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THE COMPETITION LAW REVIEW

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July 2011

Editorial – Antitrust Leniency Programmes

*Christopher R Leslie**

Leniency programs represent the newest tool that antitrust enforcers can employ against price-fixing cartels. These programs offer cartel participants the opportunity to expose the cartel in exchange for immunity from criminal prosecution. Because price fixing is generally a self-concealing crime, leniency programs have proven critical to discovering and punishing cartels. Most developed countries have adopted some form of antitrust leniency.

All leniency policies, however, are not created equal. They can be structured in different ways, which can affect their efficacy. For example, while the United States adopted its first formal antitrust leniency policy in 1978, few firms took advantage of the program and it had a minimal effect on the discovery and deterrence of price-fixing activity. The second incarnation of the program, however, created a sea change in anti-cartel enforcement. In 1993, the Antitrust Division of the U.S. Department of Justice significantly revised its Corporate Leniency Policy and made it easier for confessing firms to qualify for amnesty. For example, the Division limited the discretion that it had possessed under its former policy as to whether to grant amnesty to a confessing firm. Under the revised program, firms that met certain criteria – for example, being the first to confess, not being a ringleader of the cartel, and confessing before government investigators had already developed their case against the cartel¹ – could automatically receive amnesty. Further, even those firms that did not qualify for amnesty (because another cartel member had confessed first) would have their criminal fines discounted by a factor based on the order in which they confessed. This more lenient leniency policy increased the number of cartel confessions from one per year under the old program to three per month under the revised policy.²

Today, there is no denying the success of leniency programs around the world. In the United States, the Corporate Leniency Policy has been the ‘most effective generator of cartel cases and is believed to be the most successful program in U.S. history for

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¹ Under the 1978 policy, amnesty was essentially precluded if the Antitrust Division had already begun an investigation into the suspected cartel. Under the new policy, the existence of an investigation did not automatically preclude leniency. CHRISTOPHER MASON, *THE ART OF THE STEAL* 251 (2003).

² James M. Griffin, Deputy Assistant Attorney Gen., Antitrust Div., Dep't of Justice, *The Modern Leniency Program After Ten Years: A Summary Overview of the Antitrust Division's Criminal Enforcement Program* (Aug. 12, 2003), available at <http://www.usdoj.gov/atr/public/speeches/201477.htm>.

detecting large commercial crimes³. The European experience with leniency has been similarly triumphant.

These past successes, however, should not leave us complacent about the possibilities for improving leniency programs further. As the American experience illustrates, the form and structure of a leniency program matter a great deal. Changing the qualifications and processes for obtaining leniency can generate more leniency applications, expose more cartels, and maximize deterrence of illegal price fixing.

The issues surrounding the structure and efficacy of leniency programs were explored at the Competition Law Scholars Forum held in September 2010 at City Law School, London. The conferees included enforcement officials, attorneys, academics, and students who have implemented, utilized, and/or studied various leniency policies. The wide-ranging discussion addressed many of the legal, economic, and moral issues that surround government leniency programs. The participants also pondered the morality of government actors granting immunity to one participant in a conspiracy while punishing other members in a conspiracy.

During the course of the day-long discussion, several themes emerged. First, despite the growing importance of leniency programs, the actual operation of these programs is somewhat opaque. For example, leniency programs succeed in generating confessions by rewarding cartel defectors with immunity from criminal prosecution and, in some jurisdictions, limits on private liability. In theory, this causes cartel partners to distrust each other and to race to the prosecutors' office in order to expose the cartel in exchange for leniency. Outside of the enforcement agencies themselves, however, not much is known about the dynamics and timing of the race. At the conference, Peter Willis, a partner at Dundas and Wilson, presented his research on EU leniency applications for which data was available regarding the timing of leniency applications. His data showed a surprising gap in time between the first leniency application by a participant in a given cartel and the second applicant from that same cartel. The sample suggested that the conventional story told by antitrust enforcers that there is a race to the prosecutor's office – sometimes won by a matter of minutes, hours or days – may not explain the confession dynamics in many cartels. The data is fascinating, but unfortunately cannot tell the whole story because the EU does not publish this information for all leniency applicants. Thus, it is unclear whether the sample is representative. If it is, this has broader implications for leniency theory and suggests that antitrust enforcers should consider whether leniency programs could be modified in order to increase the race dynamic.

Some level of clarity was provided by Sari Suurnakki, Deputy Head of Unit for the Cartels Directorate of the Directorate General for Competition of the European Commission. In her presentation, Deputy Suurnakki emphasized the importance of leniency programs in the overall fight against price-fixing cartels. She noted that

³ Gary R. Spratling, *Detection and Deterrence: Rewarding Informants for Reporting Violations*, 69 GEO. WASH. L. REV. 798, 799 (2001).

leniency programs were responsible for a significant increase in the number of cartels prosecuted by the European Commission. For example, the five-year period from 2005 through 2009 saw three times the number of cartel cases as the equivalent five-year period a decade before. Deputy Suurnakki explained what was expected of leniency applicants, namely that they provide all available evidence and answer enforcers' questions; that they not destroy, falsify, or conceal evidence; that they end all involvement in the cartel; and that they not disclose their application. It is this final requirement of nondisclosure that creates some of the issues we have today of not being able to properly study leniency programs. Deputy Suurnakki also noted the confidentiality of leniency applications and the rules designed to protect that confidentiality, such as the giving of oral statements instead of written documents that could be discovered in subsequent litigation, especially in the United States with its broad discovery rules. In my mind, this creates a tension between the desire to protect the individual leniency applicant and the desire to improve the effectiveness of leniency programs writ large. While cartel investigations need to be kept confidential so as not to alert cartel participants who may destroy evidence, after the cartel has been exposed, excessive secrecy can make it harder to hold the lawbreakers accountable and to study the operations of anti-cartel agencies.

A second theme that emerged at the conference is that leniency programs are but one part of overall anti-cartel policy. Leniency programs should not be created or modified without appreciating the other moving parts of an antitrust enforcement regime. For example, leniency programs work in tandem with government penalties. As the form and amount of antitrust penalties change, so might the configuration of the optimal leniency program.⁴ Leniency policies do not exist in isolation. How a jurisdiction structures its leniency program could affect how it should craft other components of its overall antitrust policy, and vice versa.

The two articles in this issue of the *Competition Law Review* address different aspects of the theme. In her article, Professor Caroline Cauffman of the University of Maastricht studies the relationship between leniency programs and private damages actions. Both enforcement mechanisms serve a deterrent function, but the latter also provide compensation to the victims of cartel overcharges. However, private damages actions could potentially reduce the effectiveness of leniency programs. Professor Cauffman examines ways to reconcile these two components of anti-cartel enforcement efforts.

In our second article, Florence Thépot examines the connection between corporate leniency and individual liability for price fixing. Discussing the economic theory of principal-agent relationships, Ms. Thépot explores how programs that allow for individuals within a cartel to obtain leniency can help destabilize cartels. Moreover, she demonstrates that this destabilizing effect exists even if nobody actually applies for individual leniency.

⁴ Christopher R. Leslie, *Cartels, Agency Costs, and Finding Virtue in Faithless Agents*, 49 WILLIAM & MARY LAW REVIEW 1621 (2008).

