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The Imposition of "Follow-on Penalties" on Managers and Employees

*Carsten Koenig**

Whereas the European Commission is not empowered to impose penalties on individuals according to Regulation 1/2003, many EU Member States allow their national competition authorities or criminal law enforcers to do so. However, because the Commission typically invokes its competence where markets in more than three Member States are affected, the divergence of sanctioning powers leads to the paradoxical situation that individuals may go unpunished in some of Europe's most severe antitrust cases. Thus, the question arises whether national competition authorities and other competent bodies on the national level can complement prior decisions by the European Commission with additional sanctions exclusively available under national law. I argue, in this article, that neither Regulation 1/2003, nor the principle of *ne bis in idem* preclude national competition authorities and criminal law enforcers from imposing such "follow-on penalties" on managers and employees, where this is necessary, to ensure effective enforcement and their national law allows them to do so.

I. INTRODUCTION

It is frequently said that the absence of penalties for individuals is a major weakness of competition law enforcement in the European Union.[1] In comparison with the United States, in particular, where managers and employees may be fined up to USD 1,000,000 and can even be imprisoned,[2] EU competition law seems to go easy on natural persons. Article 23(2) of Regulation 1/2003[3] empowers the European Commission to "impose fines on undertakings and associations of undertakings", but does not explicitly refer to individuals.[4] On this basis, it is widely acknowledged that the Commission does not have the powers to target managers and employees who facilitate or execute anticompetitive acts.

* Postdoctoral researcher, University of Cologne, Germany, Email: carsten.koenig@uni-koeln.de. I wish to thank Anna Butenko, Adam Jasser, Angus MacCulloch, Wouter Wils and the participants of both the 2017 Annual Conference of the Mannheim Centre for Competition and Innovation (MaCCI) and the Competition Law Scholars Forum (CLaSF)/Centre for Antitrust and Regulatory Studies (CARS) Workshop "Reform of Regulation 1/2003 – Effectiveness of the NCAs and Beyond" at the University of Warsaw for valuable comments. I am also grateful to my anonymous reviewer for very helpful advice.

1 See, e.g., Anna Tzanaki, 'From Economic Recession to Legal Opportunity: The Case for Cartel Criminalization in Europe', http://ssrn.com/abstract=2892710, October 2016; Kalliopi Kokkinaki, 'An Assessment of the Penalties System for Infringements of EU Competition Law: Can Personal Sanctions be the Missing Piece of the Puzzle?', Working Paper 6/2003 of the Institute for European Studies at Vrije Universiteit Brussel.

2 §§ 1, 2 of the Sherman Act (15 U.S.C §§ 1-7).

3 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L 1/1.

4 Only on rare occasions may individuals constitute 'undertakings', see n 15.

The fact that the European Commission is not competent to impose penalties on natural persons does not mean, however, that individual liability is unknown to competition law enforcement in the European Union. The 28 EU Member States are free to impose penalties on individuals violating their national competition laws. Furthermore, where the national competition authorities (henceforth, NCAs) are responsible for enforcing Articles 101 and 102 TFEU, according to Articles 3 and 5 of Regulation 1/2003, they can impose "any [...] penalty provided for in their national law",[5] including penalties for individuals. Moreover, irrespective of Article 83 TFEU, Member States enjoy a wide discretion with regard to criminal law and are therefore free to define and prosecute criminal competition law offences.

Until now, however, NCAs have penalised individuals only in proceedings where they themselves had run the investigations. Not a single case is known in which an NCA imposed an *administrative* penalty on an individual following a prohibition decision by the European Commission. Complementary action by *criminal law enforcers* is not unknown, but has been limited to rare occasions (the 'Marine hose cartel' being the most prominent example).[6] Because the Commission typically invokes its competence whenever an alleged anticompetitive act affects cross-border markets or national markets in more than three Member States,[7] the reluctance towards complementary proceedings on the national level leads to the puzzling result that individuals may escape penalty in some of Europe's most severe antitrust cases.

Against this background, I explore in this article whether NCAs and criminal law enforcers have the competence to impose "follow-on penalties"[8] on managers and employees after the European Commission has already adopted a prohibition decision. My argument is based primarily on a legal analysis of the relevant provisions of Regulation 1/2003 and the principle of *ne bis in idem*. I show that there is nothing in the existing legal framework that would ban NCAs or national criminal law enforcers from imposing complementary penalties on individuals where the European Commission does not have the power to do so.

On the contrary, based on Article 4(3) TEU and the principle of equivalence, NCAs and criminal law enforcers may even be legally obliged to complement a prohibition decision issued by the European Commission. This is the case wherever NCAs and criminal law enforcers would penalise an individual if the alleged anticompetitive agreement or practice had from the outset been investigated on the national level. I conclude that, under these circumstances, it is not only permissible, but also fully consistent with the system of parallel competences established by Regulation 1/2003, if the Commission issues a prohibition decision and fines the responsible undertakings, while, where

5 Article 5 of Regulation 1/2003, n 3.

6 See below, Part VI.

7 European Commission, Notice on cooperation within the Network of Competition Authorities, OJ EU 2004 C 101/43, ¶ 14.

8 I define a follow-on penalty as a penalty that is imposed by an NCA or criminal law enforcer on a natural person following a prohibition decision (and, potentially, the imposition of fines) against one or more undertaking(s) with regard to the same agreement or practice on the same relevant market at the same time.

appropriate, the competent NCAs or criminal law enforcers impose complementary penalties on the acting individuals.

II. A LEGAL BASIS FOR PENALISING INDIVIDUALS

The European Commission has presumably felt the urge to fine natural persons in the past,[9] but has so far resisted the temptation.[10] Restrictive interpretations of the law may have played a role.[11] Articles 101 and 102 TFEU prohibit harmful agreements and practices of "undertakings" and "associations of undertakings", but neither provision explicitly refers to the individuals engaging in such behaviour. The same is true for Article 23(2) of Regulation 1/2003, empowering the European Commission to "impose fines on undertakings and associations of undertakings".[12]

The European Court of Justice defines an undertaking as encompassing "every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed".[13] According to established jurisprudence of the European Courts, individuals only engage in an economic activity and thus constitute an undertaking "when they operate as independent economic actors on a market for goods or services",[14] i.e. when they are self-employed and run an unincorporated business.[15] As

9 See, e.g., European Commission, Decision of 21 October 1998, Case No. IV/35.691/E-4, ¶ 157-160 – *Pre-Insulated Pipe Cartel*; *HFB and Others v Commission*, T-9/99, ECLI:EU:T:2002:70, ¶ 105 ("[...] it is sufficient to observe that, in so far as the Commission [...] did not hold Mr Henss personally liable for the infringement committed by the Henss/Isoplus group, HFB GmbH and HFB KG cannot be imputed, on the basis of economic succession, with liability which was intentionally not established previously"). Note that Mr Henss was later convicted of having violated section 298 of the German Criminal Code (the 'bid rigging offence'), but this was technically not a follow-on proceeding as I define it in this article (n 8) because the criminal proceeding did not concern the same anticompetitive conduct as the Commission's investigation (apparently, Mr Henss decided to enter into a *new* bid rigging agreement after his companies had been fined by the European Commission, see Florian Wagner-von Papp, 'What if all Bid Riggers Went to Prison and Nobody Noticed? Criminal Antitrust Law Enforcement in Germany', in Caron Beaton-Wells & Ariel Ezrachi (eds), *Criminalising Cartels – Critical studies of an international regulatory movement* (Bloomsbury Publishing, 2011), p. 157, 169-70.

10 Wouter P.J. Wils, 'Is Criminalization of EU Competition Law the Answer?', (2005) 28 World Competition 117, 125.

11 In addition, the Commission may be reluctant to target individuals even where the law clearly allows it (see below n 14-15) because the Commission would then have to honour stricter rights of the defence. For example, the CJEU has denied legal persons a general right not to give evidence against themselves, although such right is acknowledged with regard to natural persons under Article 6(1) of the European Convention on Human Rights, see, on the one hand, *Orkem v Commission*, C-374/87, ECLI:EU:C:1989:387, ¶ 29-31; *Mannesmannröhren-Werke v Commission*, T-112/98, ECLI:EU:T:2001:61, ¶ 65-66; *Société Générale v Commission*, T-34/93, ECLI:EU:T:1995:46, ¶ 74; and, on the other hand, *J.B. v Switzerland* (2001), no 31827/96, § 64, ECHR 2001-III; *Funke v France* (1993), no 10828/84, § 44, ECHR Series A no 256.

