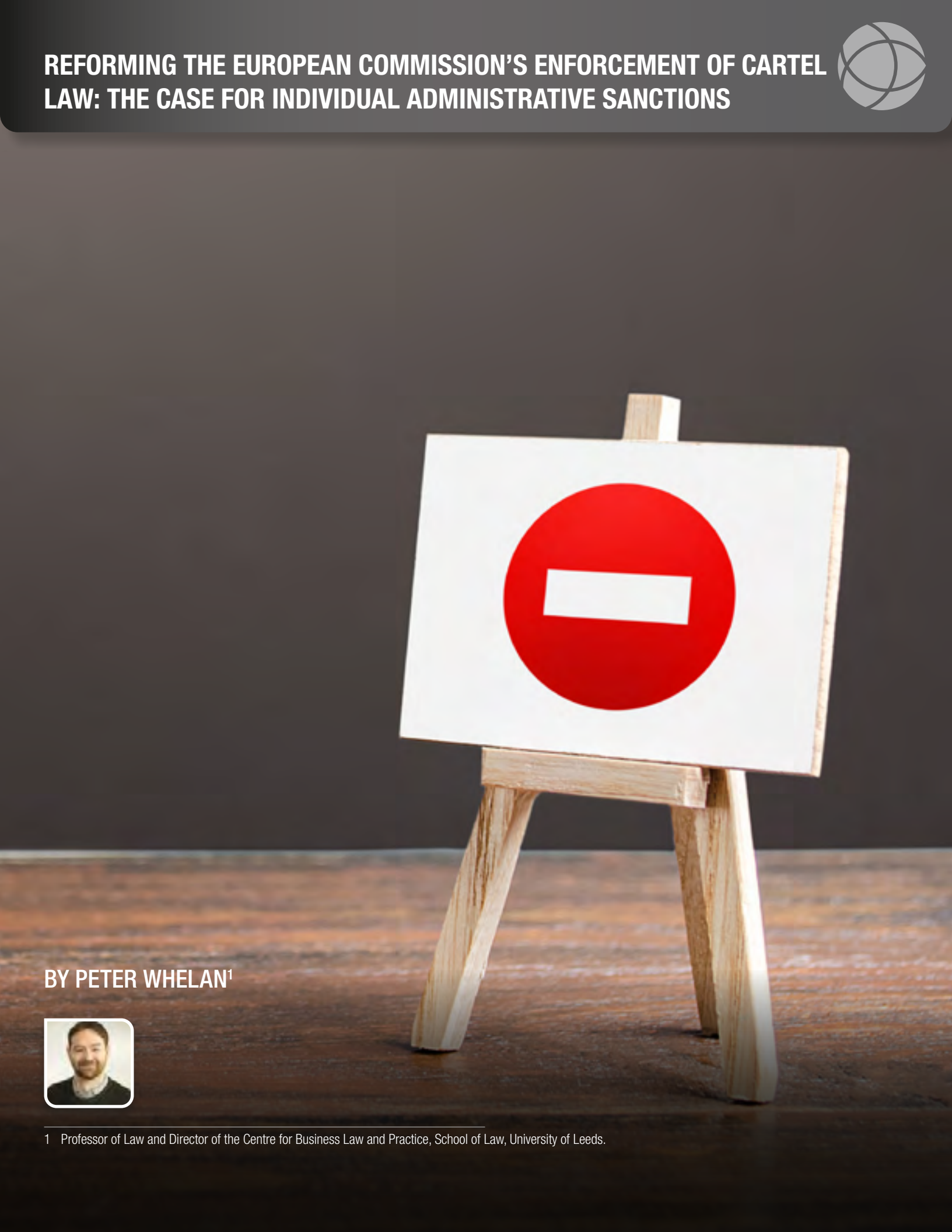
REFORMING THE EUROPEAN COMMISSION'S ENFORCEMENT OF CARTEL LAW: THE CASE FOR INDIVIDUAL ADMINISTRATIVE SANCTIONS



BY PETER WHELAN[1]

1 Professor of Law and Director of the Centre for Business Law and Practice, School of Law, University of Leeds.

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REFORMING THE EUROPEAN COMMISSION'S ENFORCEMENT OF CARTEL LAW: THE CASE FOR INDIVIDUAL ADMINISTRATIVE SANCTIONS

By Peter Whelan

Few would deny that the European Commission has an impressive track record with respect to anti-cartel enforcement. At present, however, a lacuna exists with respect to its enforcement powers: it cannot to impose fines on natural persons who are responsible for their companies' cartel activity. This article argues that, in order to achieve the deterrence of cartel activity, the Commission should be invested with the power to impose individual administrative sanctions for violations of the EU-level cartel prohibition. Although such sanctions have a drawback in terms of their vulnerability to indemnification, the stigmatization policy currently pursued by the Commission with respect to cartel activity provides considerable scope to prevent the issue of indemnification from undermining the potential deterrent effect of individual administrative sanctions.

I. INTRODUCTION

The European Commission ("the Commission") is widely considered to be one of the most robust and influential of antitrust regulators globally. It regularly imposes significant fines upon companies that are deemed responsible for violations of EU competition law. Its enforcement record regarding price-fixing cartels is especially indicative of the commitment it demonstrates in this context. From 1990 to December 2021, for example, in relation to cartel activity alone the Commission imposed fines (adjusted due to Court judgments) totaling almost 30 billion euros.[2] In that same period, it adopted 152 cartel infringement decisions (addressed to 906 infringing undertakings), with 30 of those decisions being adopted since 2017.[3] The average size of the fine imposed upon an undertaking has been measured at 17 million euros (for the period 2001–2005), 47 million (for the period 2006-2010) and 42 million (for the period 2011–2015).[4] An examination of the figures reveals that the last ten years or so display a sizeable increase in the magnitude of the cartel fines being imposed.[5]

The Commission's current record on anti-cartel enforcement is undeniably impressive and should be welcomed by those who wish to see cartel activity minimized within Europe. That is not to say, however, that potential reform to the Commission's cartel toolkit should be overlooked. Indeed, at present, there is a noticeable, significant lacuna in the powers of the Commission with respect to anti-cartel enforcement: it does not have the ability to impose administrative sanctions upon individuals who are responsible for the cartel activity of their companies, to the detriment of the objective of deterring such activity. This article argues that reform should occur to full this lacuna and that, accordingly, the Commission should be granted the power to impose individual administrative sanctions for cartel activity.

