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Master's Thesis

In

Competition Law

Criminalizing EU Competition Law: the next step for a more effective enforcement?

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Abstract

This Master's Thesis faces the generalized global trend of criminalizing competition law infringements and tries to provide an assessment regarding its potential future introduction in the EU. The paper analyses the EU legal framework in order to understand if, how and on what level, the EU and the Member States can take action in order to criminalize antitrust law. Some national situations are inquired to see concretely, in the Member States, how it was criminalized. Finally, it is provided an overview of the reasons pushing towards the criminalization and the concrete problems which can be linked to the introduction of criminal sanctions in the EU and the Member States.

Chapter 1

1.1 Introduction

The criminalization of EU Competition Law has been at the centre of numerous articles and books, appearing to be a matter which, sooner or later, may become reality.

The main question which my thesis wants to answer is if criminalizing competition law would be the right move for the EU Institutions to embark on. Generally speaking, one of the main arguments deployed to justify the introduction of criminal sanctions concerns its deterrence effect over individuals. The US Department of Justice has, in fact, several times emphasized that many cartels which were almost worldwide spread did not succeed in expanding to the US because of the fact that executives and "white-collars" feared to get caught and go to jail in the United States[1]. If this is probably true for the US, the situation in our continent might require an approach modelled on the peculiarities of the EU. Thus, the starting point of this Thesis is represented by the actual legal context provided by the Treaties.

Chapter 2 of my thesis will, consequently, focus on the present normative situation in the EU: so starting with an analysis of the relevant provisions of the TFEU (focusing in particular on Art. 83 and 103 TFEU), I will verify what the EU Institutions are really able to do. I will also underline the discretion left to the Member States in the choice of introducing or not on the national level criminal offences. After showing what are the positive and negative limits existing at this moment in the Treaties, two examples will be provided so as to illustrate tangibly how criminalization of other EU matters has been put into practice. In particular, the environmental field and the financial markets will be used to verify what legal instruments were deployed by the EU and what reasons pushed the European Institutions towards this choice. Then, I will explore the two alternative ways through which we could criminalize competition law[2]: the first one would consist in a 'simple' harmonization of the criminal offences of competition law for every EU Member State; this would happen through the application of Art. 83 (2) TFEU as legal basis or by combining the latter with Art. 103 TFEU, in case a dual legal basis is deemed to be necessary. Differently, the second alternative aspires to a more difficult goal of obtaining a criminalization on the EU level and, consequently,

[1] Hammond S., *Cornerstones of an Effective Leniency Program*, (2004) < http://www.usdoj.gov/atr/public/speeches/206611.htm >, (accessed 4th May 2016).

[2] G. Hakopian, *Criminalization of competition law enforcement*, The Competition Law Review, Volume 7 Issue 1 pp 171-172, December 2010.

realizing as well a hypothetical Code of EU Criminal Law. My attention will be directed to understand which of the two alternatives would be the best solution and which of them is practically reachable. As it will be shown, the last possibility is considered to be unlikely, because of the great political agreement which would be necessary among the several Member States.

Following the legal context in the Treaties and the explanation of the legal basis which would be concerned in criminalizing, Chapter 3 will be dedicated at exploring the national situations of the Member States about the existence or not of criminal sanctions in national competition laws. Accordingly, it will be important to step back and see in the first place how is the situation in the Member States which already chose to introduce criminal offences in their national level. This part of my Thesis will be addressed at evaluating the positive and negative results achieved by those countries which chose to criminalize Competition Law. My analysis will therefore look at the national scenarios of the UK and Ireland which can already give us the practical example of how have developed the legal circumstances in there and which were the effects of the criminalization. I will, then, look at the Italian legislation and at the Italian Competition Authority (ICA) to understand what type of regime was established and why criminal sanctions were originally excluded from antitrust remedies. Finally, more national contexts from the EU will be considered with the aim of providing an accurate scrutiny of the several legislative choices made around Europe on how to sanction antitrust violations.

Chapter 4 will explore the concrete problems existing regarding the criminalization. The connotations of such issues have to unavoidably deal with very practical problems, for instance, figuring out what competition law restrictions should be translated in criminal offences, or how the criminal process would work in reality for an antitrust offence under the EU legal framework. Specifically, I will start by illustrating the theoretical reasons which push towards the criminalization of competition law and I will point out the difficulties of individuating the infringements to be criminalized. Moreover, it will be shown whether the criminal process should be done on the national level or on level of the EU, and even more concretely what are the rights which should be granted to the defendant. It would be also relevant to understand if a pure principle of criminal due process should apply or if it would be better to look for a hybrid solution to avoid complicating even more the demonstration of guiltiness. Related to this, there is the burden of proof which, in the context of criminalization, would clearly be altered, thus making necessary further considerations on the matter. Finally,

I will try to understand who would have the power to prosecute in this context: the Commission, the national prosecutors or the European Public Prosecutor?

The methodology of this Thesis will make use of articles from the literature, books, case-law and the most relevant normative provisions. I will start the first chapter with a normative analysis of the legal instruments that the EU and the Member States can actually use in order to achieve the criminalization. Subsequently, I will explore what are the limits in the Treaties and what is, theoretically, possible to obtain nowadays without considering any amendments to the Treaties. After substantiating the present normative situation, it will be the moment to concretize it by verifying the examples in the Member States which already chose to criminalize. Hence, The UK and Ireland will be used as means of comparison to see how criminalization of Competition Law is functioning, in practice, where it has already been introduced. Italy instead, will be used as an example of a country in which the concept of criminalizing has been debated, but the administrative law view of competition law still prevails.

After checking how these countries are managing, my thesis will, through Chapter 4, shift to the core of my research question, when I will try to appreciate if criminalizing would properly be the boost needed to improve the enforcement of Competition Law. In order to do this, it will be essential to deal with the different components which the third chapter is composed of, meaning: the theoretical justifications for criminalizing, the antitrust infringements to be translated in criminal offences, the principles of the administrative and criminal due process, the changes that would be brought to the burden of proof and who should be in charge to prosecute. Nevertheless, it must be taken into consideration that the different outcomes following these problems do not give a sole answer: the consequent issues arising will have its pros and cons, but I will put emphasis on what would be the overall result of the criminalization.

Summarizing the methodology that I will use: after the legal analysis of the Treaties and of the powers involved, the concrete national examples will give a direct and initial indication on some of the matters which arise in the first chapter. Finally, an overview of the possible problems which the criminalization may carry along will be given in the fourth chapter. This final step is fundamental to understand if the criminalization of EU Competition Law truly constitutes a step forward or if the consequences involved make the game not worth the candle.

Chapter 2: Can EU criminalize Competition Law**?**

2.1. Legal context in the Treaties

In order to start framing this topic, it is proper to commence with an analysis of the relevant Treaty provisions. First of all, it must be said that Competition Law is disciplined from Art. 101 to Art. 109 in the seventh title of the TFEU under "Common Rules on Competition Taxation and Approximation of Laws". Since the criminalization of Competition Law is the subject which this Master's Thesis deals with, it is certainly needed to look at the other Treaty provisions concerning the introduction of criminal measures.

The chapter on judicial cooperation in criminal matters of the TFEU constitute the proper starting point. These articles are, in fact, in Chapter 4, Title V of the TFEU, and go from Art. 82 to Art. 86. To begin the analysis, I will start with Art. 82 TFEU in which the leading principle on criminal judicial cooperation is stated.

The principle of mutual recognition of judgments and judicial decisions[3] is, indeed, what pervade the EU sector of judicial cooperation. This principle also refers to the matters contained in Art. 83 (2) TFEU when speaking about the approximation of laws and regulations for Member States. Keeping in mind that this leading principle is the basis for the mentioned TFEU Chapter and that, consequently, the competence of EU in criminal proceeding matters is limited by it, now, it is possible to look concretely at how Art. 83 TFEU could be useful in the context of the criminalization.

Art. 83 TFEU constitutes the starting point for the simple reason that it allows substantively the introduction of criminal measures in the EU. This article is composed of three paragraphs and an analysis of each paragraph is necessary to fully understand its meaning. In the first paragraph, it is observed that the Parliament and the Council can adopt directives defining minimum rules of particular criminal offences through the use of the ordinary legislative procedure. Moreover, it is provided a description of the characteristics which the criminal offences need to have in order to be listed; specifically, the offences need to have a cross border dimension and they need to be perceived as a particular serious crime requiring an EU common basis in order to help solving the issue. As for the subjects mentioned in the second part of Art. 83 (1) TFEU we do not find Competition Law, notwithstanding the fact that

[3] Art. 82 TFEU, Treaty on Functioning of the European Union

a criminal offence in this sector would always have a cross-border dimension. Furthermore, also the need to fight these offences on a joint basis would be present, with the aim of obtaining a more uniform enforcement as well as prevention.

Although not listed, Competition Law could be introduced thanks to the third part of Art. 83 (1) TFEU which clearly foresees the possibility for the Council, acting unanimously and with the consent of the Parliament, to introduce new criminal offences according to the developments in crime there may have been if the two requirements of cross border dimension and seriousness of the offence are met.

Art. 83(2) TFEU provides for another legal basis to introduce criminal measures but the conditions and the legislative procedure to follow are different. The conditions to be met for the second paragraph are two: the first involves a previous harmonization of a specified sector, while the second one regards the effectiveness needed by the implementation of a Union policy for "the approximation of criminal laws and regulations of the Member States[4]". As for the legislative procedure, Art. 83(2) TFEU clearly states that it must be followed the ordinary or special legislative procedure, according to which procedure has been used in the previous harmonization of the specified area. Consequently, this last requirement results being stricter than the procedure prescribed in the first paragraph of the same article.

Finally, Art. 83(3) TFEU contains what has been conceived as the brake of the procedure[5]: if one of the Council Members considers a draft directive to be incompatible with its national system of criminal justice, the legislative procedure will be suspended and the matter referred to the European Council. Only in cases where consensus is reached, the procedure is allowed to re-take place.

The possibility given by this paragraph is quite important because it allows any unhappy Member State to stop the introduction of a directive and the only way to get out of this impasse is the consensus of the European Council, something which, politically speaking, is not easily achievable.

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[4] Art. 83(2) TFEU, Treaty on Functioning of the European Union

[5] Communication from the Commission to the EU Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law /* COM/2011/0573 p.4. -– < http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52011DC0573 > (accessed 1st of May 2016) -"When legislating on substantive criminal law or criminal procedure, Member States can pull the so-called "emergency brake", if they consider that proposed legislation touches upon fundamental aspects of their national criminal justice system: in this case the proposal is referred to the European Council."

Completing the analysis of Art. 83 TFEU, it seems that paragraph 1 and paragraph 2 follow two parallel tracks unable to meet each other: they can not be used to complete each other since the conditions required to use each paragraph are different.

It is proper to note, just as Hakopian does in his paper[6], that the legislative instrument prescribed to introduce criminal measures in the whole Art. 83 TFEU is the directive. This is significant for the simple reason that directives bind only Member States, meaning that a criminalization of competition law at the EU Institutions level is not achievable through this article[7].

At this point, it must be ascertained which paragraph of Art. 83 TFEU would constitute the most appropriate legal basis to criminalize EU Competition Law or if there are any other useful provisions in the TFEU. The choice basically revolves around the possibility of using Art. 83 (1) or Art. 83 (2) TFEU. In the fomer case, this would happen starting from the third sentence[8] of Article 83 (1) TFEU, i.e. a decision by the Council identifying Competition Law as a new area of crime. In the latter case, instead, a previous harmonisation of a specified sector is required.