12 In contrast, §§ 1, 2 Sherman Act apply to "every person" engaging in an anticompetitive agreement or practice, enabling the provision's application to both legal *and* natural persons.

13 *Höfner and Elser v Macrotron GmbH*, C-41/90, ECLI:EU:C:1991:161, ¶ 21; *Poucet and Pistre v AGF and Cancava*, C-159/91, ECLI:EU:C:1993:63, ¶ 17; *SAT Fluggesellschaft v Eurocontrol*, C-364/92, ECLI:EU:C: 1994:7, ¶ 18; *Compass-Datenbank*, C-138/11, ECLI:EU:C:2012:449, ¶ 35.

14 Alison Jones, 'The Boundaries of an Undertaking in EU Competition Law', (2012) 8 European Competition Journal 301, 305 with reference to multiple cases by the European Court of Justice and the General Court.

15 *Wouters and Others*, C-309/99, ECLI:EU:C:2002:98, ¶ 47; *Pavlov and Others*, C-180/98, ECLI:EU:C: 2000:428, ¶ 77; *Commission v Italy*, C-35/96, ECLI:EU:C:1998:303, ¶ 37-38. See also Wouter P.J. Wils, n 10, at 125.

hired managers or employees, in contrast, individuals "do not [...] in themselves constitute 'undertakings' within the meaning of [EU] competition law".[16]

Furthermore, it is apparent from the text of Regulation 1/2003 that its drafters did not envisage penalties being imposed on individuals. It almost goes without saying that the Regulation does not stipulate for non-monetary sanctions like imprisonment. The Regulation mentions natural persons on multiple occasions,[17] but nowhere in Chapter VI dealing with penalties. Article 23(2)(2) relates the calculation of fines to the "total turnover in the preceding business year", which indicates an application to businesses, not individuals. Against this background, it is fully comprehensible that the European Commission does not make any reference to the possibility of fining individuals in its 2006 Fining Guidelines.[18]

The European Commission is, however, only one of many authorities who are responsible for enforcing EU competition law. According to Article 5 of Regulation 1/2003, the "competition authorities of the Member States", i.e. the NCAs, shall also have the power to apply Articles 101 and 102 TFEU in individual cases. In doing so, they can impose "fines, periodic penalty payments or any other penalty provided for in their national law". The NCA's wide discretion includes the imposition of individual penalties where these are available in national law. Moreover, criminal law enforcers may be competent to prosecute the most severe offences.

In fact, the Member States are required by Article 4(3) TEU and, more specifically, the *principle of equivalence*, to ensure "that infringements of [EU] law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive".[19] Thus, if a Member State penalises managers and employees for violating its national competition laws, it must penalise them accordingly for comparable infringements of Articles 101 and 102 TFEU.

On this basis, individuals can be penalised for infringing EU as well as national competition law in "the vast majority of Member States".[20] In Germany, for example, natural persons who intentionally or negligently violate Articles 101 or 102 TFEU or the respective national law, may be fined up to €1,000,000 by the Federal Cartel Office.[21] Individuals involved in bid-rigging can be sent to jail in Germany and Austria. Section 8

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16 *Criminal Proceedings Against Becu*, C-22/98, ECLI:EU:C:1999:419, ¶ 26 (with regard to dock workers being engaged under fixed-term contracts of employment and performing clearly defined tasks).

17 Recitals 8 and 16 as well as Articles 7(2), 12(3), 19(1), 27(3) of Regulation 1/2003.

18 European Commission, Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ 2006 C 210/2.

19 *Commission v Greece*, C-68/88, ECLI:EU:C:1989:339, ¶ 24; *Siesse v Director da Alfândega de Alcântara*, C-36/94, ECLI:EU:C:1995:351, ¶ 20; *Inspire Art*, C-167/01, ECLI:EU:C:2003:512, ¶ 62; *Berlusconi and Others*, C-387/02, ECLI:EU:C:2005:270, ¶ 65; *Åkerberg Fransson*, C-617/10, ECLI:EU:C:2013:105, ¶ 26; *LCL Le Crédit Lyonnais*, C-565/12, ECLI:EU:C:2014:190, ¶ 44, see also *Manfredi*, C-295/04, ECLI:EU:C:2006:461, ¶ 62.

20 European Commission, Enhancing competition enforcement by the Member States' competition authorities: institutional and procedural issues, Commission Staff Working Document, SWD(2014) 231/2, p. 25.

21 §81(1) and (4)(1) of the German Competition Act. An English version is available at http://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.html (accessed 4 December 2017).

of the Irish Competition Act of 2002 states that individuals can be punished with fines up to €4,000,000 or imprisonment not exceeding five years for severe antitrust violations.

In France, fines up to €75,000 and imprisonment up to four years can be imposed on "any natural person [who] fraudulently takes a personal and decisive part in the conception, organization or implementation of [anticompetitive] practices".[22] The Dutch competition authority may fine individuals up to €900,000,[23] and in the United Kingdom, individuals face up to five years imprisonment and/or a fine if they participate in price-fixing.[24] Directors can also be disqualified under sections 9A to 9E of the Company Directors Disqualification Act 1986.

Not all penalties can, however, be imposed by NCAs alone. In many Member States, competition authorities must work closely with criminal law enforcers and courts, in particular, if they want to impose severe penalties like prison sentences. In Ireland, for example, a person indicted for an offence similar to those described in Articles 101 and 102 TFEU must be tried by the Central Criminal Court in Dublin.[25] In the UK, the Competition and Markets Authority (CMA) shares the power to investigate and prosecute criminal cartel offences with the Serious Fraud Office (SFO), and all penalties must be imposed by a court.[26]

As a general rule, the imposition of criminal penalties generally requires that a court must be involved in the proceeding, while administrative penalties can be imposed by the NCAs themselves where such sanctions are available in national law. Many Member States, such as the Netherlands, Belgium, Germany and Poland, enable their NCAs to penalise with administrative fines regular competition law infringements, but reserve criminal sanctions for the most serious offences. Because of the particularities of criminal law enforcement (e.g., stricter rights of the defence, higher burden of proof and, where required, jury trials), *administrative penalties* constitute the focus of the subsequent analysis. However, many of the observations concerning the permissibility of follow-on proceedings conducted in the Member States equally apply to criminal law enforcement. I comment on the differences in Part VI below.

III. THE LEGAL FRAMEWORK OF REGULATION 1/2003

In order to ensure that EU competition law can be effectively enforced, Regulation 1/2003 establishes a system of parallel competences. According to Articles 4 and 5 of the Regulation, both the European Commission and the competition authorities of the Member States shall have the power to apply Articles 101 and 102 TFEU in individual

[22] Article L420-6 of the French Commercial Code. An English version is available at https://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations (accessed 4 December 2017).

[23] Articles 56(1)(a) and 57(1) as well as Article 89 of the Dutch Competition Act, available in English at http://www.dutchcivillaw.com/legislation/competitionact.htm (accessed 4 December 2017).

[24] Sections 188 and 190 of the UK Enterprise Act 2002.

[25] Section 11 of the Irish Competition Act 2002.

[26] CMA, Cartel Offence Prosecution Guidance, March 2014, p. 1.

cases.[27] The institutional framework for their cooperation is provided by the European Competition Network (ECN), within which the authorities exchange information and share best practices.[28]

The division of work between the European Commission and the NCAs is specified in the Commission's Notice on cooperation within the Network of Competition Authorities (henceforth, "Cooperation Notice").[29] The primary objective is to ensure the effective and consistent application of EU competition law.[30] The Notice stipulates that cases will usually be dealt with by a single NCA, several NCAs, or the European Commission, depending on the geographic markets concerned. Parallel action by more than three NCAs is generally considered inefficient. Thus, if an agreement or practice has effects on competition in more than three Member States, a case shall usually be handled by the Commission.[31]

Whereas the Cooperation Notice is legally binding only by way of self-commitment,[32] Regulation 1/2003 establishes directly applicable rules that are mandatory for the Commission, the NCAs, and all other relevant bodies. As I demonstrate in this part, these rules do not preclude NCAs from imposing follow-on penalties on individual managers and employees after the European Commission has issued a prohibition decision and may have fined the undertakings involved. Instead, it is fully in line with the system of parallel competences established by the Regulation if NCAs complement the Commission's competences where this is necessary to enforce effectively Articles 101 and 102 TFEU.

