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„The impact of fines v. criminal sanctions on cartel deterrence: a comparison between the EU and the USA “

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Contents

List of Abbreviations

I.	CAFA	Class Action Fairness Act
II.	DG COMP	Directorate General for Competition
III.	ECJ	The European Court of Justice
IV.	ECN	European Competition Network
V.	EEA	European Economic Area
VI.	EPPO	European Public Prosecutor's office
VII.	FBI	Federal Bureau of Investigation
VIII.	FTC	Federal Trade Commission
IX.	GC	General Court
X.	MS	Member State
XI.	NCA	National Competition Authority
XII.	TFEU	Treaty on the Functioning of the European Union

Introduction

Recently, the interest in the field of competition has risen and many theories have been presented about how the sphere can be improved. The possibility of having a competition law framework more workable in one jurisdiction and not achieving the same results in another, triggered my interest into the topic and encouraged me to conduct research with the following research question: Which method is more impactful between the American criminal sanctions approach and the European fines approach with regards to the deterrence of cartels?

Throughout the research, I have decided to compare two of the most significant jurisdictions globally, specifically the United States of America (hence forth referred to as the US) and the European Union (hence forth referred to as the EU). The relevant law is applied, thus, comparison of jurisprudence from the jurisdictions is the focus of the paper. For drawing a line between the approaches which both have undertaken in handling the core issue of the research case law is also used. Therefore, the legal instruments applied set the territorial scope of the thesis.

The aim of the paper is to focus on one of the most common antitrust behaviors of corporations and the approaches which both the US and the EU adopted for the purpose of investigating and dealing with it. I explore and analyze the main issues which come out of the differences in both methods. Customer's protection and fair business practices should be of utmost importance, avoidance of collusion between companies for distorting competition is the main goal at the end of this analysis. Tackling cartels is one of the highest priorities in both jurisdictions, thus, they also cooperate with each other and concluded a 'first generation' agreement obliging them to provide information and evidences in the scope of the competition policy.[1] Throughout the thesis, I aim to present, based on legal instruments, real life examples and case law, not only both approaches undertaken but also to evaluate which one seems to present better results in handling antitrust violations. Taking into consideration all the information gathered, at the end I suggest a possible solution and improvements to the issue, along with methods of how both jurisdictions could merge their approaches and eliminate some of their unique differences for the purpose of tackling the illegal practices. Globalization and the constant progression do not allow

[1] Philippe Chappatte and Paul Walter, 'The Cartels and Leniency Review: European Union' (The Law Reviews, 2 March 2021) <https://thelawreviews.co.uk/title/the-cartels-and-leniency-review/european-union> accessed 19 November 2021.

nations to step aside and ignore such pending issues. Sufficient maximization of the harmony is required due to the growing market and worldwide transactions.

There is not a sufficient difference between the definition of the term cartel in the US and the EU. The competition policy of the EU describes cartels as a few independent companies which collude to fix prices, to limit output and/or share consumers/markets.[2] Furthermore, such collusion may also affect the quality of the product or service as well as infringe possible innovations in the sector. The applicable legal instrument is the Treaty on the Functioning of the European Union (TFEU), article 101, which aim is to prohibit such antitrust practices. [3]

The legal instruments covering the cartel practice in the US are the Sherman Antitrust Act[4] and the Clayton Antitrust Act[5]. It is stated that any form of agreement, despite if it is a contract, collusion in the form of trust, conspiracy, not official agreement, leading to restraints and limitation of commerce and trade, is to be categorized as unlawful practice.[6] Moreover, the Federal Trade Commission Act (FTC), prohibits all forms of unfair competition and unlawful practices.[7]

The material difference between these legal instruments is noticed mostly in the formulation of the legal text. The unique distinction is that the Sherman Act points at individuals as a separate subject of the illegal practice by providing that every individual engaged in such, shall be subject to a fine not exceeding 100 mil. US dollars and up to 10 years jail time. According to it, cartel violations are categorized as criminal felonies, thus, criminal sanctions shall be imposed on those responsible.[8]

In contrast, article 101 TFEU, does not mention individuals nor penalties to which such shall be subject if a violation of that nature occurs. The legal basis for the imposition of penalties over the unlawful practices listed in the articles at hand is article 103 TFEU. It grants powers to the European Commission to conduct an enforcement system, which naturally includes the imposition of fines.[9] Moreover, Council Regulation 1/2003, grants enforcing powers to the European Commission based on Article 103, to impose fines on corporations. The fundamental principle is

[2] Consolidated version of the Treaty on the Functioning of the European Union [2008] C 115/01, art. 101.
[3] Ibid.
[4] 15 USC §1-7, 1890.
[5] 15 USC §12-27, 1914.
[6] 15 USC §1, 1890.
[7] 15 USC § 45 (a), 1914.
[8] 15 USC §1, 1890.
[9] Consolidated version of the Treaty on the Functioning of the European Union [2008] C 115/01, art. 103.

that the sanction should be identified on the grounds of the seriousness and length of the violation, with a maximum penalty of 10% of the turnover.[10]

To further address the antitrust practice, real cases and follow up penalties from both jurisdictions are presented.

Firstly, from the EU position, The European Commission has recently investigated and discovered that Conserve Italia Soc. coop. Agricola and Conserves France S.A., have colluded for a period of 13 years and engaged in antitrust practices with other market participants. The cartel was established for the purpose of selling specific varieties of canned vegetables to merchants from the European Economic Area (EEA) and certain food companies. The Commission established that Conserve Italia as a merchant colluded with the other participants in the cartel to split the marketplace and to set up prices for various types of canned vegetables throughout Europe, which resulted in customers being subject to higher costs and suffering less competition.[11] The fine imposed by the competent authority was based on the Commission's guidelines on fines, namely the 2006 Guidelines on fines[12], for 20 mil Euros.[13] This case serves as a good example for showing the severity of the fines which the European Commission imposes as well as to show their zero-tolerance policy for cartels under the respective article 101(1) TFEU.[14] When deciding on the level of the fines, the authorities consider a number of factors, such as the seriousness of the infringement, duration, territorial scope and sale price.[15]

The second example is from USA case law, which concerns the former President and Chief Executive Officer of Bumble Bee Foods LLC, who has been found guilty of his leading role in cartel for fixing prices of canned tuna for the period of three years. He was convicted to pay 100k USD and to serve 40 months of prison time. The purpose of this sentence is to demonstrate how executives of large corporations, who cheat consumers are being brought to justice

[10] Council Regulation (EC) No 1/2003 [2003] OJ L 1/1.
[11] European Commission, 'Antitrust: Commission fines Conserve Italia €20 million for participating in canned vegetables cartel' (European Commission, 19 November 2021) <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6164> accessed 20 November 2021.
[12] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 [2006] OJ C 210/2.
[13] European Commission, 'Antitrust: Commission fines Conserve Italia €20 million for participating in canned vegetables cartel' (European Commission, 19 November 2021) <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6164> accessed 20 November 2021.
[14] Consolidated version of the Treaty on the Functioning of the European Union [2008] C 115/01, art. 101(1).
[15] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 [2006] OJ C 210/2.

and subjected to punishments. It also shows that not only corporations, but their sole leaders must and can be held accountable for their unlawful and antitrust actions.[16]

To further dive into the topic, the following Thesis paper is separated into four main Chapters. The first one "Legal basis and substantive provisions for cartel prohibitions in the EU and the USA "introduce the legal foundations of both jurisdictions designed to achieve methods for adjudicating cartel behavior. The legal basis, landmark cases, decisions, and approaches of competent authorities needed for the comparison are discussed and compared. The main purpose of the first Chapter is to outline the major distinctions towards criminal liability for antitrust behavior in both jurisdictions.

The second Chapter "Sanctions and criminal penalties for companies and individuals "takes a closer look at the types of sanctions for the various anti-competition practices, potential grounds for reducing penalties and company liabilities in case of subsidiary violations. Reference is made to the EU and the US case law for further clarification.

The third chapter: "Damages claims and fine/criminal sanctions "is dedicated to the different processes for delivering justice to civil damages cases caused by cartel activities. It explains how impacted consumers may claim damages in both jurisdictions as well as describes commonalities and differences between fine/criminal sanctions procedures in both.

The last Chapter "Common goals, different approaches, which one proves to be more workable? "addresses the question, whether the EU or the US adopted better tools for preventing antitrust behavior and punishment methods for wrongdoers. After answering it, enhancements for a smooth mixture of the two approaches are suggested to combat cartel practices. Despite the sufficient level of similarities in the competition policies, the significant core center of each is unique.

[16] DOJ, 'Former Bumble Bee CEO Sentenced To Prison For Fixing Prices Of Canned Tuna', (The United States Department of Justice, 6 June 2020) <https://www.justice.gov/opa/pr/former-bumble-bee-ceo-sentenced-prison-fixing-prices-canned-tuna> accessed 20 November 2021.

Chapter I: Legal basis and substantive provisions for cartel prohibitions in the USA and the EU

1. Historical background and development

It should be noted that the historical element is of vital importance in this comparison. The historical background of both the EU and the USA is very different, therefore, it is considered that it largely affected the policies of both as well as the way they look and adjudicate over different matters. Starting with looking back at the history, it must be mentioned that the provisions of the Sherman Act have developed over time and increased the penalties for the criminal violations under the statute. In the very beginning when the Sherman Act was drafted, it used to categorize the infringements as misdemeanors and to punish the wrongdoers with no more than 5000 USD and up to one year jail time. Policies in that aspect further developed when in 1914, a clause was added to the Clayton Antitrust Act stating that victims who suffered antitrust breaches are eligible to sue for triple damages along with their attorneys' costs.[17] For almost a century, imprisonments barely occurred, and the gravity of the fines was rarely substantial enough to contribute to cartel deterrence. However, major changes occurred when the Antitrust Procedures and Penalties Act came into force.[18] Owing to the Act and the major increase which it brought to the level of the severity of the penalties, the Sherman Act has developed multiple times through the decades. As already mentioned, nowadays it provides for fine up to 100 mil USD for corporations, 1 mil USD for individuals and no more than 10 years prison time.[19]

However, the Act itself was not enough to combat the unlawfulness and up to 1995 the Court dealt with mostly local businesses and domestic cartels.[20] This significantly changes after the landmark case *United States v. Archer Daniels Midland Co Crim*, which expanded the area of investigation and redirected the cartel enforcement policies to multi-national cartels. The case reveals a conspiracy for price-fixing among a few companies and resulted in prison sentences for

[17] 15 USC §12-27, 1914.
[18] William Kolasky, 'Criminalizing cartel activity: Lessons from the US experience' [2004] Competition & Consumer Law Journal 207.
[19] 15 USC §1, 1890.
[20] William Kolasky, 'Criminalizing cartel activity: Lessons from the US experience' [2004] Competition & Consumer Law Journal 207.

the executives of those companies and huge fines.[21] Another example for the major increase of the fines imposed by the Justice Department is the *Hoffman – La Roche* case, where the penalty amounts to 500 mil. USD for being part of vitamins cartel.[22]

European antitrust law derives mainly from articles 101 to 109 TFEU. These legal provisions were born out of the idea of a Single Market, fair and transparent competition. The first legal instrument serving this purpose was Council Regulation 17/62[23]. The wording of the instrument has originated out of one of the most landmark cases in the history of the EU, namely *Van Gen den Loos*[24].[25] Furthermore, the first significant decision of the Commission taken on the grounds of article 101 TFEU was in the *Consten and Grundig*[26] case, which further shaped the legal language of the provision and added "potential effects" as a factor needed to be considered when assessing whether an infringement of competition occurred on the Single Market. The role of the Regulation is classified as significant due to providing interpretation to the meaning of article 85 of the Treaty of Rome, as a provision prohibiting cartel behavior.[27] Moreover, anti-competitive agreements which could restrict free trade and competition on the market were also prohibited by the Regulation. The major role which the Regulation played in the history of the development of the European Union competition policies is because of its plain demonstration of prioritizing the fight against the illegal practice. Additionally, the instrument gave vast power to the European Commission in that aspect.[28] The European Commission had the ability to launch investigations, adopt decisions, to impose and enforce punishments. The first case where the Commission used its powers was in *Grosfillex and Fillistorf*[29]. Unfortunately, it did not prove to have much success and developed a path of dependencies hard to overcome. Issues such as a huge backlog of notifications due to the lack of personnel, no clear guidelines and criteria as the

[21] *United States v Archer Daniels Midland Co Crim*, No 96-CR-00640 (ND Ill, Oct. 15, 1996).
[22] *United States v F Hoffman-La Roche Ltd Crim*, No 99-CR-184-R (ND Tex, May 20, 1999).
[23] EEC Council: Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty [1962] OJ 13/204.
[24] C - 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1.
[25] EEC Council: Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty [1962] OJ 13/204.
[26] C-56/*64 Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community* [1966] ECR 266.
[27] Treaty Establishing the European Community (Consolidated Version), Rome Treaty [1957], art. 85.
[28] Laurent Warlouzet, 'The Centralization of EU Competition Policy: Historical Institutionalist Dynamics from Cartel Monitoring to Merger Control (1956-91)' [2016] JCMS: Journal of Common Market Studies 725.
[29] Grosfillex-Fillistorf [1964] 64/233/CEE, OJ 58/915.

competition policies were relatively new were only some of the results after the adoption of the Regulation.[30]

The need for a change and modernization of the procedures initiated the adoption of Regulation 1/2003. The Commission may take prohibition[31] and non-prohibition[32] decisions under the respective articles. Furthermore, due to the volume of work, it should have switched from centralized model of enforcement to a decentralized one and to allow self-assessment on behalf of the corporations, however, this did not eliminate the Commission in whole, as it kept its right to have the last word. Even more so with the updated version of the Regulation, the EU Commission have the chance to prioritize cases and to guide national authorities at the same time.

The next major step taken on behalf of the Commission is the adoption of Guidelines on setting fines for anticompetitive behavior. The main difference with the instrument serving the same purpose before is that the Commission tries to be more transparent towards the public and announces the guidelines, they follow in setting the fines. When deciding a two-step approach is followed: firstly, based on the duration and gravity a basis amount would be set, then on a case-by-case basis each will be evaluated as whether any specifications are applicable, if such it could dramatically increase the amount of the fine.[33]

On one hand, the adjudicating bodies of the national court are bound by this Guidelines and are expected to comply with them, on the other hand they also enjoy a certain level of discretion in determining the amount.[34] There is not a maximum amount of the fine, it is basically set up to 10% of the worldwide revenue of the parent company in all related business activities during the year before the decision is taken.[35] It is important to mention that the Guidelines in question apply to all kinds of antitrust infringements in comparison to the USA Sentencing Guidelines which cover solely severe misdemeanors and felonies. The EU's Fining Guidelines and EU competition law serve the purpose of determining the respective amount of the sanction imposed

[30] Martin Carree, Andrea Günster, Maarten Pieter Schinkel, 'European Antitrust Policy 1957–2004: An Analysis of Commission Decisions' (2010) Review of Industrial Organization 2010 <DOI 10.1007/s11151-010-9237-9> accessed 20 November 2021.
[31] Council Regulation (EC) No 1/2003 [2003] OJ L 1/1, art.7.
[32] Ibid, art. 10.
[33] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 [2006] OJ C 210/2.
[34] Ibid.
[35] Ibid.

by the NCA's (National Competition Authority). In addition, it should be highlighted that such fines are not imposed over individuals.[36]

Recent statistics show that the fines imposed by the European antitrust bodies are sufficiently higher in contrast to the USA.[37]

The historical background and goals of both jurisdictions resulted in different approaches which even though unsuccessful at a times, majorly contributed to cartel deterrence. The following paragraphs presents a detailed picture of the specific legal provisions applicable in such scenarios as well as applicable case law which further shaped the legal framework.

2. Core legal provisions and landmark case law

History convinced many scholars that without criminal penalties cartel deterrence is hard to be achieved. Having the possibility of facing jail time contributed mostly to effective cartel enforcement according to them. Moreover, it also has proved itself as a tool keeping employees away from potential cooperating with the initiator of the infringement.[38]

As discussed above the core legal provision in the European Union legislation, prohibiting the cartel behavior is Article 101. On the other side, section 1 of the Sherman Act lays down the corresponding provisions from the USA side. In the following paragraphs these legal provisions are discussed and interpreted in detail for the purpose of outlining core commonalities and differences between them. Where applicable case law is used to clarify not only the process which occurred shaping the provisions through the decades, but also to guarantee clear examples of the way both jurisdictions observe these antitrust violations and adjudicate based on the legal rules.

Starting with some facts, it is good to mention that it has been noticed that the financial fines in the European Union have sufficiently increased during the last years. Statistics have showed that during 2019, the EU Commission have imposed fines for 4 billion EUR for cartel behavior. In comparison during the same year, the USA has imposed fines for 356 million USD.

[36] Wayne D Collins, Joseph Angland and others, Issues in competition law and policy (ABA Section of Antitrust Law, 2008) ch. 20.

[37] John M. Connor, 'Cartels Portrayed, A 21-Year Perspective: U.S. vs. EC: Who's Winning the Prosecution Race?' (2015) AAI Working Paper No. 11-03 < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2547695> accessed 21 November 2021.