It must be also pointed out that the list of areas of crime mentioned in Art. 83 (1) TFEU is quite wide and inserting Competition Law, sic et simpliciter, could cause some overlaps with corruption[9] which has not been given an EU definition; specifically, the overlap could concern cartels but it also depends by the width of meaning which we attribute to corruption. Finally, the problem of this paragraph is also the blurry requirement of seriousness of crime. Among the items of the list we find extremely cruel crimes like terrorism or organized crime which certainly have the required seriousness but, when we speak about competition law infringements and cartels, the moral stigma attached to them is relevantly inferior. Even without mentioning the blurriness of that requirement, considering the kind of offences that are enlisted, Competition Law restrictions would not seem exactly fitting among those offences by a systematic point of view.

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[6] Hakopian, op cit, p.162 "A first important remark to be made is that both paragraphs of Art 83 TFEU exclusively provide for the use of directives in adopting substantive criminal law measures. As directives are obviously still only binding upon the Member States, it must be concluded that the wording of Art 83 TFEU excludes the possibility of instituting a criminal system of competition law enforcement at the level of the EU institutions."

[7] Ibid

[8] Art. 83 (1) TFEU, third sentence: "On the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament"

[9] S. Peers, 'EC Criminal Law and the Treaty of Lisbon' (2008) European Law Review 516-517

On the other hand, Art. 83(2) TFEU seems to constitute a better legal basis prima facie, since, when it mentions the previous harmonisation of the matter, it's not explicated the degree of harmonisation required. It is also true that this paragraph justifies the introduction of criminal measures only with the aim of better implementing an EU policy which has already been harmonised. Accordingly, in our case, we already have a certain level of harmonisation of Competition Law across the Member States, so it wouldn't be completely absurd to think of taking advantage of the possibilities offered by this article.

The closing article of Chapter 4 of Title V is Art. 86 TFEU which allows the establishment of a "European Public Prosecutor's Office[10] from Eurojust[11]" through a special legislative procedure. This provision is very interesting as concerning the fight to crimes which affect the financial interest of the EU. It doesn't require a very broad interpretation to see how Competition Law offences do go against the financial interests of the Union. It needs to be evidenced also that this article establishes the regulation as the indicated legislative instrument, differently than what happens with Art. 83 TFEU.

Furthermore, it is of interest noting that thanks to differentiation between Art. 83 and Art. 86 TFEU, in the latter article the regulation was chosen exactly because it would properly allow and confer the powers needed to the EU Public Prosecutor's Office, so that it could adequately investigate and prosecute in the competent national courts.

As a result of this, in my opinion, there is a certain clash between Art. 83 and Art. 86 TFEU given the important difference of legislative instruments chosen. While it is valuable that ex Art. 86 TFEU, it is actually possible to institute an EU Prosecutor on the EU level, the same did not happen for Art. 83 TFEU since in both of its paragraphs concerning the institution of criminal offences in the EU system, the chosen instruments are always 'simple' directives, thus, imposing only a softer harmonization among the national legislations. What I want to evidence is that the establishment of the European Prosecutor seems something quite further from us, at least in the actual political context. Hence, it might have been a more appropriate choice to use the regulation in the context of Art. 83(2) TFEU rather than limiting it only to directives, although, it is also true that it would have been considered pre-mature by most of the Member States. The consequences of the balance that was modelled thorough these articles tend towards a possible criminalization of competition law indeed, but with the evidenced limit

[10] The European Public Prosecutor's Office would have the power to prosecute in the context of a criminalization on the EU level; the matter of who will actually prosecute will be dealt with in Chapter 4 of my Thesis.
[11] Art. 86(1) TFEU, Treaty on Functioning of the European Union

of Art. 83 (2): criminalizing is only achievable through the harmonization of the legislations of the Member States and, basically, it is very unlikely to criminalize on the EU level.

After considering the forth chapter of the Title V TFEU alone, it is appropriate to look at its link with other Treaty provisions and in particular with Art. 103 TFEU. The latter specifies in its first paragraph that "the appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 shall be laid down by the Council, on a proposal from the Commission and after consulting the European Parliament[12]". What is actually most interesting of this article lays in its second paragraph where it prescribes that the regulations or directives previously mentioned are aimed at ensuring compliance with what is established in art. 101 TFEU and 102 TFEU. More in detail, Art. 103 (2) let. A TFEU will ensure compliance also through the application of fines and periodic payments: these nowadays constitute the only legal instruments used to guarantee compliance with those undertakings who are restricting the concurrence.

2.2. Choice of the legal basis

Given the previous considerations, Art. 103 (2) let. A TFEU might seem a valid legal basis to be used in order to introduce Competition Law instruments aimed at ensuring compliance with the prohibitions of Art. 101 and 102 TFEU. Anyhow, quite likely Art. 103 (2) let. A TFEU is not the appropriate legal basis to introduce criminal offences in this sector given the fact that only fines and period payments are cited in this article.

What is worth noticing is that we already have the necessary competence for the EU to introduce criminal offences and the latter is attributed by Art. 83 TFEU. Accordingly, the problem is to choose what would represent the most appropriate legal basis to criminalize Competition Law (if using paragraph 1 or paragraph 2 of Art. 83 TFEU); furthermore, it could be useful to specify and adjust the chosen basis in connection with another provision, i.e. with the use of dual legal basis.

Generally, using a dual legal basis is possible as long as both of the provisions involved are not in contrast with each other and do not lay down procedures which are incompatible between them. The use of a dual legal basis could be useful to substantiate and better specify the competence of the EU in introducing criminal offences for the Competition Law sector. Anyway, in order to use a dual legal basis it is also necessary to respect the conditions set out

[12] Art. 103 TFEU, Treaty on Functioning of the European Union

by the ECJ in its case law[13]. In order to have a correct use of a dual legal basis, both aims of the provisions need to be equally important so that neither one can prevail over the other. Consequently, if one the two provisions has a purpose which is to be identified as predominant, it will not allow the use of the dual legal basis.

A dual legal basis composed of Art. 83(1) and Art. 103 (2) let. A TFEU does not seem like a concrete alternative because of the incompatibility of procedures existing between the two provisions. In the former article, in fact, it is foreseen the participation of Parliament and Council and the use of the ordinary legislative procedure, while in the latter, the procedure prescribes the Council receiving the proposal from the Commission after having consulted the Parliament.

That is why a more coherent dual legal basis seems to be composed of Art. 83(2) and Art. 103(2) let. A TFEU since both have compatible legislative procedures (the harmonisation in the Competition Law field, in fact, would happen through the application of Art. 103 TFEU) and, in a certain sense, both provisions specify each other (the general competence of the EU to introduce criminal measures ex art. 83 TFEU and the specification of it in relation to the sector of Competition Law ex Art. 103 TFEU).

Having explained this, it is suitable to summarize the existing possibilities regarding the choice of legal basis for criminalizing Competition Law.

- Art. 83 (1) TFEU. In this case, the competence to criminalize Competition Law would exist only if "the Council unanimously decide to extend the list of areas of crime mentioned in this provision to include competition law offences[14]". Such unanimity required at the Council is not easily realizable at all, but the unlikeliness does not mean that this article could not be a correct legal basis, in case of the inclusion of Competition Law in its list of offences. Unlikely but theoretically possible.
- Art. 83 (2) TFEU. The application of this article as legal basis for criminalizing seems consistent with its aims and its quite likely to succeed in case of actual use of this

[13] ECJ, Case C-491/01, *The Queen V. Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd.* [2002], paras 93-94: "[…] The choice of a legal basis for a measure must rest on objective factors which are amenable to judicial review. Those factors include in particular the aim and the content of the measure […] If examination of a Community act shows that it has a twofold purpose or twofold component and if one of these is identifiable as main or predominant, whereas the other is merely incidental, the act must be founded on a sole legal basis, that is, the one required by the main or predominant purpose or Component".

[14] Hakopian, op cit., p.168

provision. Plausible and actually already used for the adoption of Directive 57/2014 on market abuse[15].

- Art. 83(1) + Art. 103 TFEU. As previously underlined, the combination of these articles would be incompatible because of the differences existing between their legislative procedures.
- Art. 83 (2) + Art. 103 TFEU. The two articles in combination seem like a valid dual legal basis for criminalizing but it remains to be evaluated if Art. 83 (2) TFEU is predominant over Art. 103 TFEU and if, consequently, both provision in combination should not apply.

At this point, it is proper to observe what kind of legal basis and legislative instrument have been used when it was decided to introduce criminal sanctions for certain EU sectors.

2.3. Relevant examples from criminalized EU sectors

The best way to understand what legal basis to apply in order to criminalize is to go looking at those sectors in which the EU has already introduced criminal sanctions. Two sectors, in particular, will be analysed: Environment and Financial Markets.

2.3.1. Environment

Environmental Law is an EU sector in which it is observable the presence of criminal offences from 2008. In fact, Directive 2008/99 is the legislative instrument used to harmonize criminal offences in this sector. This directive does not establish a list of criminal offences but simply imposes on the Member States to attach criminal sanctions to the illegal environmental acts already existing in their legislation and introduced through previous directives[16]. As stated in Art. 83 TFEU about prescribing minimal rules, this directive lays down only minimum requirements on the Member States but this does not impede them from introducing stricter and more protective rules.

In this particular sector, the reasons to introduce such a directive are to be found in the existing different degree of seriousness for criminal sanctions established in the several

[15] See Chapter 2, Paragraph 3 – Relevant examples from criminalized EU sectors. pp. 13-14-15
[16] Directive 99/2008/EC of the European Parliament and of the Council on protection of the environment through criminal law

Member States. Accordingly, the directive is a way to ensure more compliance with Environmental Law thanks to the threat of criminal sanctions and as well as to attribute the same level of moral stigma for these offences along the several Member States. What must be underlined is the fact that the present directive "does not lay down measures concerning the procedural part of criminal law nor does it touch upon the powers of prosecutors and judges"[17]. Once again then, the directive is chosen to impose criminal sanctions on the Member States, this is significant considering that criminalizing competition law would have to happen through a mechanism similar to what was used for criminalizing Environmental Law.

2.3.2. Effective implementation of EU policies through Criminal Law

Before going to the analysis of the most relevant sector for what concerns this Thesis, it is proper to cite a Communication[18] from the Commission explaining how to ensure effective implementation of EU policies through Criminal Law. Most of all, this Communication provide useful information on how to criminalize and why criminalize in the EU in general.

It is first of all necessary to underline that the trigger which makes an EU intervention needed to introduce criminal sanctions consists in the impediment of achieving specific results and level of enforcement through national legislation[19]. This means that the impossibility of reaching a certain goal on the national or local level 'forces' the EU to establish a common framework which allow to better accomplish the pre-determined objectives. In doing this, respecting the principle of subsidiarity is crucial. Given the high intrusiveness of criminal sanctions, these must be introduced only as 'ultima ratio' meaning that no other measures would be able to reach the same result. This is exemplified under Art. 49 (3) ECHR[20] (European Charter of Fundamental Rights). Moreover, a necessity test will be deployed by the EU Legislator in order to fully appreciate the indispensability of the criminal sanctions, their

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[17] European Commission, Environment, Legal Compliance, *Environmental Crime* - < http://ec.europa.eu/environment/legal/crime/ >, accessed 1st of May 2016

[18] Communication from the Commission to the EU Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law /* COM/2011/0573 - < http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52011DC0573 >, accessed 1st of May 2016

[19] Ibid, footnote 13 – "In cases where the enforcement choices in the Member States do not yield the desired result and levels of enforcement remain uneven, the Union itself may set common rules on how to ensure implementation, including, if necessary, the requirement for criminal sanctions for breaches of EU law".