III.1. Article 11(6)

The general rule according to which the European Commission and the NCAs are supposed to exercise their parallel competences is specified in Article 11(1) of Regulation 1/2003. As laid out in this provision, the competition authorities "shall apply the [EU] competition rules in close cooperation". This obligation to cooperate includes the authorities' duty to exchange documents and information and consult each other according to Article 11(2) to (5). Furthermore, the European Commission and the NCAs must assist each other, as stipulated in Articles 12 to 14, and abstain from any action that could negatively impact an investigation or administrative procedure conducted by another competition authority.

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27 For a comparison of powers see Wouter P.J. Wils, 'Competition authorities: Towards more independence and prioritisation?', http://ssrn.com/abstract=3000260, July 2017, p. 9-10.

28 For information on the ECN see http://ec.europa.eu/competition/ecn/index_en.html (accessed 4 December 2017).

29 See n 7.

30 Cooperation Notice, n 7, ¶ 3.

31 Cooperation Notice, n 7, ¶ 14.

32 The Notice thus binds the Commission (because it announced the Notice), but it can also be argued that the Notice binds the NCAs, see Annex 1 of the Cooperation Notice, containing a form according to which the NCAs are supposed to declare that they will also abide by the principles set out in the Notice.

A powerful rule for resolving conflicts of competence between the European Commission and the NCAs is contained in Article 11(6) of the Regulation. According to this provision, the initiation of a proceeding by the Commission "shall relieve the competition authorities of the Member States of their competence to apply [Articles 101 and 102 TFEU]".[33] In order to soften the blow for the NCAs, it is further specified that, if an NCA is already acting on a case, the Commission shall only initiate proceedings after consulting with that NCA.[34]

It follows from Article 11(6) of Regulation 1/2003 that the competence of the NCAs to apply Articles 101 and 102 TFEU as equals, based on Article 5 of the Regulation, is terminated by law as soon as the European Commission formally decides to initiate a proceeding according to Article 2(1) of Regulation 773/2004.[35] Thus, once the Commission has opened proceedings, "NCAs cannot act under the same legal basis against the same agreement(s) or practice(s) by the same undertaking(s) on the same relevant geographic or product market".[36]

What is more, the NCAs lose an essential part of their power to apply their national competition law due to the interplay of Articles 11(6) and 3(1) of Regulation 1/2003. The latter provision establishes that the NCAs are required also to apply Articles 101 and 102 TFEU whenever they apply their national competition law to agreements or practices that fall within the scope of these provisions, in particular, because they may affect trade between Member States. Thus, where NCAs are precluded by Article 11(6) of Regulation 1/2003 from applying Articles 101 and 102 TFEU, they are also precluded from applying their national competition law because they would otherwise inevitably infringe upon Article 3(1) of the Regulation.[37]

However, it is widely acknowledged that Article 11(6) of Regulation 1/2003 only relieves the NCAs of their competence to apply Articles 101 and 102 TFEU until a proceeding initiated by the European Commission is concluded. As soon as the Commission adopts a final decision, the competence of the NCAs will be revived.[38] Thus, Article 11(6) of Regulation 1/2003 does not preclude NCAs from imposing complementary penalties on

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33 Article 11(6) of Regulation 1/2003 has never been applied, but it is correctly pointed out that the *existence* of this provision facilitated an efficient case allocation, see Marco Botta, 'Testing the Decentralisation of Competition Law Enforcement: Comment on *Toshiba*', (2013) 38 ELRev 107, 113.

34 See also Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities, 15435/02 ADD 1 (accessible at http://www.consilium.europa.eu/register/en/content/int/?typ= ADV), ¶ 9, according to which the powers of the Commission "will be exercised with utmost regard for the cooperative nature of the Network".

35 Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ 2004 L 123/18.

36 Cooperation Notice, n 7, ¶ 51.

37 *Toshiba Cooperation*, C-17/10, ECLI:EU:C:2012:72, ¶ 75, 77-78. Two exceptions from this dilemma are the application of national laws stricter than Articles 101 and 102 TFEU to unilateral conduct and the application of provisions of national law that predominantly pursue an objective different from that pursued by Articles 101 and 102 TFEU – these are permissible according to Article 3(2) and (3) of Regulation 1/2003.

38 See also Peter Whelan, *The Criminalization of European Cartel Enforcement* (OUP, 2014), p. 208.

individuals violating the law *after* the European Commission has issued a prohibition decision and may have fined undertakings.

As the European Court of Justice has held in *Toshiba Corporation*, irrespective of Article 11(6) of Regulation 1/2003, the Regulation does not indicate "that the opening of a proceeding by the Commission permanently and definitively removes the national competition authorities' power to apply national legislation on competition matters".[39] Instead, the Court further held that "the power of the national competition authorities is restored once the proceeding initiated by the Commission is concluded".[40]

The European Court of Justice reached this conclusion by looking at the legislative history and considering the full context of Regulation 1/2003. As pointed out by the Court, the original proposal by the European Commission to exclude the application of national competition law to anticompetitive agreements or practices capable of affecting trade between Member States was rejected in favour of the current system of parallel application.[41] Fully aware of the alternative presented by the Commission, the Council of the European Union unequivocally opted for overlapping scopes of application and the system of parallel competences.

Furthermore, Article 16(2) of Regulation 1/2003 explicitly presupposes the possibility of NCAs ruling on "agreements, decisions or practices [...] which are already the subject of a Commission decision", and stipulates that NCAs must not take decisions "which would run counter to the decision adopted by the Commission".[42] It follows from simple logic that requiring NCAs to comply with the decisions issued by the European Commission only makes sense if they are capable of deciding on the same subject-matter in the first place.

Consequently, the restraint resulting from Article 11(6) of Regulation 1/2003 is only temporary. As construed by the European Court of Justice, the provision bans NCAs only from acting against the same agreement(s) or practice(s) by the same undertaking(s) on the same relevant geographic or product market *at the same time* as the European Commission. The NCA's power to act revives as soon as the Commission concludes its proceedings. Thus, Article 11(6) of Regulation 1/2003 does not preclude NCAs from initiating follow-on proceedings against individuals after the Commission already acted against undertakings.[43]

Furthermore, one could even argue that Article 11(6) of Regulation 1/2003 does not apply to follow-on proceedings against individuals *at all* because such proceedings

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39 *Toshiba Corporation*, n 37, ¶ 79.

40 *Toshiba Corporation*, n 37, ¶ 80.

41 *Toshiba Corporation*, n 37, ¶ 83; see also Giorgio Monti, 'Managing decentralized antitrust enforcement: Toshiba', (2014) 51 Common Market Law Review 261-280.

42 See also infra, Part III.2.

43 Note, however, that a mere duplication of the Commission's decision on the same facts would be precluded by the *ne bis in idem* principle. However, a follow-on proceeding against individuals is not a mere duplication because it is not targeted against the same person(s) as the Commission's investigation.

concern only perpetrators who are usually[44] not subject to an investigation by the European Commission (i.e., individuals, not undertakings). The personal scope of the Commission's investigation is precisely defined by the formal opening decision, according to Article 2(1) of Regulation 773/2004, in which all targets of the investigation are explicitly named.[45] As far as a follow-on proceeding conducted by an NCA concerns only persons (legal or natural) who are *not* formally addressed by the Commission's investigation, it can be submitted that the NCA investigation concerns a different case and is therefore not subject to the conflict rule laid down in Article 11(6) of Regulation 1/2003. Such an interpretation would construe Article 11(6) in line with the 'same person requirement' of the *ne bis in idem* principle.[46]

III.2. Article 16(2)

As indicated in the previous section, Article 16(2) of Regulation 1/2003 presupposes that NCAs are competent to rule on anticompetitive agreements or practices after the European Commission has already done so. According to the persuasive reasoning of the European Court of Justice in *Toshiba Corporation*, "it is apparent from [Article 16(2) of Regulation 1/2003] that the competition authorities of the Member States retain their power to act even if the Commission has itself already taken a decision".[47] As the Court went on to determine, "[t]he said provision establishes that the national authorities may intervene after the Commission, but prohibits them from contradicting a previous decision by the Commission".[48]

The European Court of Justice further elaborated in *Toshiba Corporation* that Article 16(2) of Regulation 1/2003 does not only envisage the application of EU competition law by the NCAs, but must apply *a fortiori* where NCAs intend to apply national competition law.[49] It would not be in line with the system of parallel application laid out in Article 3(1) of Regulation 1/2003 if the NCAs could apply Articles 101 and 102 TFEU but not their domestic competition laws. Thus, since the NCAs "remain authorized to apply EU law after the Commission has taken a decision, they must *a fortiori* be permitted to apply their national law",[50] provided they comply with the requirements of Article 3 of Regulation 1/2003.