These papers are also relevant to the third theme that arose during the conference discussions: how can antitrust enforcement agencies learn lessons from other jurisdictions and how can comparative scholarship inform antitrust leniency policies? While many jurisdictions have adopted antitrust leniency programs, the various programs in operation around the world differ significantly. While the American leniency program has proven successful, is the U.S. experience transferable to other countries? After all, the overall makeup of the American antitrust regime is distinctive. For example, while the United States criminalizes price fixing, other nations do not. While the United States imprisons convicted price fixers, most nations, even those that criminalize price fixing, do not; they rely instead on monetary penalties. And some countries have joint and several liability for price fixing; the United States does not.⁵

Because competition law regimes vary significantly across jurisdictions, the question remains whether these differences mean that the optimal leniency program in one jurisdiction may be suboptimal in another. The answer to this question is important, but requires more comparative work. For example, scholars could compare the effectiveness of leniency programs in those jurisdictions that offer both corporate and individual leniency policies with those that provide only the former. But pursuit of this research agenda requires more transparency, which, as noted above, is sometimes lacking. It is impossible to study which overall antitrust regime creates a more effective race to the prosecutors' office if scholars have insufficient data on the dependent variable, the race itself.

The fourth, and final, theme that I discerned from the day's dialogue is the importance of coordination or harmonization among leniency programs. Depending on the scope of a cartel, a participating firm could seek leniency in one jurisdiction and conceivably open itself up to antitrust liability in dozens of other jurisdictions. This possibility could dissuade a price-fixing firm from confessing in any jurisdiction, which would result in a harmful cartel continuing unabated. Some form of leniency harmonization among jurisdictions could remove this disincentive to cartel defection. Competition authorities already engage in trans-border cooperation regarding enforcement, such as coordination on dawn raids against suspected cartel members. Perhaps there should be greater coordination regarding leniency as well. For example, enforcement agencies could consider the possibility of one-stop leniency, in which the first firm to confess to one centralized body receives leniency in any participating jurisdictions. While conceptually simple, such an approach raises many complicated questions, including issues of preemption, what quantum of evidence and continuing cooperation are necessary, and who would have authority to determine whether a leniency applicant has violated its obligations such that leniency should be revoked. Most states want greater cooperation but none wants to cede its sovereignty.

Antitrust officials from different jurisdictions have made great strides in cooperating in the fight against international cartels. The inclusion of scholars in this transnational

⁵ *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981).

discussion of antitrust leniency coordination could improve the outcomes of these harmonization efforts. But this, again, requires greater transparency and communication between antitrust enforcement officials, attorneys, and scholars who study leniency programs. The conference demonstrated the need to continue research and discussion of all aspects of antitrust leniency programs, including more transborder cooperation.

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The Interaction of Leniency Programmes and Actions for Damages

*Caroline Cauffman**

Although leniency programmes and damages actions, at least to a certain extent, serve the same purpose of increasing compliance with the competition rules, an increasing number of damages actions risk undermining national and EU leniency programmes, because the risk of follow-on damages actions may discourage potential leniency applicants from coming forward. To increase the successful co-existence of leniency programmes and damages actions, the law can interfere at two stages: it can prevent disclosure of leniency applications and it can decrease the risk or the amount of damages to be paid by leniency recipients. This contribution will explain the current rules on these matters and analyse a number of proposals for reform. The analysis will result in a suggestion to introduce at EU level a regime to improve the procedural position of the leniency recipient in proceedings for cartel damages based on the Hungarian model.

**I. LENIENCY AND DAMAGES:
CONFLICTING MEASURES PURSUING THE SAME AIM?**

Detection and punishment of cartels has long been a difficult endeavour for EU and national competition authorities.¹ Aware of the illegal nature of cartels and the severe penalties applicable to the undertakings involved in these serious infringements of competition law, cartelists took care not to disclose their illegal activities. In an attempt to break up these clandestine bands of colluders, the Commission, inspired by US antitrust law, introduced in 1996 a leniency programme,² rewarding undertakings which provide the Commission with evidence leading to the detection and punishment of cartels with immunity from or reduction of fines. The aim of the leniency programmes is thus to increase compliance with the competition rules by creating distrust between the cartelists and increasing the risk of detection.³ After a slow start,⁴ and a revision in 2002,⁵ the EU leniency programme proved to be successful, leading to a significant

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¹ See e.g. Opinion Adv. Gen Mazák in *Pfleiderer AG v Bundeskartellamt*, Case C-360-09, www.curia.eu, n° 31; Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg Portland and Others v Commission* [2004] ECR I-123, n° 55-57.

² Commission notice on the non-imposition or reduction of fines in cartel cases, OJ 1996, C207/4-6.

³ A Caruso, 'Leniency Programs and Protection of Confidentiality: The Experience of the European Commission', (2010) *Journal of European Competition Law & Practice* 454; N Zingales, 'European and American Leniency Programmes: Two Models towards Convergence?', (2008) 5(1) *Competition Law Review* 6.

⁴ V Van Barlingen, 'The European Commission's Leniency Notice after one year of operation' (2003) *EC Competition Policy Newsletter*, no. 2; A Caruso, 'Leniency Programs and Protection of Confidentiality: The Experience of the European Commission', (2010) *Journal of European Competition Law & Practice* 455.

⁵ Commission notice on immunity from fines and reduction of fines in cartel cases, OJ 2002, C45/3-5.

increase in the number of discovered cartels⁶ and gradually national competition authorities followed the Commission's example and introduced their own leniency programmes. At present the EU operates the third edition of its leniency programme, introduced in 2006,⁷ and 26 of the 27 member states introduced their own leniency programmes which are to varying degrees modelled on the ECN Model Leniency programme.⁸

Increasing compliance with the competition rules is also one of the purposes of the attempts to increase the number of damages actions for infringements of competition law. This purpose was overtly present in *Courage* where the Court of Justice held that:

‘the existence of (a right to damages) strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community’.⁹

It was also stressed in the Commission's Green Paper on private enforcement. Indeed, according to the Green Paper, both public and private enforcement:

‘are part of a common enforcement system and serve the same aims: to deter anti-competitive practices forbidden by antitrust law and to protect firms and consumers from these practices and any damages caused by them. Private as well as public enforcement of antitrust law is an important tool to create and sustain a competitive economy’.¹⁰

The Commission recognised that damages actions for infringements of antitrust law also serve to compensate those who have suffered a loss as a consequence of anti-competitive behaviour and that this is fundamental to the idea of damages actions, but it seemed to find it equally important that damages actions have a deterrent effect and serve:

‘to ensure the full effectiveness of the antitrust rules ... by discouraging anti-competitive behaviour, thus contributing significantly to the maintenance of effective competition in the Community’.¹¹

⁶ See the evolution of the number of cartel cases decided by the Commission from 10 over the period 1995-1999, to 30 over the period 2000-2004, 33 over the period 2005-2009 and 7 in 2010, <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf>.

⁷ Commission notice on immunity from fines and reduction of fines in cartel cases, OJ 2006, C298/17.

⁸ A Caruso, ‘Leniency Programs and Protection of Confidentiality: The Experience of the European Commission’, (2010) *Journal of European Competition Law & Practice* 456. See further *infra*, II, B, 1.

⁹ Case C-453/99, *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others*, [2001] ECR I-6297.

¹⁰ Green Paper - Damages actions for breach of the EC antitrust rules COM(2005) 672, 19 December 2005, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0672:FIN:EN:PDF>, (hereinafter: Green paper), 3.

¹¹ Green Paper, 3 and 4.