[20] Art. 49 (3) EU Charter of fundamental rights: "The severity of penalties must not be disproportionate to the criminal offence"

proportionality, their dissuasiveness and their effectiveness. Only after all of these assessments, it will be possible to go on legislating on the criminalization of a particular matter.

2.3.3. Financial Markets

Passing now to the EU financial markets, criminal sanctions have been introduced on market abuse through Directive 2014/57. It needs to be pointed out that financial markets are subject to Competition Law, just as "any other industrial or services sector"[21]. Then, this detail constitutes some very important news indeed for the aims of this Thesis, since it means that a part of Competition Law has already introduced criminal sanctions for market abuse offences. These latter, in particular, have been identified by Art. 3,4 and 5 of Directive 2014/57 in the three forms of, respectively, insider dealing, unlawful disclosure and market manipulation, because of their huge potential negative impact on EU's economic interests. It's interesting to note in the Preamble of the Directive that one of the reasons which have pushed towards this criminalization concerns the insufficiency of the administrative sanctions in ensuring compliance with the rules on preventing and fighting market abuse[22]. Once again, Member States are required to introduce nationally the necessary measures in order to ensure that the three identified criminal offences are punished with criminal sanctions. The Directive also specifies in Art. 8 that legal persons must be held liable as well for the established criminal offences[23].

In both the analysed cases, the common trait is that the national legislative actions were not sufficient to fulfil the objectives, thus triggering the EU framework with the purpose of avoiding to jeopardize the attainment of the EU objectives. What now must be noted is that the legal basis used to introduce criminal sanctions in this field of Competition Law was Art. 83 (2) TFEU, consequently implying the use of directives. As a result, it is possible to state for the introduction of criminal offences in EU Competition Law that the legal basis to apply is certainly Art. 83(2) TFEU and that the system delineated in Art. 83 TFEU is imprinted, with the use of directives, towards the harmonization of national legislations. Given all the limits

[21] Financial Services, Capital Markets - http://ec.europa.eu/competition/sectors/financial_services/capital_markets.html

[22] Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive). Preamble, n..(5): "The adoption of administrative sanctions by Member States has, to date, proven to be insufficient to ensure compliance with the rules on preventing and fighting market abuse."

[23] Art. 8 (1) Directive 20014/57, "Member States shall take the necessary measures to ensure that legal persons can be held liable for offences referred to in Articles 3 to 6 committed for their benefit by any person, acting either individually or as part of an organ of the legal person, […]"

which are rightly imposed on the EU, it is difficult to imagine at this point that a criminalization may happen on the EU level.

2.4.What about the Commission?

The situation in which the Commission would be in, if a criminalization is really carried out, would not necessarily change immeasurably. What happened for financial markets is an example of this: even if this sector has been "criminalized", the situation didn't change at all for the Commission. In fact, it is up to the Member States to make sure that the three criminal offences identified by Directive 2014/57 are punished with criminal offences. It is also still up to the national courts via national criminal proceedings to deal with these offences. In reality, imagining the introduction of certain criminal offences for other Competition Law sectors, the Commission would still wear/have the classical role of vigilant over all the other Competition Law restrictions on the markets.

This situation could only get more intricate in case of a criminalization on the EU level. In that scenario, there would be to understand if the Commission would investigate also these EU criminal offences and subsequently referring the findings to the national courts, or if the Commission would only apply the usual set of Competition Law rules, leaving space for the investigating and prosecuting part to the EU Public Prosecutor.

Anyhow, the matter of who actually would have the power to investigate and prosecute in the context of the criminalization will be explored in chapter 3 of this Thesis.

2.5. Harmonizing national legislations or criminalizing on the EU level?

After providing the different possibilities existing for the legal basis and, accordingly, having proved that it is possible to introduce criminal offences for Competition Law, as it already happened for financial markets, it remains to be understood on what level the criminalization would be put in place. Keeping in mind what legal choices are there in order to criminalize, there are two different ways this may happen:

1. Harmonization of the national legislations through the use of directives and subsequent use of Art. 83(2) TFEU so as to give effectiveness to the EU policy. This is what has already happened through the Directive 2014/57 on market abuse.

Since financial markets are part of competition law, it is easily presumable that this legal basis will be used again in the near future in case the criminalization of other Competition Law sectors is considered necessary.

2. Criminalization on the EU level: this idea is much harder to concretize for the lack of empowering provisions under this regard. As pointed out earlier, both paragraph 1 and 2 of art. 83 TFEU prescribe only directives as legal instruments at their disposal, consequently not owning the necessary strength to criminalize directly on the EU institutions level.

The only reasonable possibility which could help getting to the point of a criminalization on the EU Institutions level would be through the application of Art. 86 TFEU with the establishment of the European Public Prosecutor's Office. With this additional step, considering that its focus would be the fight of crimes affecting EU's financial interests, I could only imagine that at least cartels or infractions of similar significance would certainly be prosecuted on the EU level. Now, admitting the idea that the Council finds the right motivations to establish the EU Public Prosecutor, it is at least supposable that there would have already been a harmonization of the criminal offences existing in Competition, probably using as a starting point those Member States which already chose to criminalize nationally.

Accordingly, the only way a criminalization on the EU level could happen would still need a previous harmonization of the interested sector. Therefore, it is no surprise that the two provisions laying down the competence for criminalizing Competition Law (Art. 83 paragraphs 1 and 2 TFEU) can only use directives to do so. Probably, this is not an oversight but the clear intention of the Legislator: first, requiring to assess and confirm the necessity to criminalize the sector in order to effectively reach the needed compliance with rules and then, it will translate into the legislative national convergence. This means that the EU Institutions can not operate any "imposition" over national criminal systems but a mere coordination among national legislations. Thus, no erosion of national criminal competence would take place and the Member State would have no reasons to complain about.

The logical conclusion would be that the only way criminalization of competition law may happen currently is with a previous harmonization of the national legislations. Perhaps, before this might happen, it would be required that more and more Member States introduce criminal offences for Competition Law infractions. In order to understand how actually is the situation of the criminal offences already introduced in those countries which chose to

criminalize, Chapter 2 will analyse the national scenarios to verify concretely why this choice was made and what are the consequent results and the impression which we can get out of the case law.

Chapter 3: The Situation in the Member States: Countries which already introduced criminal sanctions and others with a peculiar regime

3.1. The situation in the UK

The most significant enforcement instruments that countries have at their disposal in order to promote compliance with competition law are fines, imprisonment and leniency programs, as explained by the OECD[24]. When speaking about sanctions for individuals, given the fact that, in particular circumstances, fines and leniency programs may not be sufficient to induce compliance, it may be required to apply also imprisonment in these cases. However, there is a big difference between introducing criminal sanctions and achieving compliance, as it will be shown in this chapter.

Accordingly, the starting point will be an analysis of the most relevant national situations in which criminal offences for competition law have already been introduced. These national situations will provide a concrete example of how criminalization was realized in this sector. Moreover, countries in which both criminal sanctions and administrative ones co-exist will be underlined.

Other than the US Antitrust overseas, within the EU[25], the UK is one of those countries that chose to criminalize the cartels most recently, consequently providing an interesting example of how the criminalization was realized. Therefore, it is useful to inquire how was the situation in the UK before introducing the cartel criminal offence. Here, the context was of a diffused powerlessness on the part of the English Competition Authorities that were not able to exercise and enforce an effective deterrent effect on those people acting in breach with Competition Law. This was mainly due to the lack of adequate sanctions in the hands of the Office of Fair Trade (OFT).

The first notable step for what concerns us takes place in 1998, when Competition Law rules were introduced and modelled on what then were Art. 81 and 82 EC. Following this, the

[24] OECD, Issues Paper by the Secretariat, *Roundtable on promoting compliance with competition law*, JT03318721, 2011, p.4

[25] UK is still part of the EU while writing, but on the 23rd of June 2016 will take place the British Referendum deciding on leaving or remaining the EU ('Brexit')

issuance of the Trade and Industry's 2001 White Paper[26] contributed indeed to an approach more focused on criminal sanctions. In the Paper, it was evidenced how basically fines are not solid deterrents at all, given the great profitability that executives get from the infractions they make. Moreover, according to the US authorities, the big majority of cartels goes undetected[27], meaning that the mere threat of having to pay a fine in the worst-case scenario is not so deterring in the end. Consequently, adopting the same point of view expressed in the White Paper, the Enterprise Act introduced the cartel criminal offence in 2002. The main idea behind it was that if an individual is risking his own liberty, he would certainly think twice before engaging in a cartel[28]. By this perspective, the risk of being convicted in a prison, in combination with strong financial fines or penalties, is the only way to contrast the huge incentives that executives get from achieving economic objectives for their undertakings through illegal arrangements.

Bearing in mind the context in which the cartel offence was introduced in the UK, it is now mandatory to look at how the legislative novelty was structured, what elements is it made of and what kind of issue does it raise.

The first thing that is possible to state is that Section 188 Enterprise Act (EA) is a very broad provision catching several types of arrangements like: price-fixing, market/customer sharing, bid-rigging and output limitation[29]. In the first paragraph, the provision prescribes that an individual is guilty of the cartel offence if he dishonestly makes arrangements with one or more other persons, relating to at least two undertakings, with the aim of putting into practice one of the behaviours described by the other composing paragraphs of Section 188 EA[30]. A particularity of this provision is that theoretically it is possible to commit this criminal offence without acting in breach with the Chapter 1 of Competition Act or without violating Art. 101 TFEU[31]. Indeed, the English cartel offence presents elements from Art. 101 TFEU but it does

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[26] UK Department of Trade and Industry, White Paper, *Productivity and Enterprise: A World Class Competition Regime*, Cm 5233, 2001, < https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/265534/5233.pdf >, accessed on 7th of May 2016

[27] K. Cseres, Maarten, P. Schinkel, F.Vogelaar, *Criminalization of Competition Law Enforcement, Economic and Legal Implications for the EU Member State*s, Edward Elgar Publishing Inc., 2006. p. 250

[28] Ibid: "It was thought that the threat of criminal conviction and the possibility of a prison sentence would make individuals think very carefully before participating in a cartel or, if they are directed to do so by their managers, they may be far more willing to inform the authorities."

[29] P. Church, *The UK Criminal Cartel Offence Presentation*, Linklater LLP, 2013, < www.**linklaters**.com/pdfs/mkt/london/**Criminal Offence Presentation** slides.pdf >, *accessed on 8th of May 2016*

[30] Section 188 Enterprise Act, par.1, *Cartel Offence*, 2002

[31] P. Whelan, The Criminalization of European Cartel Enforcement,2014, p.265

not have the requirement of restricting the competition nor it has an exemption like the one provided by Art. 101 (3) TFEU[32].

Another peculiarity of Section 188 EA is that it was built around the concept of dishonesty: this was done in order to transmit and convey a moral message and also to make people perceive the incorrectness of that behaviour. Although the intent was correct, in practice this has resulted in a provision of very problematic application. In fact, the juries will have to analyse two elements of dishonesty[33]: first, if what was done is perceived as dishonest by the standards of reasonable people; second, the jury needs to verify that the defendant realized that what he was doing was dishonest according to the same standard. Due to the fact that both elements need to be verified and given also the fuzziness of the second element, it is no surprise that the cartel offence in the UK did not have a strong success. Actually, in the rare cases in which this offence was prosecuted, it was always extremely demanding to prove the second element of dishonesty.