[38] William Kolasky, 'Criminalizing cartel activity: Lessons from the US experience' [2004] Competition & Consumer Law Journal 207.

The difference between the volume of the amounts is very clear, however, two opposite views on it arise. Either more cartels have been investigated and/or reported to the competition authorities or the EU Commission confirms the opinion of the scholars, namely that it imposes tremendously high fines to the corporations.[39]

2.1 Articles 101 and 103 TFEU

To begin with article 101 TFEU, it provides for fair competition and aims to ban cartels and each agreement having the potential to disrupt competition in any possible way. The first landmark case to start with is *Courage v Crehan*, where the Court established that article 101 has not only vertical effect but also has direct horizontal effect, meaning that individuals are also capable of relying on and enforcing it in the Court.[40] Having that in mind is quite important, because the article provides them with the ability to claim damages if they have suffered losses as a result of anticompetitive behavior.[41]

The main problem outlined in the wording of article 101 TFEU is the fact that it does not specifically mention the term cartel. Instead, it refers to all contracts, agreements, concentrated practices and resolutions which could affect in a negative and disruptive way the fair competition on the single market.[42] Furthermore, the article refers to undertakings as the core subject of the restriction, it may represent not only legal persons but also natural ones engaged in economic activity and being part of a corporation.[43] The wording of article 101 TFEU is widely interpreted by the national authorities which eliminates to some extent the issue that it does not have the term "cartels" in its definition. The form of collusion is not important as long as agreement between them arises.[44]

Concentrating on the starting point, namely what a cartel is and how it has been defined across the European Union, a few important instruments must be mentioned. The first one is the Guidelines of the European Commission on the applicability of article 101. Even though a clear definition has not been provided there, the Commission repeatedly used the term and referred to

[39] DLA Piper, 'Cartel enforcement' (2017) Global Review < file:///C:/Users/HP-430-G4/Downloads/3213720_Cartel_Enforcement_Global_Review_June_20177_V13%20(1).pdf> accessed 21 November 2021.
[40] C-453/99 *Courage Ltd v. Crehan* [2001] ECR I-6297.
[41] Ibid.
[42] Consolidated version of the Treaty on the Functioning of the European Union [2008] C 115/01, art. 101(1).
[43] C-41/90 *Höfner and Elser v Macrotron GmbH* [1991] ECR I-1979.
[44] C-209/78 *Heintz van Landewyck SARL and others v Commission of the European Communities* [1980] ECR 3125.

„case by case analysis and previous case law of the Court“ as an available source of establishment of such illegal behavior.[45] On the other side, the Court of Justice has developed, shaped and provided its own definition of the term in a few cases such as CB v. Commission[46], P Dole Food Company, Inc. v. Commission[47] and T-216/13 Telefónica v. Commission[48]. Furthermore, the Court expressed their understanding of article 101 as covering cartel behavior.[49]

Commission Notice on Immunity from fines and reduction of fines in cartel cases[50], also referred to as Leniency notice delivered definition which was reused in another instrument of the Commission, the Settlement Procedure Notice.[51] It has been defined as „contract/agreement/concentrated practice between two or more competing companies having the goal to work and coordinate together their actions and behavior on the market and for the purpose of influencing their pricing schemes and trading conditions, resulting in a negative effect over consumers and other competitors.“[52]

Regarding the question to whom the provisions grant enforcement rights, the answer is the European Commission, NCAs and courts. Under the provisions, the European Commission has the right to investigate and to impose a sanction.[53] Most of the cases come to the attention of the Commission due to signaling from individuals. Often these are participants in cartel agreements using a whistleblowing channel and/or parties suffering damages due to the anticompetitive behavior of the corporations.[54] The Commission operates on the principle of prioritizing as it investigates with high priority the most serious infringements reported. As opposed to the EU Commission, the primary focus of the NCAs is over contracts and concentrated practices affecting the free competition of their Member State (MS).[55]

[45] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C 11/1, para. 9.
[46] C- 67/13 *Groupement des Cartes Bancaires (CB) v Commission* [2014] ECLI:EU:C: 2014:2204.
[47] C-286/13 P *Dole Food Company, Inc. v. Commission* [2015] ECLI:EU:C:2015:184, para. 115.
[48] T-216/13 *Telefónica v. Commission* [2016] ECLI:EU: T: 2016:369, para. 102.
[49] C- 226/11 *Expedia Inc v Autorité de la concurrence and Others* [2012] ECLI:EU:C: 2012:795, para. 33.
[50] Commission Notice on Immunity from fines and reduction of fines in cartel cases [2006] OJ C 298/23.
[51] Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases [2008] OJ C 167/1.
[52] Commission Notice on Immunity from fines and reduction of fines in cartel cases [2006] OJ C 298/23, para. 1.
[53] Alexander Israel, Jan Moritz Lang, Fabian Hubener, ‘A Practitioner’s View on the Role and Powers of National Competition Authorities’ (2016) Policy Department A: Economic and Scientific Policy <https://www.europarl.europa.eu/RegData/etudes/STUD/2016/578972/IPOL_STU(2016)578972_EN.pdf> accessed 22 November 2021.
[54] Ibid.
[55] Ibid.

Even though cartel behavior has not been classified as criminal conduct according to the core article 101 TFEU, this did not stop some European countries to introduce it as a criminal offence and to impose a criminal sanction above it. The most recent example is Denmark, where criminal cartel offence has been applied since 2013, depending on a certain criterion such as: the gravity of the offence, to what extent the individual participated in the unlawful practice, how adverse were the effects of the behavior. All these factors are quite important also in determining the duration of the prison sentence.[56] According to the Danish Competition Act the maximum prison penalty is up to 18 months, however, if the gravity of the offence is exceptionally higher, it can be extended up to six years jail time.[57] Other examples of European countries which have criminalized cartel behavior are Romania, Greece, and France, where such behavior could be adjudicated as a fraud offence.[58] The case in other European countries is that they may eventually impose a criminal sanction only over certain antitrust behavior such as bid-rigging which is specifically the case in Poland, Germany, Austria and Italy.[59] However, a deep examination led to the fact that even though adopted such legislation is not always considered as a mandatory tool. The behavior is categorized more as a fraud offence, which significantly narrows the scope of the behavior, thus, pushes it far away from criminal anti-competitive behavior. Such criminal penalties are imposed quite rarely as the national courts are still very hesitant to press charges against a person for conduct carried out for the ultimate benefit of a company. A reason for that could be the lack of experience or the lack of guidelines.[60] Furthermore, looking at the European countries as a whole it does not seem that major steps in that direction have been taken. Concerns of the competition authorities are related to the fact that if such penalties are to be more incorporated in the legal system, that may trigger people to destroy evidence and to refuse to cooperate with the investigators, thus, leading to less effective cartel investigations and negative impact on

[56] Norton Rose Fulbright, 'A global survey of recent competition and antitrust law developments with practical relevance' (2016) Competition World <https://www.nortonrosefulbright.com/en/knowledge/publications/1c8cd600/the-criminal-cartel-offence-around-the-world#autofootnote8> accessed 26 November 2021.

[57] Lov nr. 700 af 18.06.2013 Konkurrenceloven, § 22(3).

[58] Art. L420-6 C com; FEK A'93/20.04.2011, art. 44; Ordinance 21/1996 on Law of Competition published in the Official Gazette no. 88/30.04.1996, art. 63.

[59] § 298 1 StGB**;** § 168b 1 StGB**;** Art. 353 c.c.; Art. 305 k.k. (1997); Keith Jones, Farin Harrison, 'Criminal Sanctions : An overview of EU and national case law' (2014) E-Competitions, National Competition Laws Bulletin < http://awa2015.concurrences.com/IMG/pdf/keith_jones.pdf> accessed 26 November 2021.

[60] Keith Jones, Farin Harrison, 'Criminal Sanctions: An overview of EU and national case law' (2014) E-Competitions, National Competition Laws Bulletin < http://awa2015.concurrences.com/IMG/pdf/keith_jones.pdf> accessed 26 November 2021.

deterrence of the unlawful practice even though the Department of Justice of the USA proves the opposite.[61]

The second important article is 103 TFEU.[62] It is the core legal provision granting exclusive rights to the European Commission to adjudicate over cartels, agreements intending to disrupt competition and the internal market. The article is strictly related to the non-exclusive list of prohibited behaviors having the power to affect the single market.[63]Critics have criticized the article as giving too much and not enough regulated power to the Commission in terms of establishing fines as due to their sufficient increase throughout the years seems to infringe the rights of the shareholders under the European Union law. On its behalf, the Commission evaluated the fines it imposes as vital and indispensable for the purpose of achieving the goals of eliminating unlawful industry practices.[64] The language of the article is enough broad to provide for the criminalization of the cartel behavior, however, it has been limited by article 103 (2) (a) as it mentions only "fines and period penalty payments" as a mechanism for punishing the unlawful behavior.[65] Additionally, the target of the article are "undertakings", which automatically exclude the individuals from their scope.

It must be noted that during the last decade there have been attempts at criminal enforcement to be integrated into the competition system of the Union. This brings us to the adoption of Regulation 2017/1939, through which the European Public Prosecutor Office (EPPO) was established.[66] It mainly provides that each of the MS may establish EPPO on its territory to combat unlawful practices from a competitive nature. Although this was certainly a step towards the progression, the Regulation does not oblige the states to refer to the new competent body as well as not all of them have applied it. As this new authority is independent of the MS and European organizations, it does not provide the EU Commission with criminal prosecution rights. It is EPPO's discretion to conduct investigations and to prosecute them afterward. Such are adjudicated before national courts which excludes the Court of Justice of the European Union (CJEU) from the process. Again, the term "cartels" is not specifically mentioned, but it is referred to the unlawful practices affecting the financial interests across the EU which by default covers the

[61] DOJ, 'Criminal Enforcement Trend Charts' (The United States Department of Justice, 16 November 2021) < https://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts> accessed 26 November 2021.
[62] Consolidated version of the Treaty on the Functioning of the European Union [2008] C 115/01, art. 103.
[63] Ibid, (b).
[64] Rainer Bechtold, Wolfgang Bosch, Ingo Brinker, 'EU-Kartellrecht' (3rd edn., C.H.Beck, 2014).
[65] Consolidated version of the Treaty on the Functioning of the European Union [2008] C 115/01, art. 103 (2)(a).
[66] Council Regulation (EU) 2017/1939, OJ L 283/1.

cartel behavior. Such an approach seems more workable because otherwise a change in the TFEU should have been made to grant the Commission with powers to grant criminal sanctions to individuals as well as to extend the jurisdiction of the CJEU to cover also criminal matters. Furthermore, giving such power to the EU institutions would touch upon sensitive topics such as the impact it would have over the sovereignty of the states and the unwillingness of the MS to grant it.[67]

2.2 The Sherman Antitrust Act and The Clayton Antitrust Act

The Sherman Antitrust Act has been implemented in 1890 and it is the first legal instrument that outlawed detrimental industry practices in the USA. It is the legal basis that prohibits cartels and each form of agreement that could in any way exclude and restrict competition, limit innovation and industrial output, fix prices, etc. Another crucial provision of the Act is that monopolization is regarded as illegal and is subject to sanctions under the statute. The authority having enforcement rights under the instrument is the U.S. Department of Justice via initiation of legal proceedings before federal courts. The courts may decide on the future existence of the companies which infringed in any way the market, such as to be dissolved or to be subjected to a variety of restrictions for the purpose of deterrence of illegal practices. Section 1 of the Sherman Act provides for the competent authorities to choose between fines and imprisonment as a penalty method when adjudicating such matters.[68] It must be mentioned that one of the core similarities between Section 1 of The Sherman Antitrust Act and article 101 TFEU, is the fact that both provisions may be enacted by individual parties claiming damages due to the antitrust behavior of corporations. These furtherly confirms the fact that The Sherman Antitrust Act and the approach of the USA towards antitrust behavior on the market is strictly related to the consumer's welfare. In the case *Spectrum Sports, Inc. v McQuillan 506 U.S. 447*, the Court stated that the purpose of the legal instrument at hand is not to safeguard the industry operating on the market but to ensure the safety and welfare of the consumers in case of failure of the market. It confirms that the Act is concentrated on behavior that distorts competition and infringes it instead of punishing competitive conduct.[69]

[67] Ingrid Margrethe, Halvorsen Barlund, 'Leniency in Eu Competition Law' (Wolters Kluwer, 2020).
[68] 15 USC §1, 1890.
[69] *Spectrum Sports, Inc., et al v. Shirley McQuillan, et vir, DBA Sorboturf Enterprises*, 113 S. Ct. 884 (1993).

The article follows the following structure: the first part explains what behavior is considered anti-competitive and restricts it. The second part provides for the measures and penalties undertaken by the respective competition authorities to punish and prevent the unlawful conduct. A landmark case filled under the Act is *United States v. Workingmen's Amalgamated Council of New Orleans,* which extended the scope of the article to cover also labor unions.[70] In *Northern Securities Co. v. United States,* was found out that the companies involved had formed a monopoly and the court ordered them to dissolve.[71]

Even though proved successful the Act has been criticized by many. For example, the Antitrust essay by Alan Greenspan, where he explains that the legal tool rather impedes innovation instead of encouraging it as well as claims that it harms society.[72]

The subsequent legal instrument passed in 1914, namely the Clayton Antitrust Act[73] has broadened the scope of the previous one in place, namely the Sherman Antitrust Act[74]. In comparison to its predecessor, the Clayton Act has stressed upon specifically prohibited conducts that are considered as anti-competitive. The following acts have been prohibited by it: price discrimination which results in less competition on the market[75], exclusive dealings[76], tying[77], mergers and acquisitions which could limit competition on the market[78] and to limit individuals' rights, meaning that a director is not allowed to have such role in two or more competing parties if they may distort competition in case of merging[79].

The major and most important difference between the two instruments is that labor unions are not subject to antitrust law according to the Clayton Antitrust Act which was a pending issue up to then. Furthermore, the Sherman Antitrust Act simply categorized monopolies as unlawful, the Clayton Act outlawed particular business activities that are most likely to arise from monopolies.

[70] *United States v. Workingmen's Amalgamated Council of New Orlean et al*, 54 F. 994 (E.D.La. 1893).
[71] *Northern Securities Co. v. United States*, 24 S. Ct. 436 (1904).
[72] Ayn Rand, 'Capitalism: The Unknown Ideal' (New American Library, 1966).
[73] 15 USC §12-27, 1914.
[74] 15 USC §1-7, 1890.
[75] 15 U.S.C. § 13.
[76] Ibid, § 14.
[77] Ibid.
[78] Ibid, § 18a.
[79] Ibid § 19.

Based on the analysis it can be concluded that antitrust issues are of high importance for both jurisdictions. Furthermore, both have taken it up seriously which is proven by their attempts to revise legislation to keep it up to date with today's constant progression. The history of both has impacted the way the authorities proceed and think. Criminal penalties have been part of the USA legislation from the very beginning, on the other side in the EU such have not been introduced when the TFEU has been drafted as well as the Union is more administrative based, thus, it is used to act as an administrative body with the powers to only impose sanctions in the forms of fines. Providing the EU Commission with the right to impose criminal sanctions over individuals could result in tremendous shock for the Member States as they are not ready to grant such power to an outside body. Such may cause political issues and would question the sovereignty of the states.

However, it turns out that both have been criticized, thus, the goal here is to find the middle ground and to propose a resolution.

Chapter II: Sanctions and criminal penalties for companies and individuals

1. Natural/legal persons and private/public undertakings

To analyze the sanctions which, the competition authorities impose over the wrongdoers, firstly the subject of these punishments must be analyzed. A differentiation between natural and legal persons is quite important in that case. Furthermore, the concept of undertaking as well as what is considered as a private and public undertaking, how the law applies over these subjects and whether any differences arise in the way both jurisdictions consider the concepts of the subjects they cover is firstly discussed.

In the legal sphere, the term natural person is used for individual human beings, physical persons, having rights and obligations under the law. These persons are also capable of entering into legal contracts and enjoy certain rights and privileges under the law. Also, certain duties are granted to them without their explicit agreement but only due to their position in society. In contrast, a legal person has their own legal personality, and it is considered to have the right to sue and to be sued, to enter into legal agreements and contracts etc. The legal person also enjoys certain rights, privileges, and has obligations under the law. In its rights and obligations, the legal person does not differ much from the natural one, however, legal persons are considered also to be corporations/companies. The major difference between them is that the natural person could also be recognized and deemed as a legal one and has the ability to perform both roles. However, even though the legal persons have a separate legal personality from the natural ones, they can carry out their functions only through them.

Looking at the concept of undertaking the first article which must be analyzed is 101 (1) TFEU. Firstly, the purpose of the article is to abolish all industry practices which could negatively affect competition. Secondly, the article also introduces the term “undertaking”; however, it is quite broad in its sense. The main question is what the term covers and what is “undertaking”. The first case worth mentioning is *Höfner and Elser v Macrotron GmbH* where the definition of the concept was one of the preliminary questions to the court. The outcome of the case established that even public entities fall under the scope of article 101 TFEU, therefore, are

considered as undertakings. The case established that no matter how the entity has been financed, or what its legal status is, if it engages in economic activity, it is classified as an undertaking and, therefore, is subject to article 101 TFEU.[80] In that sense economic activity has been defined in another landmark judgement, namely *Firma Ambulanz Glöckner v Landkreis Südwestpfalz* and *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*, as the offer of products or services on the single market that may be carried out by a private entity to achieve revenue.[81] Therefore, the analysis confirms that both public and private entities are equally treated by the TFEU, meaning that when the court analyzes and determines whether an entity is under the scope of the treaty, it takes into consideration not the factor ownership but only what activity it carries out.