In its White Paper the Commission emphasises – probably influenced by the responses to its Green Paper - full compensation of the victims of antitrust infringements as the primary purpose of damages actions. Nevertheless, the enforcement idea has not completely disappeared. The Commission indeed points out that more effective compensatory mechanisms will increase detection of competition law infringements as well as the likeliness that infringers will be held liable. Better compensatory mechanisms will therefore have an inherently beneficial effect in terms of compliance with the competition rules and deterrence of future infringements.¹²

Although leniency and damages actions thus, at least to a certain extent, serve the *same purpose* of increasing compliance with the competition rules, it has been argued that an increasing number of damages actions may *undermine* leniency programmes.¹³ Indeed, a leniency application is a confession by an undertaking of having participated in an alleged cartel, which may result in immunity or reduction of fines, but will, at present, normally not protect the leniency applicant from the civil law consequences of his participation in an infringement of Article 101 TFEU.¹⁴ If the fact that a leniency application is made or the content thereof is communicated to cartel victims, this will enable them to more easily prove the cartel infringement by the leniency applicant and it will encourage them to actually bring claims for damages against the leniency applicant. Often, even those who suffered loss as a result of overpricing by other cartel members may successfully claim damages from the leniency applicant. Until recently the risk of damages claims against a leniency applicant was limited, given the ‘total underdevelopment’¹⁵ of damages claims for infringements of competition law in Europe. However, since the recognition by the Court of Justice of the right of any individual to obtain compensation for damage suffered as a result of an infringement of the EU competition rules¹⁶ and the active promotion of private enforcement of competition law by the European Commission, this risk is increasing continuously.¹⁷ This may discourage cartel participants from applying for leniency, which would significantly impede the discovery and punishment of cartels, which would in turn lead to a lower degree of compensation of cartel damage. The question arises as to whether

¹² White Paper on Damages Actions for Breach of the EC antitrust rules, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0165:FIN:EN:PDF>, n° 2.9; Commission staff working paper accompanying the White paper, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2008:0404:FIN:EN:PDF> (hereinafter: White Paper).

¹³ C Hodges, ‘Competition enforcement, regulation and civil justice: what is the case?’, (2006) 43(5) *CMLRev* 1390.

¹⁴ Commission notice on immunity from fines and reduction of fines in cartel cases OJ C 298, 8 December 2006, p. 17 (hereinafter: Leniency Notice), n° 39.

¹⁵ Ashurst, *Study on the conditions of claims for damages in case of claims for damages of EC Competition rules. Comparative report*, http://ec.europa.eu/comm/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf, 1.

¹⁶ Case C-453/99, *Courage v Crehan*, [2001] ECR I-6297; Joined cases C-295/04, C-297/04 and C-298/04 *Vincenzo Manfredi and others v Lloyd Adriatico Assicurazioni SpA and others*, [2006] ECR I-6619.

¹⁷ See e.g. A Riley, ‘The Modernization of EU Anti-cartel Enforcement: Will the Commission Grasp the Opportunity?’, (2010) *ECLR* 195.

and if so, what kind of measures should be taken to prevent the increasing number of damages claims from undermining the leniency policy.

To prevent damages actions from having a discouraging effect on potential leniency applicants (or at least minimise the risk of damages actions having such effect) the law can, it seems, intervene at two stages. It can prevent disclosure of leniency applications to (potential) cartel victims and/or it can reduce the amount of damages to be paid by leniency applicants.

Hereafter, I will first discuss the current rules on the disclosure of leniency documents to (alleged) cartel victims and those on the impact of leniency on the amount of damages to be paid by the leniency applicant. Next, I will discuss a number of proposals to better align leniency programmes with damages actions for infringements of competition law and identify what is in my opinion the best way to achieve this aim. The contribution will end with a summarising conclusion.

II. CURRENT RULES ON DISCLOSURE OF LENIENCY APPLICATIONS TO POTENTIAL CARTEL VICTIMS

A. Disclosure of leniency applications made to the Commission

1. Uncertainty as to disclosure of leniency documents held by the Commission

(a) Uncertainty as to disclosure to EU citizens and residents on the basis of the Transparency Regulation

EU citizens and those residing in the EU can, in principle, have access to the documents held by the Commission on the basis of Article 15(3) TFEU (ex Art 255 EC) and the Transparency Regulation (Regulation 1049/2001). Persons making an application for access under this Regulation do not need to give reasons for their requests. The Regulation does, however, in Article 4 contain certain exceptions to the principle of transparency. Article 4(1) of the Regulation provides for an absolute bar to disclosure where disclosure would undermine the protection of, amongst others, the public interest as regards the financial, monetary or economic policy of the Community or a Member State. Where disclosure would undermine the protection of commercial interests of a natural or legal person, or the purpose of inspections, investigations and audits, disclosure shall be refused unless there is an overriding public interest in disclosure (Art 4(2)). Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure (Art 4(3)). As regards third party documents the institution needs to consult the third party with a view to assessing whether an exception to the right to have access is applicable unless it is clear that the document shall or shall not be disclosed (Art 4(4)).

The applicability of Regulation 1049/2001 on competition law proceedings has been confirmed by the General Court in *Technische Glaswerke Ilmenau*.¹⁸

In its Leniency Notice the Commission recognises the application of Regulation 1049/2001 but considers that:

‘normally public disclosure of documents and written or recorded statements received in the context of this notice would undermine certain public or private interests, for example the protection of the purpose of inspections and investigations, within the meaning of Article 4 of Regulation (EC) No 1049/2001, even after the decision has been taken’.¹⁹

According to the Commission potential leniency applicants might be dissuaded from cooperating with the Commission under the Leniency Notice if this could impair their position in civil proceedings, as compared to companies which do not cooperate. Such undesirable effect would significantly harm the public interest in ensuring effective public enforcement of Article 101 TFEU in cartel cases and thus its subsequent or parallel effective private enforcement.²⁰

Even where alleged cartel victims rely on the Transparency Regulation to seek access to documents in the Commission’s file which are not obtained in the context of leniency, the Commission is reluctant to grant the requested access. On 6 December 2006, a company who was refused access to five documents referred to by the Commission in its infringement decision and not obtained in the context of leniency lodged a complaint with the European Ombudsman. The Commission argued that disclosure of the documents in question would undermine the protection of the purpose of the investigation and the protection of commercial interests.

As regards the Commission’s argument that disclosure would undermine the protection of the purpose of the investigation, the Ombudsman pointed out that the risk of a protected interest being undermined must be reasonably foreseeable and not purely hypothetical and that any refusal to grant access must clearly and precisely explain the precise manner in which disclosure would effectively undermine the protected interest. The Ombudsman referred, in this respect, to *JT’s Corporation*²¹ and *Verein für Konsumenteninformation*²² where the Court of First Instance rejected as insufficient an assessment of documents by reference to categories, rather than on the basis of the

¹⁸ Case T-237/02, *Technische Glaswerke Ilmenau GmbH v Commission of the European Communities* [2006] ECR II-5131. See also Opinion AG Kokott in Case T-139/07, *European Commission v Technische Glaswerke Ilmenau GmbH*, www.curia.eu, n° 40; A Caruso, ‘Leniency Programs and Protection of Confidentiality: The Experience of the European Commission’, (2010) *Journal of European Competition Law & Practice* 466; Decision of the European Ombudsman closing his inquiry into complaint 3699/2006/ELB against the European Commission, www.ombudsman.europa.eu.

¹⁹ N° 40.

²⁰ Leniency Notice, n° 6.

²¹ Case T-123/99, *JT’s Corporation v Commission* [2000] ECR II-3269, n° 46.

²² Case T-2/03, *Verein für Konsumenteninformation v Commission* [2005] ECR II-1121, n° 73.

actual information contained in those documents. The Ombudsman noted that the Commission had not put forward any detailed arguments which take into account the specific content of the documents in order to show that public disclosure of the documents requested by the complainants would undermine the purpose of any future investigation, and if so, whether there is no overriding public interest in disclosure. The Commission should have weighed these interests against each other and when doing so, it should have distinguished between three categories of documents: documents voluntarily submitted to the Commission in the framework of a leniency programme, documents obtained following a request from the Commission in accordance with Article 18 Regulation 1/2003 and documents obtained following an inspection carried out by the Commission in accordance with Article 20 Regulation 1/2003. While the Ombudsman did not exclude the possibility that, in order not to compromise the communication of information by undertakings applying for leniency (especially where full leniency is concerned) or answering to Article 18 requests for information, access to information obtained via these means could be refused, the Commission's powers to gather information during dawn raids would not be compromised when afterwards access to these documents were granted.

