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Published in:
Europe in Crisis: Crime, Criminal Justice, and the Way Forward. Essays in Honour of Nestor Courakis. Festschrift für Nestor Courakis. Mélanges offerts à Nestor Courakis

2017

Document Version:
Publisher's PDF, also known as Version of record

Link to publication

Citation for published version (APA):
Tzanaki, A. (2017). From Economic Recession to Legal Opportunity: The Case for Cartel Criminalisation in Europe. In C. D. Spinellis, N. Theodorakis, E. Billis, & G. Papadimitrakopoulos (Eds.), *Europe in Crisis: Crime, Criminal Justice, and the Way Forward. Essays in Honour of Nestor Courakis. Festschrift für Nestor Courakis. Mélanges offerts à Nestor Courakis: Volume II, essays in English, German, French, and Italian* (pp. 1043-1077). Sakkoulas Publications.

Total number of authors:
1

From economic recession to legal opportunity: the case for cartel criminalisation in Europe

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I. Introduction

In the aftermath of the global financial meltdown and ensuing EU crisis, the European Union still tries to agree on the causes and fine-tune its regulatory responses. Among the policy tools employed, once unimagined but now the new mainstream, have been high-powered EU state-aid laws, bank bail-in rules and aggressive intervention away from market fundamentals. Yet the crucial question remains looming upon EU policymakers: can the next crisis be prevented? Perhaps an affirmative answer partly lies with enhancing individual liability that goes beyond macro and reactive approaches and promotes deterrence of the actual wrongdoers. After all, it is people behind financial and private organisations making the actual decisions that impact our lives.

In the area of EU competition law, the time is ripe to seriously think about criminalising cartels. Despite details of implementation – EU harmonisation or decentralised enforcement, the price of another missed opportunity is too high and the challenges posed by the EU supranational structure can no longer serve as an excuse. More importantly, counter to claims that such a move is not in line with the European tradition, there is ample evidence that several Member States criminalise hard-core anticompetitive behaviour such as bid-rigging in their national laws,[1] and the EU itself is moving to that direction in other areas (e.g. criminal sanctions for market abuse offenses).[2] In the age of corporate elites, managerial capitalism, financial and industrial globalisation the most effective way to hold accountable those at the top of the ladder is by raising the threat of criminal liability. In this way we make sure that their incentives are closely aligned with those of society as a whole. In the process we also address major problems such as agency costs, moral hazard and reinforce the effectiveness of existing leniency programmes aiming to undermine cartel stability.

What Europe mostly needs is more competition and to that goal we must make market players realise that they cannot rig the rules, as they shall have "skin in the game". By having individuals bear at least some of the consequences of their actions, not only do we foster competition on the merits and help restore public confidence in markets but we also relieve companies and their parents from exorbitant monetary sanctions which have proved ineffectual and counterproductive and hence set the path for the natural selection of value creating firms in a healthy business environment. Criminalising hard-core cartels is the right thing to do and is also good economic policy that sets the tone for more

[1] For a historical perspective on the origins of criminal cartel legislation and enforcement in Europe, see Wouter PJ Wils, 'Is Criminalization of EU Competition Law the Answer?' in Katalin J Cseres, Maarten Schinkel and Floris OW Vogelaar (eds), *Criminalization of Competition Law Enforcement* (Edward Elgar Publishing 2006) 65, fn 22; Florian Wagner-von Papp and others, 'Individual Sanctions for Competition Law Infringements: Pros, Cons and Challenges' [2016] Concurrences Review N° 2-2016, Art. N° 78515 14, 22 and 24; For a contemporary perspective and a summary list of EU Member States with criminal sanctions against cartelists, see ibid 16–17, in particular fn 17; Keith R Jones and Farin Harrison, 'Criminal Sanctions: An Overview of EU and National Case Law' March 2014 e-Competitions Bulletin N° 64713.

[2] Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive) [2014] OJ L173/179. The Directive prescribes harmonised criminal penalties for insider trading and market or benchmark manipulation, and entered into force across all Member States on 3 July 2016.

thriving EU business and more law-abiding corporate employees. No question many challenges lie ahead and one needs to proceeds with great care in designing and implementing criminal law policy, yet the direction is clear.

This essay attempts to answer three questions: i) why illegal cartels persist given the existing liability regime in Europe; ii) why criminal sanctions against hard-core cartelists are a necessary supplement to the antitrust enforcement toolbox; iii) why criminal sanctions are desirable from a normative perspective. Accordingly, the analysis proceeds as follows. Part II sheds light on two prominent but underappreciated problems in the intersection of EU antitrust law and corporate governance that underlie the failures and inadequacy of the existing liability regime. Part III analyses the advantages of moving towards a mixed regime that combines corporate and individual criminal liability. Part IV explores the normative, economic and moral, arguments for cartel criminalisation. Part V concludes with some thoughts on lessons to be learnt from the crisis and the way forward for Europe.

II. EU Antitrust and the Corporation: Two Overlooked Problems?

There is universal agreement that the fight against hard-core cartels is the first priority in terms of competition policy. To that end, a growing commitment among global antitrust authorities has been building up, not least marked by the recent "leniency revolution".[3]Nevertheless, the war seems hardly won or nearly over as cartel arrangements keep on forming and being uncovered. Globalisation makes the battle against cross-border cartels ever more challenging. Despite increased public enforcement efforts, latest data suggests that Europe's track record is not very promising. In terms of GDP, propensity for cartelisation in Europe is three times and projected cartel overcharges four times higher than North America, notwithstanding the fact that total

[3] Giancarlo Spagnolo, 'Leniency and Whistleblowers in Antitrust' in Paolo Buccirossi (ed), *Handbook of Antitrust Economics* (MIT Press 2008); Caron Beaton-Wells and Christopher Tran, *Anti-Cartel Enforcement in a Contemporary Age: Leniency Religion* (Hart Publishing 2015).

fines imposed on international cartels by the EU Commission and the national competition authorities are nine times greater in size.[4] Widespread recourse to private antitrust enforcement in the US and Canada equalises the picture but does not explain the persistence of illegal cartels. In order to understand the deep roots of this phenomenon, with particular reference to Europe, and why its eradication still eludes us, one needs to look into the relationships within the corporation and the competition law treatment of its actors.

A. The Principal-Agent Relationship and the Problem of Moral Hazard

The corporation is a complex set of contracts that brings together individuals and factors of productions organised as a separate legal entity. Managers, the top decision makers within the firm, and other corporate employees are in a classic agency relationship with the corporation, whose performance is disciplined by internal monitoring and external market mechanisms.[5] This contractual relationship between the corporation (principal) and its acting agents is generally considered to be efficient as subject to the above mechanisms. The agent is expected to act in the principal's best interests in performing the task delegated by the principal. However, there may still be instances where managerial or employee incentives are not fully aligned with those of shareholders and residual owners of the corporation. The agent's decisions may then diverge from those of the principal, and conflicts of interest may arise, as their welfare functions are not perfectly overlapping. The occasional loss due to imperfect monitoring and the resources spent to ensure incentive compatibility are termed "agency costs".[6] These costs

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[4] John M Connor, 'The Private International Cartels (PIC) Data Set: Guide and Summary Statistics, 1990-July 2016 (Revised 2nd Edition)' (2016) <http://papers.ssrn.com/abstract=2821254> accessed 26 August 2016.

[5] Eugene F Fama, 'Agency Problems and the Theory of the Firm' (1980) 88 Journal of Political Economy 288.

[6] Michael C Jensen and William H. Meckling, 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure' (1976) 3 Journal of Financial

are to some extent an unavoidable side effect of the corporate form – as evidenced by the separation of ownership and control.

A related problem is that of "moral hazard", which arises when an agent's self-interested behaviour is unobservable but its outcome can be observed.[7] The agent's action affects the principal's payoff and the latter can use incentive schemes – by means of penalties and rewards – to induce the agent to act in a way he prefers.[8] The problem is typical in insurance settings,[9] employment relationships or between shareholders and management in a corporation.[10] However, there are several trade-offs under moral hazard between providing appropriate incentives for the agent and: 1) monitoring/enforcement costs; 2) providing an *ex ante* limited liability rent if the agent has no wealth; 3) providing full insurance if the agent is risk averse.[11] These trade-offs often lead to distortions and inefficiencies.[12] This suggests that the combination of optimal incentives and optimal risk sharing, and the attainment of the *first-best* outcome become elusive.[13] The problem is also present in the context of "too-big-to-fail" banks and financial institutions that may engage in excessive risk-taking in expectation of government in-

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Economics 305.

[7] Bengt Hölmstrom, 'Moral Hazard and Observability' (1979) 10 Bell Journal of Economics 74; JA Mirrlees, "The Theory of Moral Hazard and Unobservable Behaviour: Part I' (1999) 66 Review of Economic Studies 3.

