

1. Law and economics of criminal antitrust enforcement: an introduction

**Katalin J. Cseres, Maarten Pieter Schinkel
and Floris O.W. Vogelaar**

1 INTRODUCTION

Competition laws are set to maintain and protect the competitive process and allow society to reap its fruits in the form of high quality goods and services at low prices. A working competitive process is a precious public benefit that should be safeguarded, as it is well-established that attempts by firms to pervert competition cause greater overall harm than individual gain. When firms charge ‘supra-competitive’ prices and reduce output instead of competing on the market, consumers and economic efficiency will suffer serious damage.¹ Therefore, the primary objective of competition law enforcement is to keep market parties from being tempted to collude. It can be met both by facilitating an economic and legal structure that encourages competition and by actively policing the market for those who behave anticompetitively regardless. In particular, competition authorities seek to efficiently deter anticompetitive behaviour through a tuned mix of enforcement mechanisms.

In merger control, a trajectory of *ex ante* assessment and licensing serves to prevent the build-up of undesirable concentrations. Parties report their intentions to merge at their own initiative, as it is unlikely that a major merger consummated without being notified and approved will go unnoticed. Little active policing or sanctioning is required to secure truthful reporting of relevant information in the required formats.² However, anticompetitive agreements and abuses of dominance escape by their very nature the attention of the competition authorities unless actively detected. *Ex post* remedies and sanctions provide the mechanism to prevent such breaches of law. It is here that desk-top and *ex officio* detective work and evidence gathering is to be combined with tough punishments for violations detected.

Therefore, in assessing both the effectiveness and efficiency of competition law enforcement, an important criterion is the extent to which existing remedies and sanctions form a sufficient deterrent. Effective deterrence requires that undertakings that might otherwise engage in illegal activities perceive a reasonable probability of being detected, as well as a sufficiently severe punishment when indeed they are.³ The question is whether the threat of the potential punishment is sufficiently large to assure compliance with the legal rules and behaviour within the boundaries set by the law.

In the EU and its Member States, there is increasing awareness that this may not be the case. This is not so much because truly sufficient deterrence would imply that no breaches of law are to be seen, where DG Competition has found many: full deterrence is arguably too much to ask for. Rather, the effectiveness of administrative fines as presently imposed on undertakings is limited. The enforcement practice over the past decades shows that the mere application of corporate fines does not effectively deter cartels and the abuse of a dominant position. Even though existing potential ramifications for antitrust violations include serious pecuniary sanctions – with recent record-breaking fine levels in vitamins (more than €855 million in total), plasterboards (almost €480 million) and Microsoft (almost €500 million) – these amounts do not constitute a large enough threat to deter parties from outright violations of the EC competition rules.⁴

For a number of reasons, the present European system of maximum sanctions and remedies appears to be too limited to counter the apparent net gains thought to be secured through breaches of competition law. It largely relies on administrative law-based corporate fines being imposed on the undertakings. The EU fining Guidelines⁵ and European Council Regulation 1/2003⁶ limit the effective fine to a maximum of 10 per cent of group turnover worldwide. Actual fines nowadays are increasingly based on a percentage of sales concerned – as opposed to worldwide group turnover. Recent economic studies have revealed these percentages to be substantially less than the estimated benefits related to the average infringement, however.⁷ Furthermore, detection probabilities are known to be surely far from one.⁸

Moreover, these sanctions affect the corporation and not the private individuals, who may be both higher and lower management, and the ones to decide on the undertaking's business strategy, including possible anticompetitive acts. Neither the European Commission nor most of the Member States have at present possibilities to impose sanctions on individual directors, managers or employees of the undertakings that are responsible for the anticompetitive acts. Also, with only a modest level of public awareness of the seriousness of antitrust violations, incurring a negative reputation with regard to compliance with the competition rules

does not seem to worry many companies in Europe. For the same reason, the political climate is not presently suitable for tougher or alternative punishments of competition law violations, although there are signs that this may be changing. Finally, at present deterrence from effective possibilities for private damage claims remain limited in the EU.⁹

In comparison with their American counterparts, European competition authorities have a smaller arsenal of enforcement instruments. US federal antitrust laws are enforced in three main ways: criminal¹⁰ and civil enforcement actions brought by the Antitrust Division of the Department of Justice (DoJ) and state attorneys, civil enforcement actions brought by the Federal Trade Commission and civil law suits brought by private parties asserting damage claims.¹¹ As a result, potential sanctions in the US antitrust system include high corporate fines and damages claims, as well as individual fines of up to \$1 million, and maximally 10 years of imprisonment for those within the companies found responsible for the anticompetitive acts.¹²

Criminal sanctions have been part of the US antitrust system since it came into existence. Engagement in cartel agreements has consistently been punished as a criminal felony. Outright violations of antitrust laws, such as price-fixing, bid-rigging, market sharing and allocation of customers have always been regarded as felonies, and as such have been condemned both socially and politically. Criminal sanctions for anticompetitive acts seem to have gained actual political momentum and backing, and were significantly strengthened during the 1970s.¹³ Ever since, antitrust enforcement has enjoyed financial and political support by government that may have fluctuated somewhat with the party in power, but has been consistently strong.¹⁴

Antitrust authorities (DoJ and FTC) are equipped with broad investigative powers. Moreover, judges are willing to impose prison sentences on individuals. Finally, private treble damage cases, which were enabled by Section 4 of the Clayton Act from 1914, have grown exponentially since the 1960s, and in terms of the number of cases have actually long surpassed public enforcement. Combined, today the US enforcement system is characterized by substantial corporate fines on cartel members as well as tough individual sanctions on co-conspirators.¹⁵ In 2003, for example, the DoJ levied a total sum of some \$65 million in fines for antitrust violations. Out of the 500 to 600 private damage suits brought annually, in that same year the VISA/Mastercard damage suit alone was settled for more – that is, \$3.1 billion.¹⁶ Moreover, in the last five years, the Antitrust Division secured the imprisonment of over 80 individuals for a total of over 100 years, doubling the average sentences to almost one-and-a-half years above that of the 1990s, including a 10 year jail sentence in one case.¹⁷

The US system has embedded the various sanction mechanisms in a specific institutional and procedural setting.¹⁸ A unique grand jury system requires the competition authority to act as prosecutor. This is alleged to favour the investigation side.¹⁹ The plea bargaining system means that defendants seem to have an increased interest in settling cases instead of going through the rigmarole of lengthy and costly trial proceedings. Furthermore, the US DoJ operates a successful Corporate Leniency Programme that was introduced in 1993.²⁰ This programme offers (full or partial) immunity from fines for companies, directors, officers, and employees of corporations that choose to self-report their involvement in cartel agreements. For investigations which had been started already, the programme includes an 'Amnesty Plus' policy for those who report further unknown cartel arrangements. On the shadow side thereof, there is a 'Penalty Plus' policy with substantially higher fines and jail sentences for those who participated in further cartel agreements but decided not to seek amnesty. This would typically be the case where the conduct is later discovered and successfully prosecuted.²¹