One of the problems of the test which had to be fulfilled by the juries was an assessment at a later stage in order to verify whether the cartelist had a dishonest mind or not, meaning that, the offence would only exist after the realization of the infraction. Being in the Criminal Law field, the guiltiness needs to be proven beyond every reasonable doubt. When considering the difficulties for the jury to assess the element of dishonesty of the defendant and the elevate burden of proof required, this provision was unavoidably destined not to be very effective.

Accordingly, after several years of problematic enforcement and with barely one successful criminal prosecution of the offence[34], the UK legislator decided to remove the requirement of dishonesty from Section 188 ex Section 47 ERRA[35]. This was a needed decision, considering the inadequate enforcement, the problems of compatibility with Art. 7 ECHR[36] and with the principle of legal certainty. In fact, these kind of issues are probably due to the general terms in which the provision was written. This must be remembered especially for the aspect that the cartel offence is still separated from Art. 101 TFEU administrative infraction[37]. As previously underlined, it would be possible to commit a violation of Section

[32] Whelan, op cit., p.265
[33] Whelan, op cit., p. 261: "*The test for dishonesty under UK Law is provided by the case of R v. Ghos*h"
[34] Ibid
[35] Enterprise and Regulatory Reform Act, 2013
[36] See S. Parkinson, *The Cartel Offence under the Enterprise Act 2002*, 25(6) Company Lawyer 187, 2004
[37] Whelan, op cit., p.261

188 without even infringing Art. 101 TFEU considering that no appreciable restriction of competition is required by the former.

Directly linked to Section 188 is Section 190 which disciplines the penalties and the prosecution of the cartel offence. In the first paragraph of the latter, for penalties, it is prescribed the possibility of applying, in case of a conviction on indictment, a fine or the imprisonment for a term not exceeding 5 years or both the penalties. Even more interestingly, in paragraph 2 of Section 190, every proceeding for the cartel offence can only be instituted "by the Director of the Serious Fraud Office, or with the consent of the OFT"[38]. Therefore, it is possible to state that the proceeding for this cartel offence is limited by the approval which needs to be granted by the Director of the Serious Fraud Office or by the OFT; moreover, there is a certain discretion in the choice of the penalty which must be applied, since Section 190 does not prescribe imprisonment as the mandatory penalty to apply for every case of cartel offence.

What is possible to understand by this quick analysis of the English context is that simply introducing criminal sanctions for antitrust infractions does not solve any problems at all. In reality, if a country introduces criminal offences in a given field, the first element to keep in mind would be that without an effective enforcement of the "promised" sanctions, no deterrence effect is achievable, consequently vanishing any attempt of criminalization. It is also true that the same is valid also for administrative infractions: without a proper enforcement it is not possible to hope deterring people. The UK experience also taught that it is extremely important to be careful at how to build the criminal offence and that it is also necessary linking it to Art. 101 and 102 TFEU in order to keep coherence within the legal systems.

3.2. The Situation in Italy: the debate in the previous years; the administrative regime of sanctions and ambiguous criminal elements from Civil Code and Criminal Code

Passing now to a country which selected a regime of administrative sanctions for Competition Law infringements, Italy has some elements not exactly falling under the label of administrative remedies. In order to frame the matter, it is proper to start by briefly introducing the discussion which concerned the choice for a an administrative system in Antitrust Law.

[38] Section 190 EA, par. 2

3.2.1. The Debate in the previous years

For what concerns the competition sector in Italy, Law n. 287/1990 (Italian Competition Act) laid down provisions regulating and safeguarding competition and markets; this act also instituted the Italian Competition Authority (ICA)[39]. At this point, it is appropriate to understand why Italy privileged an administrative sanctions system and chose not to introduce criminal sanctions for the Italian Competition Law. These reasons can be categorized under different perspectives[40]: legalistic on one side, politic and economic on the other side.

Under the legalistic order of reasons, it was found that describing the punishable criminal conduct would pose compatibility problems with the Italian principle of legality because of the potential vagueness of the criminal offence[41]. Without going too much in detail, the description of the criminal offence could be too broad (consequently being too vague and not substantiated enough) or too specific (leaving out behaviours which should instead be punished), giving in both cases compatibility problems with the legality principle.

In the political and economic perspective, it was evidenced that the administrative sanctions are more flexible than the criminal ones. Furthermore, it was underlined that due to the complexity of the economic evaluations involved, the judge could have found himself in a sort of "impuissance psicologique"[42] because of which he would not have the necessary knowledge to judge the complex economic assessments concerned. Furthermore, under the political aspect, it was believed to be more appropriate to respect the administrative set of sanctions as prescribed in the EU Treaty.

Finally, one last reason pertaining to both legalistic and political arguments, was constituted by the Italian principle of "societas delinquere non potest"[43] according to which it was not possible to address criminal responsibility to undertakings. In any case, this principle does not apply anymore after the introduction of the Decree Law no. 230/2001 ("Administrative Responsibility for undertakings derived from criminal offences"[44])

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[39] ICA in the international name and AGCM (Autorità Garante della Concorrenza e del Mercato) in its Italian name

[40] A. Corda, Legislazione Antitrust e Diritto Penale: Spunti problelmatici in ambito Europeo, Criminalia, 2009, translated from Italian, p. 499

[41] Ibid

[42] Corda, op cit., p.500

[43] Corda, op cit., p.501

[44] Altalex, Diritto Commerciale/Amministrativo, *Responsabilità amministrative da reato per società ed enti*, 2013, < http://www.altalex.com/documents/news/2013/09/20/d-lgs-231-2001-responsabilita-amministrativa-da-reato >, accessed on 10th of May 2016

Owing to all the previous reasons, the legislator almost unanimously opted for the administrative sanctions as the only practicable and effective option in order to deter and repress anti-competitive behaviours[45]. The only space left for criminal sanctions was envisaged concerning those decisions issued by the ICA and addressed at undertakings which didn't respect its measure[46].

Anyway, given the fact that the public enforcement in the subsequent years to the Competition Act was not sufficiently effective,[47] it was also proposed to introduce fines for individuals in order to obtain a better deterrence. The issue was that such proposal would have needed to respect the principle of "contributory capacity[48]" and proportionality. Therefore, it was underlined that only the introduction of criminal sanctions for individuals would ensure a better deterrence effect and consequently a better compliance. On the same line of thought, Foffani[49] proposed to introduce in the special part of the Italian criminal code an offence entitled "crimes against competition" with the establishment of new criminal offences for corruption in the private sector. This proposal was made keeping as reference the German system which criminalizes bid-rigging.[50] This would, anyway, create problems of systemic coherence since agreements restricting/distorting/preventing competition would be treated as criminally irrelevant and punished with 'simple' administrative sanctions, while corruption in the private sector would be punished with imprisonment. As it is evident, this proposal would not have any coherence within the legal system. Consequently, it was argued[51], it would be first necessary to individuate the appropriate punishable behaviours in the antitrust sector with the introduction of proper criminal offences, and only then it would be systemically coherent to punish corruption in the private sector as well[52].

3.2.2. The administrative regime of sanctions in Antitrust Law and ambiguous criminal elements from Civil Code and Criminal Code

[45] Corda, op cit., p.501
[46] Ibid
[47] Corda, op cit., p.503
[48] Translated from Article. 53 of the Italian Constitution
[49] L. Foffani, *Tra patrimonio ed economia: la riforma dei reati d'impresa*, in Riv. trim. dir. pen. econ., 2007, p. 761.
[50] Corda, op cit., p.504. The bid-rigging offence is also briefly mentioned in par. 3.3. of this Thesis
[51] See A. Spena, *Punire la corruzione privata*? Un inventario di perplessità politico-criminali, in Riv.trim. dir. pen. econ., 2007
[52] Corda, op cit., p.505

To begin with, it is possible to evidence that the Italian Legislator throughout the 20th century has adopted an approach that has been judged as mainly centred on the role of the State as "manager and entrepreneur" [53]. By this definition it is meant to point out the fact that a lot was left to the role of the State as a key-actor in the economy, but it had often legislated without a coherent approach, leaving many economic areas unregulated or improperly regulated. This is why Law n. 287/1990 must be viewed positively, especially under the aspect that it was imprinted at respecting the structure and the substance established by the EU Treaty[54]. The system delineated by the Italian Competition Act frames "the ICA and the national civil courts [as] responsible for the enforcement of the cartel prohibition in Italy"[55].

Observing the structure of Law no 287/1990, we can state that the three main illicit behaviours were modelled on the same European terms[56], i.e. agreements restricting freedom of competition (Art.2→Art. 101 TFEU), abuse of dominant position (Art. 3→Art. 102TFEU) and mergers operations[57] (Art. 5→Art. 101 TFEU or Regulation 139/2004 in case of a merger with EU dimension). The construction of these provisions fully respect the EU formulation since these articles take also in consideration the object or the effects of the agreements. In particular, Art. 2 finds application to cartels with anti-competitive effects such as "prevention, restriction or distortion of competition on the Italian market"[58]

After this brief description of the Italian Antitrust main law, it is possible to consider the kind of sanctions prescribed by the law. The sanctions are disciplined by Art. 15 and 19 of the Italian Competition Act. The first thing to evidence is that only administrative sanctions are prescribed, as criminal sanctions are completely excluded by Law 287. Specifically, the administrative sanctions foreseen are divided in two : sanctions to protect competition and sanctions to safeguard the Authority control power[59]. In most cases, the ICA will apply a monetary sanction but if the undertaking persists with the prohibited behaviour, the Authority can suspend the activity and/or the license of the undertaking. The fines imposed on the undertakings by the ICA can reach up to 10% of their turnover from the previous financial year.

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[53] Corda, op cit., p.495
[54] Ibid
[55] F. Sutti, A. Boso Caretta, Italy: Cartels, Global Competition Review, European Antitrust Review, 2013, p.101
[56] Sutti, Boso Caretta, op cit., p.101
[57] Altalex, *Norme per la tutela della concorrenza,* < http://www.agcm.it/normativa/concorrenza/4531-legge-10-ottobre-1990-n-287-norme-per-la-tutela-della-concorrenza-e-del-mercato.html >, accessed on the 26th of May 2016
[58] Sutti, Boso Caretta, op cit., p.101
[59] Corda, op cit., p. 497

An interesting difference of the Italian system in comparison with the English one concerns the subjective element of the infringement: in fact, the former system recognizes as sufficient being able to ascertain that the behaviour put in place is detrimental to the competition[60]. No dishonesty requirement is present in the Italian legislation and no guiltiness must be proven since we are speaking about administrative sanctions. Besides, it must be also pointed out that the investigation powers and the functional activity of the ICA are safeguarded by some provisions in the Civil Code which establish criminal sanctions in case of non-compliance with specific duties (e.g. accounting obligations) put on certain persons (accountants, presidents, administrators etc.). An example of this is provided by Art. 2638 C.C. (Civil Code): this provision prescribes that all those people subject to vigilance authorities (such as the ICA for example) who voluntarily hide or miscommunicate the patrimonial, economic or financial situation of undertaking, entities, etc. are punished with imprisonment up to four years[61].