Following are some examples of how the countries, part of the European Union implemented that, as for instance Italy. As legal grounds are considered Article 106 TFEU[82] and Article 8(1) from the Italian national law NO. 287/1990[83]. Both provide that public and private undertakings are considered equal in the eyes of the law.

Looking at the opposite direction, namely how the USA described the concepts, again section 1 of the Sherman Antitrust Act is to be analyzed at first. The language used is quite vague and from mere reading is hard to be distinguished between what is considered as prohibited practice and what is permissible under the law. According to the Act each agreement, form of trust and conspiracy, unreasonably distorting competition is considered as a violation of the law.[84] In order for the scope to be sufficiently narrowed and to become clearer, case law is applied. In terms of who falls within the scope of the article, the language is quite uncertain as it mentions individuals and corporations without providing exclusions, a list of what is regarded as a corporation in that sense, or guidelines on specific scenarios where such applies.[85] Through the decades, it has been noticed that such have been clarified via case law. For instance, single economic entities - anticompetitive agreement between a parent company and one of its subsidiaries is not considered as a subject of the antitrust laws.[86] Another example of what is not considered

[80] C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH* [1991] ECR I-1979, para. 21.
[81] C-475/99 *Firma Ambulanz Glöckner v Landkreis Südwestpfalz* [2001] ECR I-8089, para 19, and C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751, para 311.
[82] Consolidated version of the Treaty on the Functioning of the European Union [2008] C 115/01, art.106.
[83] L287/1990, art.8(1).
[84] 15 USC §1 and 2, 1890.
[85] Ibid, §1.
[86] *Copperweld Corp. v. Independence Tube Corp.* 104 S. Ct. 2731 (1984).

an unlawful agreement are the ones concluded by joint ventures.[87] Moreover, there are specific sectors that are excluded from the scope of the antitrust legislation via Acts of the state such as: insurance[88]and shipping carrier corporations[89]. However, some doctrines drafted by the courts of law are concentrated on specifically safeguarding certain entities and practices.

Evaluating both jurisdictions at this aspect, it seems that the EU has a clearer overview of the type of undertakings covered by the Treaty. Furthermore, clear definitions have been established by the European Commission and the European Court of Justice in adjudicating over the cases. On the other side, the USA is quite vague and uncertain on this matter. Each scenario is strongly individual as many factors must be taken into consideration while analyzing and adjudicating. Therefore, such conclusions could be made on a case-by-case basis after consideration of all applicable Acts, doctrines, and case law.

Finally, the extraterritorial scope of the antitrust legal framework of both jurisdictions is worth mentioning. Authorities occasionally apply competition laws outside their borders for the purpose of protecting free trading on their markets. The relevant piece of legislation from US behalf is the "effects" doctrine, which serves as a jurisdictional basis for the antitrust laws to apply to individuals/companies operating beyond the borders of the country, however, their behavior has an impact on the territory of the enforcing State. Therefore, as long as agreement between competitors or any action on their behalf has a negative impact on the territory of the United States, the latter may use the doctrine to claim jurisdiction over the issue.[90] The first time when the US applied the doctrine was in the case *US v. Aluminium Company of America and others* in 1945, where it was established that the behavior of foreign companies took part in anticompetitive agreement which affected the level of imports of aluminum in the US.[91] From the EU perspective, the relevant test applied is the qualified effects test where the court looks at whether the conduct that occurred resulted in an anticompetitive effect likely to affect the territory of the

[87] *Texaco Incorporated, Petitioner v. Fouad N. Dagher, et al.* 126 S. Ct. 1276 (2006).
[88] 15 USC § 1011 - 1015, 1945.
[89] 15 USC § 861-889, 1958.
[90] Najeeb Samie, 'The Doctrine of "Effects" and the Extraterritorial Application of Antitrust Laws' [1982] University of Miami Inter-American Law Review 23.
[91] *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

EU.[92] Thus, even if all participants in a cartel are located outside of the EU territory, a cartel may be established and the EU has a right to claim jurisdiction to address it.[93]

2. Types of sanctions for anti-competitive behavior

2.1 Enforcing body

Taking a closer look into the types of sanctions which the EU introduced as a punishment for anticompetitive behavior, it is good to firstly start with briefly discussing the institutional body having enforcement powers. The legal basis which provides such exclusive powers to the European Commission is the Council's Regulation 1/2003, particularly the Directorate-General for Competition (DG COMP).[94] However, an important note must be made here because some enforcement powers are also granted to the national competition authorities who investigate such unlawful practices under the national legal framework of the Member States.[95] In order for a maximum level of coordination between the European Commission along with article 101 TFEU and the national courts along with the national law, the Regulation in question establishes an independent body, namely the European Competition Network (ECN). Its main goal is to facilitate and provide for smooth cooperation between both units.[96] The network adopted different practices and mechanisms to achieve these results such as: notifying and updating all members of the network on new cases and crucial decisions, exchanging information and evidence, cooperation during investigations, etc.[97]. Therefore, in order for such body to have its own guidelines and legal status, the following document was drafted: Commission Notice on cooperation with the

[92] C-413/14 *Intel Corp. v European Commission* [2017] ECLI:EU:C: 2017:632.
[93] European Commission, 'Antitrust: Commission fines eight producers of capacitors €254 million for participating in cartel' (European Commission, 21 March 2018) <https://ec.europa.eu/commission/presscorner/detail/en/IP_18_2281> accessed 3 December 2021.
[94] Shearman & Sterling LLP, 'European Union: Cartels & Leniency Laws and Regulations'(The International Cooperative Legal Guides, 1 November 2021) <https://iclg.com/practice-areas/cartels-and-leniency-laws-and-regulations/european-union> accessed 03 December 2021.
[95] Ibid.
[96] Council Regulation (EC) No 1/2003 [2003] OJ L 1/1.
[97] OECD, 'Competition co-operation and enforcement inventory of co-operation agreements' (OECD Competition Committee, 2015) <https://www.oecd.org/daf/competition/competition-inventory-european-competition-network.pdf> accessed 03 December 2021.

Network of Competition Authorities (Network Notice), capturing all of the details in terms of procedures and obligations.[98]

In contrast, in the US, the enforcement powers are granted solely to the Antitrust Division of the Department of Justice ("Division"), making it simpler in comparison to the EU. There is another body that is to some extent related to confronting the unlawful industry business practices, namely The Federal Trade Commission (FTC). Although having some discretion to challenge it, if they become aware of proof evidencing criminal cartel violation, the matter will be transferred to the Division.[99]

2.2 Types of sanctions

As already mentioned, the European Union's sanction system when it comes to antitrust law is administrative-based. Therefore, the adopted approach on its behalf is implementing Regulation 1/2003 by giving the power to impose fines for such infringements to the European Commission and the NCA's. When it comes to substantive infringements of competition laws, the Commission drafted and adopted Guidelines on how they calculate the fines imposed. They also present the used methodology in reaching their decisions on such matters. Having such a guideline proves very helpful to the Commission because it does not only provide transparency to the public but also guarantees consistency and legal certainty in their decisions.[100] There are two versions of the Guidelines, one adopted in 1998 and a revised version of it adopted in 2006. Furthermore, the European Court of Justice (ECJ) is more confident in the decisions it takes as having a guideline forms rules to be followed and plaintiffs may gain more trust in the legislative body due to the increased transparency. Another huge benefit of having such guidelines implemented is that they ensure cartel deterrence. Knowing that companies engaging in antitrust conduct suffer such sanctions leads to fear in other corporations and makes them afraid of participating in anticompetitive conspiracies. Keeping the information open to the public shows' potential future

[98] Commission Notice on cooperation with the Network of Competition Authorities [2004] OJ C 101/43.
[99] Shearman & Sterling LLP, 'United States: Cartels & Leniency Laws and Regulations'(The International Cooperative Legal Guides, 1 November 2021) <https://iclg.com/practice-areas/cartels-and-leniency-laws-and-regulations/usa> accessed 03 December 2021.
[100] Hubert de Broca, 'The Commission revises its Guidelines for setting fines in antitrust cases' (2006) Competition Policy Newsletter < https://ec.europa.eu/competition/publications/cpn/2006_3_1.pdf> accessed 03 December 2021.

infringers the gravity of the punishments they may suffer and deter them from engaging in such activities.[101]

Although sharing common grounds and objectives, the need for revising and updating the Guidelines was inevitable. Some changes may look simple at first sight; however, they are of huge importance in terms of establishing a proportionate penalty for concrete anticompetitive conduct. Such change is the categorization of infringements as "minor", "serious" and "very serious".[102] Such categories proved to be unnecessary as the case law showed that corporations abusing their dominant position and cartels are always considered as very serious offences.[103] Furthermore, having a "minor" section of offences was also needless as it is almost impossible to put such infringement under this category. Furthermore, the methods used for the calculation of the sanctions had many obvious drawbacks such as the maximum of 10% increase in the amount of the fine for each year the infringement continuous, the updated version of the Guidelines have multiplied it by 10 the effect of the time passed.[104] Many times, the 1998 Guidelines were criticized because do not set individual scenarios, do not take the size of the markets on which the corporations operate, nor the size of the corporation infringing the market. Thus, some important sections are revised like, setting a starting amount below the threshold for cartel infringements on a small market as well as starting to differentiate between the size of the entities operating on the market.[105]

Looking closely into the matter the main improvement which arose was setting of the basic amount of the fine. Two-step approaches have been undertaken by the authorities to calculate the respective amount. Firstly, the value of sales along with the duration of the infringement is considered, then irrespective of the duration the already identified amount called "entry fee" is analyzed separately. The basic amount of the fine is determined by the value of sales over the previous business year of the participation of the undertaking in the infringement. A reference to the value of the company's revenue in the market the violation pertained, either directly or indirectly, in the relevant geographical zone is made. The next step is the determination of the basic

[101] C-289/04 P, *Showa Denko KK v Commission of the European Communities* [2006] ECR I-5859., para. 16.
[102] Guidelines on the method of setting fines imposed pursuant to Article 15 (2) of Regulation No 17 and Article 65 (5) of the ECSC Treaty [1998] OJ C 9/3.
[103] T-51/02, *Brasserie nationale SA a.o. v Commission* [2005] ECRII-3033.
[104] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 [2006] OJ C 210/2.
[105] Hubert de Broca, 'The Commission revises its Guidelines for setting fines in antitrust cases' (2006) Competition Policy Newsletter < https://ec.europa.eu/competition/publications/cpn/2006_3_1.pdf> accessed 03 December 2021, p.3.

amount on the basis of the gravity and the duration of the alleged violation. While assessing this matter the Commission must take into consideration more than just one simple factor. It should analyze the nature of the infringement, which is strictly individual in each and every case, the territorial scope where the infringement occurred whether it is within the European Economic Area (EEA) or it goes beyond this geographical market and the joint market share of all participants in the cartel. Duration of the infringement is another core factor as the amount of the sanction heavily depends on it as well.[106] Here comes the second stage of the Commission analysis – "the entry fee", mentioned above. Irrespective of all mentioned factors this amount is an innovative tool firstly introduced in the 2006 Guidelines, having the sole purpose to deter similar infringements in the future. The sum is calculated as 15 to 25 % of the value of sales and is mandatory for cartel behavior, in contrast to other anticompetitive violations where it may be applied but it is up to the Commission to decide.[107]

The last elements which must be taken into consideration are the mitigating and aggravating factors. On one hand are the mitigating factors could be the provision of evidence that the unlawful practice stopped after the Commission initiated actions, proof of negligence in case the violation resulted from such, limited participation in the violation which did not result in anticompetitive behavior on the market and cooperation with the Commission beyond legal obligations. Such factors may sufficiently reduce the value of the penalty, as the monetary sanctions imposed by the Commission for such conduct are known to be tremendously huge. On the other hand, are the aggravating factors that have the opposite result of the mitigating factors, namely a sufficient increase in the amount of the fine. An example of such is continuing or repeating the unlawful practice or a similar one. In such cases, the Commission may increase the amount up to 100 %. Another aggravating behavior is the unwillingness of the undertaking to cooperate with the investigation and to help the Commission as well as encourage other undertakings to take part in the infringement.[108]

It is clear from the analysis that the fines imposed by the European Commission are not based on the economic gain of the infringer or on the losses suffered by the harmed consumers. These monetary sanctions have the role of arbitrary administrative elements calculated based on the significance of the violation and the elements explained above. The question here is whether this sole type of sanctions proves to be sufficient enough to deter the establishment of cartels. As

[106] Ibid, p.5.
[107] Ibid.
[108] Ibid, p.4.

mentioned before the Member States are free to introduce criminal penalties for individuals, however, so far, the main tool for deterrence seems to be the imposition of fines. EU law regime is solely focused on undertaking's guilt and administrative sanction against it. Therefore, as the EU law does provide for criminal sanctions for individuals, companies and corporations are the sole penalized offenders.[109] Furthermore, to support that Regulation 1/2003 article 23(5), provides that violations of the European competition law lack criminal character.[110]

The European Commission believes that the administrative fine-based system is quite workable in terms of cartel deterrence. Fines from such gravity not only majorly affect the share value of an undertaking but also cause hefty reputational damages.[111] It cannot be declined that the EU approach serves its purpose, however, it does not deter such violations in full, as well as the huge fines, do not reflect the losses of the consumers. In the last decades has been noticed that these types of penalties have increased extremely and if they continue to do so could largely result in the inability of the undertakings to pay them. Such may lead to bankruptcies and most likely will not deter cartels. Furthermore, to what extent such are proportionate will be another issue to arise.[112]

For comparing both jurisdictions, in the following paragraphs, the type of sanctions imposed by the US competition authorities are discussed. As already mentioned, there are two types of sanctions in the United States, namely fines and prison orders. Ever since 1890, after the Sherman Antitrust Act was adopted, anticompetitive behavior has been categorized as a criminal offence and therefore, punished with jail time. The Act has been criticized on multiple occasions for its vagueness, however, it cannot be denied that it largely contributed to cartel deterrence. Firstly, separating the individuals from the corporations and admitting their responsibility has been a major step for the US. It is crucial for the American approach as such individual consequences as imprisonment, may affect business executives and stop them from anticompetitive actions. It is important to note that at the end of the day, not the company itself commits infringements but the people hiding behind its separate legal personality. What is noticed in the EU

[109] Keith Jones, Farin Harrison, 'Criminal Sanctions : An overview of EU and national case law' (2014) E-Competitions, National Competition Laws Bulletin < http://awa2015.concurrences.com/IMG/pdf/keith_jones.pdf> accessed 26 November 2021, page 4.
[110] Council Regulation (EC) No 1/2003 [2003] OJ L 1/1, art. 23(5).
[111] Alexander Italianer, 'Fighting cartels in Europe and the US: different systems, common goals' (2013) Annual Conference of the International Bar Association < https://ec.europa.eu/competition/speeches/text/sp2013_09_en.pdf> accessed 26 November 2021.
[112] Cento Veljanovski, 'Cartel Fines in Europe - Law, Practice and Deterrence' (2006) World Competition < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=920786> accessed 26 November 2021, p. 85.

is that mostly the company, the business, and the employees suffer, however, the Treaty does not punish the real infringer behind the unlawfulness. Furthermore, having individual sentences would encourage the lower-level employees to cooperate with the court through a whistleblowing channel and to testify against their managers and executives involved in the conspiracy in exchange for a reduced sentence or even immunity.[113] Having a legal framework providing for criminal sanctions makes it vital for the corporations to have robust antitrust compliance systems in place as well as to respond promptly with effective remedies once cartel conduct is identified.

As discovered in the EU, throughout the decades sufficient increase in the amount of fines has been noticed. The last update on that matter initiated by Congress resulted in increasing the fine for individuals to up to 1 mil. USD, corporation fine to up to 100 mil. USD and prison time up to 10 years, by adopting Antitrust Criminal Penalty Enhancement and Reform Act.[114] The relevant guidelines, in this case, are the US Sentencing Guidelines. The formula outlined in the guidelines is essentially calculating the total volume of the impacted trade by the infringement, resulting in a basic base sum of a fine.[115] As clear definitions and measures for identifying what is meant by the volume of the impacted trade, the Court has full discretion to interpret it individually on a case-by-case basis.[116] Lacking such type of information deprives the public of transparency in relation to the size of the imposed fines.