With a relatively low evidence requirement, the US leniency policy further ensures that even peripheral cartel participants can come forward and blow their whistles. Also, leniency applications can be submitted for crimes committed several years in the past.²² And recently, the possibilities of a lenient treatment were extended to follow up private damages litigation by a potential reduction to single damages for corporations that benefited from public leniency.²³ Although their overall success in bringing new conspiracies to light is a topic of ongoing research and should at present not be exaggerated, the leniency programmes are documented to have successfully uncovered at least some antitrust violations hitherto unknown to the authorities. It also seems to have saved enforcement costs, speed up investigation processes and shortened decision-making periods.²⁴ Furthermore, it is said to have led to increased and enhanced civil antitrust litigation.²⁵

Surely with a keen eye for its limitations, since its origin the European Union has studied and used the US system of antitrust enforcement as a source of inspiration for developing its own. In recent years, this attention has turned to the mechanism of deterrence. Since 1996, the EC has introduced its own leniency programme, which is said to be frequently relied upon by the business community.²⁶ Yet, leniency can only be effective if the threat of potential punishment is sufficiently serious. Since these often are lucrative restraints of trade or abuses of dominance, business corporations and their management may only then start seeking its protection. In order to strengthen this threat, possibilities for both private damage suits and enhancing the potential for the imposition of individual criminal sanctions are presently at the centre of the enforcement debate throughout Europe. At EC level, one

of the Commission's objectives in introducing the Modernization package, effective as of 1 May 2004, has been to stimulate private enforcement in the Member States as a mechanism to both detect and deter collusion, by giving direct effect to Article 81 EC in its entirety. The modernization of EC competition law was further aimed at facilitating damage suits before national courts.²⁷ Following up on this objective, the Commission published a Green Paper on damages actions for breach of the EC antitrust rule end of 2005. The Green Paper addresses issues such as opt-out class actions, contingency fees for lawyers who represent claimants, the introduction of some form of punitive damages, treble or otherwise, and standards of proof in establishing the so-called 'but for' world for determining the order or amount of the damage. These issues typically trigger concerns over 'US practices', with hard-ball legal battles, ambulance chasing lawyers and over-cautious companies anxious to contract every step of the way. On the other hand, the system's combined deterrent effects are revered. Without the full incentives structure for competition law enforcement being properly laid out, however, it remains an open question whether private antitrust damage suits in Europe will ever come to be the formidable deterring factor they appear to be in the US.

For these reasons, Europe may want to show interest in the other powerful complement to public fines, that is, individual criminal sanctions such as personal fines to be imposed on those who led or participated in cartels, professional injunctions and disqualification orders and maybe even jail sentences. However, installing US style penalties in Europe raises fundamental issues as well, mainly because it requires the application of elements of criminal law in addition to the administrative law enforcement currently in use. As a result the status and tasks of the various national competition authorities (NCAs) would have to be reformulated. Also, there are serious political concerns as the trend to criminalize has important economic and social implications.

A system which is to work effectively requires the social and political consensus that individuals who violate cartel law should indeed be treated as criminals. Such a consensus seems to be generally lacking in Europe today. Yet, a number of Member States have effectively introduced criminal sanctions including prison sentences for individuals already, whilst several others are considering doing so.²⁸ Introducing criminal sanctions at EU level requires a review of the Community's existing administrative law-based competition rules, which would be very invasive and fundamental. Since it could be argued that the fight against cartels is one against professionally organized crime, and that the ultimate goal of competition authorities worldwide is deterrence and prevention, it seems important that the European Commission formulates a position on this subject.²⁹ Such a

discussion might possibly follow a bottom-up approach, as has also been the case with the uniformisation of substantive competition laws within the Member States. It may also lead to a further harmonization of the rules of cartel enforcement at EU level.³⁰

The debate has been ongoing amongst academics and academically active practitioners and it has certainly gained momentum over the last couple of years. At the 2001 European Competition Law Annual on Effective Private Enforcement of EC Antitrust Law in Florence, the programme committee was well ahead of its time in including a panel on criminal sanctions in its proceedings. It took the sensitive topic out of the category 'futuristic' and succeeded in putting it on the long-term policy agenda.³¹ The present book capitalizes on this debate and presents the reader with contributions on the specialized topic Remedies and Sanctions in Competition Policy: Economic and Legal Implications of the Tendency to Criminalize Antitrust Enforcement in the EU Member States.

The abovementioned issues were explored in conference with this title by a distinguished group of legal and economics scholars from both sides of the Atlantic, as well as by representatives of several European Member States, some of which have already gained experience with criminal sanctions in their national jurisdictions. The meetings were hosted 17–18 February 2005 by the Amsterdam Center for Law & Economics (ACLE) at the Universiteit van Amsterdam (for the workshops) and in the Royal Academy of Dutch Science (KNAW) for the plenary sessions, both in Amsterdam. The event marked the opening of the ACLE's research group on Competition of Regulation and attracted both promising young and established scholars in competition law and economics as well as influential policy makers from the various competition authorities, international legal practitioners and economic consultancy firms.

This book combines the insights obtained by applying both economic viewpoints and legal scholarship to the issue of effective antitrust deterrence. As such, it is offered as a marker for future policy debate by taking stock on current thinking about the criminalization of competition law enforcement, well ahead of the continent-wide developments that are bound to unfold in Europe on this important topic in competition policy.

The next section of this introductory chapter, surveys the economics literature on remedies and sanctions. In Section 3, some legislative background to, and legal puzzles in criminal sanctions in Europe are dealt with. These two sections are intended to further introduce the reader to the topic and serve as an appetizer for the contributions that follow. In Section 4, the structure of the book is explained by relating the various contributions. This introductory chapter then closes with some brief acknowledgements.

2 COSTS AND BENEFITS OF THE CRIMINALIZATION OF COMPETITION LAW

From the early utility theories advanced by Bentham and Edgeworth, economics has developed a powerful framework for understanding human decision-making as a ‘calculus of pleasures and pains’. Becker’s seminal 1968 paper on crime and punishment applied that framework explicitly to the realm of criminal behaviour and obedience to the law. His theory that installing sufficiently large expected pains to breaking the law deters even the toughest criminal led Becker to propose high penalties and low policing efforts – hence low discoverability – as the more efficient means of law enforcement.³² Apart from its opening up a debate on controversial matters such as personal responsibility, guilt and moral obligation, the approach poses the question of precisely which enforcement mechanism creates sufficient net negative utility to deter crime. After all, in complex criminal cases, which often involve pathological brains, deep emotions and split second bad judgement, it is not always obvious how the mind of the potential offender works and could be kept from the illegal deed.³³

In the context of competition law enforcement, the question as to how to tailor enforcement may arguably be the least difficult to answer. It involves mature and risk-neutral companies with a straightforward profit motive, which in itself is the responsibility of professional management, as well as in-house counsel advising on compliance with the law. Hence, it is unlikely that antitrust violations are negligently stumbled into or collusions emotionally conspired. Breaches of competition law rather seem to involve deliberate business decisions, directed at straightforward managerial objectives. The DoJ Lysine Tapes testify to this effect: serious conspiracies are conscious business decisions, aimed at gross enrichment at the expense of the customer and welfare at large.³⁴

Therefore, decisions to act in breach of the antitrust rules will often be based on a cost-benefit analysis, which could, probably more so than blue-collar crimes, be influenced and deterred by pecuniary sanctions. However, the puzzle remains upon whom to impose such sanctions entering the equation.³⁵ Extensive corporate governance literature, based on principal-agent problems relating to asymmetric information and imperfect monitoring, shows that managerial incentives are often difficult to reconcile with corporate profit maximization objectives. Managers may strive for objectives other than firm profits, including personal monetary gain, status, expensive business trips, lush company cars and dinners as well as discretionary powers over decision-making for which the company incurs the unnecessary costs.³⁶ Corporate penalties may therefore not constitute the appropriate sanction, because it is the individuals within

the corporation who take the decisions and, hence, actually commit the corporate crimes.³⁷ A fine imposed on the corporate entity, that is, on the owners of that entity after being discounted in the profits, may not hurt those actually responsible for the breach of law, in particular not when shareholder control over management is weak.