The jurisdictional system for the Italian Antitrust is entrusted to the Civil Courts and from 2012 to specialised courts called "Tribunale delle Imprese[62]". In detail, the decisions of the ICA can be challenged before the TAR Lazio[63] and these cases can be appealed before the Consiglio di Stato[64].

The interesting aspect is that notwithstanding the lack of criminal penalties, certain kind of cartel activities can be relevant for Italian Criminal Law as criminal offences at Art. 501 and 501bis C.P. (Codice Penale), the former entitled "market manipulation through the misuse of price sensitive information" and the latter "speculations on prices and quantities of raw materials and basic food products"[65]. These criminal offences are punished with imprisonment up to three years. Additionally, at Art. 353 C.P., it is prescribed the bid-rigging offence, which is punished up to five years of imprisonment. Interestingly linked is the 2009 pasta cartel case[66] where the interplay between ICA and Italian Prosecutor is evidenced. In this case, the anticompetitive conduct of price fixing among most Italian pasta makers was fined by the ICA with over € 12.5 million, but was also later prosecuted as a criminal offense under Art. 501bis

[60] Altalex, D. De Tommaso, Il Sindacato sui provvedimenti sanzionatori dell'antitrust, Altalex, 2015, < http://www.altalex.com/documents/news/2015/02/18/il-sindacato-sui-provvedimenti-sanzionatori-dell-antitrust >, accessed on the 26th of May 2016

[61] Corda, op cit., p.505

[62] Sutti, Boso Caretta, op. cit., p. 103

[63] Italian First Instance Administrative Court

[64] Italian Second Instance Administrative Court

[65] Sutti, Boso Caretta, op. cit., p. 101

[66] V. Pinotti, M. Sforza, Interplay between Antitrust and Criminal Law in Europe, Bloomberg Law Review, Bloomberg Finance L.P. in the Vol. 4, No. 11 edition of the Bloomberg Law Reports, Antitrust & Trade, 2011

C.P. The most remarkable element of this case was that the same documents used in the antitrust proceedings were also being used as the main supporting evidence of the criminal proceedings[67]. This shows how the cooperation between National Competition Authorities and Criminal Courts can prove to be an extremely useful instrument in order to ensure an effective enforcement on more levels.

Concluding this paragraph, the lesson to be learned by the Italian system is that even though the ICA is still far from being perfect, it certainly improved its fight against cartels and anti-competitive practices. It was pointed out in the last annual report from the ICA that both enforcement level and fines increased in number and quality[68].

Nonetheless, the cooperation between national competition authorities and criminal courts is an aspect which to my opinion deserves attention and that should be seen with a certain favour is. This kind of collaboration should be incentivized and valorised. In fact, this could be an alternative solution to a pure criminalization of competition law. Therefore, it would be possible, on one hand to leave the administrative sanctions in force as they are right now, but, on the other hand, the antitrust enforcement could be properly completed with criminal offences in the criminal codes with subsequent criminal proceedings handled directly by the Criminal Courts and assisted by the National Competition Authority, e.g. providing documents and evidence used in the antitrust proceeding.

3.3. Other national situations

Prior to highlighting the final considerations for this chapter, it is proper to briefly look at a few other EU States which prescribe criminal liability for competition violations. It needs to be, again, pointed out that the mere existence of criminal liability in Competition Law does not necessarily mean that the discipline finds application in practice. Despite the criminalizing global trend, it needs to be ascertained those situations in which criminal sanctions were introduced and applied and those other situations in which the criminal sanctions were merely proclaimed and barely applied in the practice. An example of the latter situation is given by Romania, where, even if criminal sanctions are prescribed by Law no 21/1996 (Romanian Competition Act) with imprisonment up to 4 years, there has been almost no use at all[69].

[67] Pinotti, Sforza, op cit., p.1
[68] ICA Annual Report on competition policy developments in Italy (2014), JT03384843, 2015, p.3
[69] Pinotti, Sforza, op cit., p.1. An example of criminal penalties application dates back to 2009 when, in the context of a price fixing cartel, the Romanian Competition Authority referred the matter to the criminal investigation bodies

A more peculiar situation is found in Germany: no criminal sanctions are imposed for Competition Law, exception made for bid-rigging which can be punished with a specific criminal offence in the German Criminal Code "as a particular form of fraudulent misconduct"[70]. Accordingly, when the Federal Cartel Office (FCO) finds out about a case involving bid-rigging, it will refer the proceeding against individuals to the National Prosecutor, ex Section 298 of the German Criminal Code[71]. The application of criminal sanctions for bid-rigging has been quite consistent in Germany: between 1998 and 2008, 260 persons were indicted for bid-rigging and more than half of them were imprisoned[72]. Another country which can be mentioned in this context is Ireland. The Irish Competition Act from 2002 was modelled on the EU legal framework, just as every other country analysed. This act provides punishment for both individuals and undertakings. In particular, in cases of hard-core cartel violations, individuals can be punished with imprisonment up to 5 years[73]. Interestingly, Ireland effectively enforced these provisions and convicted 33 people between 2005 and 2009, "although no one has gone to jail"[74] since the Irish Courts systematically suspended prison sentences.

3.4. Considerations/reflections over national situations

Over this chapter, it was possible to appreciate how criminalization in Competition Law was realized in certain countries, and how other countries, even without a formal criminalization, do already have in their systems, criminal offences directly or indirectly linked to antitrust violations.

The first remark that is possible to do concerning the UK situation is that despite the attempt of criminalization was appreciable, the approach adopted was, in my opinion, wrong. Due to the broad formulation of Section 188, and until 2013 because of the dishonesty requirement, the enforcement of this provision has basically been non-existing, completely vanishing the purpose of the criminalization. Moreover, the English system is quite particular due to the presence of juries in the Criminal Courts and this element has certainly also conditioned the success of the provision. Personally, I believe that in case of white-collar

[70] Pinotti, Sforza, op cit., p.2
[71] Ibid
[72] G. C. Shaffer, N. H. Nesbitt, and S.Weber Waller, *Criminalizing cartels: a global trend*?
Research Handbook on Comparative Competition Law, eds. Arlen Duke, John Duns and Brendan Sweeney, Edgar Elgar, 2015; p.16
[73] Irish Competition Authority, C. Galbreath, *Cartel criminalization in Ireland and Europe: can the United States Model of Criminal Antitrust Enforcement be successfully transferred to Ireland and Europe*? 2007, p.4
[74] Shaffer, Nesbitt, Weber Waller, op. cit., p.16

crimes the perception of the juries is affected as for these types of crimes, nowadays, it is still lacking the same level of moral stigma attached to 'regular' crimes.

Similar to the UK, but with a more active enforcement in practice, Ireland has criminalized hard-core cartels and actively convicted several persons. The issue, anyway, lays in the systematic suspension of the prison sentences which was consistently granted by the judges. It would be imaginable that this is a specific 'policy' choice although it seems incoherent with the criminalization established in 2002. On the same Irish line of behaviour, Romania also owns criminal sanctions in its legislative framework to punish competition restrictions. Once again though, after the criminalization, it didn't follow any concrete application of imprisonment.

Italy and Germany present, instead, a distinctive system of sanctions. In Italy, the ICA can only apply fines to the undertakings, but under certain circumstances and specific legal basis found in the Criminal Code and Civil Code, it is also possible to prosecute the individuals by the Criminal Courts with the aid of the Competition Authority. Analogously, Germany has only fines at its disposal in the competition sector, but it criminalized exclusively bid-rigging in 1998. Contrarily to what was observed for the UK, Ireland and Romania, in which a formal criminalization was realized, the choice for criminal sanctions in Germany has been circumscribed at a single criminal offence, delineating an important difference with the broad definition which characterized Section 188 EA in the UK. The adoption of just one criminal offence related to competition law proved to be quite effective since the enforcement has been uniform and consequently providing several sentences of imprisonment.

At first impact, after the analysis of these national situations in the EU, it comes to mind that the countries who chose to criminalize are also the countries that have enforced the less these criminal provisions. On the contrary, those Member States that circumscribed the use of criminal sanctions or formally excluded their use in Competition Law, also result to be the countries pursuing a more convinced approach in the enforcement of the system of sanctions. Indubitably, the conditions of each country are different and, accordingly, lead to different problems in the enforcement (e.g. the UK and Ireland have juries in their Criminal Courts, while most of the other Member States do not foresee any kind of jury nor in the civil procedure, nor in the criminal procedure). Nonetheless, I believe that, in order to simplify the problems of competition enforcement, a useful approach would be to leave the national competition authorities to deal with the administrative fines for undertakings and to address the task of prosecuting the individuals at the Criminal Courts. In particular, with the introduction of proper criminal offences related to Competition Law in the national criminal

codes, it would be possible to institute a convenient cooperation between Competition Authorities and Criminal Courts. The latter would be informed by the Competition Authority about any suspected person involved in cartel activities, consequently, allowing the Criminal Court to start the criminal proceeding thanks to the prosecution started by the National Competition Authority.

Next chapter will be aimed at concretizing the problems which can raise in the context of the criminalization of Competition Law on the EU Institutions level and in the Member States. Several tangible issues pertaining to the introduction of criminal sanctions in this sector will be analysed and focused in order to understand what would be the final result, including both the potential benefits and the disadvantages which may follow.

Chapter 4: Theoretical background of the matter and concrete problems

4.1. Why Criminalize?

After showing how some Member States chose to criminalize, it is now essential to inquire what are the reasons which would push the EU to introduce criminal sanctions for competition law infringements but also what kind of infringements should be involved. Accordingly, this chapter is aimed at framing the theoretical background which gives shape to the idea of criminalizing competition law in general. As it will be shown, there are several motives behind this idea but one of the main supporting arguments is that it would improve deterrence and help achieve a better and more complete enforcement. In order to understand how would this happen, it is appropriate to provide the theoretical elements of the discussion. Following the theoretical background, it will be dealt with the discussion on the kind of competition law infringements which should be translated in criminal offences. Related to this, there are risks that are peculiar to the complexity of competition law and economic assessments which, in combination with criminal sanctions such as imprisonment for individuals, creates concrete risks in its application.

4.1.1. The reasons pushing towards the criminalization of Competition Law

There are reasons which convey this trend for introducing criminal sanctions for individuals, but the main ones can be categorized as described by Hawkes[75]: the first concerns the immoral conduct put in place by the cartelists which very consciously choose to break the law; the second and more evident reason is due to the damages produced by these illicit behaviours on competitors, consumers and more in general to the whole EU single market[76]; finally the last argument concerns the proportionality with property crimes.

Criminalizing to sanction immoral behaviours does not necessary seem to be a valuable argument, given the relativity of morality, but if we think about the fact that when executives and white-collars put in practice a cartel or any other agreements which restrict the competition,

[75] G. Hawkes, Cartels – *The case for criminalization in the EU*, 2014, p.7: "The justifications that hard-core cartel conduct be criminalised are therefore moral, economic, based on proportionality in relation to property crimes and that the conduct possess the indicia of a criminal offence."
[76] Hawkes, op cit., p. 5

they are making a very clear choice of infringing the law because of the evaluation of the subsequent gains which they plan to get out of infringing competition law. Besides, it may even happen that the cartel activity continues even after the Commissions starts the investigation[77], keeping on stealing directly from market competitors and consumers. It must also be stated that criminalizing would send a clear message about the wrongfulness of such conducts so as to shape the public opinion. In fact, competition law infringements are not necessarily perceived as negatively by the public opinion as the action of robbing a bank, but the effects in terms of 'stolen' money could be quite similar.