The next step in identifying the final amount of the fine is a "culpability score" to be assigned by the court to the defendant, dependent on the unique nature of the case. In its determination, the Court analyzes many factors such as the role of the executive personnel of the company, the company's background and/or previous criminal history, the company's compliance policies in place, the level of the company's cooperation to the investigation. After identification of the base amount based on each factor mentioned it is added to the base amount and the result is from an advisory nature and it is up to the court to decide whether it will lower or increase it. The Department of Justice's (DOJ) role as well is more from advisory nature, the courts enjoy a sufficient level of discretion in deciding the size of the fine.[117]

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[113] William Kolasky, 'Criminalizing cartel activity: Lessons from the US experience' [2004] Competition & Consumer Law Journal 207.
[114] 15 USC 1, 2004.
[115] US Sentencing Commission, Guidelines Manual, § 3E1.1 (November 2012).
[116] Shearman & Sterling LLP, 'United States: Cartels & Leniency Laws and Regulations'(The International Cooperative Legal Guides, 1 November 2021) <https://iclg.com/practice-areas/cartels-and-leniency-laws-and-regulations/usa >accessed 4 December 2021.
[117] Ibid.

In terms of the prison sentence, the strongest support for such is granted by the Antitrust Division of the US DOJ. Representatives often claim that according to them there is not a strongest weapon and more efficient way to punish wrongdoers and to achieve cartel deterrence, also confirmed by statistics.[118] Same with the fines, a sufficient increase in the longevity of the prison sentence is noticed throughout the years. A recent case that led to such an increase is the sentence imposed on the CEO of the company Sea Star Line.[119] The decision of the court regarding the conviction was based on the Antitrust Criminal Penalty Enhancement and Reform Act[120]. Before the imposition of the sentence, US Sanctioning Commission revised and analyzed the volume of the affected commerce to impose a proportionate sentence. Setting such also largely depends on the level of cooperation which the defendant would provide the court with. It can be concluded that various factors apply when determining the length of the prison sentence and there is no exclusive list mentioning all of the possible scenarios which could affect the decision of the court. When adjudicating the judge is not bound by the US Sentencing Guidelines but rather uses them as an advisory measure. As in the Sea Star Line case, under the guidelines the recommended length of the prison sentence was 87 months, however, the judge imposed 5 years jail time for the defendant.[121]

Based on the analysis can be concluded that the methodology followed by the European Union in determining the size of the fines is clearer and transparent to the public. However, many uncertainties in the process of determination have been identified in the US approach. Even though it has proven workable and largely provided for cartel deterrence, it is quite unclear what path the judges follow when imposing the final penalty, when the only guidelines serve only as a recommendation tool. On the other hand, the US perspective on corporate compliance programs, whistleblowing channels and sanctioning individuals provides for a more effective deterrent. The threat of individual punishment, especially jail time, may also persuade a person to resist the temptation to engage in anticompetitive activities.

Lastly, a brief discussion on the liability of the parent companies in case of subsidiary violations is discussed. This example again shows the different ways which both jurisdictions

[118] American Bar Association, 'ABA Antitrust Section' (2009) Joint Conduct Committee E-Bulletin < file:///C:/Users/HP-430-G4/Downloads/The_Use_of_Wiretraps_in_Canadian_Competition_Law_Investigations.pdf > accessed 4 December 2021.
[119] DLA Piper, 'Antitrust matters' (DLA Piper's Newsletter, 2014) < https://www.lexology.com/library/detail.aspx?g=4dff9956-dacf-4072-8353-ca76efd13efc> accessed 04 December 2021.
[120] 118 Stat. 661, 2004.
[121] DLA Piper, 'Antitrust matters' (DLA Piper's Newsletter, 2014) < https://www.lexology.com/library/detail.aspx?g=4dff9956-dacf-4072-8353-ca76efd13efc> accessed 04 December 2021.

follow in analyzing the situation. Firstly, according to EU law, it is established that the parent company may be held liable if a subsidiary company takes part in a cartel, although the parent company did not participate in the unlawful practice.[122] Factors such as how much shares of the subsidiary company, the parent one holds, and other factors such as voting rights are taken into consideration.[123] Recent case law clearly shows namely that: *Sumal S.L. v. Mercedes Benz Trucks España, S.L.*, where the court held that the European competition law does not protect subsidiary companies from being liable for the unlawful actions of the parent company, therefore, the requirement of the parent company to specifically take part in the cartel does not exist.[124] Absolutely the opposite is the case in the US. Courts insist that as subsidiaries possess their own legal personality, and the parent company is not liable for the unlawful actions committed.[125]

3. Leniency programs

The last element discussed in this sub-chapter is the Leniency programs and notices implemented by both jurisdictions. The purpose of these programs is to allow the offenders to admit their guilt and to potentially reduce or avoid the sanction imposed on them for the alleged violations.

Firstly, the leniency program of the EU is discussed. The procedures to be followed in setting the program are described in the Commission's 2006 Notice on immunity from fines and reduction of fines in cartel cases, also referred to as Leniency Notice as well as 2012 Antitrust Manual Procedures.[126] According to the Notice, the first undertaking which notifies the EU Commission about cartel conduct, has the option to receive full immunity in two scenarios. If the whistleblower presents strong evidence for the cartel practice before the EU Commission became aware of such and initiated an investigation by itself or in cases where the Commission already

[122]Clifford Chance, 'Upside down liability in antitrust: the Sumal case puts subsidiaries of antitrust infringers in the spotlight' (2021) <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2021/10/client-briefing-on-the-sumal-judgment.pdf> accessed 04 December 2021.
[123]Ibid.
[124] C-882/19 *Sumal S.L. v. Mercedes Benz Trucks España, S L* [2021] ECLI:EU:C:2021:800.
[125] Shearman & Sterling LLP, 'United States: Cartels & Leniency Laws and Regulations'(The International Cooperative Legal Guides, 1 November 2021) <https://iclg.com/practice-areas/cartels-and-leniency-laws-and-regulations/usa >accessed 4 December 2021.
[126] Shearman & Sterling LLP, 'European Union: Cartels & Leniency Laws and Regulations'(The International Cooperative Legal Guides, 1 November 2021) <https://iclg.com/practice-areas/cartels-and-leniency-laws-and-regulations/european-union> accessed 5 December 2021.

proceeded with an investigation, however, the whistleblower provides corroborating proof for the existence of a cartel.[127] It looks quite simple to receive full immunity from first sight, however, there are much more requirements which the parties need to fulfill to be covered by the leniency. The following calmative requirements must be satisfied by the parties: a party should not have encouraged other corporations to join or alternatively stay in the cartel, before submitting notification to the Commission they should have withdrawn from the cartel, unless it is impossible to do so for the purpose of keeping privately the fact that notification to the Commission was sent, the provided evidence should not be tempered, notification to the Commission must be confidential and the other participants in the cartel must not know about it, also the leniency application on behalf of the reporting party must be strictly confidential and lastly, the reporting party is obliged to fully cooperate during the investigation.[128] Even if a company is not capable of fulfilling all of the Commission's requirements and full immunity is not granted, it could still be subject to reduction of the monetary sanction. All already mentioned conditions must be fulfilled except for the first one, namely coercing other undertakings to participate or to encourage them to stay and continue the unlawful practice.

As there is no criminal prosecution under EU competition law for antitrust behavior, when a company applies under the Leniency Notice[129] to receive immunity, the ECN+ Directive obliges MS to protect the personnel of the corporation in question to safeguard them from potential sanctioning at a national level where criminal convictions could be applied.[130]

In the US two types of leniency programs exist, one for corporations and separate for individuals. Not surprisingly, as it already has been analyzed that in the US not only corporations are prosecuted for antitrust behavior but also individuals. Starting with the leniency program for corporations, it must be noted that it is separated into two: Type A and Type B. Moreover, unlike in the EU, in the US only one undertaking is eligible to receive leniency per cartel infringement, thus, companies race to report themselves and their co-conspirators to the authorities.[131] Both A

[127] Commission Notice on Immunity from fines and reduction of fines in cartel cases [2006] OJ C 298/23, art. 9(b).
[128] Ibid, art. 10, 11 and 12.
[129] Commission Notice on Immunity from fines and reduction of fines in cartel cases [2006] OJ C 298/23.
[130] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market [2019] OJ L 11/3, art.19.
[131] Shearman & Sterling LLP, 'United States: Cartels & Leniency Laws and Regulations'(The International Cooperative Legal Guides, 1 November 2021) <https://iclg.com/practice-areas/cartels-and-leniency-laws-and-regulations/usa > accessed 5 December 2021.

and B require the parties to confess about their infringement, to initiate their own withdrawal from the illicit partnership, and to fully cooperate with the DOJ during the investigation.[132]

For leniency applicant to be eligible for Type A, six requirements must be covered: the company applicant should voluntarily notify the Division about the unlawful activity as well as to come and represent itself as a company rather than individual executives, initiated its withdrawal from the cartel as soon as the party became aware of the conspiracy, admitted about the participation in such and provides continuous assistance during the investigation, provided restitution to the harmed consumers where possible and lastly, did not coerce or encouraged other undertakings to participate or join the cartel.[133]

As an alternative Type B Leniency program is coded. It occurs when the relevant authority is already aware of the illicit activity. Such is provided only when DOJ does not have strong evidence proving the cartel behavior. The candidate must satisfy all the already mentioned requirements, except the first one. Moreover, it is of utmost importance for the company to get leniency because it will not only protect the undertaking but also its employees could be immunized from criminal prosecution.[134]

In contrast, when it comes to the Leniency Policy for individuals, for such it can only be applied before the DOJ became aware of the infringement. A few requirements must be met by the applicant: unawareness on behalf of the DOJ for the illicit activity, full and continuous cooperation provided by the individual to the investigating authorities and the individual had never encouraged other parties to join the cartel.[135]

Having such a program proved very successful for the US and resulted in the effective prosecution of many illegal cartels. Academics believe that the corporations and the employees will lose much more by covering the conspiracy instead of reporting it to the Division, especially after the increase of financial and criminal sanctions. It has been noticed that the companies prefer to report and to hope to be the first at the door instead of risking way more by hoping to get away from the law. Another crucial component that effectively contributed to the success of the Leniency program across the USA is the immunity granted not only to the corporation itself, but also to the employees who choose to participate and contribute to the investigation. It is unlikely the lack of protection to the customers motivates them to come forward and to testify, therefore,

[132] Ibid.
[133] US DOJ Antitrust Division, Corporate Leniency Policy [1993], § A.
[134] Ibid, § B.
[135] US DOJ Antitrust Division, Individual Leniency Policy [1994], § A.

extending the immunity to cover also employees proves to be an important feature in the program.[136]

The leniency programs of both jurisdictions are similar; however, differences have been identified. The US system not only provides criminal penalties for individuals but also a legal getaway from the sanction. Moreover, having such legislation and leniency programs increase the chances for reporting of cartels and achieves to a large extent the main goal, namely deterrence of cartels.

[136] William Kolasky, 'Criminalizing cartel activity: Lessons from the US experience' [2004] Competition & Consumer Law Journal 207, p.211.

Chapter III: Damages claims and fine/criminal sanctions

The third Chapter of the thesis paper is focused primarily on legal procedures for civil damages for violations suffered by the consumers due to cartel conspiracy. It is analyzed under what conditions the harmed individuals may claim damages in both jurisdictions. The differences and commonalities between the EU and the US are outlined for the purpose of deciding which one presents a more flexible and useful approach to the public and seems to serve better to the affected in a negative way individual.

1. Private enforcement of damages in EU and US

Making it possible for individuals to privately enforce anticompetitive legislation has a crucial role in the European Union. Firstly, provided in the Treaty of Rome[137] and later re-stated in Regulation 1/2003[138], the primary role of the national courts is to defend and safeguard the rights of the people and to assure their well-being.[139] Therefore, awarding damages to the affected in a negative way due to anti-competitive behavior is a power granted to the national tribunals and recognized across the Union.[140] Furthermore, the case-law of the European Union also confirms the provided in the primary legislation. For example, in the case *Courage v. Crehan*, individuals can rely on TFEU and claim damages under it in court.[141] It has been established that they may claim restoration in the form of full compensation due to the losses caused by the unlawful antitrust actions of the corporations.[142] In another landmark judgment, namely in the case *Manfredi*, the full efficiency of the treaty was acknowledged and confirmed that the EU legislation and purpose would be jeopardized if individuals are not provided with a tool or platform through which they can seek compensation for the losses suffered due to competition infringements.[143] Part of successfully combating the illegal practices is the provision of lawful and

[137] Treaty Establishing the European Community (Consolidated Version), Rome Treaty [1957].
[138] Council Regulation (EC) No 1/2003 [2003] OJ L 1/1.
[139] Andrea Renda, John Peysner and others, 'Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios' (2007) Report for the European Commission < https://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/impact_study.pdf> accessed 5 December 2021, p.9.
[140] Ibid.
[141] C-453/99 *Courage Ltd v. Crehan* [2001] ECR I-6297.
[142] Ibid.
[143] C-295/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-06619.

fair restoration for the parties suffering due to distorted competition, otherwise, the goals will not be achieved. In addition, the European Court of Justice ruled that the Union is responsible to offer appropriate mechanisms for compensating losses caused by an antitrust violation.[144]

However, looking at some statistics and studies, it has been identified that public enforcement is the most common approach for anticompetitive violations across Europe in comparison to the private actions in national tribunals.[145] On the other hand, in the US most of the cases have been initiated by private parties.[146] The reasons behind such could be the fact the individuals per se do not play a larger role in the cartel deterrence goal but as a subject to receive a mere restoration for the violation is suffered, in comparison to the US. Comparing both seems that the private enforcement options in the US have been way more developed throughout the decades, shown also via the various type of remedies for such parties, like attorney fees, options for awarding numerous damages at once, etc.[147] Inefficient private enforcement in the EU could also be a result of the lack of information and awareness by the individuals who suffered the loss.[148] Due to the lack of knowledge, end customers usually are unaware that they have been subject to an antitrust violation.[149] Moreover, for example, if a cartel's decision was increasing of prices and an individual consumer suffers the result of that decision, without public agency such as the European Commission, intervening and initiating an investigation, it is unlikely for the consumer to realize that he suffered losses due to that violation. Such infringements by cartels frequently result in dispersed damages affecting many consumers. Therefore, the damage suffered is minor, however, it negatively affects a larger group of consumers.[150] The most common scenario in such cases is that the separate individuals may be discouraged to take an action despite their attempts and motives to claim damages.[151] The reason for such discouragement could be that the individuals are waiting and expecting someone else to pursue legal actions and based on that

[144] Ibid.
[145] Denis Waelbroeck, Donald Slater and Gil Even-Shoshan, 'Study on the conditions of claims for damages in case of infringement of EC competition rules' (2004) Comparative report < https://ec.europa.eu/competition-policy/system/files/2021-04/damages_actions_claims_for_damages_infringements_study_comparative_report.pdf> accessed 5 December 2021, p. 27.
[146] Andrea Renda, John Peysner and others, 'Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios' (2007) Report for the European Commission < https://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/impact_study.pdf> accessed 5 December 2021, p.28.
[147] Ibid.
[148] Ibid.
[149] Ibid.
[150] Ibid.
[151] Ibid, p.29.

decision the others could collect their compensation, however, many times time pass and no one takes an action.[152] Other factors leading to such discouragement in the witnesses and/or victims are the material requirements of the court. It could be the case that a victim was physically present at a meeting or overheard a secret conversation leading to the existence of a cartel, however, such could not be considered if evidence confirming the claims is not provided.[153]

Another issue from a larger scale is the decentralized model of anti-competitive law enforcement which resulted from the powers granted to NCA's to adjudicate over such matters.[154] These issues furtherly showed the massive need for harmonization of EU law among the Member States and led to the establishment of the Damages Directive in 2014. Specialists believe that the adoption of the Directive resulted in increased awareness in the victims and provided for numerous damages actions after its adoption.[155] Furthermore, The Commission provided Guidelines[156] to additionally assist national courts in the implementation and to guarantee consistency among the Member States.[157]

On the contrary, for many years, the United States used to be the sole country across the globe to have efficient and working private enforcement methods for anti-competitive violations.[158] Moreover, private enforcement is the predecessor to the establishment of public enforcement in the US. The legal framework drafted and adopted by the US Congress, setting the basis for private damage proceedings is the Clayton Act. According to it, the individuals are encouraged to cooperate and engage in the enforcement of the antitrust legislation as well as tribunals are permitted to award treble damages in return as well as to cover their legal and attorney costs.[159] As in the EU, in the US also multiple bodies of law govern the anti-competition violations. The Sherman and Clayton Acts are federal laws and separately each state has a separate legal framework governing the same issues. The case is quite similar to the EU law framework

[152] Ibid.
[153] Ibid.
[154] Council Regulation (EC) No 1/2003 [2003] OJ L 1/1.
[155] Allen & Overy, 'European Commission positive about implementation of Damages Directive' (Allen & Overy, 17 December 2020) < file:///C:/Users/HP-430-G4/Downloads/EC%20positive%20about%20implementation%20Damages%20Directive%20(1).pdf> accessed 5 December 2021.
[156] Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser [2019] OJ C 267/4.
[157] Ibid.
[158] Thomas Obersteiner, 'Private Antitrust Enforcement in the US and the EU - A Comparison of Key Issues' (2019) < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3468473> accessed 5 December 2021, p.3.
[159] 15 USC §15, 1914.

and national law of the Member States. Like in the EU, in the US as well implementing both legislations to one case is a common scenario.