One effect of fining the corporation nevertheless may be that it is encouraged to improve the monitoring of its employees.³⁸ This argument assumes that sophisticated internal disclosure and reporting mechanisms and good corporate governance policies exist.³⁹ Yet, corporations remain liable for the illegal acts of their employees. As a result, there may in fact not even be a corporate incentive to monitor very strictly, as by doing so the company runs the risk of uncovering illegal acts, for which it may be held liable and which would otherwise have remained undetected.⁴⁰ Moreover, existing corporate governance mechanisms can stimulate anticompetitive behaviour against the interests of the shareholders. Suppose, for example, that management through a system of annual profit-related bonuses is encouraged to spend extra effort. This then would constitute an incentive to increase short-run profits, which could be achieved by conspiring with competitors to collude and raise prices, cash the bonus, and then quit the firm, leaving behind a skeleton in the closet. Future competition authorities or customers seeking treble damages may later find out about this cartel at the expense of the owners/shareholders. When management turnover is high, statutes of limitations long, and enforcement lags behind – which arguably are proto-typical market conditions – an enforcement system that relies purely on corporate fines may not provide sufficient deterrence. At the very least, it poses additional challenges to internal company policing of higher management, indirect punishment and contractual responsibility clauses in relation to the already complicated corporate governance policies emerging everywhere in the world.⁴¹ Much more so than presently understood, antitrust compliance has to form an integral part of good corporate governance for these mechanisms to become effective and self evident.

To prevent company liability acting as a shield behind which managers can hide and collude to their personal advantage, direct intervention from the authorities against the individuals responsible, in the form of individual fines, disqualification orders or even jail sentences may provide more effective deterrence.⁴² This has a number of benefits. By targeting the actual decision-maker, competition authorities could bypass ineffective corporate governance mechanisms of compliance and indirect punishment within the firm in cases where otherwise only corporate antitrust fines would be levied. Furthermore, the identification, branding or even formal (full or temporary) disqualification of those managers who tend to interpret the competition laws loosely would weed the offenders out of the management

pool. These potential benefits of non-monetary sanctions qualify another received conclusion in Becker (1968), which is that imprisonment and other forms of disqualification are to be avoided as forms of punishment, as they carry social costs, whereas fines are largely welfare-neutral redistributions. That these additional harsher forms of punishment may nevertheless be optimal, in particular for hard-core price-fixing, is forcefully argued in Werden and Simon (1987).

By making a clear and targeted intervention, thus separating management responsible from owners and employees with no involvement in the anticompetitive acts, individual sanctions could be efficiently paired with corporate leniency and compliance programmes. In fact, the business community would be further encouraged to have good compliance mechanisms in place so as to document the internal responsibility and place the blame in the event of a discovery. The coming into being of such internal governance and compliance mechanisms cannot be expected to happen overnight, but the threat of more severe individual sanctions from an external enforcement policy could serve as an additional stimulus for their introduction.⁴³ Also, these sanctions are restricted neither by the usual corporate limited liability principles nor by the concern that companies should not be forced into bankruptcy as a result of antitrust penalties, which is often an argument for the limitation of maximum fines.⁴⁴ Without these restrictions, it is possible to have a serious impact on individuals as jail sentences are likely to generate serious negative utility. The consequences range from an incapacitated board of directors and the need to come clean with the company's shareholders, to the individual 'naming and shaming' of the jailed managers concerned. Consequently, it would hit considerably harder than simple monetary fines.⁴⁵ Finally, it is likely that criminal prosecution of individual CEOs squarely brings antitrust violations to the public eye as a serious form of white-collar crime. Raising awareness of the fact that anticompetitive behaviour generates social welfare losses is likely to reduce violations generally.

There are a number of specific problems with and negative aspects of individualizing competition law penalties also. For instance, it may not be easy to identify the individuals truly responsible for the decision-making. In particular, where internal management control fails to install sufficiently strong managerial incentives to ensure that those in charge remain within the boundaries set by competition law, it may not always be obvious that external enforcement agencies would be able to pinpoint and target the right individuals to penalize. Only if they are, will the direct and beneficial effect of criminal sanctions apply. In particular, those responsible are likely to design mechanisms to escape detection and punishment through more professional hiding techniques as well as indemnification methods. These

could range from shifting the blame to scapegoats to negotiating contractual indirect insurance through bonuses and benefit packages that would include leave clauses when the job carries the risk of future antitrust proceedings with personal consequences.⁴⁶ Also, where sanctions somehow move away from corporate fines, the issue of the proper utility cost-benefit analysis of the manager emerges once again. In performing their jobs, which are the factors that trigger CEOs or corporate managers to violate antitrust laws? Apart from monetary incentives, there is a complicated code of business ethics and sociology of gentlemen's agreements or 'old boys' networks about which we presently understand very little.⁴⁷ These effects move proper sanctioning away from relatively straightforward fining guidelines and may require further in-depth study of cartel sociology.⁴⁸

A fundamental criticism of the criminalization of competition law enforcement, which was strongly put forward in the 2001 Florence panel as well, is that harsh criminal sanctions do not suit the nature of competition law enforcement. Competition rules have a dynamic interpretation, and over time, as economic insight has progressed, have been enforced with shifting emphases. A soft norm may not fit such strong consequential punishment as individual loss of reputation and imprisonment. The risk of what would in hindsight be perceived as false convictions is simply too large and undesirable from a social point of view. A corporate fine that later on turns out to have been debatable, however unjust to those affected by it in their personal wealth, is largely a welfare-neutral redistribution of money from a social welfare point of view. However, disqualifications and imprisonment are deadweight losses to society – not only the direct cost of imprisonment, but also the inability of those imprisoned to contribute to society for some period of time, which is often considerable for the professional group in focus – and should therefore be avoided unless it is absolutely certain that their expected deterrence effect outweighs these inherent social costs.