[8] David M Kreps, *A Course in Microeconomic Theory* (Princeton University Press 1990) 577–579.

[9] Richard A Posner, 'An Economic Theory of the Criminal Law' (1985) 85 Columbia Law Review 1193, 1203: 'The moral hazard is the danger that the insured will be induced by the fact that he has insurance to commit the act against which he has insured and thereby escape the costs of the act while reaping its benefits.'

[10] Steven Shavell, 'Risk Sharing and Incentives in the Principal and Agent Relationship' (1979) 10 Bell Journal of Economics 55.

[11] Jean-Jacques Laffont and David Martimort, *The Theory of Incentives: The Principal-Agent Model* (Princeton University Press 2002) 147–150.

[12] ibid 147–150.

[13] Alan O Sykes, 'The Economics of Vicarious Liability' (1984) 93 Yale Law Journal 1231, 1236–1239.

tervention or a "bailout" with taxpayer money (a form of "public insurance"). In a more relevant antitrust context, regulators concerned about financial stability may consider large banks involved in cartel arrangements as "too-big-to-fine", with their incentives compromised as they will not have to bear the (full) consequences of their actions.[14]

Viewed from this perspective, a "moral hazard" problem and potential agency costs arise given the fact that EU competition law only applies to[15] and sanctions "undertakings".[16] That is independent corporate entities performing economic activities or being part of a corporate group that is recognised as a "single economic entity".[17] Individuals are not directly addressed by EU antitrust rules.[18] Therefore, corporate executives and employees have no "skin in the game" when deciding their, and by inference the corporation's, involvement in a cartel agreement:[19] they may benefit from the illegal arrangement directly or get rewarded by their firm for any increased profits but they know with certainty that they will not be subject to any sanctions for their actions. They are *de jure* insulated from antitrust liability. Even if we assume that this full risk shifting of antitrust liability to the corporation is efficient in the sense that it may resolve any conflicts of interest be-

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[14] Giancarlo Spagnolo and Catarina Marvão, 'Should Price Fixers Finally Go To Prison: Criminalization, Leniency Inflation and Whistleblower Rewards In The EU' [2016] CRESSE Conference 2016 - Advances in the Analysis of Competition Policy and Regulation 7 <http://www.cresse.info/uploadfiles/2016_pa5_pa2.pdf>.

[15] David Bailey and Vivien Rose (eds), *Bellamy & Child European Union Law of Competition* (7th ed, Oxford University Press 2013) para 2.003.

[16] Article 23(2), Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules of competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.

[17] Bailey and Rose (n 15) para 2.024.

[18] Cf. Recital 8, Regulation 1/2003 (n 16): '[…] this Regulation does not apply to national laws which impose criminal sanctions on natural persons except to the extent that such sanctions are the means whereby competition rules applying to undertakings are enforced.'

[19] Nassim N. Taleb and Constantine Sandis, 'The Skin In The Game Heuristic for Protection Against Tail Events' (2014) 1 Review of Behavioral Economics 1.

tween the principal and its corporate agents, the exclusion of any individual liability for corporate actors – indeed a form of "public insurance" – may entail a divergence between aligned private corporate incentives and the public interest.[20] In essence, the law may eliminate agency costs but not necessarily "moral hazard" too.

The EU approach imposes strict vicarious liability solely on the corporation.[21] Its corporate agents are not subject to any administrative fines, civil damages or other sanctions. This legal position is defensible in principle.[22] Strict liability has many theoretical virtues.[23] But its util-

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[20] Cf. Reinier H. Kraakman, 'Corporate Liability Strategies and the Costs of Legal Controls' (1984) 93 Yale Law Journal 857, 898.

[21] Reinier Kraakman, 'Economic Policy and the Vicarious Liability of Firms' in Jennifer Arlen (ed), *Research Handbook on the Economics of Torts* (Edward Elgar Publishing 2013) 234: 'Vicarious liability is absolute, meaning that it attaches without any fault or complicity by the principal.'; Sykes (n 13) 1231: 'Business principals frequently incur civil liability for the wrongs of their agents. If the wrong is not ordered, authorized, or encouraged by the principal, then his liability is "vicarious." [...] Under certain conditions, principals are vicariously liable for torts and unauthorized contracts of their agents. Corporate stockholders are vicariously liable for antitrust violations by their agents [...].'

[22] Kraakman (n 20) 865: '[...] enterprise liability is the normal form of corporate liability in the prescriptive as well as the descriptive sense, and [...] managerial liability should be viewed as an ancillary form - as a kind of backstop for occasions when enterprise liability is likely to fail.'

[23] Steven Shavell, 'Strict Liability versus Negligence' (1980) 9 Journal of Legal Studies 1; Steven Shavell, 'Liability for Accidents' in AM Polinsky and S Shavell (ed), *Handbook of Law and Economics*, vol 1 (Elsevier 2007); Richard A Posner, *Economic Analysis of Law* (8th ed, Aspen Publishers 2011) 226–231. Strict liability is superior in terms of administrative simplicity and information requirements for enforcers (but not potential injurers), is a better means of risk sharing, and preferable if it is more desirable to control the injurer's presence and activity than the victim's – in the latter instance it is assumed to produce more appropriate incentives to take optimal care and levels of activity. It is important to note, however, that strict liability leads to optimal results only if the expected sanction equals the social cost of the harm resulting from the misconduct. Even if the firm occasionally fails to deter corporate misconduct, as long as it is forced to fully internalise the harm of their illegal acts, then the price of their products will reflect the full social costs of produc-

ity shrinks in circumstances where the costs come to outweigh any of its benefits. Importantly, one needs to appreciate the difference between the generally cost-effective rule of "direct strict liability" imposed on the actual wrongdoer, and strict vicarious corporate liability that is potentially inefficient and also entails substantial administrative costs.[24] Indeed, the whole doctrine of *respondeat superior* and vicarious corporate liability is based on the legal fiction that the principal (corporation / shareholders) is in a position to control its agents (managers/ employees) and hence on a "hierarchical model of the firm".[25] Strict liability via *respondeat superior*, as other cases of collective punishment, is premised on the idea that "someone [principal] other than the actual perpetrator [agent] of a wrongful act may have more information that he could, if motivated to do so, use to prevent the act than the government has".[26] Two points need to be made here. First, if it is almost impossible for the corporation to prevent all wrongdoing by low-level employees or risk loving managers, for example, then any "beneficial allocative effects" of strict liability are negated.[27] Second, the rule minimises social cost by tapping on private information and optimising incentives with the ultimate aim to prevent wrongful acts. It restores deterrence by targeting the principal in case of agent's insolvency and by allowing liability to be shifted back, via indemnity, to the actual tortfeasor, i.e. the lowest cost avoider.[28] In this light, the rationale favouring vicarious corporate liability is that, under the right circumstances, it may be more efficient in terms of deterring, monitoring

tion, including expected liability costs. Therefore, product prices and consumption will be at appropriate levels and market distorions are avoided. On this latter point, see A Mitchell Polinsky and Steven Shavell, 'Should Employees Be Subject to Fines and Imprisonment given the Existence of Corporate Liability?' (1993) 13 International Review of Law and Economics 239.

[24] Jennifer Arlen, 'The Potentially Perverse Effects of Corporate Criminal Liability' (1994) 23 Journal of Legal Studies 833, 849.

[25] Kraakman (n 21) 256–7.

[26] Posner (n 23) 239 and 292.

[27] ibid 240.

[28] ibid 241–242.

and sanctioning wrongdoing of the corporate actors.

However, theory suggests that corporate liability standing alone "fails" in three concrete cases, i.e. due to: i) "asset insufficiency" (practical constraints on the firm's ability to "pay the law's price" for its misconduct); ii) "sanction insufficiency" (limits of corporate penalties alone to produce adequate deterrence at reasonable cost); iii) "enforcement insufficiency" (constraints on the ability to detect and prosecute certain "low-visibility" offenses).[29] The commonality in all these cases is that the total costs of solely using strict corporate liability – e.g. externalities imposed on involuntary creditors/tort victims; underdeterrence; or underenforcement – exceed the costs of potential alternative liability regimes.[30] In fact, this may be the necessary spillover effects of vicarious corporate liability, being conceived not as a system of direct punishment of actual wrongdoers but as an incentive mechanism for the corporation to detect and punish its agents internally.[31] This self-regulatory model of controlling corporate misconduct implicitly trades off risk shifting flexibility and minimisation of agency costs, i.e. reduced conflicts of interest and compliance costs, with the ability to actually deter *ex ante* and enforce *ex post* in line with its paradigmatic potential to maximise social welfare. At best, it is a model fraught in "moral hazard", as explained above, with dubious credibility.[32] At

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[29] Kraakman (n 20) 867–868.