Moreover, Article 16(2) of Regulation 1/2003 bans NCAs only from adopting decisions that "would run counter to [a] decision adopted by the Commission". The wording indicates that the provision refers to conflicting decisions, not complementary ones. Thus, Article 16(2) leaves room for NCA decisions that *confirm* a Commission decision

44 The sole exception being self-employed individuals who run unincorporated businesses, see n 15.

45 See e.g. European Commission, Opening of Proceedings of 9 December 2016, COMP/40153 – E-book MFNs and related matters (explaining that the Commission decided to extend the proceedings against Amazon.com, Inc. and Amazon EU, S.à.r.l. to the two subsidiaries Amazon Digital Services, LLC and Amazon Media EU, S.à.r.l. in light of new evidence that was brought to light after the original opening of proceedings).

46 See infra, Part IV.

47 *Toshiba Corporation*, n 37, ¶ 85.

48 Ibid.

49 *Toshiba Corporation*, n 37, ¶ 86.

50 Ibid. This finding, in particular, is criticized by Giorgio Monti, n 41.

by imposing additional penalties. The imposition of follow-on penalties on individual managers or employees does not contest a prohibition decision by the European Commission in any way. That the Commission itself has not imposed individual sanctions will in most cases be exclusively due to the fact that it does not possess the competence to do so under Regulation 1/2003.[51]

NCA decisions imposing follow-on penalties on individuals fully account for the prior decision adopted by the European Commission. They take the antitrust infringement established by the Commission as a given and only impose complementary penalties to accommodate for the fact that only undertakings can be fined on the European level, but imposing penalties on individuals may be necessary to achieve effective deterrence, to take care of agency problems, or to punish those who are primarily responsible for violating the antitrust laws. It is difficult to imagine any better example of an NCA decision ruling on an agreement or practice under Article 101 or Article 102 TFEU, which is already the subject of a decision adopted by the European Commission, and which does not run counter to its decision.

III.3. Recital 18

Recital 18 of Regulation 1/2003 states that every competition authority should be allowed "to suspend or close a case on the ground that another authority is dealing with it or has already dealt with it, the objective being that each case should be handled by a single authority". It could be argued that this statement precludes NCAs from initiating follow-on proceedings after the European Commission has already adopted a decision because such additional action would not be in line with the proclaimed objective of having only one competent competition authority for each case.

However, this interpretation would overrate the importance of recital 18. First, it is only a recital, which elaborates on the intended meaning of certain provisions in Regulation 1/2003 (in particular, Article 13), but which is in itself not legally binding. Furthermore, having only one competent authority acting on each case is simply described as a goal, but has not become a mandatory rule of Regulation 1/2003. Article 13 merely characterises the parallel action of another authority as "sufficient grounds" for suspending or terminating proceedings and stipulates that the European Commission and the NCAs "may reject" a complaint if an agreement or practice is already dealt with by another authority.

The aforementioned interpretation of recital 18 of Regulation 1/2003 is also contradicted by Article 16(2) of the Regulation. As explained above, this provision presupposes the possibility of additional national proceedings after the European Commission has already adopted a decision. Otherwise, it would not make sense to require the NCAs not to "take decisions which would run counter to [a] decision by the Commission". It follows from this stipulation that, even though a single competent authority for each case may have been preferred by the drafters of Regulation 1/2003, the Regulation is open to exceptions.

[51] The sole exception being self-employed individuals who run unincorporated businesses, see n 15.

These basic principles were also reinforced by the European Court of Justice in *Toshiba Corporation*. The Court pointed out that recital 18 "bears no relation to the national authorities' loss of jurisdiction provided for in Article 11(6) of Regulation No 1/2003",[52] but must be read in combination with Article 13, according to which NCAs are free – but not obliged – to terminate or suspend a proceeding where another authority has already acted. As interpreted by the Court, Article 13 and recital 18 merely reflect "the broad discretion which the national authorities [...] have in order to ensure an optimal attribution of cases".[53]

Recital 18 of Regulation 1/2003 must thus be construed as stating only the general rule, but not having any legal consequences beyond those laid down in Articles 13 and 16(2). *In most cases*, there will be only a single competent competition authority, which will be either the European Commission or one of the NCAs. However, there is nothing in Regulation 1/2003 that prevents competition authorities from jointly dealing with the same case in close cooperation where they consider it appropriate. Instead, such concerted action is fully in line with the system of parallel competences established in Articles 4 and 5 of the Regulation.

This interpretation is also confirmed by the Cooperation Notice.[54] The Notice explicitly refers to parallel action "by two or three NCAs", which it considers appropriate where "the action of only one NCA would not be sufficient to bring the entire infringement to an end and/or to sanction it adequately". Although the Notice is legally binding only by way of self-commitment,[55] this statement indicates that the European Commission did not interpret Regulation 1/2003 as stipulating that, at the same time, there may always be only one competition authority, which is competent to deal with a particular case.

Interestingly, the Cooperation Notice does not mention parallel action by the European Commission and one or more NCAs. Apparently, the drafters did not consider such cooperation necessary because the Commission's powers are not restrained geographically (except, of course, to the territory of the European Union). Nevertheless, even the Commission may need the assistance of other competition authorities to "sanction [an infringement] adequately" – the prime example being the Commission's inability to penalise individuals. Although it is not mentioned in the Notice, such cooperation between the Commission and one or more NCAs is consistent with the system of parallel competences therein described.

In conclusion, as the European Court of Justice held in *Toshiba Corporation*, recital 18 of Regulation 1/2003 "cannot be interpreted as meaning that the EU legislature intended to deprive the national authorities of their power to apply national competition law once the Commission itself adopted a decision."[56] Instead, it merely states the nonbinding objective that, as a general rule, each case should be dealt with by a single competition

52 *Toshiba Corporation*, n 37, ¶ 90.

53 Ibid.

54 Cooperation Notice, n 7.

55 See n 32.

56 *Toshiba Corporation*, n 37, ¶ 89.

authority. Where appropriate, however, the Commission and the NCAs are not only allowed, but rather urged to act in cooperation to ensure that EU competition law is effectively enforced.

IV. THE PRINCIPLE OF *NE BIS IN IDEM*

It was established in the previous analysis that Regulation 1/2003 does not preclude NCAs from initiating follow-on proceedings against individuals after the European Commission has adopted a prohibition decision and may have fined the responsible undertakings. Instead, such concerted action is in line with the system of parallel competences established through Articles 4 and 5 of Regulation 1/2003 and further specified in the Cooperation Notice.

However, it was also indicated that Article 16(2) of Regulation 1/2003 allows the NCAs to act only after the European Commission has concluded its proceedings, i.e. after a final decision has been adopted. This raises the question whether follow-on penalties imposed by NCAs infringe upon the legal principle of *ne bis in idem*, which is essentially the equivalent of the double jeopardy doctrine in common law. After all, such follow-on penalties are based on the same anticompetitive agreement or practice that was the basis of the prohibition decision previously adopted by the European Commission.