Strictly related to the latter line of thinking is the third category of reasons pushing towards the criminalization, i.e. the proportionality of property crimes, given the fact that cartel activity can be seen as a type of property crime[78]. When white collars steal money from consumers, their actions correspond to a theft and it should be equally treated with adequate and proportionate sanctions. In fact, nowadays, conducts such as theft, money laundering, market manipulation and insider trading are criminalized and for reasons of consistency with these crimes, it must be pointed out that cartels can be as harmful as these crimes, if not even more[79].

Furthermore, putting a cartel into practice is not a one-time action but it is prolonged in time, consequently maturing the decision of acting in breach with competition law and conspiring against consumers to their detriment[80]. For these reasons, focusing the perception of public opinion on these infringements would be good to convey a message of moral stigma connected to such behaviours.

Given the significant gap existing when passing from fines to criminal punishments, a way to justify the criminalization is pointing at the harm provoked by anti-competitive behaviours. These last ones regard the damages produced by illicit conducts which directly affect market competitors (for instance pushing them out of the market) and deprives consumers of the benefit they would have in presence of a fair competition among the undertakings. Further negative effects derive from "the deadweight loss [..] which affects supply and demand causing buyers and sellers to misallocate their spending"[81].

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[77] ECJ, Judgment of the Court of 29 June 2006, C-308/04, *SGL Carbon AG v Commission of the European Communities,* 2006, par. 64 : "The Court of First Instance also found, […] by thus warning other undertakings, [that] SGL Carbon sought to conceal the existence of the cartel and to keep it in operation, an aim which was successfully achieved until March 1998."

[78] Hawkes, op cit., p. 7

[79] J. Clarke, The increasing criminalization of economic law – a competition law perspective, Journal of financial crime, vol. 19, no. 1, 2012, p. 86

[80] Ibid

[81] Ibid

One last reason pushing for the criminalization involves a stronger and more effective enforcement which would follow the introduction of imprisonment for individuals. About this, it must be said that, while criminal sanctions do not necessarily bring an improved deterrence on individuals, they could contribute helping that goal. In reason of this, it is now needed to inquire the elements that affect deterrence in order to understand if this assumption is correct.

4.1.2. The significance of deterrence in the enforcement context

Deterrence is certainly "one of the most important elements of competition law enforcement"[82] since the latter without an effective deterrence brings along consistent social costs and does not allow economic benefits which would follow an adequate level of deterrence[83]. Even if competition policy is obviously not just an instrument of sanction policy, it is of vital important that attention is paid, under this regard, so as to effectively discourage competition law infringements[84].

With these premises, it is now opportune to distinguish the two types of deterrence which are described in the literature: general deterrence and specific deterrence. The former is "also referred to as ex-ante deterrence, [and it] consists of preventing agents from undertaking illegal behaviours by threatening violators with sufficiently heavy sanctions"[85]. Differently, the second type of deterrence occur ex post, meaning after that the illicit conduct has been detected by the authority, and is also referred to as desistance[86]. Evidently, achieving a good level of general deterrence must be the priority with aim of containing costs and cutting unnecessary expenses (e.g. for trials in courts or for the investigations)[87]. Anyhow, it is not advisable to set a very high level of deterrence because of the risk of failing into the trap of over-deterrence, where pro-competitive behaviours would not be put in place because of the excessive level of deterrence which discourage the undertakings from searching new ways to innovate, stimulate the competition and achieving better profits. Besides, when over-deterring it does not follow any improvement of social welfare, which competitive markets would, normally and indirectly, achieve in presence of a fair competition.[88]

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[82] Whelan, op cit., p.69
[83] P.Buccirossi,; L.Ciari, T.Duso, G.Spagnolo,C.Vitale: *Deterrence in competition law*, WZB Discussion Paper, No. SP II 2009-14, p.2, ,< https://www.econstor.eu/handle/10419/51212 >, accessed on 7th of June 2016
[84] Buccirossi, Ciari, Duso, Spagnolo, Vitale, op cit., p.3
[85] Buccirossi, Ciari, Duso, Spagnolo, Vitale, op cit., p.4
[86] Buccirossi, Ciari, Duso, Spagnolo, Vitale, op cit., p.5
[87] Ibid
[88] Buccirossi, Ciari, Duso, Spagnolo, Vitale, op cit., p.7

Another factor which contributes to complicate the scenario is the fact that both undertakings and individuals may commit the competition law infraction[89]. Concerning this, an argument may be formulated regarding the ineffectiveness of fines or civil sanctions against undertakings as an efficient tool to achieve deterrence on both individuals and firms. In fact, it may very well happen that between the realization of the illicit and the detection, prosecution of it and issuing of the fine, a considerable amount of time may passes, leaving only the undertaking responsible for the action while the individuals who materially committed are left unpunished[90]. Moreover, the undertakings may actually not be able to effectively control that their employees do not act in breach with law because they could be driven by personal profit in order to reach certain target of sales[91]. Another scenario where deterrence of fines is not sufficiently strong is when the firms choose to pay the fines for their managers in case the illicit is made in the interest of the company[92]. It needs to be pointed out that while the Commissions can not fine undertakings for more than the 10% of their annual crossover, too burdensome fines do not increase the deterrence but instead they may have negative consequences for welfare maximization which is one of the main goals of Competition Law[93]. Accordingly, while it is true that the Commission has the discretion of evaluating the amount of fines to apply to the undertakings according to the gravity of the infringements and to their duration, and according to the principles established by the ECJ, the Commission can not apply excessive fines because they could also result in pushing out from the market the interested undertaking.

Following the same line of thought, the introduction of criminal sanctions for individuals would represent an approach to mitigate the 'rigidity' characterising corporate fines, by completing the instruments at the disposal to achieve an effective enforcement. In particular, on the one side with the administrative sanctions, the firms are discouraged because of the fines they are imposed in case they get caught, but on the other side, the deterrence would be more complete because of the imprisonment threat on the individuals which would, consequently, perceive much stronger the risk and dangers of the infringement.

At this point, it must be understood what are the elements that influence deterrence. While several variables are identified in the literature affecting the quality of deterrence[94], this

[89] Buccirossi, Ciari, Duso, Spagnolo, Vitale, op cit., p.9
[90] Hawkes, op cit., p.11
[91] Ibid
[92] Buccirossi, Ciari, Duso, Spagnolo, Vitale, op cit., p.9
[93] Buccirossi, Ciari, Duso, Spagnolo, Vitale, op cit., p.10
[94] Buccirossi, Ciari, Duso, Spagnolo, Vitale, op cit., p.17

paragraph can not inquire every aspect concerning it because this would fall outside of the aim of this Chapter. It is anyway possible to highlight the most important elements of legislation and enforcement which deeply affect deterrence and the quality of the effects produced by the competition policy.

Three different aspects can be distinguished[95]:

"1) the level of the loss that firms and individuals expect to suffer if they are convicted (rightly or wrongfully);

2) the perceived probability of wrongdoers being detected and convicted;

3) the perceived probability of being wrongly convicted" [96].

On these three different levels, several elements operate and influence the outcome of deterrence. Some examples of these elements are: the amount and kind of sanctions, the powers at disposal during the investigation, the number of people working on these matters and the quality of the law[97]. It is in particular the latter of the cited elements which determine a higher or lower possibility of committing mistakes in the evaluation of suspect conducts, creating even more problems in the case of the introduction of criminal sanctions for individuals.

4.2. The risks linked to the introduction of criminal sanctions

The complexity of the economic assessments involved in the evaluation of competition law infringements is an inherent characteristic of this subject. In particular, the range of mistakes which can be made in the enforcement of competition law has classically been divided in type I and type II. According to the kind of mistakes, there can be the realization of false positives (type I) or false negatives (type II). Type I errors consist in a mistaken judgement, from the CA or from the Court, sanctioning an undertaking which didn't put in practice any anti-competitive behaviour, accordingly, provoking an over-enforcement[98]. Instead, type II errors are produced by wrong evaluations performed by the enforcement organs failing to detect an anti-competitive conduct, entailing the presence of under-enforcement[99]. Both types

[95] Buccirossi, Ciari, Duso, Spagnolo, Vitale, op cit., p.12
[96] Ibid
[97] Buccirossi, Ciari, Duso, Spagnolo, Vitale, op cit., p.17
[98] New York Law School, *Error types*,< http://www.eucomplaw.com/error-types/ >, accessed on 12th of June 2016
[99] Ibid

of errors are equally harmful but the over-deterrence may be considered as bringing more undesirable consequences since it induces undertakings to act precautionary and avoiding certain transactions for the fear of being unjustly accused[100]. The peculiarity of competition law is that in some cases it will be extremely hard to ascertain if the agreement at issue is, actually, a prohibited one or if should be allowed. In an analysis of 12 cases of the ECJ[101], it was highlighted that the Court prefers committing type I errors while the Advocate Generals are more inclined to commit type II errors[102].

What previously said is certainly true for competition law in general but when speaking about introducing imprisonment for individuals, the situation gets much more complex because of the rights of the defendants that are involved. Specifically, when we are in presence of a criminal process, the guiltiness of the defendant must be proven beyond every reasonable doubt. Accordingly, in our case, a criminal court could not sentence anyone to prison unless the conduct at issue is actually restrictive of competition and if the prosecutor manages to prove the guiltiness of the accused. Under this regard, it would almost seem like if the defendant would benefit from an increased protection of his rights because of the criminal nature of the process. At this point, in cases in which there is not enough evidence to prove the guiltiness of the defendant, the national criminal court would be forced to commit a type II mistake. Not only this is appropriate with the aim of respecting the rights of the prosecuted, but it is also, actually, preferable in order to avoid the risk of imprisoning innocent people.

A more specific analysis of the rights of the defendant is to be found later on in this chapter. Now it is necessary to understand what kind of infringement of competition law deserve to be translated to criminal offences.

4.3. What type of competition law infringements should be criminalized?

First of all, in order to identify what are the competition law anti-competitive behaviours which should be translated into criminal offences, it must be said that the most severe infringements producing several negative effects on the market should be the main targets of the criminalization. This is particularly true by a moral point of view and under the perspective of conveying a stigmatizing message over economic frauds. Keeping this aim in

[100] New York Law School, *Error types*,< http://www.eucomplaw.com/error-types/ >,
[101] Ibid
[102] Ibid

mind, it must also be reminded that in many cases it will be truly difficult to ascertain the level of restrictiveness for the conduct put in place by the undertakings. Furthermore, it is complicated even to formulate the provisions for these criminal offences without running into the risk of writing them in a too broad manner (and risking a very scarce application as happened in the UK with the cartel criminal offence) or in a too restrictive way (and potentially going towards over-deterrence and catching also legitimate behaviours). Accordingly, for reasons of legal certainty, it is essential to criminalize only those anti-competitive actions which are so evidently harmful for competition as to almost constitute 'per se' infringements: in this definition, the infringements involved would be the hard-core restrictions and in general the cartel horizontal agreements as identified by the Commission in the De Minimis notice[103]. In the De Minimis Notice, in fact, three kinds of behaviours are highlighted as being certainly restrictive of competition law and, for this reason, do not need an assessment to appreciate their impact. The presumption is for agreements which "directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object:

(a) the fixing of prices when selling the products to third parties;
(b) the limitation of output or sales;
(c) the allocation of markets of customers"[104].