US differs from the EU at the very beginning of the idea for private enforcement as it is applied as a tool for cartel deterrence and sanctioning while as mentioned above the private enforcement in the EU is limited to compensation for losses caused. Such could be immediately noticed in the legal text of both jurisdictional frameworks. While the Clayton Act states that if an infringement of such nature occurs, any individual shall be recovered "threefold damages", attorney's and suit costs,[160] Article 3 from the Damages Directive[161] specifically abolishes overcompensation. This comparison clearly shows the difference in the gravity of compensations and how the US uses it as a tool to deter cartel practices.

2. European Union: Damages procedure

2.1 Legal basis and limitations

In the landmark decision of the case *Corage v. Crehan*, the CJEU stated that each undertaking and/or individual suffering damages due to anticompetitive practices is eligible to file a claim for damages under the applicable legal framework.[162] The case should be initiated before a national court and should follow either an already established decision on a cartel case or a "stand-alone action"[163], meaning that the claimants should initiate the proceedings by themselves and must prove alone that the loss they suffered is a direct outcome of the violation committed by the company in question.[164] Moreover, such a procedure could be very expensive because it also includes the collection of evidence to provide grounds for their claims, while in the follow-

[160] Ibid.

[161] 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, art.3.

[162] C-453/99 *Courage Ltd v. Crehan* [2001] ECR I-6297.

[163] Shearman & Sterling LLP, 'European Union: Cartels & Leniency Laws and Regulations'(The International Cooperative Legal Guides, 1 November 2021) <https://iclg.com/practice-areas/cartels-and-leniency-laws-and-regulations/european-union> accessed 06 December 2021.

[164] Andrea Renda, John Peysner and others, 'Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios' (2007) Report for the European Commission < https://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/impact_study.pdf> accessed 5 December 2021, p. 536.

on actions such evidence and antitrust practice have already been established by the court.[165] Therefore, on the basis of the already-completed investigation and procedure, the court takes a decision on the individual's claim. Such an option is mostly preferred by the private parties due to the costs and time which they have to spend in case a stand-alone action is undertaken. The Court of Justice once again confirmed the burden of proof over the claimants in the *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* case.[166]

The applicable legislation laying down the rules making the parties eligible for bringing an action against a competition infringer are codified in articles 101 and 102 TFEU. The Treaty has a direct effect and, therefore, individuals enforce their rights in the national tribunals of the Member State as already mentioned.[167] The goal at the end of the procedure is a meaningful remedy to be provided to the claimants who experienced losses due to anticompetitive behavior.[168]

The core issue related to the private enforcement cases in the EU is related to the fact that in the EU history usually a public antitrust authority such as the EU Commission.[169] Providing jurisdiction to NCA's via Regulation 1/2003, led to confusion and uncertainty due to the decentralization of powers, therefore the pending need for harmonizing legislation initiated the adoption and application of the Damages Directive in each Member State.[170] In contrast to US federal law, in the EU the Directive principles instead of rules. In the US the parties rely directly on the code, however, in the EU the national tribunals are expected to only implement the principles provided in the Directive in their own way.[171] Even though the instrument has been complimented on multiple occasions for the harmonization it brought across the Union via amending national antitrust legislation or the modifications in the court procedures, certain significant issues fall outside of its scope. Such issues are the lack of criminal penalties for anticompetitive conduct, class actions, and remedies such as injunctive relief.[172] As such are not covered, Member States enjoy discretion on deciding and, thus, different rules apply in each.[173]

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[165] Ibid.
[166] C-295/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-06619.
[167] C-453/99 *Courage Ltd v. Crehan* [2001] ECR I-6297.
[168] C-295/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-06619 and C-453/99 *Courage Ltd v. Crehan* [2001] ECR I-6297.
[169] Thomas Obersteiner, 'Private Antitrust Enforcement in the US and the EU - A Comparison of Key Issues' (2019) < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3468473> accessed 5 December 2021, p.6.
[170] Ibid.
[171] Ibid.
[172] Ibid.
[173] Ibid.

2.2 Claimants and defendants

The initiative for having private enforcement in the European Union has been undertaken by the ECJ, even though an administrative enforcement has already been in place with the European Commission exercising exclusive jurisdiction on the matter.[174] As the European Union law is based on the principles of equality, fairness, and respect for human rights, numerous cases of the ECJ strengthen their position in this aspect and expanded their rights and granted powers to the national tribunals. The initial steps towards the new rights have been undertaken in *Van Gend & Loos* case, where the court held that the provisions of the treaty confer rights to the individuals due to their direct effect and, thus, individuals may invoke them in their national courts.[175] Later in BRT v. Sabam case, the court confirmed that the antitrust provisions in the TFEU also have a direct effect towards individuals.[176]

According to the Community law, each person or undertaking that suffers injury due to a violation of the antitrust rules provided in the Treaty must be entitled to seek restitution from the party responsible.[177] It has been confirmed that not only any individual who suffers the losses but also each indirect purchaser who suffered considerable damage due to the illicit behavior is granted the right to claim compensation before a national court.[178] However, collective actions remain unregulated and many times such victims remain uncompensated due to the lack of an effective mechanism addressing the issue.[179]Even though Collective Redress Recommendations[180] have been introduced to the Member States, encouraging them to produce innovative methods for collective actions, so far such has not been established.[181]

As the Treaty does not provide for individual accountability for antitrust violations, the primary subject of the claim is the corporation itself, involved in the unlawful cartel practice.

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[174] Simon Vande Walle, 'Private Antitrust Litigation in the European Union and Japan A Comparative Perspective' (Maklu Publishers, 2013), p.154.
[175] C - 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1.
[176] C-127/73 *Belgische Radio en Televisie v. SABAM* [1974] ECR 51, para. 16.
[177] C-453/99 *Courage Ltd v. Crehan* [2001] ECR I-6297.
[178] Commission of the European Communities, *Damages actions for breach of the EC antitrust rules*,(White Paper, SEC 404/2008).
[179] Ibid.
[180] Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law [2013] OJ L 201/60.
[181] Marguerite Sullivan, Rüdiger Lahme and others, 'Class/collective actions in Europe: overview of applicable EU law principles' (Class Actions Global Guide, 1 July 2015) <https://content.next.westlaw.com/2-618-0602?__lrTS=20201013103854946&transitionType=Default&contextData=(sc.Default)&firstPage=true> accessed 16 December 2021.

2.3 Jurisdiction

Another core aspect of the procedure is the question of jurisdiction. Firstly, as already mentioned after the passing of Regulation 1/2003, national courts are also eligible to hear the case.[182] The first applicable legal instrument when determining jurisdiction is the Brussels Regulation.[183]According to it, the general rule is that the courts having jurisdiction over the dispute are the ones where the defendant is domiciled.[184] Nevertheless, when the dispute concerns claim for antitrust conduct, a few exceptions are laid down. If the defendants are more than one and are domiciled in multiple Member States, the claimant could decide in which of these Member States to invoke its rights and bring a claim. Each of them has jurisdiction over the dispute. In such cases the defendant located in the Member State where the claim is filed is called "anchor defendant" and the others are being joined. So, instead of filling multiple similar claims in different Member States, the simplified approach is to bring one in a single state, which would also provide for fair and transparent judgment as it would limit the potential risks which could arise with separate judgments.[185]

Another factor is the place where the injury occurred. In the case *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v. Akzo Nobel and Others*[186], the CJEU confirmed also that the court having jurisdiction over the dispute could be the one where the cartel was finalized or where the undertaking claiming damages has its registered office.[187] Further to this, in the case *Tibor-Trans Fuvarozó és Kereskedelmi Kft. v. DAF Trucks NV*, the court established that by assessing the location where the violation occurred or could occur, such might also be the place where the illegal conduct impacted the market.[188] For instance, the place where the victim alleges to have been suffering the loss or the prices were fixed.

The last crucial element to touch upon when it comes to the jurisdiction of the courts over a dispute is the factor of extraterritoriality. EU law extends and covers any behavior that has a

[182] Council Regulation (EC) No 1/2003 [2003] OJ L 1/1.
[183] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L 351/1.
[184] Ibid, art. 4(1).
[185] Ibid, art. 8(1).
[186] C-352/13 *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v. Akzo Nobel and Others* [2015] ECLI:EU:C:2015:335.
[187] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L 351/1, art.7(2).
[188] C-451/18 Tibor-Trans Fuvarozó és Kereskedelmi Kft. v. DAF Trucks NV [2019] ECLI:EU:C: 2019:635.

significant impact on intra-EU commerce. It has been discussed and debated for a long period of time, how without violating public international norms, the EU can have jurisdiction over behavior that occurred outside of the EU territory and/or a party that is a non-EU company. Therefore, two tests have been established: the so-called implementation test and the qualified effects test. Such tests have been used to limit the extraterritorial rights of the Union but at the same time to have jurisdiction on violations having foreign elements without violating the sovereignty of the other countries. The implementation test provides the Union with jurisdictional powers where the anti-competitive practice occurred in the territory of the EU.[189]The qualified effects test requires the violation to have significant, immediate, and predictable consequences in the territory of the EU.[190] The CJEU recognized both tests and confirmed that they follow the same goals and achieve the same results, meaning that EU law applies if either of them is met.[191]

2.4 Limitation period

In terms of limitation periods, both jurisdictions differ again. In the EU, the applicable legislation setting out two distinct limitation periods is Regulation 1/2003.[192] The countdown is triggered from the moment which the violation is committed or if the violation it continues, the date on which the violation ended should be taken into account.[193] Furthermore, the investigation authorities are empowered to stop the count down and renew it at the exact moment when the undertakings, subject of the investigation are notified about the interruption.[194] The first limitation period is for five years and concerns substantive fines, while the other is for three years and relates to procedural fines.[195] The maximum time for which a limitation period for substantive fines could run is ten years, while for procedural violations up to six years.[196] The final important limitation period is one of the Commission's decisions, which is set for five years from the date it becomes final.[197]

[189] C-89/85 *Ahlström Osakeyhtiö and others v. Commission of the European Communities* [1993] ECR I-1307.
[190] T-102/96, *Gencor v. Commission* [1999] ECR II-753.
[191] C-413/14 *Intel Corp. v European Commission* [2017] ECLI:EU:C: 2017:632.
[192] Council Regulation (EC) No 1/2003 [2003] OJ L 1/1.
[193] Ibid, art. 25 (2).
[194] Ibid, art. 25 (3).
[195] Ibid, art. 25 (a) and (b).
[196] Shearman & Sterling LLP, 'European Union: Cartels & Leniency Laws and Regulations'(The International Cooperative Legal Guides, 1 November 2021) <https://iclg.com/practice-areas/cartels-and-leniency-laws-and-regulations/european-union> accessed 16 December 2021.
[197] Ibid.

2.5 Appeal

If the EU Commission finds a defendant guilty of an antitrust violation, the latter has the right to appeal the decision in two months period before a General Court (GC).[198] GC has unlimited jurisdiction to investigate and adjudicate over the EU Commission's order.[199] It has the power to increase and/or decrease the amount of the sanction imposed as well as may annul the decision based on the following grounds: if the GC finds that an infringement was committed by the Commission in relation to procedural rules, if the Commission infringed TFEU, if it lacked the competence to grant a decision and to impose a sanction and if the Commission abused its powers.[200] If the defendant is not satisfied with the decision of the GC, it is allowed to request a review of the decision by the CJEU.[201]

3. United States: Damages procedure

3.1 Legal basis and limitations

In the United States, private parties are eligible to bring out damages claims via civil litigations for suffering antitrust violations. As already mentioned, the key difference between the awards which the victims could receive as compensation for their loss is three times the amount of the loss.[202] Furthermore, the costs for an attorney are also covered.[203] The legal basis for bringing such a suit and being able to obtain the compensation in question is laid down in Section 4 of the Clayton Act.[204] Additionally, another section of the same Act stands for private suits, namely section 16. It is separated and differentiated between both provisions as the latter concerns private suits for injunctive relief.[205] The primary distinction here is that in order for such relief to be granted, the damage should not have occurred yet, but rather the mere threat for

[198] Shearman & Sterling LLP, 'European Union: Cartels & Leniency Laws and Regulations'(The International Cooperative Legal Guides, 1 November 2021) <https://iclg.com/practice-areas/cartels-and-leniency-laws-and-regulations/european-union> accessed 16 December 2021.
[199] Ibid.
[200] Ibid.
[201] Ibid.
[202] 15 USC § 15, 1914.
[203] Ibid.
[204] 15 USC §4, 1890.
[205] Ibid, § 16, 1914.

such to exist is proof enough.[206] Simply said, it is not mandatory for the infringement to have already occurred and evidence for it to be presented, if only the danger for such threat is present is considered enough as a ground for a claim under Section 16 of the Clayton Act.[207]

However, like most of the rules, there are some exceptions and limitations for those types of defendants expected to cover the losses of the victims. If an undertaking and/or an individual is a leniency applicant or cooperates with the investigation authorities during an ongoing investigation procedure of the DOJ could be an exception and thus not required to pay out compensation.[208] Another potential scenario where the defendant could be excluded from the main rule is where such is an undertaking operating in the sphere of exports and is in possession of a special certificate provided by the Department of Commerce.[209] Lastly, the third potential case where the defendant is not covered by the general rule is when such is a joint venture.[210] If the joint venture activity is related to production, innovation, or research and provided the DOJ with prior notice about it, it is excluded from the statute rules.[211]

Another interesting factor worth mentioning is that the defendants in cartel violations in the US could not only be jointly accountable but also severally. Meaning that a single cartel member may be prosecuted and obliged to compensate the victims of the violation.[212] Furthermore, according to the legislation, the defendants lack a right of contribution, they are not allowed to request other members of the illicit practice to cover a part of the damages.[213] If a defendant is held severally liable, it is their obligation to cover the totality of the damages that occurred due to the unfair practice.[214]

3.2 Claimants and defendants

[206] Ibid.

[207] Shearman & Sterling LLP, 'United States: Cartels & Leniency Laws and Regulations'(The International Cooperative Legal Guides, 1 November 2021) <https://iclg.com/practice-areas/cartels-and-leniency-laws-and-regulations/usa> accessed 16 December 2021.

[208] Ibid.

[209] Ibid.

[210] Ibid.

[211] Ibid.

[212] Ibid.

[213] Ibid.

[214] Ibid.

As in the EU, also in the US, there is a dual enforcement procedure, meaning that the private enforcement could be brought by private parties on the basis of follow-on and stand-alone actions. Such suits may be initiated by different types of parties such as: final consumers, other competitors, suppliers, distributors, etc. Furthermore, there are two types of scenarios where a few claimants could bring a joint action against the infringer. Multiple parties are able to bring one claim but to act independently, and such are called joinder. The second type is class actions, where the parties act as a group suffering common circumstances. It is considered as a positive approach not only because having multiple claimants would help the investigation organ and present more stable grounds for the claim but also the final decision of the court is binding for each named claimant.[215]

For a party to be eligible and to have a "standing" to bring a suit before a court, it should have suffered damage that already occurred or is about to occur in the future due to the violation, it should have a visible link with the cartel practice, and it should be a subject of recovery on the basis of a favorable outcome.[216]

As it has already been discussed, in the US, not only corporations but also individual parties could be pointed out and held accountable for the antitrust actions. Therefore, claimants can initiate proceedings against a certain individual if the following has been satisfied: the defendant in question should have participated in the illicit conduct by himself or should of act unlawfully on behalf of an undertaking engaged in the unlawful industry practice.[217] It should be differentiated between the two possible situations as the first one provides for an individual bearing its own responsibility and, therefore, held accountable for it.[218] In the second one acting on behalf of the undertaking, the person accepted and engaged in illegal practices or validated illicit activities of other employees.[219]

3.3 Jurisdiction

As already mentioned, the US has federal laws and state laws, which also provide for two types of courts, namely federal and state courts. The federal courts have the competence to

[215] Paul H Saint-Antoine, 'Private antitrust litigation in the United States: overview' (Thomson Reuters, 1 March 2019) <https://uk.practicallaw.thomsonreuters.com/6-632-8692?transitionType=Default&contextData=(sc.Default)&firstPage=true> accessed 16 December 2021.
[216] Ibid.
[217] Ibid.
[218] Ibid.
[219] Ibid.

exclusively adjudicate over antitrust violation cases.[220] Furthermore, when the matter concerns private damages claim, the sole parties eligible to bring an action against it are direct consumers.[221] Two important matters must be taken into consideration: in order for the jurisdiction requirement to be satisfied the case should be either related to a dispute covered by the federal laws of the US, such as the Sherman Act and the Clayton Act or the parties to the dispute must be citizens of two different states as well as the respective amount for the damages caused must exceed 75k USD.[222] The latter scenario is outlined in the Class Action Fairness Act (CAFA).[223] As so far only direct consumers had the possibility to receive compensation for the damages caused, many states have implemented into their legal frameworks legislation that allows indirect victims of a violation to bring an action.[224] Such adoption and implementation furtherly extended the competences of the federal court and, thus, cases not meeting all the requirements could be brought to a federal court via Pedent jurisdiction doctrine.[225] This approach massively contributed to fair and equal treatment of individuals as well as assured legality and trust in the legal system.[226]

3.4 Limitation periods

The Clayton Act specifically provides for four years period for the statute of limitations regarding damages claims regulated by anti-competitive federal legislation.[227] The general rule is that the countdown of this period starts at the exact moment a claimant firstly suffers the consequences of the alleged violation.[228] Nevertheless, if in the future a new damage is suffered or the victim realizes or becomes aware of the damages suffered at a later stage there is an option for re-triggering.[229]

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[220] 28 USC §1337(a), 1948.
[221] Baker McKenize,' Availability of private enforcement in respect of competition law infringements and jurisdiction (Global Compliance News) <https://www.globalcompliancenews.com/antitrust-and-competition/competition-litigation/competition-litigation-in-the-united-states/> accessed 16 December 2021.
[222] 28 USC §1453, 2005.
[223] Ibid.
[224] Baker McKenize,' Availability of private enforcement in respect of competition law infringements and jurisdiction (Global Compliance News) <https://www.globalcompliancenews.com/antitrust-and-competition/competition-litigation/competition-litigation-in-the-united-states/> accessed 16 December 2021.
[225] 28 USC § 1367, 2012.
[226] Ibid.
[227] 15 USC § 15b, 1914.
[228] Ibid.
[229] *Zenith Radio Corp. v. Hazeltine Research*, 91 S. Ct. 795 (1971).