[30] Kraakman (n 20) (analysing the advantages of "dual liability" regimes – with concurrent corporate and personal liability, either shiftable or absolute - and the circumstances that may be preferable); Arlen (n 25) (dscussing the relative merits of "pure strict vicarious criminal liability" and alternative corporate liability rules - e.g. negligence, mitigation or privilege regimes); Jennifer Arlen and Reinier Kraakman, 'Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes' (1997) 72 New York University Law Review 687 (proposing mixed corporate liability regimes, combining both strict liability and duty-based liability elements – "adjusted strict liability" or "composite liability" regimes – as superior to the traditional strict vicarious liability rule).

[31] Arlen and Kraakman (n 30) 754.

[32] Moral hazard operates at two levels: between the corporation/ shareholders (principal) and the managers/ employees (agents), but also between the corpora-

worst, it is a wholly inefficient and arbitrary system that may lead to undesirable outcomes. In the first instance, vicarious liability is not an optimal or credible regime when the corporation is able to influence the probability that their agents' wrongful acts will be detected and sanctioned[33] or when it "controls all the enforcement-relevant information".[34] This explains why compliance programmes may be either socially wasteful or of questionable effectiveness, under strict corporate liability standing alone.[35] In the second instance, vicarious liability is arbitrary and inefficient when its effective application is contingent on

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tion that is subject to sanctions for the antitrust violation perpetrated by its agents and the public enforcement authorities that represent the public interest. See n 20 and accompanying text. In fact, within the corporation, moral hazard is present at several stages: *ex ante* when the agent decides to undertake the illegal act, but also *ex post* when the corporation undertakes policing or reporting measures.

[33] Kraakman (n 21) 245–248 and 256; Arlen and Kraakman (n 30).

[34] Kraakman (n 21) 258. Notably, even though the corporation may have control and an information advantage as regards enforcement, compared to the antitrust authority, in this setting, this does not mean that it necessarily has superior information as to the occurrence of the illegal act itself. It is the wrongdoer who has full control of the latter.

[35] For an insightful analysis of the "perverse effects and credibility problems" that plague strict liability, see Arlen and Kraakman (n 30) 709–717; and Bruce H Kobayashi, 'Antitrust, Agency, and Amnesty: An Economic Analysis of the Criminal Enforcement of the Antitrust Laws against Corporations' (2001) 69 George Washington Law Review 715, 735–739. As Arlen and Kraakman convicingly explain strict liability may result in either excessive or inadaquate corporate compliance and monitoring levels. They may be excessive when the sanction exceeds the expected social cost of harm. But they can also be insufficient when *ex post* policing measures increase the probability of punishing the corporation itself, therefore they are not an *ex ante* credible threat that will necessarily deter corporate agents from wrongdoing. See also Assaf Hamdani and Alon Klement, 'Corporate Crime and Deterrence' (2008) 61 Stanford Law Review 271, 276 and 290–298. When compliance measures cannot eliminate misconduct - e.g. when agents derive substantial personal benefits from wrongdoing, or when the severity of corporate sanctions raises the risk of bankruptcy - firms may reduce their monitoring effort as the marginal benefit of additional compliance does not lead to equal reduction in expected liability.

external and not *ex ante* verifiable factors (e.g. firm's wealth constraints) that may lead to underdeterrence of wrongdoers and undercompensation of victims with adverse welfare consequences in both instances. These effects are amplified in combination with other legal doctrines such as limited corporate liability[36] and potential strict liability of a parent company for antitrust violations of its subsidiaries.[37]

B. Antitrust Sanctions and the Problem of Underdeterrence

Corporate entities liable for antitrust violations under EU competition law may face either administrative fines[38] or private damages actions.[39] Against all good intentions, it is difficult for corporate sanctions alone to produce desirable results on all fronts. What is particularly worrying, however, is the indication that corporate liability fails in its most important task: to prevent antitrust violations from occurring.[40]

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[36] Frank H Easterbrook and Daniel R Fischel, 'Limited Liability and the Corporation' (1985) 52(1) University of Chicago Law Review 89.

[37] Carsten Koenig, 'Parent Company Liability for Antitrust Infringements by Subsidiaries – an Economic Analysis of the Single Economic Entity Doctrine in EU Competition Law' (LLM Thesis, Harvard Law School 2016).

[38] Regulation 1/2003 (n 16). Wouter PJ Wils, 'The European Commission's 2006 Guidelines on Antitrust Fines: A Legal and Economic Analysis' (2007) 30 World Competition: Law and Economics Review 197.

[39] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, [2014] OJ L 349/1. The new Directive aims to harmonise private antitrust enforcement across Member States and will become fully effective on 27 December 2016. Peter Davis, Ioannis Lianos and Paolisa Nebbia, *Damages Claims for the Infringement of Competition Law* (Oxford University Press 2015); Damien Geradin, 'Collective Redress for Antitrust Damages in the European Union: Is This a Reality Now?' (2015) George Mason Law & Economics Research Paper No. 15-16.

[40] William Breit and Kenneth G Elzinga, 'Antitrust Penalties and Attitudes Toward Risk: An Economic Analysis' (1973) 86 Harvard Law Review 693, 709: 'What we are seeking is an antitrust fine that is large enough in the case of each individual firm to make its management unlikely to violate the antitrust laws, but which is not so large as to cause a violator to go out of business or to offend our sense of ab-

Deterrence of potential price-fixing, enabled via effective enforcement, has well documented beneficial effects on industry mark-ups.[41] Yet, in the face of increasing antitrust fines in Europe, even to the extent criticised as being "criminal in nature" for the purposes of the ECHR,[42] the goal of deterrence appears far from view.[43] Accounting for the efficient implementation of leniency programmes, EU fines still remain too low to have sufficient deterrent effects.[44] The most eloquent evidence of the current state of failure to deter is the continuing formation of cartels, the steady presence of recidivism and the inability of increased antitrust fines to have considerable impact on corporate governance.[45] If anything, the limited evidence available suggests that colluding managers are rewarded rather than being punished, as theory goes, via disqualification, dismissal, and incentive contract or compensation revisions.[46] What is more, we know that when sanctions fail to deter they

solute equity'.

[41] Michael Kent Block, Frederick Carl Nold and Joseph Gregory Sidak, 'The Deterrent Effect of Antitrust Enforcement' (1981) 89 Journal of Political Economy 429.

[42] Wouter P.J. Wils, 'The Increased Level of EU Antitrust Fines, Judicial Review, and the European Convention on Human Rights' (2010) 33 World Competition Law and Economics Review 5, 16: 'Whereas the European Commission's antitrust fining powers are not "criminal" within the meaning of EU law, they are "criminal" within the wider autonomous meaning of Article 6 ECHR.' Indeed, EU antitrust fines as addressed only to "undertakings" are "outside the hard core of criminal law".

[43] See note 4 and accompanying text.

[44] Paolo Buccirossi and Giancarlo Spagnolo, 'Optimal Fines in the Era of Whistleblowers. Should Price Fixers Still Go to Prison?' in Vivek Ghosal and Johan Stennek (eds), *The Political Economy of Antitrust*, vol 282 (Emerald Group Publishing Limited 2007).

[45] Spagnolo and Marvão (n 14) 4 and 21; Paolo Buccirossi and Giancarlo Spagnolo, 'Corporate Governance and Collusive Behaviour' in Dale W Collins (ed), *Issues in Competition Law and Policy*, vol. 2 (ABA Section of Antitrust Law 2008) 1231–1236.

[46] Spagnolo and Marvão (n 14) 21. The examples provided come from the banking sector and antitrust investigations following the Libor scandal.

may result in large distortions.[47] The Damages Directive, promising in vision but a product of political compromise, falls short of achieving its own goals, including full compensation of victims. It is unlikely to improve efficiency of litigation; in fact it is more likely to increase the costs to private claimants; it only provides for simple damages; and most importantly, does not harmonise class actions.[48] To make things worse, the shadow of Brexit throws into question the legal status of the UK, with its well-developed principles and practice, as a key EU forum of choice for private antitrust actions.[49]

Against this backdrop, some definitional clarifications need to be made in order to appreciate the deterrence goal and its functioning. To deter means to discourage someone from committing an illegal act by resort to the threat of sanctions in the event the act is actually committed.[50] Classic deterrence theory suggests that optimal expected sanctions should exceed the potential offender's expected benefits, duly taking into account the probability of detection and punishment.[51] The logic behind the deterrent mechanism is to negate the incentive to commit the illegal act by making it unprofitable in expectation. Ac-

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[47] Emilie Dargaud, Andrea Mantovani and Carlo Reggiani, 'Cartel Punishment and the Distortive Effects of Fines' (2016) 12 Journal of Competition Law and Economics 375; Vasiliki Bageri, Yannis Katsoulacos and Giancarlo Spagnolo, 'The Distortive Effects of Antitrust Fines Based on Revenue' (2013) 123 Economic Journal F545. Note that fines – regardless of whether profit-based (a "restitutionary" remedy) or harm-based (a "compensatory" remedy) – are inadequate to produce optimal deterrence when the probability of detection and punishment is less than one. See Posner (n 23) 262.