II. THE CONCEPT OF AN INDIVIDUAL ADMINISTRATIVE SANCTION

Individual (or personal) administrative sanctions are sanctions that are imposed solely upon natural persons following an administrative proceeding, that is a proceeding that is conducted in front of an administrative body (rather than a formally-designated judicial body or criminal court), following administrative procedures, and adhering to administrative standards of proof and administrative rules of evidence.[6] With the "pure" form of such sanctions, the courts only get involved in the sanctioning process with respect to the judicial review of the acts of the administrative body at issue, i.e. their infringement decisions.[7] Despite its imposition outside of a traditional "criminal" setting, a sanction in the administrative context is not necessarily devoid of societal stigma,[8] and particularly so at EU level,[9] where there is a tendency to rely upon administrative sanctions with a penal nature.[10] An individual administrative sanction can take many different forms,[11] including the loss of specific rights (e.g., the right to apply for public tenders or grants), a prohibition on engaging in a particular profession, and the requirement to pay money as a punishment,[12] and depending on the circumstances their consequences in practice can of course be extremely harsh for the person subjected to them.[13]

2 See European Commission, "Statistics on Cartel Cases," December 10, 2021, https://ec.europa.eu/competition-policy/cartels/statistics_en, 2.

3 *Ibid.* 4-5.

4 See e.g. M. Hellwig and K. Hüschelrath, "Cartel Cases and the Cartel Enforcement Process in the European Union 2001–2015: A Quantitative Assessment" (2017) 62(2) Antitrust Bulletin 400, 433.

5 See European Commission, *op. cit.*, 2.

6 P. Cacaud, M. Kuruc & M. Spreij, *Administrative Sanctions in Fisheries Law*, Food and Agriculture Organization of the United Nations, Rome, 2003, 2-3.

7 See e.g. R. Brown, "Administrative and Criminal Penalties in the Enforcement of Occupational Health and Safety Legislation" (1992) 30(3) Osgoode Hall Law Journal 691, 692-693.

8 See e.g. R. Galbiati and N. Garoupa, "Keeping Stigma Out of Administrative Law: An Explanation of Consistent Beliefs" (2007) 15 Supreme Court Economic Review 273.

9 Cf.: J. Öberg, "The Definition of Criminal Sanctions in the EU" (2014) 3(3) European Criminal Law Review 273, 286-287 and 291-292; and K. Ligeti, "European Criminal Law: Administrative and Criminal Sanctions as Means of Enforcing Community Law" (2000) 41(3-4) Acta Juridica Hungarica 199, 206.

10 L. Besselink, "Sovereignty, Criminal Law and the New European Context," in P. Alldridge and C. Brants (eds), *Personal Autonomy, the Private Sphere and Criminal Law: A Comparative Study*, Hart Publishing, Oxford, 2001, 103.

11 R. McKay, "Sanctions in Motion: The Administrative Process" (1964) 49(2) Iowa Law Review 441, 443.

12 A. Weyembergh & N. Joncheray, "Punitive Administrative Sanctions and Procedural Safeguards: A Blurred Picture that Needs to be Addressed" (2016) 7(2) New Journal of Criminal Law 190, 194.

13 W. Gellhorn, "Administrative Prescription and Imposition of Penalties" [1970] 3 Washington University Law Quarterly 265, 271.

Although for some commentators an administrative sanction in fact implies something distinct to a monetary sanction, such as the forced closure of an establishment or the loss of a business license,[14] it is the financial form of the sanction (i.e. the negative economic impact inherent in its coerced relocation of financial resources[15]) that constitutes the relevant definition adopted in this article. Consequently, for present purposes, individual administrative sanctions can be understood solely as fines that are imposed upon natural persons in the context of an administrative proceeding. Such fines can pursue a number of different objectives including deterrence, compensation, and punishment.[16]

III. EU-LEVEL ANTI-CARTEL ENFORCEMENT AND THE SCOPE FOR EMPLOYING INDIVIDUAL SANCTIONS

Under Regulation 1/2003, the Commission currently has the power to impose administrative sanctions (fines) upon undertakings that have intentionally or negligently violated the EU competition law provisions, including its cartel prohibition.[17] The Commission does not have the power to impose fines upon natural persons for their infringements of the EU cartel prohibition, except that is in the very infrequent circumstance where the natural person at issue constitutes an undertaking in their own right (i.e. an independent entity offering goods or services on a market), rather than a constituent person of a larger undertaking.[18]

Moreover, from a close reading of that Regulation, one can clearly see that the fining powers of the Commission are designed with *businesses* rather than *individuals* in mind: Article 23(2) provides that fines will be calculated with reference to "total turnover in the preceding business year."[19] As a result, it is completely understandable that the Commission's Fining Guidelines omit any reference to the fining of infringing individuals,[20] and it is certainly not surprising to discover that, as Cauffman notes, to date there has not been a single case where the Commission has imposed a fine upon an individual employee as a component part of an undertaking that has infringed the EU competition law rules.[21] Consequently, and despite the lack of an express, legally-binding statement prohibiting individual antitrust sanctions at EU level, we can say with some confidence that the directors, managers or employees of an infringing company cannot at present be targets for the potential imputation of that company's cartel infringement.[22]

It is true that EU competition law is not only enforced by the Commission but also by National Competition Authorities ("NCAs") in the EU Member States.[23] When the national enforcement of EU competition law occurs, the NCA in question may well be able to sanction directly (or seek the imposition of sanction upon) natural persons within the infringing undertaking. As Article 5 of Regulation 1/2003 provides, in enforcing EU competition law, the NCAs may impose "fines, periodic penalty payments or any other penalty provided for in their national law." In national enforcement, the existence or otherwise of an imputation process focusing on natural persons depends therefore on the specifics of national law, which of course need to adhere to the EU principles of effectiveness and equivalence when EU competition law is being enforced at national level.[24] There are in fact a number of jurisdictions within the EU that enforce EU competition law through, *inter alia*, an imputation process that focuses on natural persons. In Denmark, for example, criminal sanctions can be imposed upon natural persons within an infringing undertaking,

14 C. Adam, S. Hurka & C. Knill, "Conceptualizing and Measuring Styles of Moral Regulation," in C. Knill, C. Adam and S. Hurka (eds), *On the Road to Permissiveness?: Change and Convergence of Moral Regulation in Europe*, Oxford University Press, 2015, 22.

15 A. Freiberg, "Reconceptualizing Sanctions" (1987) 25(2) Criminology 223, 235.

16 See e.g. C. Diver, "The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies" (1979) 79(8) Columbia Law Review 1435, 1456.

17 See *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*, [2003] OJ L1/1 (hereafter "Regulation 1/2003"), Article 23(2).

18 See W. Wils, *Principles of European Antitrust Enforcement*, Hart Publishing, Oxford, 2005, 93.

19 C. Koenig, "The Imposition of "Follow-On Penalties" on Managers and Employees" (2018) 13(2) Competition Law Review 139, 142.

20 *Ibid.*

21 C. Cauffman, "Civil Law Liability of Parent Companies for Infringements of EU Competition Law by Their Subsidiaries," February 8, 2019, https://ssrn.com/abstract=3331083, 5.