As regards the Commission's argument that disclosure of the requested documents would undermine commercial interests, the Ombudsman recognised that each document clearly contained commercially sensitive information and that public disclosure of any of these documents would damage the legitimate commercial interests of third parties. The Ombudsman, however, pointed out that, even if a document contains commercially sensitive information, it is incumbent upon the institution holding that document, to evaluate, whether there is an overriding public interest in that document's disclosure. Referring to the Commission's Working Paper accompanying the White Paper on Actions for Damages for breach of EC antitrust rules and the Court of Justice's decision in *Courage*, the Ombudsman considered that the claimant's action for damages also served a public interest. In those circumstances, the Commission should, in the eyes of the Ombudsman, have ascertained whether that public interest was overriding. The Ombudsman pointed out that the Commission should in this respect have evaluated whether the documents in question did actually contain information which might, generally, be useful in any action for damages before national courts (e.g. information relating to damage caused to third parties, and to a causal link between the infringement and the damage). The Ombudsman found that it should also be taken into consideration whether the national court could effectively request access to the documents in question, pursuant to Article 15 Regulation 1/2003. In this respect, the Commission should have considered whether it had already made or could make the national court aware that it held documents which might be relevant for the proceedings before the said court, in order thereby to enable the national court to exercise its right to request copies of such documents.

The Commission did not agree with the Ombudsman that there was in the case at hand a public interest in the disclosure of the requested information. The Commission therefore did not consider it necessary to carry out the weighing of the interest to be

protected against the public interest in non-disclosure. Nevertheless, the Commission did follow the Ombudsman's advice and carried out a full analysis to show that the public interest in disclosure would not override the exception relating to the need to protect commercial interests, set out in Article 4(2) Regulation 1049/2001. As it is sufficient that there is one ground to refuse access to the documents in question, the Ombudsman did not consider it necessary for the Commission to also weigh the interest in public disclosure against the exception relating to the protection of the purpose of an investigation. The Ombudsman therefore concluded that the Commission accepted the Ombudsman's draft recommendation and closed the case.²³

At present, a case is pending before the General Court which deals with a request made under Regulation 1049/2001 for access to documents and/or information submitted by leniency applicants and/or related information.²⁴ In this case, the applicant (CDC Hydrogene Peroxide Cartel Damage Claims) complains about infringement of Article 4(2) Regulation 1049/2001 and asserts that the Commission's refusal of access to the contents of the Commission's case-file:

'is inconsistent with the principles of law of effective compensation for infringements of EC competition law, as the interest of the injured parties in the details of the infringement is to be valued more highly than the interest of the undertakings in not disclosing to the public the details of the infringement alleged by the Commission and the scope of its cooperation with the Commission within the framework of the leniency notice'.²⁵

Some indications of the General Court's and the Court of Justice's thinking on these issues can be derived from cases dealing with the application of Regulation 1049/2001 in merger and state aid cases.

In two cases²⁶ dealing with requests for disclosure of documents acquired in a merger investigation, the General Court stated that, in order to refuse access to documents on

²³ Decision of the European Ombudsman closing his inquiry into complaint 3699/2006/ELB against the European Commission, www.ombudsman.europa.eu.

²⁴ Action brought on 15 August 2008, *CDC Hydrogene Peroxide v Commission* (Case T-437/08), OJ 2008, C313/48; A Caruso, 'Leniency Programs and Protection of Confidentiality: The Experience of the European Commission', (2010) *Journal of European Competition Law & Practice* 468. A similar case was removed after the applicant reached a settlement with the cartelists (Order of the General Court in Case T-399/07, OJ 2011 C80/34).

²⁵ Action brought on 15 August 2008, *CDC Hydrogene Peroxide v Commission* (Case T-437/08), OJ 2008, C313/48.

²⁶ Case T-237/05, *Editions Jacob v Commission*, www.curia.eu; Case T-111/07, *Agrofert Holding v Commission*, www.curia.eu. Relying on *Technische Glaswerke Ilmenau*, the Commission applied for the suspension of the General Court's decision in Case T-237/05. The application was refused on the ground that the alleged legal uncertainty created by a later decision of the CJEU in another case, which could be given an interpretation diverging from the decision of the General Court would risk to deny the principle of the non-suspending character of the appeal against a decision of the General Court. Moreover, although the *fumus boni juris* does have an impact on the condition of urgency, the applicant would still need to prove a serious and irreparable harm. The Commission fails to prove this as it can still refuse access to a specific document, if it considers this necessary to protect the commercial interests of the parties involved in a merger investigation. The mere possibility that Editions Jacob would bring an action against the Commission if it refused access to the

the ground that disclosure of such documents would undermine the protection of commercial interests of a natural or legal person, the Commission needs to verify not only whether the documents in question come within the scope of this exception but also whether it is reasonably foreseeable that disclosure of those documents will specifically and actually (so not purely hypothetically) harm the interest protected and whether there is no overriding public interest in disclosure. That concrete examination must, moreover, be carried out in respect of each document referred to in the request for access and it must be apparent from the decision. The General Court recognised that it follows from case-law that a concrete, individual examination of each document requested may not be necessary where, due to the particular circumstances of the individual case, it is obvious that access must be refused or, on the contrary, granted. Such could be the case, *inter alia*, if certain documents were either, manifestly covered in their entirety by an exception to the right of access or, conversely, manifestly accessible in their entirety, or, finally, had already been the subject of a concrete, individual assessment by the Commission in similar circumstances. According to the General Court, it cannot, however, be accepted that, with regard to mergers, documents sent to the Commission are to be regarded, in their entirety, as being manifestly covered by the exception relating to the protection of the commercial interests of the notifying parties and of third parties. The same applies *mutatis mutandis* to the refusal of access on the ground that such access would undermine the protection of the purpose of inspections, investigations and audits, and that there would be no overriding public interest in disclosure of the document concerned. The General Court found that, in the cases at hand, it was not apparent from the grounds of the Commission's decision that the Commission carried out a concrete, individual examination of the documents requested in order to refuse their disclosure. The Commission appealed both judgments and might obtain an annulment of the General Court's decision as the Court of Justice seems to be more responsive to the use of, be it rebuttable, presumptions of inaccessibility.

In *Technische Glaswerke Ilmenau* the Grand Chamber of the Court of Justice in relation to a case dealing with access to the file in a procedure for reviewing state aid indeed held that, although

‘53 It is true that, in order to justify refusal of access to a document the disclosure of which has been requested, it is not sufficient, in principle, for that document to fall within an activity mentioned in Article 4(2) of Regulation No 1049/2001. The institution concerned must also supply explanations as to how access to that document could specifically and effectively undermine the interest protected by an exception laid down in that article (Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco v Council* [2008] ECR I-4723, paragraph 49).