In these considerations, it should be taken into account that prison sentences, which typically attract a lot of media attention, give a strong public signal. Moreover, they satisfy victims' feelings of revenge more than any other type of sanctions. On the other hand, the threat of false convictions may well erode confidence in their own business decisions within corporations. It can both create an inefficiently careful mode of operation and internal communication and stimulate precautionary law breaching. Such paranoia could harm essential entrepreneurial spirits. Edging firms towards anticompetitive acts because they run the risk of being sanctioned anyway is at least equally socially undesirable.⁴⁹ One benefit of criminal law enforcement which requires hard 'smoking gun' evidence in this respect is that it can reduce the likelihood of false convictions.

Raising the standards of proof in antitrust cases could be a proper way to remedy these potential problems related to tougher and personalized punishment.⁵⁰ Yet, this may trigger unwanted effects of its own. It would lengthen procedures and hence raise the cost of enforcement. Also, given the nature of competition law, higher standards of proof may lead competition authorities to focus on the more clear-cut cases, relying on well-established case law only rather than picking up complicated novel cases. This selection effect may slow down the present symbiosis developing between advanced academic industrial organization research and landmark competition cases. It would reduce the role of economic arguments, which is essential to proper interpretation of the rules of competition. Competition law enforcement is a continuing 'arms race', in an ever-changing business environment, between firms that explore the boundaries of the law and competition authorities that seek to uphold the rules within the spirit of the competition laws to the best of their ability. It might thus be expected that prosecuting fewer traditional hard-core cases with a high standard of proof might not be preferred over a wider, looser and less consequential ongoing process of shaping the mutual understanding of proper competitive conduct.

Finally, it is important to realize that the business community is likely to respond to a developed criminal enforcement system. When the stakes are high enough and managers continue to be tempted and determined to conspire in restraint of trade – and the Lysine tapes again show they are, even if risking jail sentences – internal disciplinary cartel mechanisms designed to ensure adherence to the cartel are likely to become grimmer than they often are already today. They may come to include threats to family members and physical abuse, not unlike the way in which 'business messages' are often conveyed in circles of traditional organized crime.⁵¹ Harsher internal punishment within the cartel does not necessarily constitute a social problem. As cartels by their nature are outside the law, they become harder to enforce without raising suspicion, with more explicit internal punishment attracting public attention. Hence, detection may be helped in this way. Moreover, when competition law violations become part of organized crime, this may surely in itself deter a large majority of professionals from even thinking about going in such a direction.

There are at least three side-effects of such a development. First, there may be negative externalities of settlements in cartel circles. For example, innocent bystanders may get hurt in the process. In particular, unsuspecting trading partners, relying on business relations to last, may suffer indirect consequences whenever their supplier is tied up in another part of its business. This is no different from standard solvability and similar creditors' issues, apart from the fact that they are not straightforwardly reflected in the company's prospectus or annual accounts. As a result, these effects are

likely to form a social business hazard. Secondly, it is not unlikely that harsh internal cartel discipline and punishment render neutral important elements of enforcement. In particular, without tagging (expert) witness protection programmes onto leniency programmes, potential retaliation against those who claim leniency is likely to neutralize such programme's benefits. Thirdly, when the processes of detection and punishment are hardened in the ways proposed, so may be the interaction between the business world and competition authorities. Although this could arguably be said to lead to even higher professional standards, there is also a risk that companies will personalize their disagreement with competition law enforcement.⁵² That is, individuals responsible in the enforcement agencies, as well as witnesses and judges, may be threatened in their personal lives. Again, this has been observed to occur in the fight against organized crime. Although fortunately enough we still seem to be far removed from assassinations of judges for antitrust reasons, the process may possibly have some selection effect as far as the recruiting of staff for competition authorities is concerned. At best, it requires compensation for these occupational hazards, which would need to be weighed against the expected benefits of individuals sanctions. In other words, the criminalization of competition law enforcement is likely to require a rethinking of the entire enforcement system as well as of the checks and balances that go with it.

3 LEGAL PUZZLES IN THE CRIMINALIZATION OF EUROPEAN COMPETITION LAW

This need to rethink enforcement also derives from a number of legal puzzles specific to EC competition law. Current corporate governance rules do not deal with violations of competition law. Instead, they tend to focus on the accounting and financial information that has to be given to the public or to financial compliance enforcement agencies such as the US SEC.⁵³ Corporate liability does not seem to extend to violating competition rules as yet.⁵⁴ In most of the Member State jurisdictions, directors and/or Supervisory Board members of companies may be held personally liable for irresponsible conduct and gross negligence related to violations of internal (financial) rules vis-à-vis their company or their shareholders. While there is a clear awareness in corporate governance circles of the need to increase disclosure requirements and to create internal audit and compliance committees, at the moment there seems to be neither a proposal nor even an academic or public discussion on including compliance with competition rules amongst the liability obligations of those company's board members.⁵⁵ If corporate governance rules cannot or will not seek to

ensure compliance with competition rules, then the more severe criminal sanctions might do just that.⁵⁶ However, installing criminal sanctions such as fines, professional remedies, disqualification orders and jail sentences in Europe raises fundamental questions of law. In particular, as noted above, it requires elements of criminal law in addition to present administrative law enforcement. The trend to criminalize also has important economic, social and political implications. Besides introducing new procedural rules, it will need enhanced and strong investigative powers, courts that take an active role as well as high standards of proof as the offence will then have to be proven beyond reasonable doubts.⁵⁷ Furthermore – as is the case at least in Europe – criminal law based indictment of private individuals for infringements of competition law may trigger complicated issues under the European Convention of Human Rights that are so far uncharted. All in all, the application of criminal sanctions requires more complex, more careful and most probably more time-consuming procedures.

Many EU Member States in fact abandoned their ineffective competition regulation based on an administrative control model of checks on ‘misuse’ of economic powers during the 1980s and 1990s and adopted a competition law system similar to the rules presently laid down in Articles 81 and 82 of the EC Treaty and in the EC Merger Regulation.⁵⁸ Competition law gained importance and as a consequence the ineffective misuse systems, which included criminal law enforcement in certain jurisdictions, were abandoned.⁵⁹ The new competition laws followed a prohibition system and enforcement was generally vested with an administrative body with judicial decision-making powers. Enforcement became primarily administrative law based, including administrative law sanctions. These new competition regimes seemed to work more effectively than their predecessors and, indeed, their main achievement was to gain social and political support for a more severe enforcement of competition law. Despite the intensive and successful work of competition law watchdogs all around the EU, practice shows that the fight against cartels seems to require more. Even though the level of corporate fines has increased radically in the last couple of years, as discussed earlier in this introduction, the mere application of fines imposed on undertakings seems to be insufficient to deter undertakings from engaging in illegal cartel activities effectively.⁶⁰ Therefore, the search for more effective enforcement methods to prevent outright violations of competition law and substantial economic harm to society has taken a serious turn.