[48] Sebastian Peyer, 'The Antitrust Damages Directive —Too Little, Too Late' (2015) 1(1) CPI Antitrust Chronicle.

[49] Oxera, 'Brexit: Implications for Competition Enforcement in the UK' (June 2016) <http://www.oxera.com/Latest-Thinking/Agenda/2016/Brexit-implications-for-competition-enforcement-in.aspx> accessed 4 September 2016.

[50] Steven Shavell, *Foundations of Economic Analysis of Law* (Harvard University Press 2004) 531.

[51] Gary S. Becker, 'Crime and Punishment: An Economic Approach' (1968) 76 Journal of Political Economy 169.

cordingly, optimal antitrust sanctions must be "sufficient to render the expected value of the illegal behaviour equal to zero".[52] There are two necessary conditions for deterrence to work, i.e. that: i) the target of the legal threat "knows about and considers the possibility of sanctions"; and ii) "the sanctions can actually be applied".[53] It follows that in order to achieve deterrence, knowledge of the level of sanctions, certainty of their application and effective enforcement are indispensible. The whole point about enforcement is to make credible the legal threat of punishment in case rules prohibiting price-fixing and other cartel arrangements, for example, are violated. Seen in this light, public antitrust enforcement as well as private civil actions for damages by cartel victims and private compliance/ monitoring programmes by corporations are substitute mechanisms to this end.[54]

Given the above insights, it is no surprise that EU antitrust sanctions do not produce sufficient deterrence. In fact, exclusive reliance on corporate mechanisms or monetary sanctions facing solely the corporation is inherently likely to underdeter.[55] With regard to fines, their application, albeit increasing in size and visibility, is at least partially arbitrary. First, given the way EU fines are set, the various factors that are included in their calculation and the wide discretion the EU antitrust authorities enjoy, it is almost impossible for firms to be *ex ante* certain as to the expected fine level. In the face of uncertainty, firms cannot comply with law even when it would have been in their private in-

[52] Douglas H. Ginsburg and Joshua D. Wright, 'Antitrust Sanctions' (2010) 6 Competition Policy International 3, 7.

[53] Shavell, *Foundations of Economic Analysis of Law* (n 50) 532.

[54] A. Mitchell Polinsky and Steven Shavell, 'The Theory of Public Enforcement of Law' in Steven Shavell and A. Mitchell Polinsky (eds), *Handbook of Law and Economics*, vol. 1 (Elsevier 2007) 449–450.

[55] Wouter P.J. Wils, 'Does the Effective Enforcement of Articles 81 and 82 EC Require Not Only Fines on Undertakings but Also Individual Penalties, in Particular Imprisonment' in Claus-Dieter Ehlermann and Isabela Atanasiu (eds), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Hart Publishing 2003); Steven Shavell, 'Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent' (1985) 85 Columbia Law Review 1232.

terest to do so (i.e. their expected private benefits are outweighed by the actual fine).[56] Second, the difficulty to detect and the likelihood to escape punishment are factored into the firms' decision of whether to commit the antitrust violation. Fines are discounted by the probability of detection. Third, adjusting fines upwards to take account of the decreased probability of detection and punishment will lead to impossibly high fines.[57] Such high fines will exceed the existing maximum ceiling, and are multiple times higher than the fines actually imposed in practice, not least because of the risk of pushing the corporation into bankruptcy.[58] The corporation's inability to pay any increased fines may deny their effectiveness and also have disastrous spillover effects for third parties, to which the cost of bankruptcy may be externalised.[59] Increase in the level of fines may merely lead to "strategic judgment proofness" and other creative ways to circumvent the law.[60] Fourth, increasing fines, beyond a certain level, may not translate into increased ability of corporations to control their agents. That is they either cannot fully control the corporate environment or they cannot influence the agents' personal incentives. For example, in large decentralised organi-

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[56] In theory, of course, the effects of uncertainty cut both ways and may well lead companies to comply with the law even if it would have been in their private interest not to do so, i.e. any fine is outweighed by the expected private benefits of illegal conduct. For hard-core cartels, this private cost-benefit balancing is not particularly relevant as I am arguing in section IV that such arrangements clearly lack any social value. The more subtle point I mean to emphasise here, however, is that the inconsistent and arbitrary nature of fines may lead firms genuinely committed to complying with the law not to be able to do so.

[57] Wils, 'Does the Effective Enforcement of Articles 81 and 82 EC Require Not Only Fines on Undertakings but Also Individual Penalties, in Particular Imprisonment' (n 55) 11–17.

[58] ibid.

[59] John C. Coffee, '"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment' (1981) 79 Michigan Law Review 386, 400–402; Kraakman (n 20) 882.

[60] Paolo Buccirossi and Giancarlo Spagnolo (n 44) 111–113; Yeon-Koo Che and Kathryn E. Spier, 'Strategic Judgment Proofing' (2008) 39 RAND Journal of Economics 926.

sations it may be difficult to identify the actual individuals who committed the violation.[61] In addition, expected sanctions may fail to render the violation unprofitable for the corporate manager / employee, even assuming that it is unprofitable for the corporation in view of potentially high corporate penalties. Fifth, the larger the private profits from the cartel the higher the fine necessary to deter and so the more likely the corporation will be unable to pay, which makes the analysis circular.[62] Sixth, maximal or disproportionately high sanctions face "normative constraints" as they raise fundamental issues of justice[63] and marginal deterrence.[64] Seventh, suboptimal sanctions may simultaneously produce under- and overdeterrence. As far as hard-core cartels are concerned, it is unlikely that they discourage socially beneficial behaviour but they may well induce excessive and socially wasteful investment in private preventive or policing measures,[65] i.e. compliance programmes[66] or civil damages litigation. Eighth, even assuming perfect enforcement with a probability equal to one and therefore reasonably high optimal fines, these fines will be discounted by the time value of money and may thus result in underdeterrence. The implication of the time value of money concept is that even if antitrust authorities impose a high penalty (which in nominal terms could deter), firms will still have incentives to form an illegal cartel in case they can profit from paying penalties in the future, i.e. when the value of paying the postponed fine in the future is less than their immediate benefit from

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[61] Hamdani and Klement (n 35) 274; cf. Shavell, 'Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent' (n 55) 1240.

[62] Shavell, 'Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent' (n 55) 1237.

[63] Wils, 'Does the Effective Enforcement of Articles 81 and 82 EC Require Not Only Fines on Undertakings but Also Individual Penalties, in Particular Imprisonment' (n 55) 17–18; Kraakman (n 21) 882.

[64] George J Stigler, 'The Optimum Enforcement of Laws' (1970) 78 Journal of Political Economy 526; Polinsky and Shavell (n 54) 432–434.

[65] Ginsburg and Wright (n 52) 8–9.

[66] Kimberly Krawiec, 'Cosmetic Compliance and the Failure of Negotiated Governance' (2003) 81 Washington University Law Quarterly 487.

the cartel.[67] Finally, even when sanctions fail to deter in the first instance by making potential cartelists bear the full costs of their actions, theory suggests that by fully compensating victims we can avoid market distortions, in terms of price and output, and thus eliminate any deadweight loss.[68] In reality, however, there are two kinds of challenges that indicate that sanctions may not avoid being at least partially distortive. In a world of uncertainty, it may be inherently difficult to estimate the "optimal" level of sanctions, and the "right" multiplier to make up for any decreased probability of detection and punishment. It may in fact be preferable to set fines/ damages equal to harm given the amount of information needed otherwise and the varying attitudes of corporate employees (e.g. risk preferences) who may be differently affected by higher pressures to take care.[69] Furthermore, some of the substitution effects (and the deadweight loss) cannot be eliminated when compensation to cartel victims is not complete. For example, this is the case when victims are risk averse and any expected damages uncertain, or when compensation is either partial or not fully passed

[67] Osnat Jacobi and Avi Weiss, 'The Effect of Time on Default Remedies for Breach of Contract' (2013) 35 International Review of Law and Economics 13. Ironically, this problem is more severe for newcomers in the market, who may face difficulties in accessing capital due to lack of credit history, and therefore their subjective discount factor of paying the fine later could be relatively high. On the economics of small businesses and newcomers' financial difficulties to raise capital in particular, see Osnat Jacobi and Noam Sher, 'A Commitment Mechanism to Eliminate Willful Contract Litigation' (2015) 11 Review of Law & Economics 231. It is, however, such new market entrants that could become disruptive forces known as "mavericks" whose incentives to undercut prices make coordination less likely. Hence, underdeterrence could be a serious concern in this regard.

[68] William M Landes, 'Optimal Sanctions for Antitrust Violations' (1983) 50 The University of Chicago Law Review 652.