54 ... the Court has acknowledged that it is, in principle, open to the Community institution to base its decisions in that regard on general presumptions which apply

requested document does not constitute a serious and irreparable harm, see Case C-404/10 P-R, www.curia.eu.

to certain categories of documents, as considerations of a generally similar kind are likely to apply to requests for disclosure relating to documents of the same nature (*Sweden and Turco*, paragraph 50).²⁷

The Court of Justice added that, as regards procedures for reviewing State aid, such general presumptions may arise from Regulation 659/1999 and from the case-law concerning the right to consult documents on the Commission's administrative file. Where interested parties, except for the Member State responsible for granting the aid, do not have a right under the procedure for reviewing State aid to consult the documents on the Commission's administrative file, account must be taken of that fact for the purposes of interpreting the exception laid down by Article 4(2), third indent Regulation 1049/2001. Whatever the legal basis on which it is granted, access to the file enables the interested parties to obtain all the observations and documents submitted to the Commission, and, where appropriate, adopt a position on those matters in their own observations, which is likely to modify the nature of such a procedure.²⁸ In the view of the Court of Justice, general presumption do not, however, exclude the right of the interested party to demonstrate that a given document disclosure of which has been requested is not covered by such a presumption, or that there is a higher public interest justifying the disclosure of the document concerned by virtue of Article 4(2) Regulation 1049/2001.²⁹

Based on *Technische Glaswerke Ilmenau* it has been argued that, if documents are subject to a specific regime of restriction of access, such as leniency documents, this should be taken into account for the application of the Transparency Regulation and that this may lead to a general, rebuttable presumption of protection of confidentiality.³⁰

The Court's decision in *Pfleiderer* concerned access to documents submitted to an NCA. Nevertheless, it may also have an impact on access to documents submitted to the Commission in the course of a leniency procedure before the Commission. The Court stated in *Pfleiderer* that:

'(t)he provisions of European Union law on cartels, and in particular Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 101 TFEU and 102 TFEU, must be interpreted as not precluding a person who has been adversely affected by an infringement of European Union competition law and is seeking to obtain damages from being granted access to documents relating to a leniency procedure involving the perpetrator of that infringement'.³¹

²⁷ Case C-139/07 P, *European Commission v Technische Glaswerke Ilmenau*, www.curia.eu.

²⁸ Case C-139/07 P, n° 55-59.

²⁹ Case C-139/07 P, n° 62.

³⁰ A Caruso, 'Leniency Programs and Protection of Confidentiality: The Experience of the European Commission', (2010) *Journal of European Competition Law & Practice* 468.

³¹ Case C-360/09, *Pfleiderer AG v Commission*, www.curia.eu, n° 33.

This seems to preclude the application by the Commission of a hard and fast rule which would refuse allegedly injured parties all access to documents submitted by a leniency applicant. The Court's decision in *Pfleiderer* does not, however, seem inconsistent with the Commission's statement in its Leniency Notice that

‘normally public disclosure of documents and written or recorded statements received in the context of this notice would undermine certain public or private interests ... within the meaning of Article 4 of Regulation (EC) No 1049/2001, even after the decision has been taken’.³²

Given the Court's decision in *Technische Glaswerke Ilmenau* it seems even not precluded that the Commission would use a presumption that access by allegedly injured parties to documents submitted by a leniency applicant undermines public or private interests. It seems, however, that such presumption would need to be rebuttable, meaning that the allegedly injured party must be given the right to prove that on weighing the interests protected by EU law taking into account all elements relevant to the case³³ the presumption is rebutted and it must be given access to the requested leniency documents. These are, however, only speculations. In order to know the Court of Justice's vision on this issue, its decision in CDC is to be awaited.

(b) Limited access to the file by complainants in the public procedure

The complainant's access to the file is limited to a non-confidential version of the statement of objections. The Leniency Notice explicitly states that other parties than the addressees of the statement of objections will not be granted access to corporate statements, but from the moment when the leniency applicant discloses to third parties the content thereof.³⁴ The non-confidential version of the statement of objections will therefore normally contain no references to corporate statements and in fact references to pre-existing documents submitted by the leniency applicant will be excluded as well.³⁵

In settlement procedures the complainant's access to file is more limited. He will only be informed in writing of the nature and the subject matter of the procedure.³⁶

(c) Uncertainty as to disclosure at the request of national Courts

Article 10 EC (now Art 10 TEU), which obliges the Member States to facilitate the achievement of the Community's tasks, has been interpreted by the Court of Justice as

³² N° 40.

³³ Compare Case C-360/09, n° 30 et seq.

³⁴ N° 33.

³⁵ A Caruso, ‘Leniency Programs and Protection of Confidentiality: The Experience of the European Commission’, (2010) *Journal of European Competition Law & Practice* 464.

³⁶ Art. 6 Commission Regulation 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, [2004] OJ L123/18, as amended by Art 1(2) Regulation 662/2008; A Caruso, ‘Leniency Programs and Protection of Confidentiality: The Experience of the European Commission’, (2010) *Journal of European Competition Law & Practice* 464.

imposing on the European institutions and the Member States mutual duties of loyal co-operation. Article 10 TEU thus implies that the Commission must assist national courts when they apply Community law.³⁷ For the purposes of the application of competition law this is confirmed by Article 15(1) Regulation 1/2003 which provides that national courts in proceedings for the application of (now) Article 101 and 102 TFEU may ask the Commission to transmit to them information in its possession. According to the Commission's Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC (now Articles 101 and 102 TFEU) a national court may for example ask the Commission for documents in its possession.³⁸

In transmitting information to national courts, the Commission has to uphold the guarantees given to natural and legal persons by Article 339 TFEU (ex Article 287 EC).³⁹ Article 339 TFEU prevents members, officials and other servants of the Commission from disclosing information covered by the obligation of professional secrecy. The information covered by professional secrecy may be both confidential information and business secrets. Business secrets are information of which not only disclosure to the public but also mere transmission to a person other than the one that provided the information might seriously harm the latter's interests.⁴⁰ The Commission also has to make sure that it safeguards its own functioning and independence.⁴¹ The Commission regards its assistance to national courts as part of its duty to defend the public interest. It has no intention to serve the private interests of the parties involved in the case pending before the national court.⁴² This statement, made in the Commission's Cooperation Notice is, however, not binding on the Court of Justice.

According to the Co-operation Notice, the combination of Articles 10 TEU and 339 TFEU does not lead to an absolute prohibition for the Commission to transmit information which is covered by the obligation of professional secrecy to national courts. The case law of the Community courts confirms that the duty of loyal co-operation requires the Commission to provide the national court with whatever information the latter asks for, even information covered by professional secrecy. However, in offering its co-operation to the national courts, the Commission may not in any circumstances undermine the guarantees laid down in Article 339 TFEU. Consequently, before transmitting information covered by professional secrecy to a

³⁷ Case C-2/88 *Imm., J.J. Zwartveld and others*, [1990] ECR I-3365, n° 16 to 22 and Case C-234/89, *Stergios Delimitis v Henninger Bräu AG* [1991] ECR I-935, n° 53.

³⁸ Commission notice on cooperation between the Commission and the Courts of the Member States, OJ C 101, 27 April 2004, (hereinafter: Co-operation Notice) n° 21.

³⁹ *Delimitis*, n° 53.

⁴⁰ Co-operation Notice, 23; Case T-353/94, *Postbank NV v Commission of the European Communities*, [1996] ECR II-921, 86 and 87 and Case 145/83, *Stanley George Adams v Commission of the European Communities*, [1985] ECR 3539, n° 34.

⁴¹ Green Paper, n° 77; *Zwartveld*, n° 10-11; *Postbank*, n° 93; Case C-275/00, *European Community, represented by the Commission of the European Communities v First NV and Franex NV*, [2002] ECR I-10943, 49.