22 *Cp.*: R. Alexander, "Systematically Flogging the Wrong: EU Corporate Fines Violate the Fundamental Rights of Shareholders – The European Commission as Revenant of the Persian Great King Xerxes" (2021) 32(4) European Business Law Review 681, 689; A. Riley, "The Modernisation of EU Anti-Cartel Enforcement: Will the Commission Grasp the Opportunity?" (2010) 31(5) European Competition Law Review 191, 205; and S. Germont & O. Andresen, "Public Enforcement by the Commission: A Strategic Perspective," in G. Amato and C.D. Ehlermann (eds), *EC Competition Law: A Critical Assessment*, Hart Publishing, Oxford, 2007, 705.

23 See Regulation 1/2003, Recital 8 and Article 3.

24 On these principles and their application in this context, see M. Frese, *Sanctions in EU Competition Law: Principles and Practice*, Hart Publishing, Oxford, 2014, 98-103.

where those persons have violated Article 101(1) of the Treaty on the Functioning of the European Union ("TFEU") "by entering into a cartel agreement";[25] specifically, such natural persons face "imprisonment for up to one year and six months if the breach is intentional and of a grave nature, especially due to the extent of the infringement or its potentially damaging effects."[26] The imputation of an undertaking's antitrust infringement to a natural person does not only occur in the criminal setting, however.[27] In Portugal, for example, it occurs in the context of an administrative proceeding, where certain individuals within an infringing undertaking can be subjected to non-criminal fines of up to 10 percent of the annual remuneration that they receive from the infringing undertaking.[28] Such examples of *individual*-focused imputation processes, of course, stand in clear distinction to the approach of the Commission in enforcing EU competition law.

It is submitted that the Commission could legally be granted the power to impose administrative cartel sanctions upon natural persons without having to amend the current Treaty framework.[29] Article 103(1) TFEU provides that "[t]he appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 shall be laid down by the Council, on a proposal from the Commission and after consulting the European Parliament." These Regulations or Directives can be designed in order, *inter alia*, "to ensure compliance with the prohibitions laid down in Article 101(1) and in Article 102 [TFEU] by making provision for fines and periodic penalty payments": Article 103(2)(a) TFEU. Given the deterrence potential of individual administrative sanctions (detailed below in Section IV), as well as the inherent link between deterrence and compliance, it is reasonable to conclude that these provisions of EU law provide a solid basis for the introduction (through a Regulation) of individual administrative cartel sanctions at EU level.

The situation is different with respect to criminal sanctions (i.e. the imposition of custodial sentences). The employment of criminal sanctions for cartel activity raises very difficult issues to do with their relative efficiency,[30] as well as with their appropriateness.[31] Legally and practically, such sanctions also raise a plethora of difficult challenges, including, for example, issues to do with the appropriate definition of offences,[32] their interaction with administrative leniency,[33] the issue of parallel or concurrent administrative and criminal antitrust proceedings,[34] the strengthening of procedural guarantees when one moves from an administrative regime to a criminal one,[35] and effective international enforcement cooperation.[36] In European practice the effectiveness of criminal cartel sanctions can certainly be questioned,[37] if not doubted altogether.[38]

The European efforts to date to make such a sanction an effective deterrent against cartel activity have in fact been subjected to severe criticism in the literature,[39] with some commentators arguing that, notwithstanding the US example, cartel criminalization does not really have a

25 The Danish Competition Act, Consolidation Act No. 869 of 8 July 2015, Section 23(3).

26 *Ibid*.

27 See e.g. T. Tóth, "International Report," in P. Këllezi, B. Kilpatrick & P. Kobel (eds), *Liability for Antitrust Law Infringements & Protection of IP Rights in Distribution*, Springer, Cham, Switzerland, 2019, 18-19.

28 See Portuguese Competition Act, Law 19/2012, Articles 69(4), 73(1) and 73(6). On the growing importance of such individual-focused antitrust enforcement in Portugal, see J. Vieira Peres & C. Vieira Peres de Fraipont, "Non-Compete Clauses and Fines on Natural Persons: The Blueotter and EGEO Case (Portugal)" (2022) Journal of European Competition Law & Practice, forthcoming, emphasizing Case PRC/2019/3, *Blueotter/EGEO*, Decision of the Portuguese Competition Authority, June 30, 2021.

29 *Cp.* M. Wise, "Competition Law and Policy in the European Union" (2007) 9(1) OECD Journal of Competition Law and Policy 7, 73.

30 See e.g. S. Shapiro, "The Road Not Taken: The Elusive Path to Criminal Prosecution for White-Collar Offenders" (1985) 19(2) Law & Society Review 179, 206.

31 See e.g. P. Whelan, "Morality and Its Restraining Influence on European Antitrust Criminalisation" (2009) 12(1) Trinity College Law Review 40.

32 See e.g. A. MacCulloch, "Honesty, Morality and the Cartel Offence" (2007) 28(6) European Competition Law Review 355.

33 See e.g. C. Beaton-Wells, "Criminal Sanctions for Cartel Conduct: The Leniency Conundrum" (2017) 13(1) Journal of Competition Law & Economics 125.

34 See e.g. P. Whelan, "Cartel Criminalisation and Due Process: The Challenge of Imposing Criminal Sanctions Alongside Administrative Sanctions within the EU" (2013) 64(2) Northern Ireland Legal Quarterly 143.

35 See e.g. P. Whelan, "Criminal Cartel Enforcement in the European Union: Avoiding a Human Rights Trade-Off," in C. Beaton-Wells and A. Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement,* Hart Publishing, Oxford, 2011.

36 See e.g. A. Stephan, "Four Key Challenges to the Successful Criminalization of Cartel Laws" (2014) 2(2) Journal of Antitrust Enforcement 333, 352-359.

37 See e.g. A. Jones & R. Williams, "The UK Response to the Global Effort Against Cartels: Is Criminalization Really the Solution?" (2014) 2(1) Journal of Antitrust Enforcement 100.

38 See e.g. E. Morgan, "Criminal Cartel Sanctions Under the UK Enterprise Act: An Assessment" (2010) 17(1) International Journal of the Economics of Business 67.