There are also multiple scenarios where the statute of limitation could be extended for example in a situation where the claimant could provide evidence that the defendant committed actions intending to hide and cover the illegal behavior or that he/she was not aware of any detailed information regarding the suit, nor should have been expected to be aware of such.[230]

3.5 Appeal

Not only the prosecution process but also the appeal one differs very much in comparison to the EU approach on appealing. Firstly, as the US is a common law country, in order for a criminal prosecution to be initiated, the grand jury shall issue an indictment.[231] If such indictment is obtained and the procedure starts, each factor of the claim for a violation must be proven beyond a reasonable doubt.[232] In cases where the defendant is found not guilty, the government is not allowed to appeal the decision or to initiate another procedure against the defendant.[233] In contrast, if the court held the defendant guilty for the alleged violations, he has the right to appeal the decision.[234] In terms of procedural rules, there is no difference in comparison to other proceedings falling under the exclusivity of the federal court, meaning that an appeal must be filed within the period of fourteen days after entering the judgment.[235]

4. Key challenges in the private enforcement claims

To finalize Chapter III, special attention is paid to some of the key challenges and obstacles both jurisdictions face. The first one is the issue with follow-on actions in private enforcement claims. Such procedure ensures that the claimants could rely on an already settled case by the Court and could switch their focus to the losses they have suffered due to the violation. In the USA such approach has been codified as a general rule and prior cases are considered evidence

[230] Paul H Saint-Antoine, 'Private antitrust litigation in the United States: overview' (Thomson Reuters, 1 March 2019) <https://uk.practicallaw.thomsonreuters.com/6-632-8692?transitionType=Default&contextData=(sc.Default)&firstPage=true> accessed 16 December 2021.
[231] Shearman & Sterling LLP, 'United States: Cartels & Leniency Laws and Regulations'(The International Cooperative Legal Guides, 1 November 2021) < https://iclg.com/practice-areas/cartels-and-leniency-laws-and-regulations/usa >accessed 16 December 2021.
[232] Ibid.
[233] Ibid.
[234] Ibid.
[235] Ibid.

of the violation per se, in the European Union an additional step is attached to the rule. According to the Damages Directive, if a violation has been established in a court of a Member State, such should be considered as undeniably confirmed if another claim for damages is filed in the same national court settled the case in the first place.[236] However, if an action is brought before a national tribunal in another Member State, the already established decision should at least represent evidence of a violation.[237] Furthermore, additional limitations have been attached to follow-on actions depending on the geographical, material, timely and material scope of the violation in question.[238]Nevertheless, the standing which the US federal Acts grant to the previously established decision is only prima facie proof of the violation, meaning that their effect is not exclusive as well as applicable for each type of antitrust violations.[239]

The second key challenge assessed is the role that damages play after an antitrust violation is established. It is considered that the "full compensation" granted by the EU legislation serves the sole purpose of compensating the victims, however, does not expand its goals and does not contribute to cartel deterrence, thus, it is concluded that the EU is more friendly territory for claimants in that aspect.[240] Article 3 of the Damages Directive establishes the right for full compensation, which means that the person who suffered the antitrust violation shall be compensated in such a way, like the violation did not occur in the first place and put him in a position like a claimant would have been if the violation was not committed.[241] In contrast, it is considered that the approach of the US does not compensate in full the victims but rather the amounts are based on estimations by the jury. The estimated amount is tripled by the court and many times does not reflect the gravity of the total damage arising from the infringement. Therefore, critics believe that via trebling the amount of the damage, the US provides for higher fines in theory, however, in practice is not the case.[242] Therefore, on a federal level, the damages

[236] 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, art. 9.
[237] Ibid.
[238] Thomas Obersteiner, 'Private Antitrust Enforcement in the US and the EU - A Comparison of Key Issues' (2019) < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3468473> accessed 5 December 2021, p.22.
[239] Ibid.
[240] Ibid, p.23.
[241] Directive 2014/104/EU of the European Parliament and of the Council of 26 Novem-ber 2014 on certain rules governing actions for damages under national law for in-fringements of the competition law provisions of the Member States and of the Euro-pean Union [2014] OJ L 349/1, art. 3.
[242] Frank P. Maier-Rigaud, Christopher Milde and Peter Bönisch, 'Quantification of Damage on Both Sides of the Atlantic: What's the Difference? (2016) International Antitrust Law and Policy: Fordham Competition Law 2015 <https://ssrn.com/abstract=2725473> accessed 5 December 2021.

award in the US comprise overcharges only.[243] In that regard, the EU has presented a much-simplified approach and it does not provide for treble damages, however, it considers in depth the full loss which may lead to substantial monetary compensation.[244]

The third and last key issue to be mentioned is the discovery of evidence for the damage suffered by the victims due to the anticompetitive violations. Finding and presenting evidence confirming the claim is a key element in private enforcement cases, however, obtaining such is not that simple. In most cases, such proofs are not in the possession of the claimant himself but rather in the defendants, third parties, and public authorities.[245] The nature of the cartel is secret; therefore, the discovery of evidence is a crucial element in the process. According to critics, the approach undertaken by the US achieved to a larger extent the main goal, namely, to abolish cartel practices.[246] Relevant information could be found in the Federal Rules of Civil Procedure, where it is provided that disclosures from experts, initial disclosures before any official discovery, or partial such are required.[247] Furthermore, the rules go beyond by allowing disclosures of specific information, documentation, and facts from the opposite party to the trial.[248] Such an approach provides for more room for action and contributes massively to the investigation and the procedure. In contrast, such disclosures of evidence are not a common practice across the Union. The impossibility of accessing proofs is evaluated as one of the biggest obstacles for the claimants across the Union.[249] There is not a clear set of rules provided in the Damages Directives on how such issues could be approached but rather room for an interpretation and choice of approach is left to the Member States alone.[250] According to it, upon request by the claimants, the national courts are empowered to request disclosure of such information and/or documentation, however, they should take into consideration multiple conditions such as: to what extent the

[243] Ibid.
[244] Ibid.
[245] Thomas Obersteiner, 'Private Antitrust Enforcement in the US and the EU - A Comparison of Key Issues' (2019) < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3468473> accessed 5 December 2021, p.19.
[246] Ibid.
[247] Fed R Civ P 26-37.
[248] Albert A. Foer and Randy M. Stutz, 'Private Enforcement of Antitrust Law in the United States' (Edward Elgar Pub, 2012).
[249] Thomas Obersteiner, 'Private Antitrust Enforcement in the US and the EU - A Comparison of Key Issues' (2019) < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3468473> accessed 5 December 2021, p.20.
[250] Directive 2014/104/EU of the European Parliament and of the Council of 26 Novem-ber 2014 on certain rules governing actions for damages under national law for in-fringements of the competition law provisions of the Member States and of the Euro-pean Union [2014] OJ L 349/1, art. 5.2 to 5.8.

documentation is relevant to the case, whether such action is fair and proportionate, whether the information is confidential, etc.[251]

It can be concluded that both jurisdictions present quite different approaches towards the damages claim procedures. Not only laid down in the respective legal instruments but also in terms of procedural rules and processes. It has been noticed that the way the US legislation is constructed speaks more for the main goal, namely the deterrence of cartels, as well as provides for collective actions which are still not regulated in the EU and provides for different types of awards as compensation for the ones suffering the damages. In contrast, the EU legislation indeed does not provide for treble damages, however, on multiple occasions, the full compensation awarded by the EU law is more than the one calculated based on overcharges in the US. However, the lack of individual accountability is also outlined as missing in the EU approach and also questions to what extent the Union achieves deterrence of cartels without this element implemented in its system. Also, the challenges which the claimants in the EU face due to the lack of strong legislation allowing them to request disclosure of evidence, bring uncertainty to the fairness and success of the investigation and the subsequent decision of the court.

Both still have room for improvement; however, it should be noted that their systems have developed to a large extent during the last few decades. Not only the legal frameworks passed, but also the case law decisions enacted contributed to the way both systems operate today.

[251] Ibid.

Chapter IV: Common goals, different approaches, which one proves to be more workable?

The final Chapter of this Thesis Paper is dedicated to the improvements suggested by professionals for the smooth mixture of the approaches presented by the EU and US to achieve cartel deterrence across their jurisdictions or at least limit it as much as possible with innovative tools. Despite the success which both have achieved so far in tackling the illicit industry practices, holes in the processes, unregulated areas, and lack of clear legislation have been identified, which shows the pending need for a change.

A sufficient level of similarities has been identified between both jurisdictions, however, still, the differences prevail. Therefore, based on the analysis, certain conclusions could be made. To reach a final decision and for each reader to draw its own conclusions, in the following sections the major difference, namely the administrative fine-based system and lack of individual accountability in the EU will be opposed to the US criminal-sanction approach, for the purpose of identifying which one gave not only greater achievements in terms of deterrence but also rewarded fairly the claimants and served justice in accordance with the law.

Lastly, suggestions for improvements based on the analysis are provided as well as recommendations of scholars and opinions of critics. The common factor on which all agree is that such a step forward is huge and will not be achieved easily. The question concerns two of the most significant jurisdictions worldwide and not only due to certain jurisdictions specifics but also the differences in the political and cultural aspect act as an obstacle for major changes. Starting with the historical development of both, it must be highlighted that the system of the EU is younger in comparison to the US as well as the historical path is shorter. Moreover, the way both look over antitrust offences differs from the very beginning. The administrative character of the EU system establishes barriers to the countries expressing the desire to implement criminal sanctions for the alleged conduct. In contrast, the US follows a path of development in that aspect for a few decades and proved the success of the system via its case law.

However, at the end of the day, the final goal of both is to achieve cartel deterrence and to provide fair and transparent judgment. The strongest benefit which both jurisdictions possess, and which also builds a hope that such mixture could be achieved comes from the common aims. It is true that the core center and understanding of each is unique, however, in terms of

progression and innovation, such drastic changes are required for both to cope up with globalization and ensure harmony.

1. Criminal offence and treble damages

For the analysis of the criminal sanction approach of the antitrust behavior of companies, it must be mentioned that US's perspective on the matter is crucial to the way such is adjudicated. The Supreme Court evaluates the cartel practice as pure evil having a detrimental effect on competition.[252] The perspective in which the US sees the violation is crucial for the analysis as it is the first factor that impacted the severity of the sanctions imposed on the offenders. Antitrust violations and especially hard-core ones such as the cartel practices of the companies are prosecuted as criminal offences as well as due to their severity both companies and individuals could be subjected to a sanction.[253]

The US government takes violations from this character very seriously and this is further shown via the procedure and the parties involved in the investigation. Not only the DOJ but also its partners responsible for crime control and enforcement of the law such as the Federal Bureau of Investigation (FBI) and numerous independent inspectors are involved and are being granted equal power to use alike methods and to have equal access to technical tools to proceed with the investigation.[254] The US Constitution specifically outlines and confers the equality of the rights granted to the investigation authorities.[255] Moreover, due to the uniqueness of the US common law system, another body is involved in the procedure, namely the grand jury which is responsible to hear the evidence. Such elements are absent in the EU court system, however, in my opinion, it is very useful as such a tool is one of a kind and could benefit the investigation. The group consists of twenty-three people who have different backgrounds, thus, could have different points of view.[256] They may look at one piece of evidence and produce completely different ideas, also are empowered to request testimony and specific documentation as additional proof.

[252] *Verizon Communications v. Law Offices of Curtis V. Trinko, LLP*, 124 S. Ct. 872 (2004).
[253] OECD, 'Criminalization of cartels and bid rigging conspiracies – Note by the United States' (2020) Working Party No. 3 on Co-operation and Enforcement < https://www.justice.gov/atr/page/file/1316546/download> accessed 16 December 2021, p.2.
[254] Ibid.
[255] Joseph Wayland, 'Antitrust Division Manual'(US DOJ Antitrust Division, 5th edn.2016).
[256] OECD, 'Criminalization of cartels and bid rigging conspiracies – Note by the United States' (2020) Working Party No. 3 on Co-operation and Enforcement < https://www.justice.gov/atr/page/file/1316546/download> accessed 16 December 2021, p 3.

Moreover, such extensive powers are granted to them as they are the ones responsible for reaching a final decision as to whether anticompetitive conduct occurred.[257] However, as their powers are limited to compelling evidence in a documentation form only, the DOJ also relies on other investigation organs who are authorized to request search warrants, to obtain tapes produced by cooperatives parties to the investigation, etc.[258]

Since the creation of the antitrust policy up until now, the US has been unshakable in its position regarding criminal prosecutions of both individuals and corporations. DOJ grants also monetary and administrative sanctions, however, along with them grants jail sentences due to the severity of the acts. The government is assured that such largely contribute to cartel deterrence across the US. Each cartelist but also each reasonable person is afraid to face the court due to the possibility of getting a jail sentence, thus, a greater deterrent than that does not exist according to scholars such as T.O. Barnett.[259] In my opinion, these claims are aligned with the reality as there is not a person who would not think twice before getting himself in an illicit partnership such as a cartel, knowing what consequences he could suffer. DOJ also believes that individual culpability and criminal offences along with jail sentences for the responsible executives, managers, and employees are the most serious and harsh punishments available for cartel behavior.[260] The prosecution of the ones most responsible for the anti-competitive behavior has thus been a priority for DOJ in combating cartel practices. Moreover, the DOJ claims that merely having the corporations accountable and levying hefty fines for unlawful conduct is far from accomplishing fairness and successful contribution to the achievement of deterrence.[261] As already mentioned, according to the US legal Acts, an individual could receive up to ten years jail time and up to a 1 million USD fine.[262] In addition to these punishments, an individual could also be sentenced to probation for up to three years.[263] So far in the US history of cartel violations, according to case law, the

[257] *United States v. R. Enterprises*, 111 S. Ct. 722 (1991).
[258] OECD, 'Criminalization of cartels and bid rigging conspiracies – Note by the United States' (2020) Working Party No. 3 on Co-operation and Enforcement < https://www.justice.gov/atr/page/file/1316546/download> accessed 16 December 2021, p 3.
[259] T.O. Barnett, 'Criminal Enforcement of Antitrust Laws: The U.S. Model' (2006) The United States Department of Justice < https://www.justice.gov/atr/speech/criminal-enforcement-antitrust-laws-us-model> accessed 16 December 2021.
[260] Ibid.
[261] B. Snyder, 'Individual Accountability for Antitrust Crimes' (2016) Department of Justice < https://www.justice.gov/opa/file/826721/download> accessed 16 December 2021.
[262] 15 USC §1, 1890.
[263] OECD, 'Criminalization of cartels and bid rigging conspiracies – Note by the United States' (2020) Working Party No. 3 on Co-operation and Enforcement < https://www.justice.gov/atr/page/file/1316546/download> accessed 16 December 2021, p 6.

longest period for which such sentence has been imposed is sixty months. The sanction was imposed over the executive of a price-fixing cartel in the case e *United States v. Frank Peake*.[264] According to statistics, between 2010 and 2018, more than 450 individuals have been sentenced to prison for cartel conduct.[265]

The second type of defendant in cases for antitrust violations is the corporations themselves. They can also be held criminally responsible for the anti-competitive actions of the executives and/or employees. In addition to this, several administrative penalties are suffered by corporations due to their participation in illicit activity. It must be noted that receiving criminal sanctions does not exclude the court from applying administrative sanctions as well.[266] The administrative fines in the US are calculated based on the Sentencing Guidelines, which provides that the final amount should reflect the volume of the damage resulting from the illegal practice.[267] By relying on the Sentencing guidelines and imposing fine sanctions on the corporations, DOJ is trying to accomplish multiple objectives. Firstly, due to the unlawful behavior, the cartelists have gained some ill-obtained funds, therefore, via the fine, they will release a substantial part of the acquired in an unlawful way. Secondly, the gravity of the fine must be harsh enough to not only correspond to the severity and the seriousness of the cartel behavior but to also achieve a greater purpose, namely cartel deterrence. Thirdly, they are also important for the purpose of encouraging cartelists to step forward and cooperate and in return to apply for leniency and benefit from it.[268] As discussed in Chapter II, the first one to come forward could be covered by the Leniency Policy.