⁴² Co-operation Notice, n° 19.

national court, the Commission will remind the court of its obligation under Community law to uphold the rights which Article 339 TFEU confers on natural and legal persons and it will ask the court whether it can and will guarantee the protection of confidential information and business secrets. If the national court cannot offer such guarantee, the Commission shall not transmit the information covered by professional secrecy to the national court.⁴³ Only when the national court has offered a guarantee that it will protect the confidential information and business secrets, will the Commission transmit the information requested, indicating those parts which are covered by professional secrecy and which parts are not and can therefore be disclosed.⁴⁴ There are further exceptions to the disclosure of information by the Commission to national courts. Particularly, the Commission may according to the case law of the Court of Justice in *Zwartveld*, *First and Franex* and *Postbank*, refuse to transmit information to national courts in exceptional circumstances where this is required by overriding reasons relating to the need to safeguard the interests of the Community or to avoid any interference with its functioning and independence, in particular by jeopardizing the accomplishment of the tasks entrusted to it.⁴⁵ Therefore, the Commission states, it will not transmit to national courts information voluntarily submitted by a leniency applicant without the consent of that applicant.⁴⁶ It can, however, be questioned whether the transmission of all information voluntarily submitted by a leniency applicant would indeed interfere with the functioning and independence of the Commission and whether no other measures could be taken to prevent this.⁴⁷

This is all the more the case now the Court of Justice recognised in its decision in *Pfleiderer*, which was - it has to be recognised - given in a case dealing with access to leniency documents received by a national competition authority under its national leniency programme, that:

‘The provisions of European Union law on cartels, and in particular Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 101 TFEU and 102 TFEU, must be interpreted as not precluding a person who has been adversely affected by an infringement of European Union competition law and is seeking to obtain damages from being granted access to documents relating to a leniency procedure involving the perpetrator of that infringement’.⁴⁸

⁴³ *Zwartveld*, n° 10 and 11 and *Postbank*, n° 93.

⁴⁴ Co-operation Notice, n° 25.

⁴⁵ *Zwartveld*, n° 10 and 11; *First and Franex*, n° 49 and *Postbank*, n° 93.

⁴⁶ Co-operation Notice, n° 23-26.

⁴⁷ Comp. European Parliament resolution of 26 March 2009 on the White Paper on damages actions for breach of the EC antitrust rules (2008/2154(INI)) <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2009-0187+0+DOC+XML+V0//EN>.

⁴⁸ *Pfleiderer*, n° 33.

Moreover, what about disclosure orders from courts outside the EU, in particular from US courts?⁴⁹ It seems that the Commission cannot easily be compelled to grant access to leniency applications in the course of US private antitrust proceedings. Although the US courts have not yet explicitly dealt with the question, the Commission will probably enjoy immunity from discovery as an agency of a foreign state (the European Union) within the meaning of 28 USC § 1602 *et seq.*⁵⁰ Even if the Commission would not be entitled to foreign sovereign immunity, it might invoke the law enforcement investigatory privilege, which is intended to safeguard the public interest in the integrity of on-going criminal or civil investigations by the government. Furthermore, the Commission could invoke the doctrine of international comity. The two last mentioned mechanisms, however, imply a balancing of the competing interests, which means that there is no guarantee that they will lead to a denial of production of documents.⁵¹ Whether individual Commission officials enjoy immunity is to be determined by the State Department,⁵² as an aspect of the President's responsibility for the conduct of foreign relations and recognition of foreign governments. The State Department is likely to grant immunity as far as the request for non-party discovery concerns information relating to acts taken in an official capacity or obtained in an official capacity.⁵³

(d) Publication of certain information in the final Commission decision finding an infringement of competition law

Article 30 Regulation 1/2003 orders the Commission to publish the names of the parties and the main content of the decision, including any penalties imposed. It shall, however, have regard to the legitimate interest of undertakings in the protection of their business secrets. In addition to this mandatory publication in the official journal the Commission voluntarily publishes a non-confidential version of the decision itself.⁵⁴

In its Leniency Notice the Commission states that it will, in order to explain the reason for the immunity or reduction of the fine, indicate in any infringement decision that an

⁴⁹ Although US discovery is to a large extent conducted between the parties and does not in principle require the intervention of the Court, I will discuss this issue here. Indeed, if one party refuses to disclose information it will, even in the US, be up to the Court to compel in whole or in part or refuse discovery.

⁵⁰ A Petrasincu, 'Discovery revisited – the impact of the US discovery rules on the European Commission's leniency programme', (2011) *ECLR* 362. Support for this position can be found in the fact that the Supreme Court qualified the proceeding before the European Commission as the proceeding of a foreign tribunal (*Intel v AMD*, 542 U.S. 241 (2004)) and in the fact that the Court in *Payment Card Interchange Fee*, 2010 U.S. Dist. Lexis 89275, fn. 10 (EDNY 2010) seems to hold that the Commission could in general invoke the act of state doctrine.

⁵¹ A Petrasincu, *ibid.*, 362-363. See Section II.A.2.

⁵² *Samantar*, 130 S. Ct. 2291.

⁵³ See for example the Statement of interest and suggestion of immunity of and by the United States of America in *Claudia Balcerio Giraldo et al. v Drummond Company, Inc. et al.*, see <http://uribe-georgetown.org/wp-content/uploads/2011/04/03.31.11%20Statement%20of%20Interest%20re%20Uribe.pdf>.

⁵⁴ A Caruso, 'Leniency Programs and Protection of Confidentiality: The Experience of the European Commission', (2010) *Journal of European Competition Law & Practice* 464.

undertaking cooperated with the Commission during its administrative procedure.⁵⁵ The final Commission decision even discloses the identity of the leniency applicant and contains a rather detailed description of his participation in the cartel.⁵⁶ This can harm the leniency applicant's position in follow-on actions for damages. In its Leniency Notice the Commission seems to accept this consequence, as it stated that:

‘the fact that an undertaking cooperated with the Commission during its administrative procedure will be indicated in any decision, so as to explain the reason for the immunity or reduction of the fine. The fact that immunity or reduction in respect of fines is granted cannot protect an undertaking from the civil law consequences of its participation in an infringement of Article 81 EC’.⁵⁷

Yet, in recent years, the Commission takes into account the confidentiality of the sources of its information when publishing the details of infringing conduct. Quotes of oral statements and other leniency submissions are in principle removed from the final public version of the Commission's infringement decisions.⁵⁸

In *Bank of Austria Creditanstalt AG* the General Court stated that the precursor of Article 30 Regulation 1/2003 (Art. 21 Regulation 17/62):

‘prohibits, besides the disclosure of business secrets, in particular the publication of information covered by the exceptions to the right of access to documents that are laid down in Article 4 of Regulation No 1049/2001 or information which is protected under other rules of secondary legislation, such as Regulation No 45/2001’.

The General Court, however, stated that this provision is not a bar to the publication of information with which the public has the right to be acquainted through the right of access to documents.⁵⁹

The Court's decision in the pending case on access to leniency documents on the basis of the Transparency Regulation will thus also have an impact on the Commission's right to refer to leniency documents in the published version of its infringement decisions.⁶⁰

⁵⁵ Leniency Notice, n° 39.

⁵⁶ Van Bael and Bellis, *Competition Law of the European Community*, Kluwer Law International, Alphen aan den Rijn, 2010, 1138.

⁵⁷ Leniency Notice, n° 39.

⁵⁸ A Caruso, ‘Leniency Programs and Protection of Confidentiality: The Experience of the European Commission’, (2010) *Journal of European Competition Law & Practice* 465.

⁵⁹ Case T-198/03, ECR 2006, II-1429. See also Case T-474/04, *Pergan Hilfsstoffe für industrielle Prozesse GmbH v Commission of the European Communities*, [2007] ECR II-4225.

⁶⁰ Cf. Section II.A.1.(a).

