemming from the inevitable division of *prosecutorial* powers, it is also troublesome and difficult to reconcile with general procedural law principles, when a single authority is vested with *investigative* competencies regarding both undertaking's conduct in administrative procedures (under national and Community law) and actor's conduct in criminal law procedures (where procedural safeguards tend to be more comprehensive). Whether this 'double hat' of NCAs in reality occurs and, if so, whether this would be problematic, is for a great deal dependant on the specific national procedures operative within the Member States. To make a general comment, the author would advise to divide the administrative and criminal investigatory competencies over separate agencies. If, however, procedures are divided over separate departments within a single agency, it is important to install chinese walls between these departments.

Further to these 'procedural' complications of criminalizing cartels within the Community (economic analysis and division of competencies), also 'material' drawbacks must be regarded (possible disadvantageous to enforcement). This problem will be elaborated on below, thereby focussing on a single enforcement tool, leniency.

Negative effects for leniency policy

It should be noted from the outset, as established in Part I of this paper, that the interplay between operating a leniency scheme together with an effectively deterring personal sanctioning system, brings about considerable positive effects that should not be underestimated. In the US, for instance, "it is precisely the risk of imprisonment of individuals and the complex interplay between the interest of companies and their officers which has ensured the remarkable success of the Department's corporate leniency programme."[65] Within the Community, introducing this level of personal deterrence cannot be regarded as effective (for leniency purposes), however.

[65] Joshua, [2002] *E.C.L.R.* 5, p. 236.

Even when all Member States would decide to implement custodial sanctions for cartel conduct and simultaneously operate personal leniency programmes, the success of US' enforcement practice could still not be matched. After all, the success of US leniency programme can be explained - amongst others - by the fact that immunity can be granted by a single (federal) authority.[66] It is exactly this characteristic which is lacking in the Community.

The negative interplay between leniency and criminalization is the result of the patchwork of leniency programmes[67] in combination with the different sanction modalities imposable by the numerous enforcement agencies, which - to date - all hold parallel competences to apply article 81 EC-Treaty in full. It would not be wise for Member States desiring to toughen their enforcement systems, to disregard these negative aspects. After all, the prime objective of imposing custodial sanctions for cartel conduct is to establish effective deterrence, which in turn is likely to facilitate enforcement. When the effectiveness of leniency programmes would be negatively affected by national criminal law provisions, this uncoordinated toughing of national sanctioning systems should clearly be reconsidered.

A successful leniency policy encompasses four elements: deterring sanctions, large reductions, transparency, and certainty. When all four criteria are fulfilled, cartel participants are 'stimulated' to defect from their restrictive agreements and make an early leniency application. Hence, cartels would be destabilized from within. As argued above, installing personally deterring sanctions for corporate actors can significantly accelerate this process. Even when collusion would still be beneficial from undertakings' perspective (keeping in mind the lenient treatment available) cartels can be unravelled if actors feel threatened by personal sanctions. Imprisonment is even likely to deter corporate actors irrespective of cartel's profitability.

For Community purposes this assumption is, however, less evident. After all, parallel to Community's enforcement authority - the Commission - NCAs are equally competent to apply Community competition law. Only when the Commission pursues a cartel, NCAs are relieved from their competence to apply article 81 EC-Treaty.[68] The Commission will, generally, only pursue cartels if competition is affected in more than three Member States, is closely linked to other Community provisions which may be exclusively or more effectively

[66] Ibid.
[67] See Brokx, 'A Patchwork of Leniency Programmes', [2001] *E.C.L.R.* 2, pp. 35-46.
[68] Article 11 (6) Reg. 1/2003.

applied by the Commission, ór Community interest requires a Commission decision to develop Community competition policy.[69] In all other cases, cartels will be pursued by one or more NCAs. National authorities are competent when three cumulative criteria are fulfilled: the cartel has substantial direct effects on competition within its territory, is implemented within or originates from its territory; the authority is able to effectively bring to an end the infringement and can sanction the infringement adequately; and the authority can gather the evidence required to prove the infringement.[70] Dependant on case-specific elements, different NCAs are competent to impose sanctions provided for in their national laws[71] for a single infringement of article 81 EC-Treaty. Reg. 1/2003, although providing grounds for national enforcers to suspend proceeding (article 13), does not prevent different competition authorities from successively dealing with the same infringement. Multiple proceedings leading to multiple sanctions are therefore likely to occur.[72]

When a NCA is competent to pursue a cartel, it may also decide to grant lenient treatment to collaborating undertakings (and individuals) for infringements within its territory. Since Member States' competence is easily construed, prospective applicants are impelled to make leniency application in numerous Member States. After all, "an application for leniency to a given authority is not to be considered as an application for leniency to any other authority."[73] Acknowledging that the Commission is likely to pursue a cartel when more than three Member States are affected (and four leniency applications would therefore be sufficient, to the Commission and three NCAs), this allocation-rule does not create individual rights for cartel participants.[74] In order to be safe from public prosecution, offenders must therefore file numerous applications. Even if an undertaking can apply for leniency in all competent Member States and actually makes simultaneous applications, there is still "a multiple risk of not qualifying" for leniency in *all* distinguished Member States.[75] This is a clear risk for prospective applicants, which is likely to affect the preceding cost-benefit analysis.