The principle of *ne bis in idem* is laid down, *inter alia*, in Article 50 of the EU Charter of Fundamental Rights,[57] and Article 4(1) of Protocol 7 to the European Convention on Human Rights.[58] It stipulates that no one shall be liable to be tried or punished in criminal proceedings for an offence for which he or she has already been acquitted or convicted. The principle of *ne bis in idem* also applies to penalties imposed in administrative proceedings depending on the nature of the offence and the nature and severity of the penalty.[59]

As acknowledged by the European Court of Justice, the principle of *ne bis in idem* must also be respected in proceedings for the imposition of penalties under EU competition law.[60] In *Limburgse Vinyl Maatschappij and Others v Commission*, the Court held that the principle "precludes, in competition matters, an undertaking from being found guilty or proceedings from being brought against it a second time on the ground of anti-

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57 Article 50 CFR: "No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law."

58 Article 4(1) of Protocol 7 of the ECHR: "No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State."

59 *Lauko v. Slovakia* (1998), no 4/1998/907/1119, § 56, ECHR 1998-VI; EU Network of Independent Experts on Fundamental Rights, *Commentary of the Charter of Fundamental Rights*, June 2006, p. 385.

60 *Boehringer Mannheim v Commission*, C-7/72, ECLI:EU:C:1972:125, ¶ 3; *Limburgse Vinyl Maatschappij and Others v Commission*, C-238/99 P, ECLI:EU:C:2002:582, ¶ 59; *LVM v Commission*, T-305/94, ECLI:EU:T:1999:80, ¶ 96; *Aalborg Portland and Others v Commission*, C-204/00, ECLI:EU:C:2004:6, ¶ 338-340; *Showa Denko v Commission*, C-289/04 P, ECLI:EU:C:2006:431, ¶ 50; *Toshiba Corporation*, n 37, ¶ 94; the application of *ne bis in idem* to competition law cases is addressed, *inter alia*, by Michal Petr, 'The Ne Bis in Idem Principle in Competition Law', [2008] 29 ECLR. 392, and Wouter P.J. Wils, 'The Principle of Ne Bis in Idem in EC Antitrust Enforcement: A Legal and Economic Analysis', (2003) 26 World Competition 131.

competitive conduct in respect of which it has been penalised or declared not liable by a previous unappealable decision".[61] This finding was later confirmed in *Toshiba Corporation*.[62]

In *Toshiba*, the Court also explained that "in competition law cases, [...] the application of [the principle of *ne bis in idem*] is subject to the threefold condition that in the two cases the facts must be the same, the offender the same and the legal interest protected the same".[63] In *Aalborg Portland and Others v Commission*, the Court held, in slightly different words, that "the application of that principle is subject to the threefold condition of identity of the facts, unity of offender and unity of the legal interest protected".[64] On this basis, the Court summarised *ne bis in idem* as meaning that "the same person cannot be sanctioned more than once for a single unlawful course of conduct designed to protect the same legal asset".[65]

As this last sentence indicates, since the principle of *ne bis in idem* follows from individual freedoms and constitutes a fundamental right, it must always be applied to *a specific person* (i.e. a legal subject capable of bearing rights and duties). It is widely acknowledged that both natural and legal persons can be protected by fundamental rights. Undertakings, however, are *economic entities* (not to be confused with *legal persons*), and are thus *in this capacity* not capable of bearing rights and duties.[66] As a consequence, *ne bis in idem* cannot be applied to undertakings just as fines cannot be imposed on undertakings, but only on natural or legal persons.

Follow-on proceedings by NCAs against individual managers or employees will by definition concern the same facts as those at the basis of a preceding decision by the European Commission against one or more undertakings. Furthermore, they will concern the same legal interests as long as both the Commission and the NCAs act in order to ensure the effective enforcement of EU competition law.[67] The decisive question thus becomes whether the Commission and the NCAs conduct their proceedings against *the same persons*.

If one clearly distinguishes between the undertaking as an economic entity, and the natural and legal persons being part of that entity, it is easy to see that this will usually *not* be the case. As explained above, the European Commission is capable of imposing penalties on natural persons only in the rare situation where Articles 101 or 102 TFEU are violated by self-employed professionals or unincorporated businesses. In all other cases, the Commission conducts its proceedings exclusively against legal persons, primarily corporations. The exact targets of its investigation are named by the

61 *Limburgse Vinyl Maatschappij and Others v Commission*, n 60, ¶ 59.

62 *Toshiba Corporation*, n 37, ¶ 94.

63 *Toshiba Corporation*, n 37, ¶ 97.

64 *Aalborg Portland and Others v Commission*, n 60, ¶ 338.

65 Ibid.

66 *Ne bis in idem* does apply, however, to the legal persons constituting the undertaking.

67 See however Part VI below with regard to criminal sanctions.

Commission in its opening decision, according to Article 2(1) of Regulation 773/2004.[68] Thus, there is usually no doubt as to the persons affected.

Where the European Commission has not formally conducted its proceedings against any natural person, there will be no conflict with the principle of *ne bis in idem*, if one or more NCAs later decide to open additional proceedings against individual managers or employees.[69] The NCAs will only be banned by the principle of *ne bis in idem* from opening proceedings against certain individuals where the Commission has already run official investigations against the same persons. Otherwise, the unity of offender prerequisite will not be met.

The principle of *ne bis in idem* is not applicable only because a person was already indirectly affected by a prior proceeding. Instead, the person must have been an official target of the previous investigation. Thus, managers and employees cannot claim a violation of *ne bis in idem* on the grounds that they were *de facto* implicated in a prior proceeding by the Commission against the legal persons they are working for. For example, it will not be sufficient that the individuals who are targeted in a follow-on proceeding were previously interviewed by the Commission, according to Article 19(1) of Regulation 1/2003, or even that their homes were searched according to Article 21(1) of the Regulation. If clearly the individuals were not themselves targets of the investigation, they will not be able to rely on the principle of *ne bis in idem* should one or more NCAs later decide to open proceedings against them.

In conclusion, the principle of *ne bis in idem* will usually not preclude NCAs from imposing additional penalties on individuals who facilitate or execute anticompetitive agreements or practices even if those acts have already been subject to a prior decision by the European Commission against one or more undertakings. Follow-on proceedings by NCAs will generally concern the same facts and the same legal interests as the initial proceeding by the Commission, but they do not aim at imposing a penalty on the same offender.

V. Additional Law and Policy Considerations

In this part, I briefly explore whether imposing follow-on penalties on individuals fits in the legal and policy framework for EU competition law enforcement. Although further research will be necessary to draw definite conclusions on this point, I show that the general intuition of EU competition law seems to favour such an approach. I comment

[68] See n 45.

[69] Michael J. Frese, *Sanctions in EU competition law: principles and practice* (Hart, 2016), p. 85 ("It logically follows that the principle of *ne bis in idem* is not opposed to the penalisation of natural persons for an infringement for which the responsible legal person has already been penalised, or vice versa."); Bas van Bockel, *The Ne Bis in Idem Principle in EU Law* (Wolters Kluwer, 2010), p. 220 ("The liability of the legal entity must be considered as one that is distinct from that of its executives and/or employees for the purposes of the application [of the] *ne bis in idem* principle and the prohibition of double punishment in EU law."); Silke Brammer, *Co-operation between National Competition Agencies in the Enforcement of EC Competition Law* (Hart, 2009), p. 384 ("[...] in this scenario, there is no identity of the parties and double jeopardy issues do not arise.").

in turn on effective deterrence, non-discrimination and the primary law principles of effectiveness and equivalence.

V.1. Deterrence

Whereas the primary purpose of private antitrust actions under the Antirust Damages Directive is to ensure victims' right to full compensation,[70] the most important policy goal of public enforcement of EU competition law is deterrence.[71] The Commission and NCAs impose fines and other penalties on legal and natural persons to prevent them from infringing the competition laws. At least on the European level, other purposes such as retribution or restoration are significantly less relevant for justifying competition law enforcement.

It is evident that imposing follow-on penalties on managers and employees would increase deterrence. Yet, it is not so much the addition to the total level of deterrence that matters, although many authors have argued (convincingly) that fines in the EU are probably still too low to achieve effective deterrence.[72] More importantly, individual liability entails specific benefits that considerably distinguish it from other enforcement instruments such as corporate liability.