2. Uncertainty as to disclosure of leniency documents within the power of the leniency applicant or third parties

The leniency applicant is, once the statement of objections is issued,⁶¹ in principle free to voluntarily disclose leniency information to potential cartel victims, but he is unlikely to do so. Other cartelists could be easier to persuade to disclose leniency information. However, certain precautions are in place to prevent the disclosure by other cartelists of leniency information obtained through access to the file. While the protection of documents supplied by a leniency applicant is not a bar to their disclosure to other addressees of the statement of objections in order to safeguard their rights of defence in the procedure before the Commission, corporate statements enjoy a special protection. They are only accessible at the Commission's premises and normally on a single occasion following the formal notification of objections.⁶² Company representatives or legal counsel exercising their right of access to the corporate statements need to commit not to make any copy by mechanical or electronic means of any information in the corporate statement to which access is being granted. This protection is not extended to pre-existing documents, which are accessible according to the normal rules. All information obtained through access to file may, however, only be used for the purposes of judicial or administrative proceedings for the application of the Community competition rules at issue in the related administrative proceedings. The use of such information for a different purpose during the proceedings may be regarded as lack of cooperation within the meaning of points (12) and (27) of the Leniency Notice. Moreover, if any such use is made after the Commission has already adopted a prohibition decision, the Commission may, in any legal proceedings before the Community Courts, ask the Court to increase the fine in respect of the responsible undertaking. Should the information be used for a different purpose, at any point in time, with the involvement of an outside counsel, the Commission may report the incident to the bar of that counsel, with a view to disciplinary action.⁶³ Cartel victims can therefore practically not make use in civil procedures of leniency information from the Commission's file obtained through other cartelists' access to the file.

Before *Pfleiderer*, it could be argued that the national courts of the Member States, because of their duty of loyal cooperation with the EU, were not entitled to order the leniency applicant to disclose leniency information which the Commission intends to protect. Since *Pfleiderer*, the question arises whether the leniency applicant may be ordered to disclose leniency documents, at least under the conditions set out in that judgement.

⁶¹ Leniency Notice, n° 12.

⁶² Leniency Notice, n° 8.

⁶³ Leniency Notice, n° 7, 33-34; Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004, OJ 2005, C325/7 (hereinafter: Notice access to file), n° 48.

What about discovery ordered by US courts? Rule 26(b) Federal Rules of Civil Procedure appears to create a general presumption in favour of broad discoverability⁶⁴ and the Federal Rules of Civil Procedure do not provide for an exception for self-incriminating documents.⁶⁵ The power of the US federal courts to order the production of documents for use in US courts is not limited by foreign laws, including so-called blocking statutes that prohibit disclosure.⁶⁶ Moreover, discovery of documents between parties (R 34) applies to all documents the respondent has in his possession, custody or control, which includes the legal right to obtain the document on demand. Furthermore, discovery is not limited to the production of documents, but also includes depositions by oral examination or written questions of, for example, the management or employees of the leniency applicant (R 30-31), interrogatories served on the defendant (R 33) and requests for admission (R 36).⁶⁷ Even if the document containing the corporate statement is protected from disclosure, there may thus remain a duty to disclose its content. This is not to say that any motion to order discovery will be granted. There are limits to the right to discovery under the US Federal Rules of Civil Procedure. One of the limits which is particularly relevant to the discovery of corporate statements made to the Commission, is the principle of international comity, which refers to ‘the respect sovereign nations afford each other by limiting the reach of their laws’.⁶⁸ However, this principle allows the US courts a wide discretion. A list of factors that are to be taken into account in a comity analysis can be found in the Restatements (Third) of Foreign Relations Law of the United States and includes the importance of the information requested to the litigation and the extent to which compliance with the request would undermine important interests of the state where the information is located. The list of factors has been further elaborated by the US Department of Justice in its 1995 Antitrust Enforcement Guidelines for International Operations.⁶⁹ US Courts have been given plenty of occasions to apply this principle to

⁶⁴ SR Miller, K Nordlander & JC Owens, ‘U.S. Discovery of European Union and U.S. Leniency Applications and Other Confidential Investigatory Materials’, *CPI Antitrust Journal* March 2010(1) 5.

⁶⁵ R Grasso, ‘The E.U. Leniency Program and U.S. Civil Discovery Rules: a Fraternal Fight’, 29 *Mich. J. Int’l L* 2008, 586; K Nordlander, ‘Discovering discovery – US Discovery of EC Leniency Statements’, (2004) *ECLR* 648-649. See also SR Miller, K Nordlander & JC Owens, ‘U.S. Discovery of European Union and U.S. Leniency Applications and Other Confidential Investigatory Materials’, *CPI Antitrust Journal* March 2010(1) 5.

⁶⁶ *Société Nationale Industrielle Aerospatiale v U.S. Dist. Court for S. Dist. Iowa*, 482 U.S. 522,544, n. 29 (1987); R Grasso, ‘The E.U. Leniency Program and U.S. Civil Discovery Rules: a Fraternal Fight’, 29 *Mich. J. Int’l L* 2008, 583.

⁶⁷ R Grasso, ‘The E.U. Leniency Program and U.S. Civil Discovery Rules: a Fraternal Fight’, 29 *Mich. J. Int’l L* 2008, 583-584; K Nordlander, *op cit*, n 65, 658.

⁶⁸ *Hartford Fire Ins. Co. v California*, 509 US 764, 817 (1993) (Scalia, J., dissenting). Other doctrines that could be of use are the privilege law and the act of state doctrine, see further SR Miller, K Nordlander & JC Owens, ‘U.S. Discovery of European Union and U.S. Leniency Applications and Other Confidential Investigatory Materials’, *CPI Antitrust Journal* March 2010(1) 7-8.

⁶⁹ As far as request for information by administrative agencies is concerned there are two agreements between the US and the European Union dealing with the principle of comity: the 1991 Agreement between the Government of the United States of America and the Commission of the European Communities Regarding the Application of their Respective Competition Laws, OJ 1995, L95/47 and the 1998 Agreement Between the European Communities and the Government of the United States of America on the Application of

cases dealing with motions to order disclosure of leniency applications. They did not always reach the same result, but there is a trend not to order disclosure of EU leniency documents. Whereas the US District Court of Columbia in the *Vitamins Antitrust Litigation* granted a motion to compel disclosure,⁷⁰ the US District Court for the Northern District of California denied a motion to compel disclosure in the *Methionine Antitrust Litigation*⁷¹ and the *Rubber Chemicals Antitrust Litigation*.⁷² The latter approach has been followed in other cases.⁷³ In *Re Flat Glass Antitrust Litigation* the District Court of the Western District of Pennsylvania first granted discovery of a series of materials, including leniency submissions to the Commission and materials gathered through access to the file,⁷⁴ disregarding letters sent by the Commission's services aimed at a different result. After a formal intervention by the Commission as a party to the US proceedings, through a motion to reconsider the order, supported by a letter of the US Department of Justice and an official statement from the Director General of DG Comp, the parties entered into a consent order that substituted the original order with one that substantially reflected the Commission's demands.⁷⁵ In *Re Payment Card Interchange Memorandum Fee and Merchant Discount* the District Court of the Eastern District of New York refused to give an order for the disclosure of a statement of objections. The Court considered that the Commission's interest in confidentiality outweighs the plaintiff's interest in discovery.⁷⁶ It is to be awaited if this trend will change after *Pfleiderer*.⁷⁷

Rule 45 of the Federal Rules of Civil Procedure makes it possible to compel non-parties who are US nationals or residents or who are found within the US to disclose information by serving a subpoena on them and 28 U.S.C. § 1782 grants US federal district courts the power to order any person who resides or is found in a US district to give his testimony or statement or to produce a document or other thing for use in a

Positive Comity Principles in the Enforcement of the Competition Laws, OJ 1998, L 173/28. These agreements are however not binding on courts, see R. Grasso, o.c., 593-595.

⁷⁰ Misc. No. 99-197, Slip Copy, 2002 WL 34499542 (D.D.C.).

⁷¹ Misc. No. 99-197, Slip Copy, 2002 WL 34499542 (D.D.C.).

⁷² No. C04-1648 MJJ, 486 F.Supp.2d 1078, 2007-1 Trade Cases P 75,721.