39 See e.g. M. Furse, *The Criminal Law of Competition in the UK and in the US: Failure and Success*, Edward Elgar, Cheltenham, 2012, Chapter 4 (focusing on the UK) and Chapter 5 (focusing on Ireland).

place within this context.[40] Nonetheless, it is arguable that under the current Treaty framework no amendment is required in order to mandate through EU law the imposition of criminal sanctions in the *EU Member States* for violations of EU competition law.[41] The actual imposition of criminal sanctions by *the Commission itself* would not be possible, however, without a change in the Treaties as well as in the EU-level institutional setup.[42] This is because such action would require the adoption of a Regulation (as opposed to a Directive) and there is simply no basis under the current criminal law competence of the EU institutions for such a legal development.[43] In any case, politically, it would be incredibly difficult to "sell" such EU-level action to European citizens and to implement effectively and legitimately.[44]

IV. JUSTIFYING THE IMPOSITION OF INDIVIDUAL ADMINISTRATIVE CARTEL SANCTIONS BY THE COMMISSION

This article contends that individual sanctions should be imposed in order to help the Commission to secure the deterrence of cartel activity within the EU. Admittedly, this position would not be universally accepted by informed scholars. Indeed, it has been argued in the law and economics literature (most notably by Posner) that, in order to secure deterrence, there is no need for sanctions to be imposed upon *individuals* (as opposed to corporate entities) in the context of corporate wrongdoing.[45]

The general argument presented in this context is founded upon an important feature of (optimal) corporate fines: that they create incentives for the company to scrutinize, discover and avert any unlawful conduct of those individuals who are acting within the scope of their employment.[46] The point is that, if sanctions are imposed upon the infringing companies themselves, those companies will be incentivized to monitor actively their agents and to sanction them appropriately (e.g., through demotion or sacking[47]) when they are involved in prohibited cartel activity, thereby ensuring that those agents are deterred from lawbreaking.[48] As stated by Posner himself:

> it is unimportant whether the individual corporate employees are joined as defendants in antitrust cases. A corporation has effective methods of preventing its employees from committing acts that impose huge liabilities on it. A sales manager whose unauthorized participation in a paltry price-fixing scheme resulted in the imposition of a $1 million fine on his employer would thereafter … have great difficulty finding responsible employment, and this prospect should be sufficient to deter.[49]

Clearly, then, the idea of imposing individual administrative sanctions for cartel activity runs counter to that particular argument.

A solid argument in favor of employing personal sanctions to deter cartel activity would thus address Posner's argument head on. The first point to be emphasized here is that Posner's argument is very vulnerable to attack on the basis of at least two clear limitations facing a corporation that wishes to punish internally its infringing employees: (a) the ability of a company to discipline its employees is limited to the impact of dismissal (itself undermined by the existence of alternative employment prospects), as well as to the value of the personal assets of

40 See e.g. K. Ost, "From Regulation 1 to Regulation 2: National Enforcement of EU Cartel Prohibition and the Need for Further Convergence" (2014) 5(3) Journal of European Competition Law & Policy 125, 134.

41 See e.g. P. Günsberg, "Exploring the Case for Criminalisation of Business Cartels in Europe," in J.B. Banach-Gutierrez & C. Harding (eds), *EU Criminal Law and Policy: Values, Principles and Methods*, Routledge, Abingdon, 2017, 216-217.

42 See G. Hakopian, "Criminalisation of EU Competition Law Enforcement – A Possibility after Lisbon?" (2010) 7(1) Competition Law Review 157, 171-172.

43 See in particular Article 83 TFEU.

44 See e.g. L. Danagher, "The Criminalisation of Cartels: A European and Trans-Atlantic Perspective" (2012) 33(11) European Competition Law Review 522, 523.

45 See K. Dau-Schmidt, "Preference Shaping by the Law," in P. Newman (ed.), *The New Palgrave Dictionary of Economics and the Law: Volume 3*, Macmillan Reference Ltd, London, 1998, 87.

46 B. Kobayashi, "Antitrust, Agency, and Amnesty: An Economic Analysis of the Criminal Enforcement of the Antitrust Laws Against Corporations" (2001) 69(5-6) George Washington Law Review 715, 736.

47 A measure of caution is probably warranted here though, depending on the circumstances; see e.g. J. Paha, "Antitrust Compliance: Managerial Incentives and Collusive Behavior" (2017) 38(7) Managerial and Decision Economics 992, 1001.

48 See W. Page, "Optimal Antitrust Remedies: A Synthesis," in R. Blair & D.D. Sokol (eds), *The Oxford Handbook of International Antitrust Economics: Volume 1*, Oxford University Press, 2015, 264.

49 R. Posner, *Antitrust Law*, 2nd Edition, University of Chicago Press, 2001, 271.

the employee in question;[50] and (b) the infringing employee may be aware that she will have left the firm by the time the infraction is likely to be discovered.[51]

The second point to be made is that it may be too simplistic to assume that, in large (M-form) corporations in particular, where there may be attenuated relationships between senior executives and the managers and employees operating at the multitude of different levels in the corporate hierarchy, the existence of the antitrust fine will be swiftly and efficiently brought to bear to subordinates, with the result that such fines may not fully manage to change the organizational behavior at issue.[52] The third point that one should make is that, even when they face potential antitrust fines, companies may hesitate to punish their transgressing employees when they are discovered, as: (i) they may fear that firing employees too readily may create difficulties in terms of future recruitment; and (ii) in future they may need to rely upon the cooperation of those employees in order to secure antitrust leniency from the authorities.[53] The fourth and final point to note is that to expect the company to want to discipline effectively its infringing employees when they get caught ignores the fact that the interests of the individual infringers and their company may well be fully aligned with respect to the phenomenon of antitrust lawbreaking (which may occur when corporate cartel fines are sub-optimal in nature).[54] The Secretariat of the OECD Competition Committee, in its detailed analysis of the place for individual sanctions in cartel law enforcement, readily accepted this point, in positing that

> [s]ince corporate fines rarely reach a level that would maximize their deterrent effect, they also provide insufficient incentives for a corporation to effectively monitor its agents to prevent them from acting unlawfully and from putting the corporation at the risk of being fined for participating in an unlawful cartel.[55]

In short, then, and irrespective of the potential force of Posner's argument for other types of corporate wrongdoing, *when the cartel sanctions to b*e imposed upon companies are sub-optimal,[56] the targeting of infringing individuals who work for the company may become an attractive idea in terms of securing deterrence.[57] After all, one must remember that it is the

> individual officers and agents who in the final analysis must make the antitrust laws work by reflecting in their day to day business decisions respect for and adherence to the underlying principles expressed in the antitrust laws.[58]

On the (realistic) assumption that the individual administrative fines that are imposed are actually sought to be collected by the competition authority, such sanctions therefore have potential to plug any deterrence gap that may be engendered by relying solely upon corporate sanctions: by targeting directly the individual who is responsible for taking the decision to engage in cartel activity,[59] they can impact upon that particular

50 A.M. Polinsky & S. Shavell, "Should Employees Be Subject to Fines and Imprisonment Given the Existence of Corporate Liability?" (1993) 13(3) International Review of Law and Economics 239, 255-256. See also J. Ellison, "Individual Deterrence and Competition Disqualification Orders" (2011) 10(1) Competition Law Journal 65, 67.

51 See, e.g.: S. Calkins, "Corporate Compliance and the Antitrust Agencies' Bi-Modal Penalties" (1997) 60(3) Law and Contemporary Problems 127, 142; and A. Ezrachi & J. Kindl, "Criminalization of Cartel Activity – A Desirable Goal for India's Competition Regime?" (2011) 23(1) National Law School of India Review 9, 13.