One of the main benefits of individual liability is that it takes care of agency problems that arise because the risks and chances of anticompetitive behaviour turn out to be different for corporations and their employees. All corporate decisions are inevitably made by individuals, be it managers or rank-and-file employees. While individuals decide whether a corporation infringes competition law, it is primarily the corporation that is held responsible for such infringements.[73] Incentives for the corporation and its employees may be different.

Managers and employees may pursue personal benefits when facilitating an anti-competitive practice of "their" corporation. They may hope to achieve a bonus or a promotion in return for making the corporation more profitable. Or they may just want

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70 Article 3(1) of Directive 104/2014/EU 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, OJ 2014 L 349/1; see also *Donau Chemie and Others*, C-536/11, ECLI:EU:C:2013:366, ¶ 24; see also *Manfredi*, C-295/04, ECLI:EU:C:2006: 461, ¶ 95; *Courage and Crehan*, C-453/99, ECLI:EU:C:2001:465, ¶ 26; and the Opinion of Advocate General Jääskinen in *CDC Hydrogen Peroxide*, C-352/13, ECLI:EU:C: 2014:2443, ¶ 124.

71 European Commission, Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ 2006 C 210/2, ¶ 4; *Musique Diffusion française v Commission*, Joined cases 100 to 103/80, ECLI:EU:C:1983:158, ¶ 106 ("[...] the Commission [...] must ensure that its action has the necessary deterrent effect, especially as regards those types of infringement which are particularly harmful to the attainment of the objectives of the Community.").

72 Mario Mariniello, 'Do European fines deter price fixing?', Research paper, http://voxeu.org/article/do-european-fines-deter-price-fixing (accessed 4 December 2017) (stating that cartel fines in the European Union are very far from their optimal level and arguing that they should be increased); John M. Connor & Robert H. Lande, 'The size of cartel overcharges: Implications for U.S. and EU fining policies', (2006) 51 The Antitrust Bulletin 983, 1020-1021 (stating that cartel fine levels in both the United States and the European Union are far too low, but that, unfortunately, the EU fine levels are even lower on average than the US levels).

73 The corporation's shareholders, employees, suppliers, and customers as well as other contingencies are also collaterally affected, but they are (in most cases and as a general rule) not directly liable.

to secure their positions. Because they will not be personally liable for a fine imposed on the corporation, they weigh the costs and benefits differently than would the corporation.

Individual liability takes care of such agency problems by addressing incentives directly to the acting individuals. If a sales manager is personally liable for entering into a price-fixing agreement with a competitor of her employer, she may assess the risks and benefits of such behaviour differently than if she were to implicate only the corporation.

In this regard, there is no difference between imposing individual liability through follow-on penalties and ordinary, non-derivative individual liability for competition law infringements as it is available in the laws of many EU Member States. Thus, it can be concluded from a deterrence point of view that the imposition of follow-on penalties can serve an important function by taking care of agency problems and better ensuring antitrust compliance of individuals.

V.2. Non-discrimination

It is one of the fundamental principles of European law, that everyone is treated equally before the law. This is not only stipulated in Article 20 of the EU Charter of Fundamental Rights, but also included in all European constitutions.[74] Thus, when the Member States use their penalising powers to enforce competition law, they are bound to apply them equally to all persons concerned unless there is objective justification for differentiation.

NCAs enjoy a wide discretion in choosing the cases they want to pursue, but their discretionary power is confined by the principle of equal treatment. Thus, if one accepts the finding that NCAs are perfectly competent to impose follow-on penalties on individuals, it would present a conflict with the principle of equal treatment if an NCA routinely fined individuals in purely domestic proceedings but never imposed fines following a prohibition decision by the European Commission. Would not the executives fined by the German Federal Cartel Office for participation in the 'beer brewery cartel'[75] rightly consider it unequal treatment that no such fine has been imposed, for example, on those responsible for the 'power cables cartel'?[76] That, additionally, the competent NCAs may not be able to conduct proceedings against the legal persons responsible for the competition law infringement (due to Article 11(6) of Regulation 1/2003 and the concurring competence of the Commission) would not seem sufficient justification for discriminating between individuals.

If one accepts that NCAs are competent to impose follow-on penalties, they need to decide on the imposition of such penalties according to the same criteria they apply in

74 Explanations Relating to the Charter of Fundamental Rights, OJ 2007 C 303/17, at 24.

75 Federal Cartel Office, Decision of 2 April 2014 in case no B10-105/11, summary available in English at http://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2014/B10-105-11.pdf (accessed 4 December 2017). Fines imposed on 14 individuals amounted to a total of approx €3.6 million.

76 European Commission, Decision of 2 April 2014, Case AT.39610 – *Power Cables*. No fining decision against a natural person has become known. The beer brewery case and the power cables case both concerned cartels (involving price-fixing in the former case, and market and customer allocation in the latter), were decided at the same time, and, taking into account the total amount of fines imposed (€338 and €302 million respectively), may arguably be presumed to have caused similar harm to the economy.

purely domestic proceedings. Relevant factors may include the gravity of the offense, an individual's role in facilitating and implementing the anticompetitive practice, the degree of culpability, the extent of the harm caused, the number of victims, an individual's role in the organisation, an individual's responsibility with regard to antitrust compliance, and many more. On this basis, it seems unlikely that a convincing case could be made in favour of sanctioning individuals only in purely domestic proceedings, but not in cross-border cases.

On the contrary, given that the European Commission typically invokes its competence where an alleged anticompetitive act affects cross-border markets or national markets in more than three Member States,[77] the anticompetitive effects of the investigated practices tend to be particularly large. Thus, one expects the individuals who facilitate these practices not to be substantially less blameworthy than individuals in purely domestic cases.

In conclusion, the principle of equal treatment argues in favour of initiating follow-on proceedings against individuals whenever they are targeted if the case is purely domestic. Depending on the circumstances, equal treatment may even require that an NCA initiates such proceedings (or abstains from pursuing a comparable domestic case).

V.3. Effectiveness and equivalence

EU competition law does not require the EU Member States to impose particular sanctions on persons violating Articles 101 and 102 TFEU. Article 5 of Regulation 1/2003 merely stipulates that NCAs "may take" certain decisions when applying those provisions in individual cases, including termination decisions, interim measures and imposing fines and other penalties.

Yet, as has been derived by the European Court of Justice from primary law (notably, Article 4(3) TEU concerning the Member States' duty of sincere cooperation), national rules governing the enforcement of EU law must not render the enforcement of EU law practically impossible or excessively difficult (principle of effectiveness), and must not be less favourable than rules governing similar domestic actions (principle of equivalence).[78]

It is difficult to make a convincing argument in favour of a specific enforcement instrument on the basis of the principle of effectiveness, given that the competition rules can be enforced in many different ways (including private and public enforcement and corporate and individual liability).[79] Nevertheless, where empirical findings show a substantial enforcement gap, e.g. due to the agency problems described above, it could be submitted that Member States are required to address directly sanctions to individuals.

More relevant in the given context, however, is the principle of equivalence. As previously mentioned, the European Court of Justice has argued with regard to sanctions

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77 European Commission, n 7, ¶ 14.

78 See e.g. *Eturas and Others*, C-74/14, ECLI:EU:C:2016:42, ¶ 32; *Nike European Operations Netherlands*, C-310/14, ECLI:EU:C:2015:690, ¶ 28; *Courage v Crehan*, n 70, ¶ 29.

79 It has been argued with regard to criminal punishment that it is not simply a means of enforcement, but (primarily) serves other objectives than those pursued by competition law, see n 88-91.

that the principle of equivalence requires the Member States to ensure "that infringements of [EU] law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive".[80] It follows from this rationale that, if a Member State enables its NCA to impose administrative fines on individuals for violating national competition laws, it must also enable the NCA to impose administrative fines for comparable infringements of Articles 101 and 102 TFEU.[81]

The NCAs must apply Articles 101 and 102 TFEU not only in addition to their national laws, but also to cross-border cases, even if their national laws are not applicable. Furthermore, the NCAs are not relieved of their duty to enforce Articles 101 and 102 TFEU against individuals only because the European Commission initiated a proceeding against one or more legal persons. Since the Commission lacks the competence to address sanctions to individuals, it is left to the NCAs to determine whether additional follow-on penalties are appropriate and necessary to achieve effective deterrence. The principle of equivalence requires them to conduct this analysis with the same rigour that they apply to purely domestic cases.