[69] Steven Shavell, 'The Optimal Level of Corporate Liability given the Limited Ability of Corporations to Penalize Their Employees' (1997) 17 International Review of Law and Economics 203, 209–210. See also Breit and Elzinga (n 40) (who argue for a single fine, to replace other antitrust sanction mechanisms, as a superior means to achieve deterrence in light of enforcement cost savings and management risk attitudes).

through onto the actual victims overcharged by the cartel.[70] This scenario may come close to reflecting the current state of affairs in the EU, even following the passage of the Damages Directive. In any event, private damages actions as just another type of monetary sanction face all the problems of publicly imposed fines raised above. Consequently, they are not a real solution, even if they can complement fines and help mitigate their disproportionately high levels or some of the resulting distortions.[71] Lastly, leniency – successful as it may have been – could have reached its deterrent limits as currently implemented in the EU.[72] Besides any problems due to poor enforcement and coordination efforts, it may in fact only assist in uncovering the least harmful cartels or the most likely to be detected anyway.[73]

In view of the above exposition, it is clear that antitrust sanctions in Europe do not provide adequate deterrence. Yet, this may not be a fatal failure. Indeed, some level of under-deterrence may be justified and desirable.[74] We might tolerate sanctions falling short of the *first best* outcome, i.e. the expected fine being less than the actual harm, because the marginal benefits may not justify the costs of improving on deterrence. The question then becomes whether it is worthwhile for society

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[70] Landes (n 68) 677.

[71] Wils, 'Does the Effective Enforcement of Articles 81 and 82 EC Require Not Only Fines on Undertakings but Also Individual Penalties, in Particular Imprisonment' (n 55) 22.

[72] Spagnolo and Marvão (n 14) 8–10. The authors provide evidence of "leniency abuse" and overuse, including by recidivists. They critically note, however, that excessive leniency creates distortions, waste of resources and reduced expected sanctions, ultimately undermining deterrence.

[73] Florian Wagner-von Papp, 'Book Review: "Anti-Cartel Enforcement in a Contemporary Age: Leniency Religion", Edited by Caron Beaton-Wells and Christopher Tran' (*Antitrust & Competition Policy Blog*, 4 January 2016) <http://law professors.typepad.com/antitrustprof_blog/2016/01/florian-wagner-von-papp-on-anti-cartel-enforcement-in-a-contemporary-age-leniency-religion-.html> accessed 4 September 2016. See also n 62 and accompanying text.

[74] Polinsky and Shavell (n 54) 414.

to pursue additional deterrence.[75] Are the costs of increasing fines or the probability of cartel detection prohibitive? Are higher fines counterproductive and ineffective? Are there alternative means to improve deterrence at lower social cost? Having broadly addressed some of the first questions already, I turn to the latter one next.

II. From Limited Corporate to Individual Criminal Liability: The Best of All Worlds?

Individual antitrust sanctions, including imprisonment, can enhance deterrence and social welfare.[76] Complementing corporate sanctions, which alone fail to produce desirable results, with individual criminal penalties will improve the effectiveness and ensure the credibility of rigorous EU antitrust enforcement. In effect, the combination of corporate and personal liability can resolve the problems of distorted incentives associated with "moral hazard" and agency costs in the public interest and also address the problem of too little incentives to comply with the law. It may indeed be the optimal mix to achieve a "best of all worlds" outcome: more deterrence with more effective and less costly enforcement effort.

To begin, individual liability for antitrust violations provides a partial solution to the drawbacks and inadequacies of a single corporate liability regime outlined above. Targeting the actual wrongdoers, the corporate actors involved in the cartel, overcomes the distortions and

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[75] Michael K. Block and Joseph Gregory Sidak, 'The Cost of Antitrust Deterrence: Why Not Hang a Price Fixer Now and Then' (1980) 68 Georgetown Law Journal 1131.

[76] Kraakman (n 20) 878: 'Absolute managerial liability is one way to increase the effective sanctions faced by firms and to reduce the frequency of undeterred offenses'. This section will focus on the arguments for absolute, rather than shiftable, individual liability for hard-core cartelists as it is more potent to comprehensively address the deficiencies of strict vicarious corporate liability standing alone. The best representative of unshiftable invididual liability is imprisonment and so the focus of the analysis going forward will implicitly be on individual criminal sanctions. For more on this distinction, see ibid 868.

inefficiencies caused by strict vicarious corporate liability.[77] Raising the threat of punishment directly towards the cartelists ensures the universal and consistent application of the law, therefore it creates superior incentives to deter and comply with the legal commands. Enforcement no longer depends on the corporation's ability and incentives to control its own agents. Sanctioning mechanisms against individuals are not contingent on whether the corporation can actually control or influence their behaviour, or whether it can identify the wrongdoers and has the necessary information to punish them internally. The external threat of punishment may also restore the credibility of compliance programmes. By changing the personal cost-benefit calculus of the individual, direct liability provides incentives for the corporation to make sure its internal monitoring mechanisms are effective. In effect, personal liability makes managers and employees "more expensive" to hire, as they will ask a premium for the liability risk they will have to incur.[78] If nothing else, personal liability increases the cost of "illicit bargains" between the corporation and its employees.[79] The managers and employees too now have a direct interest to resist any corporate pressure to break the law, as they will be held personally accountable for their actions.[80] In the end, this resistance may increase the cost of price-fixing for the corporation.[81] Corporate sanctions may not be sufficient to make price-fixing unprofitable for the corporation, especially

[77] See n 24 and accompanying text.

[78] Kraakman (n 20) 879. As opposed to usually diversified shareholders, corporate managers are generally undiversified and risk averse, so they have a counter-incentive to breaking the law and given the potential of personal liability, they will thus ask a premium that "exceeds their total expected losses and risk bearing costs", including the potential risk to their future reputation, income and career opportunities.

[79] ibid.

[80] Wils, 'Does the Effective Enforcement of Articles 81 and 82 EC Require Not Only Fines on Undertakings but Also Individual Penalties, in Particular Imprisonment' (n 55) 24.

[81] Gregory J. Werden and Marilyn J Simon, 'Why Price Fixers Should Go to Prison' (1987) 32 Antitrust Bulletin 917, 931.

given the practical constrains of imposing antitrust sanctions high enough to deter, but this may not be true for the individual. With personal liability, corporate agents will have weaker incentives to engage in the illegal cartel because they will bear the full risk of punishment but they shall share the gains with the firm.[82] By playing one against the other, the use of both corporate and personal liability may take advantage of internal conflicts of interest and agency costs to the "service of deterrence and enforcement".[83] To be sure, even assuming that internal corporate mechanisms are strict and more effective than public enforcement, without more, it cannot be certain that they serve society's interests. For example, internal sanctions may be less severe than public sanctions, especially if imprisonment is an option, but the probability of their application is much higher.[84] Therefore, there is real pressure to go by the corporation's best interests, which may be engaging in illegal acts to secure corporate profits. If public sanctions fail to take the profit out of price-fixing,[85] the add-on of individual liability at least puts some sand into the powerful mechanisms of internal corporate discipline and makes sure that (low-level) corporate employees do not become convenient scapegoats,[86] or makes the price of loyal but non law-abiding employees for corporations higher. Indeed, the price may become too high if corporate employees are faced with the sanction of imprisonment. In the presence of leniency, the threat of very high personal sanctions may provide individual cartelists "with the single greatest incentive to self-report" and cooperate with antitrust authorities in the prosecution of the cartel.[87] Corporate compliance is

[82] Daniel R. Fischel and Alan O Sykes, 'Corporate Crime' (1996) 25 The Journal of Legal Studies 319, 324.

[83] Kraakman (n 20) 885.

[84] Coffee (n 59) 410.

[85] Ginsburg and Wright (n 52) 3.

[86] Coffee (n 59) 410.

[87] Gregory J. Werden, Scott D. Hammond and Belinda A. Barnett, 'Deterrence and Detection of Cartels: Using All the Tools and Sanctions' (2011) 56 Antitrust Bulletin 207, 215; Paolo Buccirossi and Giancarlo Spagnolo (n 44) 99.

streamlined, cartel detection and enforcement are strengthened and corporate actors have stronger incentives to act in the best interests of society.

In light of the above exposition, individual liability is directly beneficial for "innocent" corporations that are genuinely committed to comply with the law.[88] First, it takes off the pressure on corporations to invest in excessive compliance for fear of being vicariously liable for any antitrust violations committed by their employees whose behaviour in fact they cannot fully control.[89] Second, it mitigates the adverse selection and moral hazard problems firms are faced with during the hiring process and in the course of employment.[90] Being personally liable, employees will have incentives to avoid misconduct independently of any corporate monitoring. Third, it rationalises public enforcement. Effective introduction of individual criminal liability may remove the need to rely on legal fictions such as the single economic entity doctrine upon which parental corporate liability is based in order to deter non law-abiding subsidiaries.[91] This will be a welcome de-

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[88] Wils, 'Does the Effective Enforcement of Articles 81 and 82 EC Require Not Only Fines on Undertakings but Also Individual Penalties, in Particular Imprisonment' (n 55) 24.