Separately from the administrative fine imposed on the companies for participating in cartel conspiracy, the Court could also order the corporations to cover the damages suffered by those affected.[269] Such order is completely individual and comes along with the criminal

[264] *United States v. Frank Peake*, 804 F.3d 81 (1st Cir. 2015).
[265]OECD, 'Criminalization of cartels and bid rigging conspiracies – Note by the United States' (2020) Working Party No. 3 on Co-operation and Enforcement < https://www.justice.gov/atr/page/file/1316546/download> accessed 16 December 2021, p 6. and DOJ, 'Criminal Enforcement Trend Charts' (The United States Department of Justice, 16 November 2021) < https://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts> accessed 16 December 2021.
[266] Ibid.
[267] US Sentencing Commission, Guidelines Manual, § 3E1.1 (November 2012).
[268] OECD, 'Criminalization of cartels and bid rigging conspiracies – Note by the United States' (2020) Working Party No. 3 on Co-operation and Enforcement < https://www.justice.gov/atr/page/file/1316546/download> accessed 16 December 2021, p 7.
[269] Ibid.

penalties and administrative fines.[270] Via ordering an individual's loss to be compensated the Court achieves once again the main goal and at the same time serves justice to the harmed ones.[271]

The option for probation is not only open for individual offenders but also for corporations. The Court may request a continuous monitoring of company activities or periodical reports to be drafted and delivered to the DOJ.[272]

Special attention must be paid to the "treble damages" as provided in the US Code, many believe that via increasing the final amount three times contributes to the achievement of cartel deterrence.[273] The Court confirms their understanding of the treble damages as one of the most successful tools in the case *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*.[274] As already mentioned in Chapter III, such damages are not the only option for a reward available to the claimants in a private enforcement case against a cartelist. Such also includes payment of lawyer's fees[275]. Moreover, with improvements during the recent years, the US now covers indirect purchasers along with direct ones, meaning that now they are allowed to receive compensation for the damages suffered.[276] The case *Illinois Brick Co. v. Illinois*[277] was a starting point and based on the decision reached in the final stage of the proceedings, many states drafted and passed legislation that empowered the indirect victims to be able to file a claim for damages suffered due to anti-competitive conduct.[278]

Taking a step back, the claim for achieving deterrence via the "treble damages" approach, has been discussed and criticized on multiple occasions. The Court not only believes that such has been one of the best tools established to contribute to cartel deterrence but also to encourage claimants to take actions against the abusers and to serve justice.[279] Another interesting argument supporting the thesis of the Court is that of course not all of the cartelists came forward, have

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[270] Ibid.
[271] Ibid.
[272] Ibid.
[273] Ibid.
[274] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*., 105 S. Ct. 3346 (1985).
[275] Shearman & Sterling LLP, 'United States: Cartels & Leniency Laws and Regulations'(The International Cooperative Legal Guides, 1 November 2021) < https://iclg.com/practice-areas/cartels-and-leniency-laws-and-regulations/usa > accessed 17 December 2021.
[276] *Illinois Brick Co. v. Illinois*, 97 S. Ct. 2061 (1977).
[277] Ibid.
[278] Leon B. Greenfield and David F. Olsky, 'Treble Damages: To what purpose and to what effect?' (2007) International Cartels – Comparative Perspectives on practice, procedure and substance < file:///C:/Users/HP-430-G4/Downloads/Treble%20Damages%20Article_%20BIICL%20conference%20(1).pdf> accessed 17 December 2021, p.2.
[279] Ibid.

been caught or reported, therefore, in order for justice to be achieved, treble damages must be awarded in order to push the ones which have been found guilty and this punishment to serve as an example not only to potential wrongdoers but to also current ones and to stimulate them to come forward.[280] However, due to the broad nature of the legal text, it is not clearly outlined whether such severe damages are imposed only over the hard-core illegal behavior or for each related somehow to an antitrust violation.[281] The problem with the lack of guidelines is solved by the Court on a case-by-case basis, however, it is questionable to what extent this solution is fair and clears out all of the uncertainties.[282] As an example, the following case is discussed: *LePage's v. 3M*.[283] The issue which triggered the claim on behalf of LePage was the fact that 3M offered a discount offer, more specifically an above-cost one, on some products to its consumers.[284] As the LePage was not capable of offering the same discounts and, thus, suffered losses.[285] The Court observed and granted 68 million USD to be paid in return to the claimant as compensation for the damages suffered.[286]

Uncertainties arise in such cases as it is not clear why behavior of a competitor which could on one hand benefit the final customers, but on the other cause losses for other competitors on the market, is regarded as punishable by law.[287] There is a pending need of clear guidelines categorizing the illegal behavior and for which the most severe punishment must be served.[288] Not taking action will discourage competitors from beneficial campaigns such as reduction of prices on exclusive deals.[289] Secondly, it will harm the consumers because they will not be able to enjoy certain preferential prices.[290] Thirdly, due to fear of being sued, many competitors would step aside and will not only lose faith in the legal system but also will avoid similar practices as they may lose more than they could gain, not only in the financial aspect but reputational damages as well.[291]

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[280] Ibid.
[281] Ibid, p.6.
[282] Ibid.
[283] *LePage's Inc. v. 3M* , 324 F.3d 141 (3d Cir. 2003).
[284] Ibid.
[285] Ibid.
[286] Ibid.
[287] Leon B. Greenfield and David F. Olsky, 'Treble Damages: To what purpose and to what effect?' (2007) International Cartels – Comparative Perspectives on practice, procedure and substance < file:///C:/Users/HP-430-G4/Downloads/Treble%20Damages%20Article_%20BIICL%20conference%20(1).pdf> accessed 17 December 2021, p7.
[288] Ibid.
[289] Ibid.
[290] Ibid.
[291] Ibid.

2. Monetary sanction and damages in the form of full compensation

Like in the US, in the EU, antitrust violations have been taken very seriously by the competition authorities and the Member States. Fair and lawful competition is one of the core elements in the establishment of the Union and the shared market in the first place. Infringing the free market could cause substantial damages and lead to lack of progression, limitations in innovation, loss of consumers etc. The goal at the end of the day is consumer's welfare and well-being as well as maintaining the trust and transparency in the system.[292]

The EU competition law framework is built on the idea of eliminating national obstacles for achieving a greater purpose namely proper functioning of the market.[293] It ensures that undertakings are bound by equal terms and obligations as well as have an equal presence and standing in each Member State.[294]

In the EU, cartels are categorized as hard-core infringement. Such behavior on the market results in pressure on the parties which are not involved in the practice and could even bring some corporations to bankruptcy.[295] Although, having that it in mind, critics such as Peter Whehan does not agree that purely financial methods provide for cartel deterrence but rather result in ineffective legislation, methods and cause damages to final consumers.[296] Furthermore, he believes that the lack of criminal sanctions largely contributes to ineffective control on the matter.[297] The solution provided by him is similar to the approach undertaken by the US antitrust authorities, namely introducing criminal sanctions along with other punishments such as fines, disqualification of executive persons, etc.[298]

Therefore, the central question of this analysis is whether the monetary sanctions imposed by the European Commission are harsh enough to achieve cartel deterrence. Primary

[292] Marcin Szczepański, 'EU competition policy: Key to a fair single market' (2019) European Parliamentary Research Service < https://www.europarl.europa.eu/RegData/bibliotheque/briefing/2014/140814/LDM_BRI(2014)140814_REV1_EN.pdf> accessed 17 December 2021.
[293] Ibid.
[294] Ibid.
[295] Ibid, p.9.
[296] Peter Whelan, 'A Principled Argument for Personal Criminal Sanctions as Punishment under EC Cartel Law' (2007) The Competition Law Review vol.4 < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1027925> accessed 17 December 2021.
[297] Ibid.
[298] Ibid.

concerns related to the sanctioning theory are based on the fact that the fines are too harsh, since the adoption of the instrument regulating the procedure, namely the Guidelines on fines[299].[300]According to the analyst Mario Mariniello, the amounts are not only too severe but also disproportionate to the infringement and it could result in increase of prices by the undertakings in order to be able to pay the fine.[301] However, in such scenarios, the final consumers will be subjected to the increased prices and their welfare will be harmed.[302]Two separate views could be obtained here. The first one is that by implementing the guidelines, the EU Commission tried to increase transparency in relation to the methods applied in calculating the penalties.[303] The instrument benefited the EU Commission because it provided regulated grounds upon which the authorities could base their sanctions and at the same time provided clear a overview to the cartelists on what to expect if they engage in the unlawful practice.[304] However, the instrument is not clear enough to what extent the fines in question are proportionate for each and every situation.[305]The discretion which the EU Commission enjoys under the guidelines is not strictly limited, thus, may result in too harsh sanctions.[306] This discretion establishes preconditions for further market distortion as well as disproportionate measures for deterrence.[307] Instead of pro-actively punishing the illegal behavior, it could result in ineffective measures and a lack of trust on competitors' behalf.[308]

The truth according to specialists in the area of antitrust violations is that the current legislation at place is far from achieving cartel deterrence on two grounds.[309] The first one is that cartelist lack respect and trust in the system due to the fine-based approach of the Union. Many believe that if hypothetically, the pure imposition of fines deters cartel establishment, with the time it will not be enough as companies would attempt to look for alternative methods to commit

[299] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 [2006] OJ C 210/2.
[300] Mario Mariniello, 'Do European Union Fines deter price fixing?' (2013) Bruegel policy brief < https://www.bruegel.org/wp-content/uploads/imported/publications/Do_European_Union_fines_deter_price-fixing-__English_.pdf> accessed 17 December 2021.
[301] Ibid.
[302] Ibid.
[303] Ibid.
[304] Ibid.
[305] Ibid.
[306] Ibid.
[307] Wouter P. J. Wils, 'Optimal Antitrust Fines: Theory and Practice' (2006) World Competition < https://www.concurrences.com/IMG/pdf/08Wils_Optimal_antitrust_fines-_Theory_and_practice-2.pdf?10523/b27129004641a28dbdb1d65eb5f767db611929ad> accessed 17 December 2021.
[308] Ibid.
[309] Ibid.

violations for earning profits.[310] In my opinion, raising fines in that aspect is not fair punishment as going back to the roots of individual accountability, it must be noted that the idea behind the criminal sanction and the imposition of a jail sentence is not linked to the prevention of certain violations.[311] It would indeed contribute to some extent; however, the general rule is that it will point out the responsible individual for the violation that occurred and will punish him for the infringements committed.[312] Thus, such punishment could serve as a good example to the society for the prevention of future violations, but to also show how one should take responsibility for his actions.[313]

The second ground is the economic factor.[314]The whole process from reporting to investigating, prosecuting, and imposing a fine is very costly and time-consuming.[315] Separately from the amount which will be imposed as a sanction, additional costs exist which are not considered in the first place.[316] Such are paid by the companies and the individuals involved in the dispute and by the public.[317] In addition, as already mentioned, companies could raise prices after the imposition of the fine which will affect the final consumers and could cause additional damages. [318]

Even though, considered as a method not achieving full deterrence, the role of which the fines have in the prosecution process of cartelists is also important.[319] Three crucial factors have been pointed out when it comes to their purpose.[320] As already mentioned, the fines are quite harsh and even being threatened with them effectively impacts potential cartelists.[321] They consider not only the fact the fine depends to a large extent on the gain from the violation, therefore,

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[310] Peter Whelan, 'A Principled Argument for Personal Criminal Sanctions as Punishment under EC Cartel Law' (2007) The Competition Law Review vol.4 < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1027925> accessed 17 December 2021.
[311] Ibid.
[312] Ibid.
[313] Ibid.
[314] Wouter P. J. Wils, 'Optimal Antitrust Fines: Theory and Practice' (2006) World Competition < https://www.concurrences.com/IMG/pdf/08Wils_Optimal_antitrust_fines-_Theory_and_practice-2.pdf?10523/b27129004641a28dbdb1d65eb5f767db611929ad> accessed 17 December 2021.
[315] Ibid.
[316] Ibid.
[317] Ibid.
[318] Mario Mariniello, 'Do European Union Fines deter price fixing?' (2013) Bruegel policy brief < https://www.bruegel.org/wp-content/uploads/imported/publications/Do_European_Union_fines_deter_price-fixing-__English_.pdf> accessed 17 December 2021.
[319] Wouter P. J. Wils, 'Optimal Antitrust Fines: Theory and Practice' (2006) World Competition < https://www.concurrences.com/IMG/pdf/08Wils_Optimal_antitrust_fines-_Theory_and_practice-2.pdf?10523/b27129004641a28dbdb1d65eb5f767db611929ad> accessed 17 December 2021.
[320] Ibid.
[321] Ibid.

as much as the profit they make, the potential fine increases along with it or even becomes bigger.[322] The reputational damages and the administrative costs also result from the fine penalty.[323] Moreover, all combined may affect the business of the competitor in the future and to cause bankruptcy.[324]

Deterrence by itself is a concept of establishing a realistic threat of punishment that weights substantially in the ratio of projected risks, costs and revenues in order to dissuade corporations from engaging in anti-competitive agreements and practices.[325] The fine-based approach is considered to be categorized as a successful tool and capable of achieving cartel deterrence alone, only if, the anticipated amount of the sanction outweighs the estimated profit.[326]

To conclude with the discussion on the fine-based approach, the last element discussed is to what extent the Damages Directive[327] implemented and adopted by the Member States, achieves the standards for fair compensation. Via the legal instrument, harmonization of the current national laws regulating proceedings for damages for violations of the EU antitrust law, is intended.[328] According, to statistics, one of the most-claimant-friendly countries are Germany and the Netherlands.[329] In contrast, private claims in other Member States are pseudo-existent.[330] Such inequality in the efficiency of the damages regimes across the countries has been evaluated as having a substantial negative impact on the operation of the market.[331]

[322] Ibid.
[323] Ibid.
[324] Marcin Szczepański, 'EU competition policy: Key to a fair single market' (2019) European Parliamentary Research Service < https://www.europarl.europa.eu/RegData/bibliotheque/briefing/2014/140814/LDM_BRI(2014)140814_REV1_EN.pdf> accessed 17 December 2021.
[325] Wouter P. J. Wils, 'Optimal Antitrust Fines: Theory and Practice' (2006) World Competition < https://www.concurrences.com/IMG/pdf/08Wils_Optimal_antitrust_fines-_Theory_and_practice-2.pdf?10523/b27129004641a28dbdb1d65eb5f767db611929ad> accessed 17 December 2021.
[326] Ibid.
[327] 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 Euro-pean Union [2014] OJ L 349/1.
[328] Pablo Ibáñez Colomo, 'Competition Law and Innovation: Where Do We Stand?' [2018] Journal of European Competition Law & Practice 485, p.496.
[329] Ibid.
[330] B. Rodger, 'Competition Law: Comparative Private Enforcement and Collective Redress across the EU' (Wolters Kluwer Law & Business, 2014) p. 302.
[331] Pablo Ibáñez Colomo, 'Competition Law and Innovation: Where Do We Stand?' [2018] Journal of European Competition Law & Practice 485, p.496.

The core provision of the Directive is Article 3, stating that each individual who suffered loss due to the anti-competitive behavior is eligible to get full compensation.[332] Even though the Directive represented a sufficient level of harmonization after its implementation, gaps are still existent and confront the achievement of a completely fair award. The first loophole is the lack of provision and/or mechanism regulating collective actions in cases relating to antitrust violations. The only step towards fixing this issue is the Recommendations on Common Principles for Collective Redress[333], however, they are not much of a solution as they are not legally enforceable.[334] Another issue identified is the exclusion of punitive damages, as pointed out by the Court in *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* case, such are incompatible with EU law.[335]

3. Recommendations for future improvement and adaptability

In the following sections, different ideas and improvements are provided for the development of the antitrust policies in the EU and US by implementing not only elements of the two distinct approaches but also introducing brand new methods and tools to strengthen the already established processes.

3.1 Introducing individual accountability

The first and most substantial suggestion which could substantially contribute to cartel deterrence is the establishment of individual accountability in the EU competition law. In my opinion, the first step towards the improvement of the current EU legislation is to recognize the responsibility of the individual as a party initiating the commitment of the violation. Such an approach would not only contribute to the main goal but would increase the trust in the legal system on an individual's behalf. In my opinion, the final consumers suffering the losses of the

[332] 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 Euro-pean Union [2014] OJ L 349/1, art.3.
[333] Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law [2013] OJ L 201/60.
[334] CMS Legal Services, 'The EU Directive on Antitrust Damages Actions' (2015) < file:///C:/Users/HP-430-G4/Downloads/The_EU_Directive_on_Antitrust_Damages_Actions_lo-res%20(2).pdf> accessed 17 December 2021.
[335] C-295/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-06619.

anticompetitive behavior of undertakings are not convinced that with the imposition of a fine, companies learn their lesson and refrain from engaging in similar practices in the future. Such an example could be Google, which was subject to a fine by the EU Commission for abusing its dominant position on multiple occasions.[336] Combining all fines-imposed amount to 9.5 billion USD.[337] The current approach of the EU, maybe give results for smaller corporations and businesses, however, with dominant companies operating on the same level as Google, such do not provide more effective results. Therefore, harsh penalties must be applied which are not in the form of payment but such that would affect the individuals hiding behind the company.