These agreements are presumed to harm the competition among the undertakings regardless of the actual circumstances. It is also worth to point out that the proposed kind of behaviours to criminalize are those horizontal agreements which are very close to what expressed by letters A, B and C of Art. 101 (1) TFEU. Following these indications, these kinds of infringements (which correspond to the definition of cartel in general) are the ones which should/could be translated in criminal offences in the national criminal codes of the Member States. I agree with the proposal by Hawkes since it depicts a useful direction which a future criminalization could follow but the same proposal also omits to consider other aspects. In fact, the proposed idea of criminalization excludes: the horizontal agreements which do not have the one of the characteristics previously explained, the vertical agreements which may present more difficulties in their detection, and the abuse of dominant position. In the case in which a criminalization of cartels would be achieved, it would certainly seem odd that vertical

[103] Hawkes, op cit., p. 3. In his proposal for criminalizing, Haweks suggests to catch all the "hardcore restrictions of competition as defined by the European Commission 'de minimis' notice [..] by way of corporate fines, individual fines and imprisonment".
[104] Commission Notice on agreements of minor importance, 2001, C 368/13, par. 11.

agreements and abuse of dominant position would not be listed as criminal offences, especially considering that their effects might be very damaging for competition just as cartels are. Moreover, such a choice would not be coherent in the legal system because it would not be justifiable by reasons pointing at the minor harm provoked by vertical agreements and abuse of dominance, nor it would be proportionate to imprison individuals for cartels but not for other similar competition law infringements. Besides, such a legislative choice would also hinder the deterrence effect on the individuals given the 'unfair' perception of the punishment remedy which would apply only to certain infractions while not applying to others which result, anyway, in restricting competition among undertakings and depriving final consumers from the benefit they would receive from a fair competition.

Accordingly, an argument may be formulated: cartels which aim or have the effect of fixing prices, restricting output or allocating customers should certainly be criminalized; together with these horizontal agreements, vertical agreements which have the same features should also be included in the criminalization. Finally, the abuse of dominance should be listed as a criminal offence as well because, otherwise, it would seem that those undertakings (which are already in the advantageous position of dominance) receive almost a sort of preferential treatment in comparison with the other undertakings with much lower market shares. Consequently, in order to implement a criminalizing legislative choice for competition law infringements, it is necessary to adopt a coherent approach in the identification of the criminal offences to prosecute, while leaving aside those competitive constraints which do not reach the threshold of harmfulness to the markets and which, consequently, do not justify their criminalization. Furthermore, coherency in the selection of infringements to criminalize is essential to reach the appropriate level of deterrence, without trespassing into over-deterrence or conversely in under-deterrence.

Anyhow, criminalizing would not mean passing completely from the application of administrative sanctions to the exclusive application of criminal sanctions. Actually, the administrative and criminal sanctions system could work together with the Commission and the National Competition Authorities delivering administrative fines to the undertakings and the national criminal courts sentencing individuals with both imprisonment and administrative fines or solely with imprisonment. This would be, in my opinion, the only way to complement the system of remedies which the Commission, NCAs and national courts have at their disposal and, by doing this, achieving a better enforcement which would also result in an increased deterrence for the undertakings and for the individuals.

4.4. The shift from civil/administrative regime to criminal due process: the need to respect the procedural rights of the defendant

If criminal sanctions are introduced in the antitrust enforcement, certain procedural rights of the defendant must be respected in order to have a criminal trial which is in line with the ECHR and respects human rights in general. The starting point is Art. 6 ECHR which establishes the right to a fair trial. While this provision may be applied also to the civil/administrative regime, it entails some specific rights for the defendant which, in case of a criminal process, must be necessarily safeguarded.

The system put in place in the EU foresees the Commission as an administrative body which investigate, prosecute and adjudicate, leaving the legal review function to the General Court of the European Court of Justice. How would all of this be affected by the introduction of the criminal sanctions in antitrust law? The answer to this question begins with the description of the intensity required in the standard of proof to be satisfied.

4.4.1. How would the standard of proof change?

One of the first elements that are touched in case of introduction of criminal offences for antitrust infringements is the standard of proof. The latter can be referred to as " the duty of the person responsible for proving the case"[105].

Generally speaking, it is possible to presume that the passage from an administrative regime to a criminal one will require a stronger amount of evidence for the prosecuting authority in order to win the case. In fact, in criminal regimes, it is granted a broader protection to the individuals' rights with the aim of respecting their human rights but also the procedural rights of the defendant. This could result in weakening the competition law enforcement given the fact that, nowadays, only the administrative regime is set, consequently, it is not required to prove guiltiness beyond every reasonable doubt. Therefore, the Commission must 'only' prove that the undertakings have committed an infringement of Art. 101 or 102 TFEU. In the administrative regime, "a standard of proof on the balance of probabilities can be deemed to be sufficient"[106]. The guarantees that would apply in a criminal process, do not apply in the

[105] HG.org, Different standard of proofs, < https://www.hg.org/article.asp?id=6363 >, accessed on the 13th of June 2016
[106] Whelan, op cit., p. 179

administrative regime of fines held by the Commission, which does not need to respect the same procedural rights which would have been bound to respect in a criminal case. This is why it is suggested in the literature[107] that a shift towards a criminal regime for antitrust law infringements could make more complex sanctioning individuals in comparison with fining undertakings under the civil regime, vanishing one of the purposes of the criminalization.

Art. 6 (2) ECHR prescribes the presumption of innocence without stating anything about how the quality of the standard of proof should be. Even looking at the EU Charter of Fundamental Rights, nothing is said about the standard of proof and Art. 48 ECFR simply re-states what evidenced by Art. 6 (2) ECHR[108].

One possibility left to understand what should be the level of standard of proof after the introduction of criminal offences is by looking at the jurisprudence of the European Court of Human Rights. The latter did not produce a broad case-law concerning the concept of the standard of proof and has actually been quite cautious on the matter. In particular, in Salabiaku v France[109], the Court of Human Rights underlined that "*presumptions of fact and law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle. It does, however, require the contracting states to remain within certain limits in this respect as regards criminal law. [...] Article 6(2) does not therefore regard presumptions of fact or of law provided for in criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence. This test depends upon the circumstances of the individual case*"[110]. Basically the Strasbourg Court left wide freedom to the States and their national laws to decide autonomously what their legal system considers as standard of proof. Indubitably, this constitutes a problem because the different standard of proofs adopted by the Member States in the EU will certainly not easily coincide. This means that a 'European' standard of proof should be set[111] in order to achieve a uniform application of antitrust criminal sanctions in the criminal courts across the different Member States.

[107] Whelan, op cit., p. 179, "A criminal conviction may become so difficult to obtain in comparison to a civil/administrative ruling that, in allocating resources to the criminal efforts, in effect one sacrifices success under a civil/administrative regime in favour of failures under a criminal one".
[108] Art. 48 ECFR is, in fact, entitled "Presumption of innocence and right to defence".
[109] European Court of Human Rights, *Salabiaku v France*, Application no. 10519/83, 1988
[110] Ibid, Par. 28
[111] Whelan, op cit., p. 181

4.4.2. The right to silence and not to self-incriminate

Once again, the starting point is provided by Art. 6 ECHR: even if this provision does not explicitly mention the right to silence or the right against self-incrimination, the ECtHR highlighted in Funke v France[112] that these two rights constitute "the heart of a fair procedure under Art. 6 ECHR"[113]. These two rights are, indubitably, connected to the presumption of innocence, since it is assumed that the prosecutor will not make use of methods against the will of the defendant[114] . Amyway, in Orkerm vs Commission[115], it was established that Art. 6 ECHR does not entail "the right not to give evidence against oneself" [116]. The Commission will not be able to directly ask an undertaking for an admission of infringement but they may ask the company to hand in every useful element and information in their possession[117].

Human rights are part of EU law and as such it is mandatory to comply with them. Accordingly, in a criminal proceeding the accused has broader rights which could complicate the work of the prosecutors. While administrative regimes allow to obtain more easily answers from the defendant, for instance through the use of "factual questions"[118], criminal process follow a stricter protection for the rights of the defendant. The potential conflict following this situation concerns the fact that defendants may want not to provide any information incriminating a company because otherwise the same information could be used in a criminal proceeding against himself[119]. This issue can be straightforwardly solved by establishing safeguards for the declarations rendered in the administrative process by the defendant and, consequently, no use of such evidence can be done in the criminal case. An example of this is provided by the English Competition Act which explicitly safeguards the "statements compulsorily obtained from an individual in administrative context"[120] by impeding their use in the criminal proceedings.

Accordingly, Art. 6 ECHR exercise some constraints on the prosecuting authority in order to adequately protect the procedural rights of the defendant and respecting EU law. Especially with solutions such as the one provided by the UK Competition Act, it is possible

[112] ECHR, *Funke v France*, Application no. 10828/84, 1993
[113] Whelan, op cit., p. 181
[114] Whelan, op cit., p. 182
[115] ECJ**,** Judgment of the Court of 18 October 1989, C-374/87 - Orkem v Commission of the European Communities, 1989
[116] Whelan, op cit., p.182
[117] Ibid
[118] Ibid
[119] Whelan, op cit., p. 183
[120] Whelan, op cit., p.184

to respect the right to a fair criminal due process while still while still being able to correctly assess the case at issue.

4.4.3. The principle of ne bis in idem

Another component of the principle to a fair trial is provided by the principle of ne bis in idem. Art. 6 ECHR does not explicit it but in the Protocol no.7 of the ECHR, at Art. 4 it is identified the right not to be tried or punished twice. In substance, this provision prohibits prosecuting an individual twice for the same criminal offence[121]. After the Menarini case[122], it was pointed out that the term criminal deployed in the provision, also includes the administrative regime of competition law[123]. Consequently, problems of coordination could raise between an administrative infringement proceeding and a criminal process having as object the same anti-competitive conduct.

In order to understand when are we in presence of a second prosecution for the same offence, several tests have been deployed by ECtHR, which actually have used widely different approaches[124]. In a case from 2009[125], the Court specified that we are in presence of a second same offence only in case the dispute results from "identical facts or facts which are substantially the same as those underlying the first offence"[126]. Moreover, this guarantee applies as soon as the previous acquittal or conviction gains effect of res judicata[127]. But the issue of Art. 4 protocol no.7 ECHR is that it only applies for offences under the same jurisdiction[128], so that, in case of multiple prosecutions under different jurisdictions, for instance by several NCAs, the latter provision would not be able to prevent a 'double' prosecution for the same offence.

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[121] Art. 4 Protocol no.7 to 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."

[122] ECHR, *Menarini Diagnostics v Italy*, *Application* no. 43509/08, 2011. The Menarini case interpreted the extent of Art. 6 ECHR in connection with competition law proceedings. The ECtHR underlined that "it [is[not incompatible with Article 6(1) for the sanction to be imposed initially by an administrative authority, provided that the decision was subject to control by a court having full jurisdiction. Such a court should have power to decide on all aspects of law and fact and if necessary reformulate the decision on both facts and law"; see also Antitrust Writing Awards, C. Bellamy, *ECHR and competition law post Menarini : An overview of EU and national case law*, e-Competitions, N°47946, 2012, < awa2013.concurrences.com/business-articles-awards/article/echr-and-competition-law-post#nb6 >

[123] Whelan, op cit., p. 228

[124] Ibid

[125] *Zolotukhin v Russia*, Application no. 14939/03, 2009, press release issued by the Registrar, Feb. 2009

[126] Ibid, (p.3)

[127] Ibid

[128] Whelan, op cit., p. 228

If we imagine a legal system in which, respectively, the Commission and the NCAs deal with the administrative sanctions, while, the criminal national courts deal with the criminal sanctions, no apparent obstacles seem to be found. Anyhow, when considering the aspect that corresponding to the notion of undertaking may be also an individual performing an economic activity[129], there may be some problems involving the principle of ne bis in idem. Therefore, an individual could find himself in a situation in which both administrative sanctions and criminal sanctions may be applied to him, first as an undertaking and then as an individual, consequently, prosecuting the same person twice for the same infringement[130]. In particular, this concrete issue would violate the principle of not being punished twice if the NCA and the national Criminal Court pertaining to the same jurisdiction, both prosecute the same infringement on the same individual in two parallel proceedings. The consequence of this is that when the factual circumstances giving rise to the offence are actually the same for both prosecutions, the principle of ne bis in idem will apply and will prevent one of the prosecution to take place.