[89] Kraakman (n 20) 885: 'Absolute personal liability may reduce firm compliance costs [for certain] offenses […]. Offenses such as insider trading, which benefit managers directly rather than through the firm, place considerable pressure on private controls over managerial behavior. Enterprise liability would be warranted only if firms could identify and punish offenders more efficiently than outside enforcers could […].'

[90] Cf. Buccirossi and Spagnolo (n 45) 1233, n 57.

[91] See Koenig (n 37) 65. Given the complementary functions of these enforcement instruments, a move towards individual criminal liability in the EU may justify less use or reliance on parental corporate liability for antitrust violations of their subsidiaries, in particular if there appears a risk of "overdeterrence" in the future. A related point has been formally made by Polinsky and Shavell (n 23) 239–240, who argue that from a deterrence point of view, public sanctions on employees are beneficial (when they exceed the highest possible sanctions the corporation can impose on them) but corporate liability should be reduced accordingly in order to avoid market distortions.

velopment for parent companies, especially multinationals, which may in fact not know or are not able to discourage their subsidiaries' employees from participating in the illegal cartel. It also avoids the risk of *ad hoc* enforcement by public authorities, which may be lured in making an example by imposing a very high fine on a multinational parent company in order to improve their poor enforcement record. However, as already said, the essence of effective enforcement is to deter the illegal cartel from forming. Raising arbitrarily high fines on corporate entities not directly controlling the perpetrators only serves to increase the risk of potential market distortions. The threat of personal punishment directed to the actual cartelists helps avoid or reduce the distortive effects of strict vicarious corporate liability that may be missing the mark. Any excessive fines or compliance expenditures are ultimately passed on to consumers in the form of higher prices and foregone products.[92] This is an unfortunate result since it is consumer interests that antitrust law is called upon to protect.[93] As a result, individual liability may reduce the costs of errors as well as the need for excessive investment in corporate compliance and monitoring, and therefore helps minimise the "overdeterrence" problem.[94]

In addition, individual liability puts a check on the practical constraints of antitrust enforcers to impose optimal fines on corporations. Indeed, individual sanctions are an alternative means to achieve deterrence and victim compensation in case of a corporation's inability to pay.[95] For violations such as price-fixing where the probability of detec-

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[92] Ginsburg and Wright (n 52) 5.

[93] Kobayashi (n 35) 736; Coffee (n 59) 402.

[94] Block and Sidak (n 75) 1133–1138; Fischel and Sykes (n 82) 324–325; Ginsburg and Wright (n 52) 5 and 8.

[95] Jan Imgrund, 'The "Inability to Pay" Doctrine in European Competition Law' (2012) 33 European Competition Law Review 560; Carsten Grave and Jenny Nyberg, 'A Company's "Inability to Pay" a Cartel Fine Imposed by the European Commission' (2011) <http://papers.ssrn.com/abstract=1961744> accessed 29 June 2016; Michael Reynolds, Sarah Macrory and Michelle Chowdhury, 'EU Competition Policy in the Financial Crisis: Extraordinary Measures' (2010) 33 Fordham International Law Journal 1670, 1733–1736; Catherine Craycraft, Josephl Craycraft

tion is very low, optimal fines may need to be very high in order to deter and offset any concealment efforts by the cartelists.[96] So there is increased likelihood that the expected sanctions will exceed the corporation's assets. This is important for another reason. EU practice suggests that a "bankruptcy discount" due to financial constraints is often applied when calculating actual fines.[97] Against this backdrop, it can be argued that personal liability may address the externalities associated with impossibly high corporate fines and solves the antitrust enforcers' dilemma in this regard.[98] That is individual liability reduces the risk and social costs of bankruptcy, faced by innocent third parties,[99] while

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and Joseph C Gallo, 'Antitrust Sanctions and a Firm's Ability to Pay' (1997) 12 Review of Industrial Organization 171.

[96] Posner (n 9) 1195.

[97] Reynolds, Macrory and Chowdhury (n 95) 1723, 1733; Andreas Stephan, 'The Bankruptcy Wildcard in Cartel Cases' (2006) Working Paper No. 06-5 Centre for Competition Policy, University of East Anglia <http://papers.ssrn.com/abstract=912169> accessed 5 September 2016; Philip Kienapfel and Geert Wils, 'Inability to Pay – First Cases and Practical Experiences' (2010) Number 3 — 2010 Competition Policy Newsletter <http://ec.europa.eu/competition/publications/cpn/2010_3_1.pdf> accessed 5 September 2016. A "recession defense" for cartelists is not officially recognised but there is leeway to argue for the firm's inability to pay as a justification for a "bankruptcy discount" to any fines imposed, which creates perverse incentives for cartelists to present a dim picture of their financial situation and also find other ways to game the law, e.g. by shielding corporate assets. Nevertheless, the EU antitrust authorities' overly cautious approach in setting sufficiently high fines is based on the legitimate concern that in case the risk of bankruptcy materialises, competition in the market will be weakened due to the exit of the insolvent firm following the imposition of the fine. Thus, the reasonable dilemma of antitrust enforcers: whether in the name of protecting competition, optimally deterrent fines actually come to undermine it.

[98] Coffee (n 59) 406–407. The author calls this the "nullification problem", whereby judges resist imposing severe penalties on corporations, which flows from the "externality problem", the recognition that such penalties will ultimately fall on innocent parties.

[99] Kraakman (n 20) 882; Coffee (n 59) 400–402. Such third parties are all stakeholders in the corporation: creditors, suppliers, distributors, employees and consumers. For example, contrary to shareholders, employees or small suppliers will

it may help contain potential opportunistic behaviour by shareholders whose assets are protected by the principle of limited liability.[100] As a result, individual liability may mitigate the problems of "strategic judgment proofness"[101] by corporations and "political judgment proofness" by antitrust authorities given their discretionary power and conservative approach in deciding fines.[102]

Moreover, adding individual to corporate liability is a unique way to achieve both effective and marginal deterrence, the latter of which is usually undermined by impossibly high fines.[103] The goal of marginal deterrence is promoted in two ways. First, with dual liability that combines *two* sanctioning tools and "penalty diversification", it is less likely that sanctions are too low and that either the corporation or the individual employee is not affected by some of the different *kinds* of punishment.[104] Second, personal liability is a cost-effective means of additional deterrence since it comes to threaten a new group of potential offenders – individual wrongdoers that have been thus far immunised.[105] It deters more, with only modest penalties to that purpose and

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be undiversified and will have to incur severe losses in the event of bankruptcy while they will not be compensated for such risk *ex ante*.

[100] David Milton, 'Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability' (2007) 56 Emory Law Journal 1305, 1307: '[...] the best way to understand the purpose of limited liability is as a subsidy designed to encourage business investment [that] comes at the expense of corporate [contract or tort] creditors.'; Paul Halpern, Michael Trebilcock and Stuart Turnbull, 'An Economic Analysis of Limited Liability in Corporation Law' (1980) 30 The University of Toronto Law Journal 117.

[101] Yeon-Koo Che and Spier (n 60).

[102] Paolo Buccirossi and Giancarlo Spagnolo (n 44) 111.

[103] Shavell, 'Criminal Law and the Optimal Use of Non monetary Sanctions as a Deterrent' (n 55) 1246. The author argues that it is unwise to have very high levels of sanctions and too low a probability of detection, even if this is thought to save on enforcement costs, because such a policy would directly conflict with the goal of marginal deterrence, which requires some graduation in the schedule of sanctions. See also n 63 and accompanying text.

[104] Kraakman (n 20) 880.

[105] ibid 886.

with the same public budget. In this way, it also has the potential to produce economies in enforcement costs.[106] Further, even if some individuals addressed with the legal threat of personal liability remain undeterred, since the probability of detection increases in the presence of dual liability, as explained above due to the intra-firm frictions it creates between the corporation and its agents, fines may well reduce and so will enforcement costs. In effect, the addition of personal liability increases the expected sanction without increasing the magnitude of sanctions.[107] One then manages to break the vicious circle of impossibly high fines and avoid their counterproductive and undesirable side effects. In symmetry with but beyond the above economic arguments, personal liability relaxes any proportionate justice concerns and the "normative constraints" criticism of maximal fines.[108]

Lastly, individual liability solves problems of underdeterrence in a way that corporate liability inherently cannot address. For instance, it targets directly the culpable managers or employees who may have left the firm at the time the violation is detected.[109] More broadly, the proximity and the certainty of a personalised, publicly imposed sanction heighten the stakes and make absolute individual liability increase its

[106] ibid.