52 H. Amoroso, "Organizational Ethos and Corporate Criminal Liability" (1995) 17(1) Campbell Law Review 47, 58.

53 F. Wagner-von Papp, "Compliance and Individual Sanctions in the Enforcement of Competition Law," in J. Paha (ed.), *Competition Law Compliance Programmes: An Interdisciplinary Approach*, Springer, Cham, Switzerland, 2016, 139. See also B. Fisse, "Penal Designs and Corporate Conduct: Test Results from Fault and Sanctions in Australian Cartel Law" (2019) 40(1) Adelaide Law Review 285, 294.

54 In fact, it is not difficult to find examples of situations where individuals were promoted (or at the very least not sanctioned) within their companies after having been found to have engaged in competition law violations, itself a phenomenon that lends some credence to the claim concerning the alignment of the respective individual and corporate interests; see e.g. A. Stephan, "See No Evil: Cartels and the Limits of Antitrust Compliance Programs" (2010) 31(8) Company Lawyer 231, 237. This particular phenomenon has even been observed in the US when it started to rely more heavily upon individual *criminal* sanctions to enforce their competition laws; see e.g. M. Wheeler, "Antitrust Treble-Damage Actions: Do They Work?" (1973) 61(6) California Law Review 1319, 1337. For empirical work in support of the existence of this phenomenon in more recent times, see J. Connor & R. Lande, "Cartels as Rational Business Strategy: Crime Pays" (2012) 34(2) Cardozo Law Review 427, 440-442.

55 OECD Competition Committee, *Cartels: Sanctions Against Individuals*, DAF/COMP(2004)39, January 10, 2005, 7.

56 For a solid empirical analysis that concludes that current EU-level cartel fines are indeed sub-optimal, see e.g. F. Smuda, "Cartel Overcharges and the Deterrent Effect of EU Competition Law" (2014) 10(1) Journal of Competition Law and Economics 63. See also F. Smuda, "Cartels and Fines," in P. Whelan (ed.), *Research Handbook on Cartels*, Edward Elgar, Cheltenham, forthcoming.

57 *Cp.* R. Kraakman, "Corporate Liability Strategies and the Cost of Legal Controls" (1984) 93(5) Yale Law Journal 857.

58 T. Vickery, "Representing Individual Corporate Officers and Agents in Criminal Antitrust Proceedings" (1975) 26(3) Mercer Law Review 935, 950.

59 R. Blair, "A Suggestion for Improved Antitrust Enforcement" (1985) 30(2) Antitrust Bulletin 433, 452.

individual's cost/benefit analysis,[60] with the aim of moving her towards antitrust compliance with respect to her company's activities.[61] In other words, by targeting employees directly one can try to ensure that those employees' incentives are not distorted and that they are in fact incentivized to adhere to the dictates of the cartel prohibition.[62]

For some commentators on antitrust enforcement, this is a crucial point, with Markham, for example, arguing that "imposing a fine of any size, however large, will not deter violations unless the fine is imposed on the decision maker [i.e. the individual] who opts to violate the law."[63] Moreover, with the existence of personal sanctions, individuals will also be invested with a "weapon" which they can use to attempt to resist any pressure that may be placed upon them by their superiors to cause them to engage in anticompetitive behavior,[64] a situation that is naturally more likely to arise when corporate sanctions are indeed sub-optimal. Personal sanctions can therefore be seen as a useful mechanism to resist any process of deindividualization that may otherwise occur in a corporate setting.[65] In relative terms, individual fines can be far cheaper to administer than other types of personal sanctions (notably custodial sentences).[66] Their introduction also engenders less of an institutional burden, in that they can rely upon existing procedures and agency competences.[67] Given these points, it is thus rather understandable why the European Parliament, in resolutions adopted concerning the European Commission's Annual Report on Competition Policy, has in two recent consecutive years advocated in favor of introducing individual administrative cartel sanctions to complement those that already exist with respect to legal persons.[68]

Whilst not without their own controversy as a method of enforcing competition law provisions,[69] individual administrative sanctions present a significant potential advantage over corporate liability in terms of their ability to achieve deterrence: their success does not depend upon the extent to which a corporate entity is able to pay a (huge) optimal antitrust fine. Instead, the focus is placed on the *individual*'s expected cost/benefit analysis. The optimal individual administrative fine would focus on the expected personal benefit that the employee expects to gain from engaging in anticompetitive behavior. That benefit will of course be very indirect and nowhere near the expected benefit of the infringing company, with the result that it would be reasonable to accept that a cap of a multiple of an employee's annual benefits (as has been proposed by Riley[70]) would not undermine deterrence-focused efforts of the enforcer. The profit from the unlawful activity accrues after all to the infringing company.

Indeed, anticompetitive activity can be easily conceptualized as a form of what is known as "unethical pro-organizational behavior,"[71] in other words illegal or unacceptable behavior that is "neither specified in formal job descriptions nor ordered by superiors, yet is carried out to benefit or help the organization."[72] Most likely, if an employee engages in anticompetitive activity for any particular personal gain,[73] that individual's own expected benefit will be founded on the (possibly marginal) contribution that the anticompetitive behavior makes to the employee's

60 See e.g. D. Baker, "The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging" (2001) 69(5-6) George Washington Law Review 693, 713.

61 S. Souam, "Optimal Antitrust Policy under Different Regimes of Fines" (2001) 19 International Journal of Industrial Organization 1, 3.

62 M. Huffman, "Incentives to Comply with Competition Law" (2018) 30(2) Loyola Consumer Law Review 108, 120.

63 J. Markham, "The Failure of Corporate Governance Standards and Antitrust Compliance" (2013) 58(3) South Dakota Law Review 499, 507.

64 M. Crane, "Commentary: The Due Process Considerations in the Imposition of Corporate Liability" (1980) 1(1) Northern Illinois University Law Review 39, 45 (making this point with respect to criminal sanctions).

65 See e.g. P. Schultz, "The Morally Accountable Corporation: A Postmodern Approach to Organizational Responsibility" (1996) 33(2) Journal of Business Communication 165, 173.

66 See e.g. S.B. Farmer, "Real Crime: Criminal Competition Law" (2013) 9(3) European Competition Journal 599, 610.

67 See e.g. S. Hillsman, B. Mahoney, G. Cole & B. Auchter, "Fines as Criminal Sanctions," US Department of Justice, National Institute of Justice, Washington DC, September 1987, 2.

68 See: European Parliament, *European Parliament Resolution of 19 January 2016 on the Annual Report on EU Competition Policy (2015/2140(INI))*, [2018] OJ C11/2, [29]; and European Parliament, *European Parliament Resolution of 14 February 2017 on the Annual Report on EU Competition Policy (2016/2100(INI))*, [2018] OJ C252/78, [60].