A more effective enforcement system was also the driving force behind the modernization of EC competition law, which was launched by the publication of the 1999 Modernization White Paper.⁶¹ The main goal of the modernization process was to refocus the Commission’s resources and

activities in order to increase the effectiveness of enforcement in terms of detecting and deterring cross-border cartels.⁶² In order to achieve this objective, the European Commission had taken a number of initiatives. It has been successfully operating a leniency programme since 1996. Its revision in 2002 has resulted in far-reaching and cleverly conditioned possibilities for lenient treatment, providing for complete immunity from fines for the first party who provides sufficient evidence to permit an investigation or to establish the existence of an infringement of Article 81(1) EC.⁶³

The reform process that had been launched by the White Paper ultimately led to the adoption of Regulation 1/2003, which effectively decentralized the enforcement of EC competition law, establishing the European Competition Network. As of 1 May 2004, NCAs and national courts have the competence to enforce the competition rules of the EC Treaty almost on an equal footing with the Commission.⁶⁴ Today, the direct application of Articles 81 and 82 EC forms a system of decentralized enforcement and parallel competences. In the new system, companies have to rely on their own assessment of the legality of their agreements in view of the prevailing competition rules. It is also expected to facilitate the bringing of private antitrust damage cases.

Furthermore, the Commission's decisional, investigatory and sanctioning powers have been extended. Article 21(1) of Regulation 1/2003 empowers it to conduct investigations in premises other than business premises, such as the homes of directors and employees of the company concerned, when there is reasonable suspicion that this would be necessary for the investigation in order to prove violations of Articles 81 and 82 EC. European investigation techniques are not, and possibly never can be, at the professional level often applied in US cases, where FBI methods, based on criminal law, up to and including infiltration, wire-tapping and undercover operations are occasionally employed.⁶⁵ Yet, deep in its heart, the Commission may well dream of extending its present 'dawn raids' in this direction, for example soliciting the help of international crime-fighting units like Scotland Yard, Europol and Interpol. A further legal basis is yet to be found for such an extension of powers.⁶⁶

The Commission affirms its commitment to intensifying the fight against hard-core cartels through increasing its inspection and enforcement powers. For the same purposes, DG Competition has been reorganized in order to create a dedicated cartel unit in June 2005. Some 60 specialized staff members in a single Directorate are specifically burdened with the enforcement of competition policy in relation to cartels as well as to dealing with immunity applications under the Commission's leniency programme. A key objective of the Cartel Directorate is to increase enforcement against cartels and cut lead times for cartel procedures.⁶⁷ Moreover, and in order to streamline the leniency procedures at the Commission and adopt decisions

more quickly, particularly in cases where the undertakings do not contest having committed the infringement, the introduction of some sort of settlement procedure in cartel cases is being considered.⁶⁸ Where all or most of the undertakings under investigation seem to cooperate with the Commission anyway, it considers the introduction of a US kind of plea bargaining system.⁶⁹

Whilst Regulation 1/2003 has not prevented Member States from implementing criminal sanctions for the enforcement of EC competition law, it has not allowed the European Commission to impose any kind of penalties other than those based on administrative law principles, that is, corporate fines.⁷⁰ Under the current EC Treaty, the Commission does not have the competence to introduce criminal sanctions for the violation of Articles 81 and 82 EC. Is it then legally impossible for the Commission to criminalize competition enforcement? Even though the Treaty on the European Union, in its Title VI, provides for judicial cooperation in criminal matters (Articles 29 EU, 30 EU and 31(e) EU), expressly conferring competence on the European Union in criminal matters, Article 47 EU provides that nothing in the Treaty on the European Union is to affect the EC Treaty. That requirement is also found in the first paragraph of Article 29 EU, which introduces Title VI of the Treaty on the European Union.

Furthermore, the ECJ seems to have opened the way for the Commission to propose the implementation of criminal sanctions in Member States for the effective enforcement of EC law. In a recent dispute between the Council and the Commission about the legal basis of a Framework Directive on environmental offences the ECJ has argued that:

[A]lthough, as a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence, that does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures that relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective.⁷¹

This judgment seems to imply that, in certain cases, it would be possible for the Council within the framework of the current EC Treaty and on the basis of the Commission's proposal to adopt measures that would oblige Member States to introduce criminal sanctions in their national legislations in situations where such measures would be absolutely indispensable for the attainment of the Treaty objectives. However, as was the case in the judgment at hand, where the issues were related to criminal sanctions indispensable to achieve compliance with Community environmental Directives, the essential

choice of which criminal measures to apply would remain at the discretion of the Member States themselves. Consequently, this judgment is not primarily about the harmonization of criminal sanctions already in existence in the various Member States, but rather about the possibility of imposing upon the Member States the obligation to introduce certain criminal sanctions necessary for realizing Community objectives in the first place.

Whether this possibility would apply by analogy to issues concerning competition law enforcement as well remains to be seen. One of the constitutional impediments could be that the Commission itself would not dispose of the power to impose such criminal sanctions itself. In a system heavily relying on parallel and shared enforcement between the Commission and the NCAs, this might run counter to the argument that such measures should be deemed 'indispensable' for the attainment of Community objectives. Furthermore, in the environmental law context, the shared responsibility between the Commission and the Member States is not in issue as it is the Commission that proposes the issuance of Directives to the Council for the Member States then to implement these Directives in their national legislations. Consequently, the Member States alone were responsible for the appropriate compliance mechanisms, whether criminal by nature or not. Therefore, it is herewith submitted that the Commission should be vested with powers of criminal enforcement in the first place before it would seem possible for it to propose that the Council should take measures (by Regulation or Directive and on the basis of the Articles 83 and 308 of the EC Treaty) to impose the introduction of criminal sanctions in their national legislations upon the Member States.

It should be recalled here that, on the basis of Article 83(1), the Council may adopt appropriate regulations or directives to give effect to the principles set out in Articles 81 and 82 EC on a proposal from the Commission and after consulting the European Parliament. In Article 83(2), the Treaty expressly provides that the regulations or directives referred to in paragraph 1 shall be designed in particular to ensure compliance with the prohibitions laid down in Article 81(1) and in Article 82 by making provision for fines and periodic penalty payments. Does Article 83(2) encompass criminal sanctions and especially jail sentences as well? The original drafters of the EC Treaty probably only had sanctions of an administrative nature in mind. Consequently, it seems that such Community measures at least would have to rely on Article 308 as well, if not to say that, maybe, the EC Treaty would have to be amended to render such Community measures possible.

Harmonization of national laws already in existence might, however, be a different issue altogether. As has been explained, at the moment the Community seems to lack the power to require Member States to introduce criminal sanctions in respect of anticompetitive conduct. Once most of the

Member States have introduced criminal sanctions for the enforcement of their own national competition law and of their own violation, it may seem likely that EC harmonization of the national measures will be the next logical and necessary step. Considering the fact that a number of Member States (United Kingdom, Ireland, Estonia, Hungary, Cyprus, Malta, and to a lesser degree Germany and France) have already introduced criminal sanctions (or elements of quasi-criminal enforcement as in the Netherlands) in their respective competition laws and a number of other countries (like Sweden, Austria) are seriously considering doing so, this bottom-up approach may result in EC harmonization in the future as there would then be a common understanding of 'indispensability' amongst the Member States.