[107] Shavell, 'Criminal Law and the Optimal Use of Non monetary Sanctions as a Deterrent' (n 55) 1250. Here reference is made to the economic analysis of attempts but the comparison to price-fixing is apt. With regard to "object" restrictions of competition, it is the agreement to price fix that is illegal *per se* under Article 101 TFEU regardless of the materialisation of its effects, therefore a form of attempt. Cf. Wils, 'The European Commission's 2006 Guidelines on Antitrust Fines' (n 38) 221–223 as to the presumption of intent for "object" restrictions in calculating fines in the EU. Moreover, with regard to the criminal offense in the US, one needs only prove agreement and criminal intent, see Maurice E. Stucke, 'Morality and Antitrust' (2006) Columbia Business Law Review 443, 492–494.

[108] See n 63 above and accompanying text.

[109] Wils, 'Does the Effective Enforcement of Articles 81 and 82 EC Require Not Only Fines on Undertakings but Also Individual Penalties, in Particular Imprisonment' (n 55) 20.

effective deterrence.[110] For once, internal sanctions may be limited and hence fail to make the expected net benefit from the cartel equal to zero for the individual.[111] Or cartelising employees may perceive it is not likely they will be punished internally, in which case the severity of the internal sanction will have to be raised to produce adequate deterrence.[112] Unless the employee has equivalent assets, however, any optimal monetary sanctions will not suffice to deter him. This can be a serious problem in case of lower level employees in big corporations with worldwide operations, whose total wealth may be very low compared to the potential harm from the cartel. Then the threat of public sanctions and in particular imprisonment – the sole prerogative of the state – can effectively help to bridge this deterrence gap of any wealth constrained or judgment proof employees.[113]

The case for imprisonment of individual cartelists is even stronger. While it incorporates with full force all the above advantages of individual sanctions, it also has further positive traits. To begin, imprisonment can reach to groups of individuals who are not much affected by monetary or other sanctions. For example, old managers or employees being close to retirement may not care much about their future employment prospects or damage to their reputation and so dismissal or disqualification will not be enough to deter them,[114] and the same is true with fines in case such employees are wealth constrained. Similarly, criminal sanctions may have an impact on wealthy individuals involved in illegal cartels, typically considered a "crime of the affluent", for a number of reasons.[115] That is a criminal conviction carries a stigma that may impair the cartelist's human capital, it may result in disqualification from future employment in the industry, and it over-

[110] Cf. Stucke (n 107) 519.

[111] Buccirossi and Spagnolo (n 45) 1233; Polinsky and Shavell (n 23) 239–240.

[112] Polinsky and Shavell (n 23) 256.

[113] S Shavell, 'The Judgment Proof Problem' (1986) 6 International Review of Law and Economics 45, 55.

[114] Wils, 'Is Criminalization of EU Competition Law the Answer?' (n 1) 86.

[115] Posner (n 23) 277–278 and 283–284.

comes any wealth constraints issues as well.[116] The solvency limitation problem may be a serious concern even in the case of wealthy individuals because the probability of detection and punishment may be very low for cartel arrangements, and therefore deterrent sanctions will need to be adjusted upwards. This could be either due to concealment efforts of the cartel, or due to their wealth, affluent individuals may have greater access to good defence lawyers, thus decreased likelihood of being convicted.[117] In addition, any fines that confiscate all of their wealth may still have diminished deterrent effect since such individuals may be able to recoup quickly because of their highly valued human capital, such as expertise and connections in the industry.[118] At the same time, the sanction of imprisonment is considered to be a greater deterrent compared to monetary sanctions.[119] As a result, any prison sentences may need to be very short given the increased disutility they impose on the individual[120] or indeed even the threat of imprisonment may be enough to deter.[121] Furthermore, imprisonment can have a direct incapacitation effect. This means that there may be a reduction of future collusion since individual cartelists, especially recidivists, imprisoned will be disabled from forming new cartels.[122]

Notwithstanding the advantages outlined above, the unique strength and decisive argument for imprisonment is that it is "unshiftable" liability.[123] Unlike monetary sanctions against individual wrongdoers that could effectively be nullified via indemnification from the benefiting corporation to the personally liable and sanctioned employee, imprisonment is a sanction that cannot be avoided or shifted *ex*

[116] ibid 284; Werden, Hammond and Barnett (n 87) 213.

[117] Posner (n 23) 278.

[118] ibid.

[119] Werden, Hammond and Barnett (n 87) 213–214; Wils, 'Is Criminalization of EU Competition Law the Answer?' (n 1) 85–86.

[120] Posner (n 23) 284; Stucke (n 107) 534.

[121] Polinsky and Shavell (n 23) 253.

[122] Paolo Buccirossi and Giancarlo Spagnolo (n 45) 99.

[123] See n 76 above.

post and it is also more difficult to arrange a premium to compensate the employee's risk bearing *ex ante*.[124] Therefore, only the threat of imprisonment is a credible mechanism for individual employees to comply with the law by avoiding the "indemnification problem", i.e. the possibility that firms reimburse the individual fine to their managers or employees when their unlawful behaviour was aimed at increasing shareholder value.[125] Thus, it solves the "moral hazard" problem discussed in section II.A in the public interest.[126] The argument in favour of imprisonment and against contractual risk shifting is compelling also from a normative perspective when the employee's conduct and the breach of legal commands were intentional as in the case of price-fixing.[127] The next section will shortly comment on these issues.

III. Economics, Morality and the Principle of Ultimate Ratio

There are two sets of arguments, economic and moral, that complete the above analysis with a normative perspective. First, from an economic point of view, it is argued that absolute personal liability for hard-core cartels is necessary to address the problem of underdeterrence and ensure the integrity of the legal system. Indeed, we need to move from Becker's pricing model, which aims at fully internalising

[124] Wils, 'Does the Effective Enforcement of Articles 81 and 82 EC Require Not Only Fines on Undertakings but Also Individual Penalties, in Particular Imprisonment' (n 55) 27–28; Werden and Simon (n 81) 931; Kraakman (n 20) 876–877.

[125] Paolo Buccirossi and Giancarlo Spagnolo (n 44) 99; Fischel and Sykes (n 82) 322.

[126] See n 20 and n 32 above and accompanying text.

[127] Kraakman (n 20) 877. For an economic analysis of antitrust violations as intentional torts, see Landes (n 68). For the distinction between crimes or intentional torts and unintentional torts or accidental conduct from an economic point of view, see John C Coffee, 'Does "Unlawful" Mean "Criminal": Reflections on the Disappearing Tort/Crime Distinction in American Law' (1991) 71 Boston University Law Review 193, 221–233; Posner (n 9); Posner (n 23) 260–265; Shavell, 'Criminal Law and the Optimal Use of Non monetary Sanctions as a Deterrent' (n 55) 1247–1249; Keith N Hylton, 'The Theory of Penalties and the Economics of Criminal Law' (2005) 1 Review of Law & Economics 175.

the harm and compensating the victim, to Cooter's sanctioning approach, designed to completely deter socially undesirable conduct.[128] That is a move from a pricing model for unintentional torts being a by-product of socially desirable activity that assumes an efficient market to a punitive model of preventing calculated conduct lacking any social utility.[129] In the latter instance and given the social and intentional character of the act, sole reliance on monetary or private sanctions naturally produces inadequate deterrence,[130] and most importantly may lead to inefficient coerced transfers.[131] Criminal sanctions are necessary and desirable to avoid efforts to bypass the market, the "system of voluntary, compensated exchange", that undermine the efficient allocation of resources[132] and diminish the law's stature as a legitimate

[128] Becker (n 51); Robert Cooter, 'Prices and Sanctions' (1984) 84 Columbia Law Review 1523, 1523: '[...] defining a sanction as a detriment imposed for doing what is forbidden, and a price as money extracted for doing what is permitted'.

[129] Posner (n 9) 1215: '[…] but for the high [enforcement] cost of criminal sanctions the optimum level of [cartel] activity would be zero, [therefore] these sanctions are not really prices designed to ration the activity; the purpose so far as possible is to extirpate it.'; Cooter (n 128) 1548.

[130] Shavell, 'Criminal Law and the Optimal Use of Non monetary Sanctions as a Deterrent' (n 55) 1238–1241 (outlining five factors indicating when monetary or tort remedies may not be enough to deter the illegal act).

[131] Posner (n 23) 276–277 and 288.