4.4.4. The division of functions

Art. 6 (1) ECHR establishes that "[...] everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."[131]. In order to have an independent and impartial tribunal, it is essential to separate those bodies which investigate and prosecute from the authorities who actually assess the case. This division of functions constitutes what is mainly required by the first part of Art.6 (1) ECHR to ensure the right to a fair process.

Given the fact that Art. 6 ECHR can apply also to administrative regimes[132], the system established in the EU with the Commission investigating, prosecuting and sanctioning the undertakings would not be compatible with the requirements of impartiality and independency necessary to respect the right to a fair trial. Actually, to avoid the impasse, the General Court was attributed the role of Court of Appeal, reviewing the administrative decisions of the Commission on the requests of annulment by the undertakings[133]. While this 'escamotage' may work for the administrative regimes, in case of a criminal proceeding, it would be completely

[129] Whelan, op cit., p.229
[130] Whelan, op cit., p. 230
[131] Art. 6 (1) ECHR
[132] Whelan, op cit., p.184; see also ECtHR, *Engel and others v. the Netherlands, Application no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72,* 1976
[133] Ibid

inconceivable to let the same body deploy cumulatively three different functions. Normally, in order to formulate a criminal charge it is required to respect human rights, meaning that one body deals with activity of evidence gathering and bringing the latter to trial, while another authority judges whether the defendant is guilty or not[134].

The main function of the division of powers is to respect the right of the defendant to a fair trial but also to obtain a more efficient antitrust enforcement[135]. In the scenario of criminalizing cartels for instance, the Commission could still have the investigative role but the assessment phase of the evidence would necessarily be in the hands of the national criminal courts. Next paragraph tries to explain concretely which would be the authority prosecuting the defendants.

4.5. Who would have the power to prosecute?

Based on what established at the end of Chapter 2, the first step for criminalizing EU Competition Law will, certainly, be constituted by the harmonization of national legislation. Keeping in mind what already happened for the Directive 2014/57, the power to prosecute this kind of offences is necessarily in the hands of the national criminal courts. In fact, imagining a directive criminalizing cartels for instance, and that national legislative implementation is already in place, the criminal proceedings would simply follow the national rules disciplining the criminal proceedings. In this example, the national criminal courts investigate, prosecute and provide the ruling against the individuals suspected for the criminal offences, while the Commission still have the classic role of 'guardian' of Competition Law, monitoring eventual infringements on the markets and fining the undertakings that restrict competition.

According to the introduction of Directive 2014/57 on market abuse, the delineated system did not change, it only implied that Member States need to punish those conducts with specific criminal sanctions to be introduced in their legal system. The same scenario would be conceivable for a cartel criminalization: since it has not been established yet the European Public Prosecutor, and as there are no EU jails, the investigation, prosecution and adjudication of the case will, necessarily, be entrusted to the national criminal courts.

[134] Whelan, op cit., p.185
[135] Whelan, op cit., p.186

Chapter 5

5.1 Conclusions

This Master's Thesis was aimed at understanding the implications characterising the introduction of criminal sanctions for competition law infringements. Mainly, I tried to provide the answer to the question whether criminalizing antitrust law actually constitute the next logical step to undertake in order to improve and complete the enforcement of EU Competition Law.

In order to fulfil the aim of this thesis, I started, first of all. with providing the relevant EU legal framework for the discussion. In particular, it was pointed out that a possible legal basis to use with the aim of criminalizing antitrust law is found in Art. 83 TFEU, providing two different ways (according to paragraph 1 and 2) in which criminalization can be achieved. It was showed that this provision intentionally indicates the directive as the legislative instrument to be deployed if criminal sanctions must be introduced in the legal system of the Member States. Accordingly, an analysis of the possible legal basis specified the reasons why Art. 83(2) TFEU constitutes the most plausible provision to be used in order to criminalize.

Moreover, two examples were provided from other EU law sectors that had been already criminalized: environment and financial markets. Specifically, it is the latter that is particularly pertinent: financial markets are a part of competition law and, consequently, if Art. 83 (2) TFEU was deployed to introduce criminal offenses of market manipulation and insider dealing, this can only mean, a fortiori, that Art. 83 (2) TFEU is the correct legal basis to use for criminalizing EU Competition Law.

Concluding the second chapter, it was highlighted how the criminalization can, at least in the beginning, only be obtained through the harmonization of the national legislations of the Member States by application of Art. 83 (2). This is due to the fact that with the purpose of criminalizing directly on the EU level, it would be necessary to use a legislative instrument such as the regulation (basically, directly producing effects on the Member States) so that no national transposition of EU rules need to take place in their legal systems. The highlighted problem is exactly that no such provision concerning competition law can be found in the Treaties providing the regulation as legislative instrument, and, this is why, Art. 83 (2) TFEU constitute the correct legal basis to apply, causing the necessity of criminalizing EU Competition Law through the harmonization of the legislation of the Member States.

After showing the legal context involved in the criminalization, in Chapter 3, I directed my attention on the national situations of the Member States, inquiring those countries that already criminalized national competition law and other states which feature a mixed regime. In particular, the reasons for analysing the national contexts was to realize how the quality of the enforcement of competition law varied according to the choice of criminalizing or not. Moreover, the situation in the Member States can also depict practical problems that allow to prevent them under the EU perspective. Thus, I started my analysis of the legislation of the Member States with the UK, where the cartel criminal offence had already been in the national legislation for some time. It was shown that the cartel offence was conceived in order to deter more effectively antitrust law infringers. Anyway, due to several reasons (for instance, Section 188 CA was formulated in a very broad manner and it had an unclear requirement of dishonesty) the English cartel offence received a very scarce application and enforcement. Consequently, it was proved that the mere introduction of criminal sanctions for a certain infringement does not solve any issues at all if an effective enforcement does not follow the introduction of the legislative novelty.

At this point, my analysis looked at Italy as an example of a Member State which does not have criminal sanctions for competition law but, which do have hybrid administrative/criminal elements in the system. In particular, I presented some provisions from the Italian Civil and Criminal Code (for instance Art. 353 C.P. on bid-rigging and Art. 501 C.P. on market manipulation through the misuse of price sensitive information) which do foresee criminal sanctions in case of violation of certain obligations relating to Italian competition law. Accordingly, theoretically, the ICA can only fine the undertakings acting in breach with competition law, but, in practice, the national criminal courts can prosecute individuals for certain individuated offences related to competition law.

Other national situations (such as for Ireland, Germany and Romania) regarding competition law sanctions were briefly analysed. It was observed that exactly those Member Stat which chose to criminalize, like the UK and Ireland, are also the countries that adopted a very soft approach in enforcing the criminal provisions; while Member States that only have one criminal offence related to national competition law (like Germany) also resulted in more effectively enforcing the criminal sanctions. Finally, I evidenced that a close collaboration among NCAs and national criminal authorities would be beneficial in order to achieve an appropriate enforcement of competition law that would be featured and completed by the criminal enforcement of the national criminal courts.

In the last chapter I provided the theoretical background to the criminalization of competition law and pointed out at the concrete problems which the introduction of criminal sanctions for individuals produces.

First of all, the motives that push for the criminalization were described and between the most important ones we can find a more effective general deterrence on individuals and an enhancement of competition law enforcement. More reasons also attained to the harmfulness of the anti-competitive conduct put in place by the undertakings which, basically, has the effect of depriving the consumers of the benefits they would enjoy in the presence of a fair competition. Furthermore, when considering the deterrence, the risks of over-deterrence and under-deterrence were pointed out and, thus, the difficulty of achieving an appropriate amount of deterrence without hindering the competition.

Another practical issue regards the selection of the anticompetitive behaviours which should be translated into autonomous criminal offences. When evaluating what kind of conducts should be made criminally prosecutable for the individuals, it must be kept in mind the complex and technical assessment which competition law implies and for which in many cases it will not be easy at all understanding if we are in presence of a competition law infringement or not. This is why, in the selection of the agreements to be criminalized, it must be considered that the criminal offence must be specific enough for reasons of legal certainty and, possibly, must not be too broad, so as to avoid the risk of catching legitimate behaviours in the application of the criminal provision.

The final part of the final chapter was dedicated at inquiring the relationship existing between administrative regimes and criminal due process. In fact, as it was showed in the pertinent paragraph, the rights of the accused come into play according to what kind of proceeding the defendant is involved in. This means that a criminal proceeding will grant the defendant a broader protection of his human rights in comparison with an administrative regime, which, somehow, reduces the prerogatives that are granted the prosecuted individuals in criminal proceedings. Accordingly, several elements are touched by the alternative situation of a criminal or an administrative proceeding, such as the rights to silence, the principle of ne bis in idem, the standard of proof, etc.

The picture that comes out of these chapters, in my opinion, clearly delineates the shapes of a criminalization of EU Competition Law in the future. This is evident because of all the reasons that were previously explored, but in particular, due to the general criminalizing

trend diffused around the world and to the necessity to stigmatize economic conducts that can only harm competition, markets and consumers. Accordingly, the translation of a cartel infringement into criminal offence, directly foreseen in the national criminal codes of the Member States, does seem likely to happen at some point.

Remembering the criminalization that already occurred for financial markets, it is only a matter of time before a new directive is issued on other aspects of competition law. The harmonisation of the national legislations on the matter, would not be as invasive of competencies as a (currently impossible) criminalization on the EU level would be: the Member States would only transpose the directive in their legal systems as they have been used to in all these years.

The concrete difficulties which could follow the criminalization (inquired in Chapter 4) do not constitute obstacles so significant to give up the project of criminalizing competition law. With an appropriate coordination of administrative regimes aimed at sanctioning undertakings, and, criminal proceedings focusing on punishing individuals, it is possible to achieve a more balanced and complete enforcement system. Introducing criminal sanctions for antitrust infringements would not only be beneficial for deterrence, but would also boost the competition and the social welfare coming out of fair competition.

Due to all the previous considerations, it is not a provocative statement to say that, during next years, we can certainly expect the introduction of criminal offences for Competition Law in the EU.

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- IRL, Competition Act, 2002
- IT, Civil Code
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List of Abbreviations

- CA= Competition Act
- EA= Enterprise Act
- ECJ= European Court of Justice
- EU= European Union
- ECHR= European Convention on Human Rights
- ECtHR= European Court of Human Rights
- FCO= Federal Cartel Office
- ICA= Italian Competition Authority
- MS= Member State
- NCA= National Competition Authority
- OFT= Office of Fair Trade
- TFEU= Treaty on Functioning of the TFEU
- TEU= Treaty on European Union