Against this background, it is apparent that for the moment a tendency to criminalize competition law enforcement merely exists at Member State level. Neither the EC Treaty nor Regulation 1/2003 is likely to provide an obvious legal basis for the greenfield introduction of criminal sanctions in the enforcement of EC competition law at both Community and Member State level. The current enforcement system is embedded in an administrative law framework where the Commission acts as investigator, prosecutor as well as the decision-making authority. Introducing criminal sanctions into this system would mean a substantial institutional as well as procedural reform. Effective enforcement of competition laws is best achieved through a mix of public enforcement, leniency programmes, criminal sanctions and private damage suits. For competition rules to play a more prominent role in day-to-day business, explicit compliance obligations and mechanisms could also be included in the audit requirements of companies, so that compliance with competition rules becomes an integral part of corporate governance obligations and policies. At present, there is an increasing number of companies that establish competition rules-oriented compliance programmes, including commitments to dismiss employees whenever they act in breach of competition rules.⁷²

The US example shows that deterrence objectives could be best achieved through a combination of policy instruments. While private enforcement, leniency programmes and criminal sanctions are all generally seen to have the same objectives, that is, increasing detection of cartels, improving investigation and the deterrence of cartel arrangements, their effectiveness and the ease of their implementation do differ and occasionally work in opposite directions. This mix of instruments, therefore, implies complicated trade-offs. There is, for example, the tension between applications for leniency and the risk of becoming subject to private damages suits or individual prison sentences. Furthermore, as noted earlier, an operational compliance programme may effectively take away the need for harsh direct

individual sanctions in individual cases, as violations will be avoided. Within the specifics of the various legal systems, these effects are to be weighed and tailored to the goal of optimal deterrence. Moreover, apart from introducing new procedural rules, it will require the national courts to take an active role. In the present system of decentralized enforcement, national courts show little experience in competition cases. This will have to change, *inter alia* through intensive educational programmes.

Besides the legal puzzles, there are substantial economic, political and social implications of criminal enforcement of competition law that could complicate the introduction of such types of sanctions. Changing the legal culture, and especially the corporate governance culture, could be an answer to these issues. In other words, internalization of the need for compliance with the competition rules has to become the norm.⁷³ Any reform in this direction will require consistency with the ruling social and legal norms within the EU, as well as a detailed consideration of its short and long-term costs and benefits. Yet, it seems that fundamental resistance to any one of these issues in particular is fading. The legal and political hurdles on the road to effective competition law enforcement seem no longer insurmountable. Instead, the debate appears to centre around the pros and cons of each specific element within the mix, in which the cost of enforcement are set off against insight into how to effectively influence the decision-making processes of those who think about violating competition law for their own selfish gain before they actually do so and inflict deadweight losses on society. For that to be achieved, a combined '*law and economics*' approach is essential. This book intends to offer just that to the debate, for which the editors are much obliged to all the contributors.

4 STRUCTURE OF THE BOOK

The backbone of this book is formed by the invited contributions to the plenary conference programme. Edited transcripts of the round-table discussions, questions from the floor and panel responses reflect the exchange of views in the ensuing debate. In so far as these would add to the arguments made or deal with the further coverage of Member States experiences, we have included selected papers contributed to the workshop programme. Claus-Dieter Ehlermann's opening speech takes stock on the debate since the 2001 Florence conference and sets out how this book relates to and expands on this debate. He observes a warming to the idea of criminalization in enforcement circles between 2001, when that possibility was discussed in Florence, and today. Where the topic was still considered with scepticism as being rather 'futuristic' in 2001, today it is part of the

ongoing discussions around decentralization of enforcement, leniency and rising standards of evidence.

The book consists of three parts. In Part I, the various aspects of criminal enforcement of competition law are catalogued, analysed and discussed. William Kovacic provides a checklist for the proper design of remedies. In order to do so, Kovacic crept into the mind of a potential competition law violator to view the pros and cons of abiding by the law from that perspective. His chapter sets out how US competition law enforcement has developed over time to discourage and detect violations of antitrust rules. Although he submits that important insight into all the aspects relevant to proper enforcement may still be lacking, Kovacic sees substantial benefits in the use of criminal sanctions. In the next chapter, the question ‘Is criminalization of EU competition law the answer?’ is answered in the affirmative by Wouter Wils upon a scholarly and in-depth weighing of the various arguments. Wils views the prospect of personal time to be spent in jail as a powerful deterrent. He submits that the term ‘criminalization’ should be further defined, goes on to observe a general trend in Europe towards criminal sanctions, and subsequently sets out how criminal sanctions could possibly be reconciled with the organization of the Member States’ national and European competition laws and their respective enforcement agencies. The following chapters by Andreas Reindl and Giancarlo Spagnolo represent extended versions of their introductions to the conference’s morning panel discussion, which is reflected in Chapter 7. Reindl reveals an active OECD reporting on the topic of criminalization. In particular, he points out that it should be recognized that the enforcement results in the US might not materialize in Europe in quite the same manner. Also, the cost of enforcement could prove to be considerable. If criminal sanctions are to be imposed – and Reindl is not against doing this *a priori* – they would be most logically dealt with at the level of the EU Member States rather than by the European Commission. Giancarlo Spagnolo’s contribution reflects an extended discussion of the advantages and drawbacks of criminalization that includes his brief introduction to the panel, but also deepens some discussions that arose in the workshops. These include two issues on which he has written elsewhere: (i) the introduction of rewards for parties that come forward spontaneously with information on anticompetitive acts (also called leniency plus) and (ii) penalties that extend beyond the firms’ instantaneous profits to shareholders. Furthermore, Spagnolo elaborates on the effect touched upon above that more serious punishment may pave the way to a hardening of internal cartel regimes to prevent defection and undercutting, which may entail consequences socially undesirable in themselves. Spagnolo welcomes the introduction of personal criminal sanctions into the European competition law enforcer’s arsenal. The subsequent discussion focused on

weighing both sides in the cost-benefit analysis of criminalization. Kovacic supports Spagnolo's ideas on the introduction of mechanisms rewarding whistle blowing and cooperation with the authorities, drawing on US experience with the False Claims Act. Wouter Wils, on the other hand, fears the fabrication of evidence and the associated costs of disentangling reliable from unreliable information that such rewards might stimulate. In addition, he emphasizes that proper empirical assessment is called for before anything can be decided. Yet, he would *a priori* expect the costs of judicial review not to surpass present enforcement spending to any large extent, whereas the threat of imprisonment would weigh heavily in the decision-making process of chief executives, including on matters that are outside our competition laws.

Part II of this book focuses more specifically on the interaction between leniency programmes and criminal sanctions. In their contribution, Dirk Schroeder and Silke Heinz conclude negatively on the introduction of criminal sanctions in the present structure of European and Member State leniency programmes, which they deem to be complex enough already. According to the author, harsher and personal punishment would only disturb the present delicate design. Patrick Massey firmly takes the opposite view. Although he agrees that leniency programmes should possibly be better designed, thereby drawing on experience gained with existing leniency programmes in the US and the EU, he argues that without the threat of criminal sanctions, the effectiveness of leniency mechanisms may be little. In Chapter 10, Michael Frese sets out how leniency programmes and criminal sanctions are likely to interact in a negative manner. He proposes some amendments to remedy the potential problems as identified by him in a concise and informative way.