VI. The Special Case of Criminal Law Enforcement

The focus of the analysis so far has been on administrative fines imposed on individuals by NCAs after the Commission has adopted a prohibition decision and may have fined one or more legal persons. In some Member States, however, some or even all penalties that can be imposed on individuals violating the antitrust laws are considered to be of a criminal nature and require the involvement of criminal law enforcers and courts. In such proceedings, the NCAs may play a supporting role (as in the UK, where the CMA can prosecute cartel offences), or no role at all (as in Germany, where the criminal bid-rigging offence is enforced by public prosecutors and criminal courts with no obligatory formal participation of the Federal Cartel Office).

As I argue in this part, follow-on criminal proceedings are even less problematic than the imposition of additional administrative penalties from the perspective of Regulation 1/2003,[82] but account must be given to procedural safeguards such as due process to avoid conflicts with the EU Charter of Fundamental Rights and the European Convention on Human Rights.

First, most of the preceding analysis also holds true for criminal proceedings. Article 11(6) of Regulation 1/2003 applies to criminal law enforcers and courts via Article 35(2)

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[80] *Commission v Greece*, C-68/88, ECLI:EU:C:1989:339, ¶ 24; *Siesse v Director da Alfândega de Alcântara*, C-36/94, ECLI:EU:C:1995:351, ¶ 20; *Inspire Art*, C-167/01, ECLI:EU:C:2003:512, ¶ 62; *Berlusconi and Others*, C-387/02, ECLI:EU:C:2005:270, ¶ 65; *Åkerberg Fransson*, C-617/10, ECLI:EU:C:2013:105, ¶ 26; *LCL Le Crédit Lyonnais*, C-565/12, ECLI:EU:C:2014:190, ¶ 44, see also *Manfredi*, C-295/04, ECLI:EU:C:2006:461, ¶ 62.

[81] Criminal punishment may be different since it is argued that criminal competition law offences (primarily) serve other objectives than those pursued by competition law, see n 79.

[82] See also Renato Nazzini, 'Criminalisation of Cartels and Concurrent Proceedings', [2003] 24 ECLR 483, 488 ("Criminal proceedings are allowed to proceed alongside proceedings before the European Commission").

to (4), but, analogous to what has been said above with regard to competition authorities,[83] criminal enforcers and courts also regain their competence as soon as the Commission concludes its proceedings. Article 16(2) of the Regulation does not even apply to criminal law enforcers and courts because it only refers to the "competition authorities of the Member States", and there is no provision in Article 35 extending this to other authorities or courts.

Article 16(1) of Regulation 1/2003, which is essentially equivalent to Article 16(2), but applies to courts, not NCAs, stipulates that, "[w]hen national courts rule on agreements, decisions or practices under [Article 101 or Article 102 TFEU] which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission".[84] This provision also applies to *criminal* courts, but it will not be violated as long as criminal proceedings do not challenge the substantive findings of the European Commission but merely complement additional penalties for individuals.[85]

Moreover, Article 3(3) of Regulation 1/2003 in combination with the last sentence of recital 8 of the Regulation leaves a relatively wide discretion to the Member States when it comes to imposing criminal sanctions on individuals. Article 3(3) of the Regulation stipulates that the obligation essentially not to deviate from EU competition law according to Article 3(1) and (2) is not applicable when competition authorities and courts of the Member States apply "provisions of national law that predominantly pursue an objective different from that pursued by [Articles 101 and 102 TFEU]". It is submitted that this is true for criminal law provisions because they aim at retribution, incapacitation and other specific objectives of criminal law.

This interpretation is confirmed by the last sentence of recital 8 of Regulation 1/2003, specifying that the Regulation does not apply to "national laws which impose criminal sanctions on natural persons except to the extent that such sanctions are the means whereby competition rules applying to undertakings are enforced".[86] Systematic interpretation shows that this stipulation relates directly to Article 3(3) of Regulation 1/2003, which leads back to the delicate question of objectives (the goals of both criminal law and competition law are of course much debated).[87] Concluding from the rule/exception structure of the last sentence of recital 8, however, the drafters of Regulation 1/2003 apparently held the view that, at least as a general rule, criminal sanctions for individuals predominantly pursue objectives different from those pursued by Articles 101 and 102 TFEU (and are thus *not* "means whereby competition rules

83 See Part III.1.

84 See also *Masterfoods and HB*, C-344/98, ECLI:EU:C:2000:689, ¶ 52 (stating, even before Regulation 1/2003 entered into force, that "when national courts rule on agreements or practices which are already the subject of a Commission decision they cannot take decisions running counter to that of the Commission").

85 Note that, according to the applicable rules of criminal procedure, criminal courts would probably need to observe a higher standard of proof. This may require prosecutors to produce additional evidence.

86 The wording of the last sentence of recital 8 is much criticized, see, e.g., Court of Appeal (Criminal Division), *IB v The Queen,* [2009] EWCA Crim 2575, ¶ 30: "Taken by itself, however, its meaning seems to us to be obscure."

87 Wouter P.J. Wils, n 10, at 132-133.

applying to undertakings are enforced" in terms of the last sentence of recital 8). Hence, they should fall under the exception of Article 3(3) of Regulation 1/2003.

A similar understanding was demonstrated by the English Court of Appeal in *IB v The Queen*.[88] The Court construed the cartel offence according to sections 188 and 190 of the UK Enterprise Act 2002 as not being "national competition law", in terms of Article 3 of Regulation 1/2003, in order to uphold a criminal proceeding that was conducted against individuals in the UK before the European Commission had concluded its administrative proceeding against the responsible undertakings.[89] This narrow interpretation of the UK cartel offence has been criticised by renowned competition law experts,[90] but it is consistent with the purpose of Article 3(3) and recital 8 of the Regulation, which aim to give Member States leeway with regard to imposing criminal sanctions on individuals.[91] The Court of Appeal further held that there was no basis for saying that Regulation 1/2003 "makes the punishment of an offence […] the *exclusive* province of the designated national competition authority."[92]

Whether one considers criminal law offences as not being "national competition law", in terms of Article 3 of Regulation 1/2003, or whether one exempts criminal cases from the stipulations of that article by means of Article 3(3), the result in either case is that criminal law enforcers and criminal courts are not required by Article 3(1) of Regulation 1/2003 to apply Articles 101 or 102 TFEU in criminal cases against individuals. As a consequence, criminal law enforcement on the national level is not barred *at any time* by Article 16(1) and (2) of the Regulation, which only concern the application of Articles 101 and 102 TFEU. Thus, Regulation 1/2003 does not exclude the possibility of concurrent criminal proceedings.

More serious challenges arise from the EU Charter of Fundamental Rights and the European Convention on Human Rights, and, specifically, the right to a fair trial according to Articles 47(1) of the Charter and 6(1) of the Convention. In the UK, where jury trials are the norm for all criminal cases, there has been much debate about the permissibility of "concurrent" criminal and civil/administrative proceedings after the introduction of the new cartel offence in 2002.[93] It was argued that a fusion of criminal

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88 Court of Appeal (Criminal Division), *IB v The Queen,* [2009] EWCA Crim 2575.

89 The defendant had argued that Articles 3, 5 and 35 of Regulation 1/2003 must be construed as stipulating that *only* NCAs are competent to apply national competition law (as well as, where appropriate, EU competition law) and had asserted that the Crown Court initially hearing the case was not a designated NCA.

90 Wouter P.J. Wils, n 10, at 133 ("[…] it is perfectly clear from the history of the Enterprise Act 2002 that the cartel offence was introduced in UK law because it was considered that the existing fines on companies were insufficient to deter hard-core cartels prohibited by Chapter I of the Competition Act 1998 and Article 81 EC, and that imprisonment was the most effective additional deterrent."); Michael O'Kane, *The Law of Criminal Cartels: Practice and Procedure* (OUP 2009), ¶ 2.104. See also Andreas Stephan, 'The UK cartel offence: a purposive interpretation?' (2014) 12 Crim LR 879, 890; David Ormerod, 'Case Comment', [2010] 6 Crim LR 494, 496.