69 F. Wagner-von Papp, "Introduction" [2016] 2 Concurrences 14, 17.

70 See Riley, *op. cit.*, 205.

71 A. Paruzel *et al.*, "Psychological Contributions to Competition Law Compliance," in Paha, *op. cit.*, 217.

72 E. Umphress, J. Bingham & M. Mitchell, "Unethical Behavior in the Name of the Company: The Moderating Effect of Organizational Identification and Positive Reciprocity Beliefs on Unethical Pro-Organizational Behavior" (2010) 95(4) Journal of Applied Psychology 769, 770.

73 On this assumption, see, e.g.: A. Beckenstein & H. Landis Gabel, "Antitrust Compliance: Results of a Survey of Legal Opinion" (1982) 51(4) Antitrust Law Journal 459, 465; and E. Combe & C. Monnier, "Why Managers Engage in Price Fixing? An Analytical Framework" (2020) 43(1) World Competition 35, 35.

career progression or to a specific performance bonus,[74] a benefit that could well be rather modest in absolute terms.[75] The payment of an optimal fine constructed on the basis of (a multiple of) such a contribution is likely – one could reasonably assume – to be within the ability to pay of the infringing employee, who let us not forget is probably wealthier than the average delinquent.[76] Indeed, with cartel activity in particular, it seems that it is the senior managers (which presumably implies rather well paid managers) who are more often than not involved in their company's respective infringements.[77]

In any case, an individual is arguably less likely to risk personal bankruptcy on the simple basis of a cost/benefit analysis than a corporate entity would its liquidation (i.e. as a result of potential risk aversion when personal stakes are very high, the rationality assumption is arguably more realistic or stronger with respect to a company than a natural person with, e.g., a family to support[78]). Furthermore, the authorities, in proceeding to the imposition of a fine outside of an individual's means, would not be engendering the sort of insupportable market-related negative externalities that would result from a corporate liquidation. Individual managers cannot therefore be confident that the competition authority will be lenient with them (i.e. that, in such circumstances, it will actually impose a sub-optimal fine) if they argue that the imposition of an optimal fine will be ruinous for them. These points taken together, then, allow one to posit that, unlike with corporate liability perhaps, the issue of inability to pay would not be overly concerning with respect to individual personal sanctions.[79]

An additional potential advantage of personal administrative cartel sanctions at EU level concerns their positive impact on the effective operation of administrative leniency: if the Commission not only is granted the power to impose such individual sanctions but also is allowed to operate – and does operate – an individual leniency program alongside them,[80] then it can theoretically improve the rate of detection for cartels, to the benefit of deterrence of anticompetitive behavior.[81] The point here is that by threatening the individuals, as well as their companies, with potential cartels fines, the Commission may be able to strengthen its reliance upon the "prisoner's dilemma" in enforcing its cartel prohibition; it can, in other words, build further distrust within a cartel arrangement leading either to its more rapid disintegration in practice or, failing that, to more likely self-reporting when the arrangement has fallen apart organically.[82] As has been stressed in the literature on antitrust criminalization, this effect can occur in two distinct ways: (a) there will be additional runners in a potential "race to the regulator," as individuals as well as legal persons are exposed and can therefore be incentivized to report the cartel to the authorities; and (b) the companies will therefore have an additional source of informing or whistle-blowing to worry about (i.e. their own infringing employees or those within the other companies participating in the cartel), with the result that they themselves may face a larger incentive to get in first to secure a fine discount.[83]

Of course, individual administrative sanctions are not without their own limitations. They thus should not be viewed as a panacea to the issue of cartel activity. The main drawback to individual administrative sanctions is they are open to the possibility of indemnification by the undertaking at issue,[84] with the result that their deterrent effect depends upon whether the legal system at issue can manage to prevent the

74 See Baker, *op. cit.*, 698. It is also possible that the individual infringer's intended benefit is the mere satisfaction of having contributed to their firm's profitability (Paruzel *et al., op. cit.*, 216) or simply the enjoyment of the "quite life" that results from not having to engage in aggressive competition (E. Morgan, "Controlling Cartels – Implications of the EU Policy Reforms" (2009) 27(1) European Management Journal 1, 11).

75 See, e.g.: P. Curran, "Antitrust Sentencing – The Defense Lawyer's View" (1979) 47(3) Antitrust Law Journal 707, 710; and A. Morrison, "Sentencing in Criminal Antitrust Cases" (1977) 46(2) Antitrust Law Journal 528, 529.

76 Posner, *op. cit.*, 271.

77 See e.g. D.D. Sokol, "Antitrust Compliance," in M. Hitt *et al.* (eds), *The Oxford Handbook of Strategy Implementation*, Oxford University Press, 2017, 162.

78 See Posner, R., "The Rights of Creditors of Affiliated Corporations" (1976) 43(3) University of California Law Review 499, 502. *Cf.* J. Macey, "Agency Theory and the Criminal Liability of Organizations" (1991) 71(2) Boston University Law Review 315, 334.

79 *Cf.*: W. Wils, "Panel 4: Criminal Sanctions: Working Paper 1," in C.D. Ehlermann & I. Atanasiu (eds), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law*, Hart Publishing, Oxford, 2003, 438; and T. Calvani & T.H. Calvani, "Custodial Sanctions for Cartel Offences: An Appropriate Sanction in Australia?" (2009) 17 Competition and Consumer Law Journal 119, 131.

80 Hong Kong is a recent example of an antitrust regime that imposes individual sanctions whilst also operating an individual leniency policy alongside a corporate (i.e. undertaking-focused) one; see Hong Kong Competition Commission, *Leniency Policy for Undertakings Engaged in Cartel Conduct*, April 16, 2020, https://www.compcomm.hk/en/legislation_guidance/policy_doc/files/Leniency_Policy_Individuals_E.pdf.

81 See P. Mändmaa, "Assessing the Effectiveness of Competition Law Enforcement Policy in Relation to Cartels" (2014) 3(11) Journal of Arts & Humanities 33, 45.

82 On the importance of distrust to a successful working of the mechanism of leniency, see e.g. C. Leslie, "Trust, Distrust, and Antitrust" (2004) 82(3) Texas Law Review 517, 640-641.

83 See F. Ducci, "Cartel Criminalization in Europe: Addressing Deterrence and Institutional Challenges" (2018) 51(1) Vanderbilt Journal of Transnational Law 1, 21.