In Part III, country experiences are reported. In an introductory chapter to the part, Nonthika Wehmhörner discusses the present practice regarding pecuniary sanctions in the US and EU. She also elaborates on the optimal fining theory and concludes that there is room for the two to grow closer together. Eleanor Fox presents us with some of the US facts and views on criminal competition law enforcement, calling for internationalization of its success at a global scale. The contributions of the European Member State representatives are subsequently ordered by the extent of experience with criminal sanctions so far. Concerning the UK, Diana Guy of the UK Competition Commission reports that the threat of custodial sentences – albeit that, at the time of writing this, these have not actually been handed down yet – surely would add to better compliance. Terry Calvani, who was still with the Irish Competition Authority at the time of the conference, shares this view in his contribution. According to him, anticompetitive prices are a form of theft and should be treated as such. Germany has prosecuted

individuals successfully in several cases in the last couple of years, handing down jail sentences of up to almost a year. However, these proceedings turn out to be complicated, and do not seem to have a direct relation to leniency claims, as is explained by Christof Vollmer in his contribution. Peter Lewisch seems to be more careful in the next chapter, concluding on the deterring effects established in Austria. He believes that public criminal proceedings and quasi-criminal sanctions prove to be costly to the point of being inefficient. Aini Proos of the Estonian Competition Authority has less hesitation in applying criminal enforcement of the recent Estonian competition laws. However, since the competent Estonian authorities have been given instruments of criminal punishment in September 2002, no offenders have actually been jailed. Nevertheless, Proos warns of the costs of legal action, including the hiring of expensive outside counsel and administrative procedures. Pieter Kalbfleisch, President of the Dutch Competition Authority, stresses some of the benefits of the administrative sanctioning system used by the Netherlands Competition Authority ever since the Dutch misuse system was abandoned in 1998. The Dutch competition law system pre-1998 proved to be highly ineffective in spite of its having a criminal law base. According to Kalbfleisch, the administrative law system presently in force is cost-effective and just. It has proven to be powerful enough to deter, and may do so even more when supported in the future by enhanced, and hopefully equally effective, civil enforcement rules.

The panel and floor discussions that followed first turned on the question of how to measure the effectiveness of competition law enforcement in general. From the floor, Terry Calvani qualifies Patrick Massey's earlier remarks on the lack of actual criminal sanctions. According to Massey, no cartel conspirator is losing any sleep over the possibility of being criminally indicted as long as arrested and handcuffed managers do not appear on television. Calvani, on the contrary, points to several cases pending and submits that these are only the beginning since the recent reconstitution of the Irish cartel division. Kalbfleisch and Proos comment on the discretionary powers of the competition authorities to tailor the punishment to the crime. It is in this context that Bruce Lyons remarks that in order to weigh the costs and benefits of criminal enforcement correctly, more insight will be required into the sociology of cartels and their membership. Others agree with this call for further research. What level and quality of management triggers cartel membership? What keeps these executives from breaking the law? Could sanctions be designed that help to deter effectively? Although it is a shared view that too little is known about these issues (which include items like peer pressure as well as direct bonuses for which Dirk Schroeder suggests a questionnaire methodology), it is widely felt that the threat of personal incarceration must be serious for those who face it. Finally, on

behalf of the organizing ACLE, Floris Vogelaar's conference wrap-up and closing words form the last chapter of the book.

ACKNOWLEDGEMENTS

The editors are grateful to all speakers and contributors. In the workshop held on Thursday 17 February 2005, which preceded the actual conference on Friday February 18, 27 contributed papers were presented in a number of lively parallel sessions. These sessions came prior to the two plenary addresses by Bruce Lyons and Giancarlo Spagnolo. It has only been possible to include a few of these contributed papers in this book. Be assured that none of these contributions has been left out for lack of quality. Some were too advanced for this survey book and would be better placed in a specialized journal. Others covered largely the same areas, so that a choice had to be made. Furthermore, it was decided to keep merger control outside the scope of the book as this would constitute a related though separate and large topic on its own. As a result, Chapters 10, 11, 15 and 16 complement in a coherent manner the invited papers that reflect the Friday plenary conference programme.

In the process of selecting suitable papers and helping to sharpen logic and presentation, we are indebted to a number of external referees. We thank Adriaan Braat for his valuable overall editorial assistance, which was not always an easy task with contributors of varying backgrounds following different reference standards common in the world of law and economics. Adriaan also provides helpful research assistance to the writing of this introductory chapter. Ine Raangs painstakingly produced the transcripts of the panel and floor discussions for editing. Luke Adams gave his very stimulating support in the actual production of the book. We are grateful to him as well as to Edward Elgar Publishing for their initial and unconditional confidence in the project.

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NOTES

1. Although it is difficult to quantify these damages, average anticompetitive mark-ups have in some studies even been found to be of the order of 50 per cent. See Connor and Bolotova (2005) or OECD (2002), p.2.

2. This is not to say that there are no problems in obtaining accurate private information from merging parties, which they have an incentive not to reveal, but rather that remedies and sanctions play a small role in revelation. See Lagerloef and Heidhues (2005). Merger remedies include divestitures, a study of the effectiveness of which (Davies and Lyons, 2005), was presented in the workshop programme to the conference by Bruce Lyons. As the topic of this book is narrower, insights obtained at the conference in merger control have not been included.
3. Baker (2001), p. 697.
4. See Geradin and Henry (2005) on recent European antitrust fine levels.
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 (the 'Guidelines'). OJ 1998/C 9/03.
6. See in particular Articles 23 and 24 of Regulation 1/2003.
7. Connor and Bolotova (2005) and Wils (2005).
8. Bryant and Eckart (1991). The OECD estimates the chance of detection at one in six, so substantial dark numbers are likely to subsist. OECD (2002), p. 3.
9. See Commission of the European Communities (2005).
10. Although fining corporations would be, as we refer to it in Europe, 'administrative law enforcement'.
11. The Department of Justice uses a number of tools in investigating and prosecuting criminal antitrust violations. Department of Justice attorneys often work with agents of the Federal Bureau of Investigation (FBI) or other investigative agencies to obtain evidence.
12. These maximum individual punishments have been increased over successive amendments to the Sherman Act. The present levels were set in the Criminal Antitrust Penalty Enhancement and Reform Act, signed into law by President Bush in June 2004. See also Hammond (2005).
13. Baker (2001), p. 694.
14. Ghosal and Gallo (2001).
15. Baker (2001), pp. 693–94.
16. See DoJ workload statistics and the contribution of Wehmh rner to this volume. See VISA Check/MasterMoney antitrust litigation, No. CV-96–5238.
17. Kobayashi (2004) and Hammond (2005). See also Gallo et al. (1994) and Magney and Anderson (2004). Posner (2001), pp. 45–6 provides long-term time-series on US antitrust enforcement since the 1970s. See Ghosal (2005) for recent statistics on US criminal sanctions.
18. Davidow (2005), p. 299.
19. The grand jury system favours the investigation side as testimonies are taken in secret and witnesses or targets have no lawyers present in the grand jury room. However, government has to prove guilt beyond reasonable doubt. Baker (2001), p. 699.
20. The US Corporate Leniency Programme, 10 August 1993. According to Platt Majoras (2003), it has been the 'most active generator of criminal investigations'.
21. See Platt Majoras (2003).
22. Riley (2005), p. 380.
23. See Hammond (2005).
24. This may increase the costs of claimants, as their legal counsel is responsible for gathering internal documents as evidence in preparation for leniency claims. The costs of this, irrespective of the question whether or not it is appropriate that they fall on the firms, need to be weighted against saved public enforcement expenses in any analysis of the social benefits of leniency programmes.
25. Riley (2005), p. 377.
26. European Communities (1996).
27. See Monti (2004) and Kroes (2005).
28. The United Kingdom, Ireland, France, Germany, Estonia, Hungary, Cyprus and Malta have introduced criminal sanctions in the enforcement of their competition law. These sanctions include corporate and individual fines as well as jail sentences. In the United Kingdom, director disqualification and criminal fines on individuals were also introduced