National leniency programmes that do not fulfil the important elements of large reductions, transparency, and certainty, could even further hamper early cartel defections. This

[69] Paragraph 14 and 15 of the Commission Notice on cooperation within the Network of Competition Authorities.
[70] Paragraph 8 of the Commission Notice on cooperation within the Network of Competition Authorities.
[71] Article 5 Reg. 1/2003.
[72] The *ne bis in idem*-principle has to be applied by the different sanctioning authorities. Authorities must therefore regard other sanctions already imposed for the same infringement. See: *Walt Wilhelm* [1969], 14/68.
[73] Paragraph 38 of the Commission Notice on cooperation within the Network of Competition Authorities.
[74] Paragraph 31 of the Commission Notice on cooperation within the Network of Competition Authorities.
[75] See Harding/Joshua, [2003], p. 266.

conclusion especially holds when corporate actors risk custodial sanctions in these jurisdictions and immunity is either not provided at all, not automatic, or not complete.[76] After all, the estimated benefits of cartel defection would be either less favourable, or less apparent. *Possible* costs deriving from disclosure of cartel agreements (largely constituted by imposed sanctions) could tip the balance for undertakings (read: corporate actors) in favour of concealment and collusion.

Another aspect of the negative interplay between custodial sanctions and leniency programmes is related to the criminal nature of the offence. Actors who face custodial sanctions under Member States' laws for committing offences of which the direct link with article 81 EC-Treaty is broken, are likely to be dissuaded from making a corporate leniency application under the Leniency Notice (and national leniency programmes). Even when the exchange of information is adequately safeguarded, as currently is the case (under both Reg. 1/2003 and the Commission Notice on cooperation within the Network of Competition Authorities), directors are still at risk since Commission decision are published and national prosecutors could start *ex officio* investigations.

Necessary adjustments

In order for undertakings to make an early leniency application, the concomitant benefits must be clear and easy to calculate. In this respect it is to be regretted that different sanctioning and leniency policies are applied within the Community. Not only will companies be fined based on diverging national calculation systems,[77] more importantly, corporate actors are approached differently for the same infringement.

When not all (competent) Member States operate a leniency programme the costs of application in other jurisdictions will increase, which diminishes the likelihood of application. Therefore, in a decentralized enforcement system in which Network members hold parallel competences, it is important that all members operate leniency programmes. If not, the destabilisation of cartels cannot be maximized.

Besides the need of operating a leniency programme, these national schemes have to be adapted to each other. Different leniency programmes operative in the Community, with some Member States applying multiple schemes (for undertaking and individual), is detrimental to the much needed transparency and certainty of leniency programmes. This will hamper corporate actors when calculating the benefits of early cartel defection.

[76] For similar reasoning, see Harding/Joshua, [2003], p. 266.
[77] Another aspect of current decentralized enforcement system, which has not been dealt with in this paper.

Further to these requirements for leniency programmes, it is also important that sanctions are approximated. After all, this can further facilitate cost-benefit analyses. More important, however, is that approximation of sanctions could give an impetus to the harmonization of leniency policies. A one-stop-shop system for leniency applications could then be considered. A single application, providing for complete and automatic immunity to both undertaking and corporate actors (US-style), could considerably increase transparency and certainty, and therefore also the likelihood of collaboration.

Since harmonization of criminal laws is not very likely in light of the current fragile constitutional framework, approximated national sanctioning systems should be based on administrative laws. This would, however, automatically disqualify custodial sanctions. Although certainly not as effective as imprisonment, personal fines and disqualification orders can, under the circumstances established in Part I of the paper, very well constitute strong personal deterrents.

In this utopia of uniform sanctions and a one-stop-shop leniency application, Member States are advised to abandon their national provisions criminalizing cartel conduct.

Conclusion

Introducing custodial sanctions to punish individuals for concluding restrictive agreements create strong incentives for corporate actors to refrain from collusion. Although certainly not perfect (as can be witnessed from US practice), corporate actors will be more effectively deterred when they risk going to jail. Further to these benefits from a preventative perspective, custodial sanctions are also capable of improving actual enforcement (investigation, detection, prosecution) when the possibility to apply for personal leniency is provided.

As established, in Community context the benefits of imposing custodial sanctions are less evident. Having considered the characteristics of Community's enforcement system, it must be concluded that uncoordinated criminalization at *national* level is highly undesirable for leniency policies' success. To put it in the words of Harding and Joshua, "the cocktail of enforcement strategies now appearing across European jurisdictions can lead to procedural complications. Whereas the availability of criminal proceedings may be seen as a *sine qua non* of successful enforcement in the American context, their appearance within the very different legal structures in Europe may be more of a mixed blessing."[78]

[78] Harding/Joshua, [2003], p. 268.

If Member States are truly convinced that imprisonment is a necessary tool in their fight against cartels, they are advised to make an effort in expanding Community's competence range. With Rosochowicz, the author therefore concludes "that the European Union should introduce criminal sanctions at the European level, in order to compensate for the disparities of the various national systems."[79] However, since the time cannot yet be considered right to reallocate criminal law competences, introduction of uniform personal sanctions of an administrative law nature could be a first important step.

The author considers it of the utmost importance to make these efforts. After all, only when Commission's sanctions are deterring for corporate actors, less restrictive agreements will be concluded, perverse personal incentives will diminish, and early leniency applications will be stimulated. When the Commission does not take the required measures (propose amendments), more Member States are likely to pursue uncoordinated initiatives to the detriment of Community's leniency policy.

[79] Rosochowicz, [2004] *E.C.L.R.* 12, p. 756.

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