84 See e.g. D. Rubinfeld, "Improving Antitrust Sanctions," in D. Ginsburg & J. Wright (eds), Global Antitrust Economics – Current Issues in Antitrust and Law & Economics, Institute of Competition Law, New York, 2016, 99.

company from paying the antitrust fine on behalf of the responsible individual.[85] Full indemnification occurs in this context when the company in effect pays the antitrust fine officially imposed by the competition authority upon its employee, as well as the legal fees encountered by that natural person in the administrative procedure, so that the employee does not actually face a financial detriment from antitrust enforcement: through indemnification the individual sanction can become a de facto corporate one.[86] While, perhaps surprisingly,[87] the indemnification by companies of the fines and/or the legal expenses of their employees can be legally acceptable in certain jurisdictions,[88] there is no denying the potential of the phenomenon of indemnification to undermine the objective of the legal sanction in question, even when it is only partial in nature.[89] In practice, with respect to competition law, indemnification can achieve its (anti-deterrence) aim in a variety of ways; as Zimmer explains,

> [t]he preventive effect of fines on natural persons is … doubtful when these can be sure to receive a corresponding compensation from their employers. Such compensation can be paid ex ante as well as *ex post*, for instance when a higher salary or an additional bonus is agreed upon before an authority discovers the cartel [or, for our purposes, any unlawful anticompetitive conduct], or when the employee is reimbursed in the amount of the fine after a regulatory offence proceeding is conducted.[90]

In the absence of any real stigma associated with the imposition of individual administrative sanctions, successful indemnification thus ensures that the employee's cost/benefit analysis does not include consideration of such sanctions, with the result that they become ineffective in pushing the employee towards compliance.[91] Naturally, the problem of potential indemnification is not an easy one to resolve in practice,[92] not least due to due to difficulty of ensuring detection of indemnification.[93] The first thing to do would of course be to prohibit a company from paying an individual administrative antitrust fine,[94] as has been done, for example, in New Zealand.[95] That prohibition also needs to be effectively enforced with sanctions for the infringing company.

As intimated above, key too is the issue of stigma. The crucial point here is that, if being sanctioned officially by the Commission is viewed as stigmatic by the individual concerned, then the *mere process* of sanctioning can act as a deterrent, irrespective of whether indemnification of the fine by the company later occurs. Indeed, as Grasmick & Appleton have noted, "[u]ndoubtedly, the avoidance of stigma is a motive in human behavior, and, consequently, the threat of stigma if exposed as a law violator probably is a deterrent."[96] Fortunately, the Commission has been quite active – and arguably rather successful – in pursuing a policy of stigmatization with respect to cartel activity. Such activity is expressly acknowledged in Commission statements as involving "wrongdoing" on behalf of the infringing undertaking.[97]

This morality-laden term is even employed in speeches commenting on situations where infringing undertakings benefit from a reduction in their cartel fine as a result of their formally admitting their respective infringements: when settling with the Commission via its official

85 G. Lusty, "Refining the Anti-Cartel Toolkit: Complements to Corporate Fines" (2010) 9(3) Competition Law Journal 338, 349.

86 W. Mullin & C. Snyder, "Should Firms be Allowed to Indemnify their Employees for Sanctions?" (2010) 26(1) Journal of Law, Economics, and Organization 30, 31.

87 See, however, P. Bowal, "Expensive Day at the Office: Can Corporations Indemnify Their Agents Who Suffer Personal Liability for Regulatory Offences?" (1995) 45(3) University of Toronto Law Journal 247, 276.

88 See e.g. P. Bucy, "Indemnification of Corporate Executives Who Have Been Convicted of Crimes: An Assessment and Proposal" (1991) 24(2) Indiana Law Review 279.

89 See e.g. R. Mikos, "Indemnification as an Alternative to Nullification" (2015) 76(1) Montana Law Review 57, 73.

90 D. Zimmer, "Individual Sanctions in German Competition Law: The Case for a Criminalisation of Antitrust Offences" [2016] 2 Concurrences 28, 31. See also T. Wein, "Cartel Behaviour and Efficient Sanctioning by Criminal Sentences" (2021) 17(2) European Competition Journal 309, 311.

91 *Cp.* Anonymous, "Indemnification of the Corporate Official for Fines and Expenses Resulting from Criminal Antitrust Litigation" (1962) 50(3) Georgetown Law Journal 566, 576.

92 P. Wirz, "Imprisonment for Hard Core Cartel Participation: A Sanction with Considerable Potential" (2016) 28(2) Bond Law Review 89, 106.

93 See, e.g.: Department of Trade and Industry, "A World Class Competition Regime," CM 5233, London, July 2001, [7.17]; A. Boberg, "Fixing the Price at Liberty: The Case for Imprisoning Price-Fixers in New Zealand" (2010) 16 Auckland University Law Review 81, 91; and D. King, "Criminalisation of Cartel Behaviour," Ministry of Economic Development Occasional Paper 10/01, Wellington, New Zealand, January 2010, 17.

94 See e.g. D. Bein, "Payment of a Fine by a Person Other than the Defendant – Law and Policy" (1974) 9(3) Israel Law Review 325, 343.

95 See Section 80A of the Commerce Act 1986, as amended.

96 H. Grasmick & L. Appleton, "Legal Punishment and Social Stigma: A Comparison of Two Deterrence Models" (1977) 58(1) Social Science Quarterly 15, 20.

97 See e.g. European Commission, "Statement by Commissioner Vestager on Decision to Fine Truck Producers €2.93 Billion for Participating in a Cartel," STATEMENT/16/2585, Brussels, July 19, 2016, 2.

settlement policy, cartelists in effect acknowledge their own "wrongdoing."[98] Cartel activity in particular is officially viewed in the same light as "taking steroids at the Olympics."[99] It is unequivocally perceived as being "bad for everybody" (except, of course, the participants), causing customers in particular to be "outraged."[100] As conduct that is "strictly forbidden to companies doing business in Europe,"[101] cartel activity is "serious malpractice" for which no tolerance is warranted.[102] Those who engage in it are quite simply "robber barons" who deserve punishment,[103] and the Commission "will not hesitate to take firm action" against such conduct.[104] Given this context, it is not an exaggeration to state – as Harding does – that, at EU level, cartel activity has been subjected to "official vilification."[105] At times, the language employed by Commission officials when detailing the wrongfulness inherent in cartel activity can be very similar indeed to that used by Department of Justice officials when commenting on their criminal enforcement activities against individual executives, who face up to ten years of imprisonment as a maximum sentence if convicted.[106]

On at least three occasions, the Commission has even gone as far as stating that price-fixing is "one of the cardinal sins of EU antitrust enforcement,"[107] a moralistic phrase which echoes the words of the U.S. Supreme Court when it held that cartels are "the supreme evil of antitrust."[108] The analogy with sin – with it the implication that some form of "penance" is required – is compounded with Commission statements that acknowledge the "strong temptation" that the unlawful profits from cartels can engender in potential and actual offenders.[109] The current Commissioner for Competition has gone as far as stating that, with antitrust offenses, "what is at stake is as old as Adam and Eve," in that "it all comes down to greed."[110]