- in 2002. In Austria, a long tradition of (rarely applied) individual criminal sanctions for cartel agreements was abolished in 2002, however, imprisonment for bid-rigging is still in force. See the contribution of Lewisch in this volume. In Sweden, the so-called Cartel Investigation Committee was established in order to consider the introduction of a new competition law and assess the need for criminalizing competition law. The Committee has proposed to criminalize sanctions for horizontal cartel: Swedish Government Official Reports 2004;131 'Competition crime, a legislative model'. Holm (2005), p.3. The Netherlands are on the verge of introducing quasi-criminal fines to be imposed upon directors and those who led or participated in cartels.
29. Maybe the recent judgment of the European Court of Justice in C-176/03 *Commission v. Council* Judgement of 13 September 2005 is of some guidance in this respect. See also Section 3 hereinafter.
 30. For example, on the basis of Articles 83 and 308 EC.
 31. See Ehlermann and Atanasiu (2001), p. xxix; Consumers' Association (2002); Azevedo (2003) and Nazzini (2003), Rosochowicz (2004), Joshua (2000; 2004). and OECD (2005).
 32. This basic insight was further qualified in an extensive literature, with Stigler (1970) and Ehrlich (1973) as early contributions. In a dynamic setting, optimal fines are found to be finite in Leung (1991). See Polinsky and Shavell (2000) for a survey. In the context of antitrust, several authors, including Landes (1983) and Kobayashi (2004), warn of the over-compliance effect of high fines.
 33. See Fiorentini and Pelzman (1995).
 34. US Department of Justice Antitrust Division, *The International Lysine Cartel at Work*, March 2000; for the accompanying speech, see Griffin (2000).
 35. See, for example, Parker (1989).
 36. The seminal reference is Grossman and Hart (1983).
 37. An early argument for imprisonment in the context of antitrust is Werden and Simon (1987). See also the contribution of Spagnolo in this volume. More general related studies are Coleman (1989), Macey (1991), Newman and Wright (1990), Polinsky and Shavell (1993), Davis (1996) and Garoupa (2000).
 38. See Ulen (1996).
 39. Negative examples and the lack thereof were in evidence in the recent past in cases like Enron, Worldcom, Tyco, Ahold and Parmalat.
 40. Arlen (1994).
 41. See Fischell and Sykes (1996) and Shavell (1997).
 42. See Shavell (1987) and Cherry (2001) for a comparison.
 43. See Azevedo (2003).
 44. Limited liability can also encourage corporate crime, see Arlen (1994).
 45. See Waldfogel (1995) and Alexander (1999).
 46. Mullin and Snyder (2004) consider indemnification and possible ways to avoid it. Among other things, they warn that formally prohibiting indemnification may pose an implicit burden on honest firms as well, when there are enforcement errors.
 47. On these issues, there is a lot that can be learned from the study of the economics and sociology of organized crime. See, for example, Fiorentini and Peltzman (1995). Some progress in this direction is made in the contribution of Spagnolo to this volume.
 48. See Levenstein and Suslow (2006) or Harrington (2006).
 49. On the consequences of errors in competition law enforcement on firm strategies, see Schinkel and Tuinstra (2006).
 50. See Andreoni (1991).
 51. Such practices have, in fact, been reported to exist in collusive contexts already. For example, Porter (2005) relates how a new entrant in the New York City market for garbage collection received a dead dog's head in the mail as a 'welcome' gift to antitrust. See *ibid.*, p. 154.
 52. Alternatively, Friedman (1999) finds in the possibilities for rent seeking in this interaction an argument for harsh punishments.
 53. See also the notorious US Sarbanes-Oxley Act of 2002.

54. See Khanna (1996).
55. See Vogelaar (2005a; 2005b).
56. In the UK, following the introduction of more severe sanctions and increased powers of investigation, compliance of UK industry with competition rules is expected to increase. See Rodger (2005), p. 356.
57. See Kraakman (1984).
58. This is equally true for the new Member States, where competition was actually non-existent in the socialist area and where competition was of great importance in creating a functioning market economy. The basic conditions for free competition were introduced by the legal reforms between 1989 and 1991. From 1990 onwards, new national competition laws were enacted and thus the enforcement of competition law could begin. After 1990 accession to the European Union became the most relevant external pressure to influence competition policies in Eastern Europe. See Cseres (2005), p. 346.
59. Gerber (1998), pp. 402–3.
60. For trends in EU corporate fines, see Geradin and Henry (2005) or the contribution of Wehmh rner in this book.
61. White Paper on Modernization of the Rules implementing Articles 81 and 82 of the EC Treaty, Commission programme No. 99/027, 28.04.1999.
62. See points 8, 41, 42, 75 White Paper.
63. Commission notice on immunity from fines and reduction of fines in cartel cases (2002/C 45/03). Instrumental in these reforms have been the insights into incentive mechanisms developed in Motta and Polo (2003).
64. The essence of the new regulation is the following. The notification system has been abolished and Article 81 EC became directly applicable in its entirety, thus including Article 81(3). Agreements that fulfil these requirements of Article 81 EC will be deemed legal without the need for notification and a prior administrative decision. The National Competition Authorities, the so-called NCAs, and the Commission form a network of public authorities cooperating closely together. This so-called European Competition Network provides a focus for regular contact and consultation on enforcement policy to ensure consistent application. The Commission has a central role in the network to ensure such consistency.
65. See Griffin (2000) and Eichenwald (2000).
66. See MacNeil (2003).
67. Commissioner Kroes created the new Cartel Directorate with three units and an experienced management team in order to bring economies of scale and to pool the Commission's best anti-cartel knowledge. See, 'The First Hundred Days 40th Anniversary of the Studienvereinigung Kartellrecht 1965–2005', International Forum on European Competition Law, Brussels, 7 April 2005, or Lowe (2005), p. 3.
68. See Atwood (2005) and Ducore (2005).
69. Lowe (2005), pp. 5–7.
70. Article 23(5) and Recital 8 of Regulation 1/2003.
71. Press release No. 75/05, 13 September 2005, Judgment of the Court of Justice in Case C-176/03, Commission of the European Communities v Council of the European Union, particularly paras 46–55.
72. Rodger (2005), p. 363.
73. See Azevedo (2003).

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