Although it seems hard to be achieved, the solution could be very simple. As the EU competition law instrument, namely the TFEU does not provide for the criminalization of antitrust violations, the appropriate amendments must be made or a completely new instrument, binding on all Member States must be introduced.[338]Most importantly, to be such amendment possible, the EU itself must show interest in making radical changes to its understanding of the notion of antitrust violations.[339] According to the EU competition authorities, non-tolerance of cartels is well introduced with the sanction policies in place, however, it seems to me that their size equalizes criminal sanctions.[340]

However, as mentioned in Chapter I, such an approach could raise political issues as well as would question the sovereignty of the MS. Each government would be reluctant to provide the right of such gravity to an outside body. Therefore, for individual accountability to become a fact and the Member States, to be prepared to face such method of sanctioning, the following approach could be followed. If the EU draft and implement a binding policy requiring all of the MS to recognize the role of the individuals in a case for antitrust violation and to impose in addition to the fines, in particular cases, prison sentences. However, by obliging them to adopt such policy, must not constitute that the EU Commission itself is granted such rights. I believe that the only fair way, such a policy to be accepted by the MS is if the right to impose criminal sentences stays within the national courts. If a case is brought before the EU Commission and the conduct

[336] Elizabeth Schulze, 'If you want to know what a US tech crackdown may look like, check out what Europe did' (CNBC, 7 June 2019) <https://www.cnbc.com/2019/06/07/how-google-facebook-amazon-and-apple-faced-eu-tech-antitrust-rules.html> accessed on 21 December 2021.
[337] Ibid.
[338] Keith Jones, Farin Harrison, 'Criminal Sanctions : An overview of EU and national case law' (2014) E-Competitions, National Competition Laws Bulletin < http://awa2015.concurrences.com/IMG/pdf/keith_jones.pdf> accessed 26 November 2021.
[339] Ibid.
[340] *A. Menarini Diagnostics S.R.L. v. Italy*, no. 43509/08 (ECtHR 27 September 2011).

is in line with such suitable for criminal sanction, the EU Commission must consult with national antitrust authorities from the MS at hand and to cumulatively establish the criminal convictions. In my opinion, such an approach provides for a middle ground and would not only keep the core powers into the national system and national courts but also would limit the EU Commission's powers and discretion to such an extent that it would not harm the sovereignty of either MS.

3.2 Foreign specialists

As mentioned earlier one of the core improvements to be suggested is the adoption of elements from the US system by the EU and vice versa. The main element which in my opinion must be present in the EU competition law is the criminal penalty.[341] The publication of Keith Jones and Farin Harrison in the National Competition Laws Bulletin provides s great overview of the criminal sanctions from the EU perspective.[342] Thus, it is used as a basis for the next suggestion. For a policy to be drafted, adopted and implemented by each State, would take approximately more than a decade, however, the final result matters. One of the core tools needed of the EU start to consider criminal penalties as an option for antitrust sanctions are the foreign specialists.[343] The delay in the establishment of individual responsibility in cartel cases could be due to the lack of experience and knowledge of the EU competition authorities on how to draft and subsequently implement the policies.[344] Furthermore, many uncertainties and unanswered questions exist on how to classify each form of antitrust behavior, how harsh should the sanctions be for each type of violation, what mechanisms must be applied in order for transparency and fairness to be achieved, etc.[345] The concerns stem directly from the fact that the EU competition authorities are still quite hesitant to impose a criminal penalty on an individual as the crime itself has been committed for the ultimate benefit of a corporation.[346] However, in my opinion, even though the antitrust violation solely benefits the undertaking, it must be considered that not the company itself got involved in the illicit practice, but rather the individual took the decision to engage the company in such. Furthermore, the following must be noted: EU law indeed does not

[341] Keith Jones, Farin Harrison, 'Criminal Sanctions : An overview of EU and national case law' (2014) E-Competitions, National Competition Laws Bulletin < http://awa2015.concurrences.com/IMG/pdf/keith_jones.pdf> accessed 26 November 2021.
[342] Ibid.
[343] Ibid.
[344] Ibid.
[345] Ibid.
[346] Ibid.

provide and require for the implementation of criminal penalties; however, it also leaves a room for Member States to decide whether to implement such measures into their national legal frameworks.[347] However, the obstacle which the Member States face at this stage is the fact that the applicable law is focused solely on the undertakings as a subject committing the violation and completely excludes the role of the individual.[348] Further to this, Regulation 1/2003 explicitly excludes the existence of a criminal element in the competition law violations.[349] Therefore, as already mentioned in order for the violations to be upgraded to criminal offences, substantial changes in the core legislation must be made.[350]

3.3 Compliance programs

Another suggestion reflects the current models established by both jurisdictions. When it comes to the US approach and since antitrust violations at US territory are classified as criminal offences provides for the need of strengthening the compliance monitoring programs in the companies themselves.[351] Furthermore, the Leniency program in the US and EU touches upon the importance of being the first one to report in order to receive protection under it, meaning that the lack of effective controls might result in lacking knowledge of unlawful practices occurring in the company, thus, miss the chance to be the first one to step forward.[352] On the other hand, in the European Union, the harsh fines, are not the solution to deter all unlawful industry practices.[353] Therefore, the suggestion for EU and US competition authorities is to research, draft and adopt an innovative method and tools for monitoring as well as must make them mandatory for the companies to implement it in their internal corporate responsibility policies, and to oblige them to report.[354] Training and channel for questions along with periodic reviews must be undertaken on a regular basis because stressing the importance of the issue is the first step towards the

[347] Ibid.
[348] Ibid.
[349] Council Regulation (EC) No 1/2003 [2003] OJ L 1/1, art. 23(5).
[350] Keith Jones, Farin Harrison, 'Criminal Sanctions: An overview of EU and national case law' (2014) E-Competitions, National Competition Laws Bulletin < http://awa2015.concurrences.com/IMG/pdf/keith_jones.pdf> accessed 26 November 2021.
[351] William Kolasky, 'Criminalizing cartel activity: Lessons from the US experience' [2004] Competition & Consumer Law Journal 207, p.217.
[352] Ibid.
[353] Ibid.
[354] Ibid.

success of the new measures.[355] The truth is that only companies which can establish such a system could anticipate being the first ones to report to the relevant authorities.[356] In addition, many companies will be open to the change and will implement the measures accordingly, however, there will be exclusions, thus, the policy must be legally binding over the states and the Member States.[357] In order maximization in abolishing unfair competition practices to be achieved, the companies must adopt innovative and effective measures for reporting, thus, special channels for antitrust violations must be established.[358] Re-structuring of departments and hiring people who are specialists in the sphere, would be able to educate and contribute not only by educating employees and executives on the consequences of engaging in such practice but also by supervising and monitoring the implementation of the innovative tools in the corporate policy.[359] Such specialists could provide the learning and development teams with ideas and advice on appropriate ways for implementation.[360]

3.4 Codification of rules

Finally, is the codification of rules. As the US is a common law system, decisions and judgments are made on a case-by-case basis. Even though many benefits are identified in this approach, drawbacks certainly exist. As violating antitrust principles is not an unusual event, cases of this nature are brought before the court regularly. As in the EU, each law is codified, I believe it largely contributes to speeding of the processes and lowering of the costs related. In the US, such a procedure could be time-consuming and quite expensive due to the fact that many parties are involved, the lack of codified guidelines and the large discretion provided to the court could cost the private enforcers much time and administrative costs related.

On the other hand, TFEU is a very-well-drafted instrument, providing definitions and guidelines for the EU Commission and the national courts when deciding and imposing decisions. In my opinion, as in the EU, each aspect of the law is codified, helps the enforcing bodies and speeds up procedures. The Federal Acts in the US, namely the Sherman Antitrust Act[361],

[355] Ibid.
[356] Ibid.
[357] Ibid.
[358] Ibid.
[359] Ibid.
[360] Ibid.
[361] 15 USC §1-7, 1890.

Clayton Antitrust Act[362] ,and the Federal Trade Commission Act[363] are an outdated, and modernized instrument, providing a new level of guidance is required.

Adopting elements vice versa between both jurisdictions would not happen easily. However, in my opinion, the approach provided by the US is more likely to achieve deterrence of cartels. My strongest argument is the personal threat that the US criminal sanction imposes on the cartelists. The fear of losing one's own freedom is the core element that could prevent engagement in unlawful industry practice. Indeed, the EU is not yet prepared to face the reality and to undertake further steps towards the penalties it imposes, however, pure imposition of administrative penalties has proven so far unsuccessful. The importance of fines in the process is undeniable and certainly contributes, but if it was enough, there would not have been attempts by some MS to introduce national legislation regulating criminal enforcement. Thus, in my opinion it is an obligation of the EU to support them in that initiative and present an innovative legal instrument criminalizing antitrust infringement.

[362] 15 USC §12-27, 1914.
[363] 15 USC § 41-58, 1914.

Conclusion

It cannot be denied that cartel deterrence is a worldwide pending issue and both jurisdictions take it very seriously. This has been illustrated in the severity of the sanctions imposed on cartelists. The legislative instruments adopted by the EU – TFEU[364] and Damages Directive[365], and the US – Sherman Antitrust Act[366], Clayton Antitrust Act[367], and The Federal Trade Commission Act[368] constitute the legal protection against the illegal antitrust conducts of companies and individuals. These instruments are very different in their nature, approach towards the violations, legal text, and age. The three legal Acts adopted by the US government are from 1890 to 1914 and in contrast, the TFEU has been born a long time ago under its initial name Treaty of Rome[369] in 1957. The Treaty developed over time and some parts of it were amended, and in comparison, with the US instruments, it is relatively new. However, it is still one of the most important instruments, governing the EU competences[370] and values[371].

Although substantially different, both jurisdictions have the same goal to achieve, namely, to abolish the establishment of cartels and to abolish unfair industry practices. Therefore, the aim of this paper is to compare and outline the differences and similarities between the EU and the US in the light of their sanction approach towards the violators. Starting with the fact that the legal systems of both are completely different, suppose discrepancies in each procedure which both carry out. Outlook of reporting methods, investigation processes, parties involved in the procedures are subjected dependent on the legal system in which they operate. In the US, the Court relies to a large extent on earlier case law in taking decisions on violations. However, in the EU, TFEU gives a substantial legal ground for the Commission and the national courts for the purpose of adjudicating on the antitrust cases brought before them. Furthermore, by revising

[364] Consolidated version of the Treaty on the Functioning of the European Union [2008] C 115/01.
[365] 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 Euro-pean Union [2014] OJ L 349/1.
[366] 15 USC §1 - 7, 1890.
[367] 15 USC §12-27, 1914.
[368] 15 USC § 41-58, 1914.
[369]Treaty Establishing the European Community (Consolidated Version), Rome Treaty [1957].
[370] Consolidated version of the Treaty on the Functioning of the European Union [2008] C 115/01, art 2 – 6.
[371] Ibid, art. 7-14.

their legislation and amending it, both represent their intent of improvement in order to cope up with the industry progression.

Additionally, the historical element must also be considered. The development of the fine-based approach of the EU and the criminal sanction approach of the US, and the path of progression which both have undertaken has been unique for each. The criminal sanctions have been present in the US sanction policy from the very beginning as well as antitrust violations have been classified per se as criminal offences. In contrast, since its establishment, the EU has always been an administratively based system, thus, it does not come as a surprise that the sanctions it imposes are in a monetary form. The shock which MS could face if they grant such power to the EU Commission might result in questions regarding the sovereignty of the States.

It has been shown that the EU and the US presented sufficient progress and results in deterring cartels as well as methods for compensating private enforcers via their distinct approaches. However, after comparing them, in my opinion US presents a stronger position as well as reflects on the real infringers, meaning the executives, managers and employees. A company should not bear the whole blame due to the decisions of individual persons. Even though, the infringement itself does not directly benefit the individual who engaged the company in the unlawful practice, the act matters. The act of a reasonable person making the decision to violate the EU competition law by engaging a company in unlawful practice, must be the focus of the proceeding.

Differences have also been identified regarding to the procedures available as well as types of damages compensations for individuals. In my opinion, a substantial improvement in the types of compensation towards private enforcements would be made if the cartelists in the EU are held liable for their actions. If for example, an executive of a company is personally affected by being sentenced to serve in prison for a certain period of time, it would bring relief to the people who suffered losses due to the unlawful actions. Because it does not look quite fair to solely sanction a company and the same person to remain within his executive role within the company. Fining the company could not bring an acceptable level of guarantee that the executive person would not engage in the same conduct in the future and that could again infringe the wellbeing of the direct and indirect consumers.

After analyzing the approaches of both jurisdictions, the second aim of this Thesis paper was to suggest innovative methods for achieving a new level of cartel deterrence in the jurisdiction which based on the analysis seems to have loopholes in its sanction approach. As already mentioned, in my opinion, EU needs to expand its core instruments by introducing individual

liability for antitrust violations and making such constitute a criminal offence. Such could be made via the establishment of a new instrument and/or via drafting and adopting a new policy. However, the core right to impose a criminal sanction is to be available only for the national courts which could also consult the EU Commission when such cases are brought before it. Thus, the fear in MS of losing its sovereignty will be eliminated as well as the increase of the trust on behalf of companies and private enforcers will follow. Moreover, foreign specialists providing regular training and introducing the scope of criminal sanctioning for such illegal behavior would also guarantee the smooth transition from civil sanction to a criminal offence.

The severity of the imposed fines certainly speaks for criminal conduct. Even though it has not been officially recognized as such, the amounts of the fines speak for it. National authorities, as well as the EU Commission, must prioritize the establishment of a legal framework introducing sanctions for individuals. Without new methods and improved instruments, the progression of the industry will bypass it at as some point which will give room for substantial infringements and the EU would not be able to cope up with them. Maximization of harmony is the final step of the competition law development; thus, it should not only support the MS already made steps to introduce such policies but should encourage the rest, especially the ones claiming to not produce efficient results in sanctioning and compensating. However, if such steps are not taken by an initiative of either MS or the EU Commission, such an event could occur that would drive them into modifying their policies.[372] Slowly but steadily, the sluggish shift may accelerate to the point where criminal sanctions for antitrust infringements in the EU Member States become a reality.[373]

[372] Keith Jones, Farin Harrison, 'Criminal Sanctions : An overview of EU and national case law' (2014) E-Competitions, National Competition Laws Bulletin < http://awa2015.concurrences.com/IMG/pdf/keith_jones.pdf> accessed 26 November 2021.
[373] Ibid.

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Zusammenfassung:

Die Antitrustpraktiken sind weltweit ungelöste Probleme. Die Untersuchung und die Sanktionierung solcher Praktiken ist von großem globalen Interesse. Solche illegalen Aktivitäten schaden und bedrohen nicht nur die beteiligten Unternehmen, sondern auch die Verbraucher, die unter den Konspirationsfolgen leiden. Jede Jurisdiktion hat ihre eigenen Verfahren zur Ermittlung und Sanktionierung von Straftätern und damit zur Beseitigung von Kartellpraktiken gewählt. Obwohl das Ziel und das Ergebnis jeder einzelnen davon das Zurückhalten der Kartellen ist, bestehen Unterschiede in den von den unterschiedlichen Jurisdiktionen angewandten Verfahren. Da stellt sich die Frage, ob die eine bessere Ergebnisse liefert als die andere.

Die in der Dissertation analysierten Jurisdiktionen sind die Europäische Union und die Vereinigten Staaten von Amerika. Einschlägige Gesetzgebung, Rechtsprechung und Literatur werden verglichen und diskutiert, um die Unterschiede und die Gemeinsamkeiten beider angewandten Varfahren zu umreißen. Die Dissertation beantwortet die Frage, ob sich das im amerikanischen Verfahren vorgestellte Element der strafrechtlichen Sanktionierung als praktikabler erweist als das administrative und fein fokussierte System der EU. Vorschläge für eine reibungslose Vereinigung und innovative Lösungsverfahren zum Thema werden gemacht, um den Herausforderungen der Globalisierung zu begegnen.

Abstract

Antitrust practices are pending issues on a global level. Investigating and sanctioning such practices have been a primary interest worldwide. Such unlawful activities harm and jeopardize not only the companies which participate in it, but also the consumers suffering the results of the conspiracy. Each jurisdiction has adopted its own approach to investigate and impose penalties on the infringers and to, therefore, abolish the cartel practices. However, even though the aim and the result of each is to achieve cartel deterrence, the differences which exist is in the approaches applied by the different jurisdictions. This gives rise to the question as to whether one provides for better outcomes in comparison to the other.

The jurisdictions analyzed throughout the Thesis Paper are the European Union and the United States of America. The relevant legislation, case law and literature are compared and discussed for the purpose of outlining the differences and commonalities in both approaches undertaken. The Paper provides an answer to the question whether the criminal sanctioning element presented in the US method proves more workable than the administrative and fine-focused system of the EU. Suggestions for smooth merging and innovative approaches towards the issue are provided for the purpose of meeting the challenges of globalization.