The EU Courts have themselves formally acknowledged the stigmatic aspect of EU-level antitrust fines. In her Opinion in *Schenker*, for example, AG Kokott emphasized that there is a "condemnation ("stigma") associated with the imposition of cartel … penalties against the [infringing] undertaking."[111] For AG Sharpston, in the *KME Germany* case, cartel activity in particular "involves engaging in conduct which is generally regarded as underhand, to the detriment of the public at large, a feature which it shares with criminal offences in general and which entails *a clear stigma*."[112] In terms of judgments, the General Court is the body that has, in recent times, routinely emphasized the stigmatic nature of

98 See J. Almunia, "Introductory Remarks on Bearings Cartel," SPEECH/14/233, Brussels, March 19, 2014, 1.

99 N. Kroes, "Antitrust and State Aid Control – The Lessons Learned," SPEECH/09/408, New York, September 24, 2009, 3.

100 J. Almunia, "Taking Stock and Looking Forward: A Year at the Helm of EU Competition," SPEECH/11/96, Paris, February 11, 2011, 2

101 European Commission, "Antitrust: Commission Fines Producers of TV and Computer Monitor Tubes €1.47 Billion for Two Decade-Long Cartels," Press Release, IP/12/1317, Brussels, December 5, 2012, 1.

102 European Commission, "Antitrust: Commission Fines Marine Hose Producers €131 Million for Market Sharing and Price-Fixing Cartel," Press Statement, IP/09/137 Brussels, January 28, 2009, 1. See also: European Commission, "Antitrust: Commission Fines Eight Producers of Capacitors €254 Million for Participating in Cartel," Press Release, IP/18/2281, Brussels, March 21, 2018, 1; and European Commission, "Antitrust: Commission Fines Investment Banks €371 Million for Participating in a European Governments Bonds Trading Cartel," Press Release, IP/21/2565, Brussels, May 20, 2021, 1.

103 P. Lowe, "Cartels, Fines, and Due Process" [June 2009] Global Competition Policy 1, 7.

104 European Commission, "Statement by Executive Vice-President Vestager on the Commission Decision to Fine Car Manufacturers €875 Million for Restricting Competition in Emission Cleaning for New Diesel Passenger Cars," STATEMENT/21/3583, Brussels, July 8, 2021, 2.

105 C. Harding, "Forging the European Cartel Offence: The Supranational Regulation of Business Conspiracy" (2004) 12(4) European Journal of Crime, Criminal Law and Criminal Justice 275, 276.

106 For example, Kroes's & Lowe's above-noted remarks that cartel activity is akin to stealing and fraud or robbery distinctly reflects the comments of the US antitrust enforcer Klein, who famously claimed that price-fixing was merely "theft by well-dressed thieves": J. Klein, "The War against International Cartels: Lessons from the Battlefront," 26th Annual Conference on International Antitrust Law and Policy, Fordham Corporate Law Institute, New York, October 14, 1999, 3. *Cp.* A. Italianer, "Fighting Cartels in Europe and the US: Different Systems, Common Goals," Speech, Annual Conference of the International Bar Association, Boston, October 9, 2013, 2.

107 See: European Commission, "Commission Ends Cartel Proceedings against Dutch Bank SNS After It Changed Its Tariffs for Exchanging Euro-Zone Currencies," Press Release, IP/01/554, Brussels, April 11, 2001, 1; European Commission, "Commission Ends Cartel Proceedings against Bayerische Landesbank Girozentrale After It Changed Its Tariffs for Exchanging Euro-Zone Currencies," Press Release, IP/01/BAY634, Brussels, May 3, 2001, 1; European Commission, "Commission Ends Proceedings against Ulster Bank After It Changed Its Tariffs for Exchanging Euro-Zone Currencies," Press Release, IP/01/635, Brussels, May 3, 2001, 1.

108 *Verizon Communications v. Law Offices of Curtis V. Trinko* (2004) 540 US 398, 408. See also M. Vestager, "A New Era of Cartel Enforcement," Speech, Italian Antitrust Association Annual Conference, October 22, 2021.

109 See e.g. J. Almunia, "Compliance and Competition Policy," SPEECH/10/586, Brussels, October 25, 2010, 2.

110 M. Vestager, "Luther and the Modern World," Speech, Copenhagen, November 14, 2016.

111 Case C-681/11, *Bundeswettbewerbsbehörde and Bundeskartellanwalt v. Schenker & Co. AG and others,* ECLI:EU:C:2013:126, February 28, 2013, Opinion of AG Kokott, [59].

112 Case C-272/09 P, *KME Germany and others v. Commission* [2011] ECR I-12789, Opinion of AG Sharpston, [64] (emphasis added).

EU-level antitrust enforcement. To take a representative example, in *Servier v. Commission* the General Court expressly acknowledged that there is a "*non-negligible stigma* attached to a finding of involvement in an infringement of the competition rules for a natural or legal person."[113]

To take another, in *Martinair Holland NV v. Commission*, it stated that an infringement of Article 101(1) TFEU "involves engaging in conduct which is generally regarded as *underhand*, to the detriment of the public at large, and which *entails a clear stigma*."[114] In fact, an online search of the Courts' official database of judgments reveals that there are over thirty judgments from the General Court that expressly acknowledge the stigmatic nature of EU-level antitrust enforcement.[115] If the Courts are indeed correct that stigma does attach to violations of the EU-level cartel prohibition, then the issue of indemnification should not become an impossible one for those who support the imposition of individual cartel sanctions by the Commission: the enforcement process should still contain a "bite" for the sanctioned individual, to the benefit of cartel deterrence.

V. CONCLUSION

The Commission has an impressive track record with respect to anti-cartel enforcement. There is, however, a lacuna in its enforcement powers: it does not have the ability to impose fines on natural persons when they are they responsible for their companies' cartel activity. This article argued that, for reasons of deterrence, the Commission should be invested with the power to impose individual administrative sanctions for violations of the EU-level cartel prohibition. Admittedly, such sanctions have a drawback in terms of their vulnerability to indemnification. Fortunately, the stigmatization policy currently pursued by the Commission with respect to cartel activity provides considerable scope to prevent the issue of indemnification from undermining the potential deterrent effect of individual administrative sanctions.

113 Case T-691/14, *Servier SAS v. Commission*, ECLI:EU:T:2018:922, December 12, 2018, [792] (emphasis added). See also Case T677/14, *Biogaran v. Commission*, ECLI:EU:T:2018:910, December 12, 2018, [130].

114 Case T67/11, *Martinair Holland NV v. Commission*, ECLI:EU:T:2015:984, December 16, 2015, [29] (emphasis added). See also Case T48/11, *British Airways plc. v. Commission*, ECLI:EU:T:2015:988, December 16, 2015, [34].

115 See http://curia.europa.eu/juris/recherche.jsf?language=en (using the term "stigma" in the text box, searching in the "competition" subject-matter box, and confining the search to closed cases and to the General Court and the Court of Justice).

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