[132] Posner (n 9) 1195. For both the efficiency and distributional repercussions, see Keith N. Hylton, 'Some Notes on Property Rules, Liability Rules, and Criminal Law' in Alon Harel and Keith N. Hylton (eds), *Research Handbook on the Economics of Criminal Law* (Edward Elgar Publishing 2012). Involuntary or uncompensated for transfers are inefficient and induce private investment in takings or defensives actions, which is wasteful from a social perspective, while the consequent fear of expropriation leads to market distrortions, e.g. less future investment or avoiding market transactions altogether. Without knowing what kind of bargaining process they may enter, people may abstain from using the market mechanism. Cf. Coffee (n 127) 233–234, who provides normative grounds as to why the criminal law is used to prohibit, rather than to price, from a distributive justice and a libertarian perspective. With regard to the second libertarian argument, the justification for punishment is the unavailability of compensation to victim(s). Making reference to Nozick, it is argued that compensation will always be inadequate, even in the ab-

and robust system of legal commands.[133] Therefore, a shift to a "property rule" backed up with the threat of criminal sanctions is appropriate to prevent intentional takings in settings they are not cost justified (low *ex ante* transaction costs; certainty as to the cheapest cost avoider),[134] or to "completely deter activity that is virtually always inefficient, whether transaction costs are high or low".[135] Hard-core cartels fit well within a property rule paradigm under both aforementioned rationales.

Price-fixing is a coerced transfer, taking place in a low transaction cost setting where it is clear that the cartelist is the lowest cost avoider.[136] At the same time, even conservative antitrust scholars, such as Antonin Scalia[137] and Robert Bork,[138] recognise that hard-core cartels lack any social utility and should be prohibited *per se* without any serious overdeterrence or compliance cost since it is clearly antisocial conduct.[139] Indeed, sanctions are a more appropriate legal control mechanism when there is better information about standards of behaviour than about external costs of harm, as is clearly the case with hard-core

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sence of injury, because of the generalised fear created not only to the potential victim but also to others that may be victimised in the future. This general state of fear, resulting in a class of uncompensated potential victims, normatively justifies public institutions of criminal justice and potentially also the sanctioning function of the criminal law.

133 Kraakman (n 20) 876.

134 Guido Calabresi and A. Douglas Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' (1972) 85 Harvard Law Review 1089, 1124–127; Hylton (n 132) 67: 'Property rules prohibit conduct and liability rules internalize costs'.

135 Hylton (n 132) 82.

136 Posner (n 23) 275.

137 Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004). Justice Scalia characterising collusion as the "supreme evil of antitrust".

138 Robert H Bork, *The Antitrust Paradox: A Policy at War with Itself* (Basic Books 1978) 263–269. Judge Bork arguing for a *per se* rule against "naked" or output-restricting cartels.

139 Stucke (n 107) 492.

cartels.[140] Moreover, introducing criminal sanctions against individuals would add the evidentiary requirement of criminal intent, which would further minimise any risk or costs of false positives.[141] Finally, reasonable sanctions generally require lower enforcement costs as they induce people to comply with the law regardless of the probability of detection.[142] For all these reasons, the benefits of introducing individual criminal liability for hard-core cartels are overwhelming and outweigh any associated costs such as the administrative and opportunity cost of imprisonment, e.g. the foregone income for the incapacitated cartelists while in prison and his reduced earning prospects thereafter.[143]

The foregoing analysis has adopted a law and economics perspective focusing on the economic consequences of the status quo of corporate liability for antitrust violations and the need and desirability of introducing individual criminal sanctions against hard-core cartelists. While the economic case for criminalisation is solid, the principle of *ultimate ratio* suggests that criminal law should be used as a remedy of last resort. Accordingly, a brief comment is due regarding the moral character of cartelising behaviour and in particular hard-core cartels.[144]

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[140] Cooter (n 128) 1549–1550. As to the costs of information and compliance with criminal law related to issues of intent, see Posner (n 23) 297. Given that cartelists are savvy businessmen or corporate employees with exposure, resources, or access to comprehensive firm-wide compliance programmes, it will be difficult to argue that they are not aware of their legal duty not to price-fix; hence the low information costs indicate that mere proof of "general intent" (i.e. proof of knowledge of the facts establishing the offense) may suffice under a criminal law prohibition of hard-core cartels in the EU. Note also the key distinction between intent and awareness, the latter of which, however, refers to socially beneficial conduct and its potential consequences. ibid 295. As said, hard-core cartels are not only intentional but also inherently harmful conduct. Consequently, the clear community behavioural standard in this case renders sanctions preferable, since their informational requirements are minimal and the social costs of error are low.

[141] Posner (n 23) 294–297; Jeffrey S Parker, 'The Economics of Mens Rea' (1993) 79 Virginia Law Review 741.

[142] Cooter (n 128) 1551.

[143] Paolo Buccirossi and Giancarlo Spagnolo (n 44) 99–100.

[144] Coffee (n 127) 198 (describing the distinguishable basic "method" that en-

Numerous normative arguments have been made justifying individual criminal liability in this regard. The normative foundations upon which the moral wrongfulness of hard-core cartels is based can be organised in two categories, i.e. based on harm done either to individuals or to institutions.[145] The first analyses the specific harm inflicted on victims of the illegal cartel and the potential moral norms violated by such behaviour. In this respect, hard-core cartels have been considered as akin to theft[146] or fraud.[147] Second, the focus has been on more general harms arising out of cartel behaviour that could render the latter morally culpable. For instance, it has convincingly been argued that antitrust and the prohibition against hard-core cartels is grounded on the moral norm of fairness, perceived as fair profit-seeking behaviour in the marketplace, and more broadly as behaviour harmonised with society's collective interest in fair efficient and open markets and the democratic way of living.[148] Similarly, cartelising behaviour has been thought to undermine the fairness, credibility and integrity of the market mechanism and in particular competition as a fundamental institution of distributive justice in a liberal society.[149] Resort to criminal sanc-

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sures the legitimacy of criminal law, one element of which is that behaviour is deemed morally culpable by the general community); Stuart P Green, 'Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses' (1997) 46 Emory Law Journal 1533 (suggesting moral wrongfulness as one of the elements of the moral content in criminal law).

[145] Bruce Wardhaugh, *Cartels, Markets and Crime: A Normative Justification for the Criminalisation of Economic Collusion* (Cambridge University Press 2014) 44.

[146] Wagner-von Papp and others (n 1) 38; Florian Wagner-von Papp, 'Compliance and Individual Sanctions for Competition Law Infringements' in Johannes Paha (ed), *Competition Law Compliance Programs - An Interdisciplinary Approach* (Springer Forthcoming) 46; Peter Whelan, 'Cartel Criminalization and the Challenge of "Moral Wrongfulness"' (2013) 33 Oxford Journal of Legal Studies 535, 544–550; Richard P Whish, 'Recent Developments in Community Competition Law 1998/99' [2000] European Law Review 219, 220; Stucke (n 107) 502.

[147] Wagner-von Papp (n 146) 45–47; Whelan (n 146) 550–555; Stucke (n 107) 503.

[148] Stucke (n 107) 495–500 and 505.

[149] Wardhaugh (n 145) 46. These arguments have been made with reference to Rawls and his conception of a market-based system of distributive justice and

tions for hard-core cartel activity serves as a mechanism to assure compliance with the rules of the marketplace and restore public confidence in the integrity of the system.[150] Consequently, criminal sanctions are a normatively legitimate means of ensuring the well- functioning of a liberal society and the well-being of its citizens.[151] Seen in this light, the normative justification for cartel criminalisation comes close to the theoretical underpinnings of Ordoliberalism, a distinctly European tradition of competition policy. The ordoliberal school of economic thought was founded on the idea of a "social market economy" promoting a competitive legal order with emphasis on an individual's freedom to compete and the fairness of the process.[152]

While this is not an exhaustive analysis of questions of morality, it is meant to show that also from a normative perspective the argument for the criminalisation of hard-core cartels in the EU is strong and clear. What is more, it is concluded that in fact the economic and the moral case for such a paradigm shift are congruent and complement each other.

IV. Conclusion: Crisis Lessons and a Vision for the Future

Let us make sure that today's solutions root out the seeds of a future crisis, at least one of our own making, or indeed of our failure to act in good time. Resolving conflicts of interest and streamlining incentives within corporate entities is a good place to start and one overlooked by EU competition law thus far. Introducing individual criminal liability for hard-core cartels can help to fill the gap. In addition, it may well serve the community interest in helping restore the public's confidence

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hence citizens' reasonable expectation that market transactions will occur in a fair manner. Reference is also made to Kant, cartelising behaviour is described by analogy as a "self-exception to the expected rules of market behaviour", in defiance to the general social norms of distributive justice. Relatedly, see also n 132 above.

[150] ibid 48; Stucke (n 107) 532, n 308.

[151] Wardhaugh (n 145) 48.

[152] Cf. ibid 175–180.

in markets and the rule of law and therefore in the EU and its bureaucracy more broadly.

Economic analysis makes us appreciate how important it is to get individual and collective incentives right. Let us use the lesson to hear the voices – unduly burdened corporations, ripped-off consumers and the sceptical wider public – that are in line with the EU common interest and overcome the noise of those interest groups – conflicted and unaccountable corporate actors – that may be affected by positive change.

What Europe learnt from the crisis is to be pragmatic and adaptive. Next we may learn to be proactive. Game on.