91 See, e.g., Margaret Bloom, 'The UK Criminalization Initiative', (2002) 17 Antitrust 59.

92 Court of Appeal (Criminal Division), *IB v The Queen,* [2009] EWCA Crim 2575, ¶ 38 (emphasis in original).

93 See, e.g., Jeremy Lever & John Pike, 'Cartel Agreements, Criminal Conspiracy and the Statutory "Cartel Offence"', [2005] 26 ECLR 164, at 169-172; Angus MacCulloch, 'The Cartel Offence and the Criminalisation of United Kingdom Competition Law', [2003] Journal of Business Law 616, at 626-627; Julian M. Joshua, 'The

and civil/administrative investigations could potentially violate due process rights of (individual) defendants, and that, as a practical matter, it could be difficult to meet the stringent evidentiary requirements of criminal procedure if this is not the sole focus of an investigation.[94] Furthermore, it was argued that pre-trial publicity resulting from a prior decision by the European Commission could make a fair trial for individuals impossible.[95] As a consequence, the Office of Fair Trading (OFT), a predecessor of the CMA, decided that criminal and civil/administrative cases would be handled by separate case teams, and that the OFT might delay decisions against undertakings in order to avoid any risk of prejudicing the outcome of criminal trials against individuals.[96]

As explained above, Articles 16(2) and 3(3) of Regulation 1/2003 allow for complementary criminal proceedings at any time, leaving it to competition authorities and criminal law enforcers to agree on the appropriate timing for each case. If national authorities prefer to stay the civil/administrative proceeding against the responsible undertakings in order to protect a criminal case from undue interference, they are free to do so. It has been argued convincingly, however, that – even with juries – it is not inevitable that a criminal trial against an individual violates the fair trial principle only because it is conducted after a decision against an undertaking.[97] Pre-trial publicity will not be a problem in each case. And even where it is, it may be possible to delay the criminal trial until the interest of the public fades, or to ensure the jurors' neutrality through warnings or directions provided by the trial judge.[98]

An example from the UK illustrates how complementary criminal proceedings against individuals can work. The procedural background of the case is as unusual as it is interesting.[99] It concerns the international marine hose cartel, which was uncovered at the end of 2006 by a successful leniency application. The European Commission, the OFT and the US Department of Justice (DOJ) investigated the case. After having covertly recorded a meeting of members of the cartel, US authorities arrested several suspects on 2 May 2007. In the following months, the DOJ, the OFT and three defendants of British nationality worked out a plea bargain.[100] On this basis, Southwark Crown Court convicted the three British defendants to prison sentences of 36 (two

UK's New Cartel Offence and its Implications for EC Competition Law', (2003) 28 Eur LRev 620, at 631-634; Renato Nazzini, n 82, at 485-486; Julian M. Joshua, 'A Sherman Act Bridgehead in Europe, or a Ghost Ship in Mid-Atlantic? A Close Look at the United Kingdom Proposals to Criminalise Hardcore Cartel Conduct', [2002] 23 ECLR 231, at 237-239.

94 Julian M. Joshua, n 93, at 238.

95 Angus MacCulloch, n 93, at 626; Julian M. Joshua, n 93, at 238-239.

96 Margaret Bloom, n 91, at 59. The OFT's approach was apparently influenced by the recommendations of Anthony Hammond and Roy Penrose in their 2001 report "The Proposed Criminalisation of Cartels in the UK", which had been commissioned by the OFT in preparation for the new cartel offence.

97 Mark Furse, *The Criminal Law of Competition in the UK and in the US* (Edward Elgar, 2012), p. 127; Peter Whelan, n 38, at 170-171; Renato Nazzini, n 82, at 486.

98 Peter Whelan, n 38, at 170-171; Renato Nazzini, n 82, at 486.

99 For an extensive description, see Furse, n 97, p. 202-214.

100 Mark Furse, 'The cartel offence – "great for a headline but not much else"?', [2011] 32 ECLR 223, 226.

defendants) and 30 months on 10 June 2008.[101] On 14 November 2008, the Court of Appeal reduced the sentences to 30, 24 and 20 months, respectively.[102] Moreover, on 28 January 2009, the European Commission imposed administrative fines totalling €131 million on the responsible undertakings.[103] The Crown Court did not apply Article 81 EC [now Article 101 TFEU] to the criminal case, and thereby avoided a conflict with Article 11(6) of Regulation 1/2003 (the Commission had adopted a Statement of Objections on 28 April 2008,[104] i.e. UK and EC proceedings overlapped for some weeks). The investigations on both levels were from the outset coordinated between the OFT and the European Commission and the authorities were careful not to complicate their respective cases. Although it was not a follow-on proceeding,[105] the marine hoses case is a good example of how NCAs, criminal law enforcers and national courts can effectively complement competition law enforcement by the European Commission.

VII. CONCLUSION

It is a common myth that EU competition law enforcement does not recognise the possibility of imposing sanctions on individual managers and employees. Considering the competences of the European Commission alone does not provide the full picture. Articles 4 and 5 of Regulation 1/2003 establish a system of parallel competences, and many Member States have empowered their NCAs or criminal law enforcers to impose monetary fines and other penalties on individuals. According to national law and the principle of equivalence, these sanctions can and must be imposed with regard to infringements of national as well as EU competition law.

As the analysis in this article has shown, there is nothing in Regulation 1/2003 that precludes NCAs from imposing follow-on penalties on individual managers and employees after the European Commission has adopted a prohibition decision and may have fined the responsible undertakings. Neither does the principle of *ne bis in idem* stand in the way of such follow-on proceedings by NCAs. Likewise, where certain anticompetitive acts are qualified by national law as criminal offences, criminal law enforcers and courts are not precluded by either Regulation 1/2003 or *ne bis in idem* from imposing additional sanctions on individuals.

Instead, it is consistent with the system of parallel competences established by Regulation 1/2003 and further specified in the Cooperation Notice if the European Commission and NCAs act closely together to ensure the effective enforcement of EU competition law. To deter the most severe antitrust violations it may be necessary that NCAs and

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101 Office of Fair Trading, Three imprisoned in first OFT criminal prosecution for bid rigging, Press Release 72/08 of 11 June 2008.

102 Court of Appeal (Criminal Division), *R v Whittle (Peter)*, [2008] EWCA Crim 2560, ¶ 32.

103 European Commission, Decision of 28 January 2009, COMP/39406 – *Marine Hoses*, see also Maurits Pino, *The* Marine Hoses *cartel*, Competition Policy Newsletter 2/2009, p. 53-54.

104 European Commission, Decision of 28 January 2009, COMP/39406, ¶ 63 – *Marine Hoses*.

105 See n 8. In *Marine Hoses*, major parts of the case against the individuals were pursued *before* the case against the undertakings. The competition authorities apparently preferred this approach in light of the debate on possible infringements of the fair trail principle described, n 93.

other competent bodies on the national level complement prior decisions by the Commission with additional penalties imposed on managers and employees. It would not be in line with the principle of equivalence and effective enforcement of EU law if the Member States reserved their power to impose individual sanctions for infringements of national competition law alone.

The idea of imposing follow-on penalties on individuals resembles that of follow-on damages actions, which are promoted by Article 16(1) of Regulation 1/2003 and Article 9 of Directive 2014/104.[106] According to these provisions, private plaintiffs can rely on final decisions by the European Commission and the NCAs to establish their damages claims in private antitrust actions. In the same manner, the imposition of follow-on penalties by NCAs could build on prior decisions by the European Commission (taking into account national procedural rules and standards). In this way, it is ensured that full effect is given to the Commission's decisions and that there is no danger of NCA decisions running counter to what the Commission has previously decided.

The interplay between the European Commission and the NCAs will be similar to the interplay of NCAs and criminal law enforcers under the national law of some Member States. In Germany, for example, the Federal Cartel Office is empowered to impose administrative fines on undertakings and individuals under the German Competition Act, but it cannot enforce the criminal bid-rigging offence under section 298 of the German Criminal Code. Thus, in bid-rigging cases the fines imposed by the Federal Cartel Office on undertakings are often complemented by criminal prosecutions against certain individuals. Just as NCAs and criminal law enforcers work together to ensure effective deterrence on the national level, the European Commission and the NCAs could work together to achieve the same in cross-border cases.

[106] 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, OJ 2014 L 349/1.