⁷³ See e.g. In re Static Random Access Memory (SRAM) Antitrust Litigation, No. 07-01819, Doc. No. 624; SR Miller, K Nordlander & JC Owens, 'U.S. Discovery of European Union and U.S. Leniency Applications and Other Confidential Investigatory Materials', *CPI Antitrust Journal* March 2010(1) 12; A Caruso, 'Leniency Programs and Protection of Confidentiality: The Experience of the European Commission', (2010) *Journal of European Competition Law & Practice* 471.

⁷⁴ In re Flat Glass Antitrust Litigation, No. 08-180 (Doc. No. 185) (29 July 2009).

⁷⁵ SR Miller, K Nordlander & JC Owens, 'U.S. Discovery of European Union and U.S. Leniency Applications and Other Confidential Investigatory Materials', *CPI Antitrust Journal* March 2010(1) 14; A Caruso, 'Leniency Programs and Protection of Confidentiality: The Experience of the European Commission', (2010) *Journal of European Competition Law & Practice* 471.

⁷⁶ In Re Payment Card Interchange Memorandum Fee and Merchant Discount, 05-Md-1720, memorandum and order of 27 August 2010; A. Caruso, 'Leniency Programs and Protection of Confidentiality: The Experience of the European Commission', (2010) *Journal of European Competition Law & Practice* 472.

⁷⁷ Case C-360/09, www.curia.eu.

proceeding in a foreign or international tribunal. The tendency of US courts to refuse discovery of European leniency documents when the order is made on the basis of R 34 the Federal Rules of Civil procedure, could mean that that the risk that such documents will be discoverable under R45 or 28 U.S.C. § 1782 is limited as well.⁷⁸ However, this too could change after *Pfleiderer*.

To prevent the leniency applicant from being ordered by a court to disclose a copy of the corporate statement he submitted to the Commission in order to obtain leniency the Commission may, upon the applicant's request, accept that corporate statements be provided orally unless the applicant has already disclosed the content of the corporate statement to third parties. Oral corporate statements will be recorded and transcribed at the Commission's premises. In accordance with Article 19 Regulation 1/2003 and Articles 3 and 17 Regulation 773/2004, undertakings making oral corporate statements will be granted the opportunity to check the technical accuracy of the recording, which will be available at the Commission's premises and to correct the substance of their oral statements within a given time limit. Undertakings may waive these rights within the said time-limit, in which case the recording will, from that moment on, be deemed to have been approved. Following the explicit or implicit approval of the oral statement or the submission of any corrections to it, the undertaking shall listen to the recordings at the Commission's premises and check the accuracy of the transcript within a given time limit. Non-compliance with the last requirement may lead to the loss of any beneficial treatment under the Leniency Notice.⁷⁹ As the transcription of the oral statement would be an internal Commission document, it would, according to some sources, not be susceptible to disclosure in civil litigation.⁸⁰ However, this is not necessarily the case. It has been argued that, in England and Wales for example, the duty of disclosure applies to all documents which are or have been in a party's control, which is defined as including documents which that party 'has or has had a right to inspect', which arguably extends to the transcript of an oral statement which has been approved as accurate by the leniency applicant. It would, however, also be possible that disclosure could be denied on the grounds that it would expose the party to a penalty.⁸¹ The leniency applicant and/or a third party can obviously only disclose a copy of the corporate statement if he possesses one or at least has a right to obtain a copy of the transcript made by the Commission. A third party does not have a right to obtain such copy from the Commission. Given the Commission's intention to protect the confidentiality of the corporate statement, it will probably hold that the leniency applicant does not have such a right either. Given the Court of Justices decision in *Pfleiderer*, it seems, however, that the courts of the Member States' may at least under the conditions set out in that judgement order the leniency applicant to testify as to the content of his leniency

⁷⁸ Ibid.

⁷⁹ Leniency Notice, n° 32.

⁸⁰ For example Van Bael and Bellis, 1137.

⁸¹ C Kerse and N Khan, *EC Antitrust Procedure*, London, Sweet & Maxwell, 2005, § 7-064, p. 422, fn 26 referring to *British Leyland Motor Corp. v Wyatt* [1979] F.S.R. 583. Also P Roth & V Rose, *Bellamy & Child, European Community Law of Competition*, Oxford, Oxford University Press, 2008, n° 13.197, fn 983.

application or at least as to his participation in the cartel. *A fortiori*, courts of non-EU countries could order such testimonies.

B. Confidentiality of leniency applications made to the NCAs?

1. Model leniency programme

Most member states adopted leniency programmes based on the ECN Model leniency programme which was meant to contribute to a soft harmonisation of the existing leniency programmes and to facilitate the adoption of such programmes by the few NCAs which did not yet operate one.⁸² The Model leniency programme aims to guarantee the confidentiality of leniency applications by providing the possibility of oral applications. The language of the Model leniency programme is rather soft: ‘Upon the applicant’s request, the NCA may allow oral applications’.⁸³ The explanatory notes are worded stronger: ‘The ECN Model Programme allows for oral applications in all cases where this would appear to be justified and proportionate’. Pursuant to the explanatory notes ‘Oral applications are always justified and proportionate in cases where the Commission is particularly well placed to act under paragraph 14 of the Network Notice’. The Explanatory notes add, however, that some NCAs will accept oral applications without requiring the applicant to demonstrate that its request is justified and proportionate.⁸⁴ If oral application is permitted the statement may be provided orally and recorded in any form deemed appropriate by the NCA. The applicant will still need to provide the NCA with copies of all preexisting documentary evidence of the cartel.⁸⁵ No access to any records of the applicant’s oral statements will be granted before the NCA has issued its statement of objections to the parties.⁸⁶ Oral statements made under the present programme will only be exchanged between NCAs pursuant to Article 12 of Regulation No 1/2003 if the conditions set out in the Network Notice are met and provided that the protection against disclosure granted by the receiving NCA is equivalent to the one conferred by the transmitting NCA.⁸⁷

According to the Report on Assessment of the State of Convergence produced by the European Competition Network at the end of 2009, full leniency applications are accepted orally under nineteen leniency programmes. The Czech, Greek, Lithuanian, Polish and Portuguese programmes do not provide for oral applications. Seventeen programmes allow for summary applications to be submitted orally. The remaining programmes do not allow an oral procedure for summary applications either because

⁸² ECN Model Leniency Programme Explanatory Notes, http://ec.europa.eu/competition/ecn/model_leniency_en.pdf, n° 7.

⁸³ ECN Model Leniency Programme, n° 28.

⁸⁴ ECN Model Leniency Programme Explanatory Notes, n° 48.

⁸⁵ ECN Model Leniency Programme, n° 28.

⁸⁶ ECN Model Leniency Programme, n° 29.

⁸⁷ ECN Model Leniency Programme, n° 30.

summary applications are not available at all or they do not provide for the availability of oral submissions in such cases.⁸⁸

2. NCAs as enforcers of EU competition law

Although the national leniency rules normally do not distinguish between cases relating to infringements of Article 101 TFEU, possibly in conjunction with national competition law and cases which only concern infringements of national competition law, this distinction might be important. This was recognised by the *Amtsgericht* Bonn which lodged on 9 September 2009 a reference for a preliminary ruling with the Court of Justice as to whether:

‘the provisions of Community competition law - in particular Articles 11 and 12 of Regulation No 1/2003 and the second paragraph of Article 10 EC, in conjunction with Article 3(1)(g) EC - (are) to be interpreted as meaning that parties adversely affected by a cartel may not, for the purpose of bringing civil-law claims, be given access to leniency applications or to information and documents voluntarily provided in that connection by applicants for leniency which the national competition authority of a Member State has received, pursuant to a national leniency programme, within the framework of proceedings for the imposition of fines which are (also) intended to enforce Article 81 EC (now Article 101 TFEU)’.⁸⁹

Advocate General Mazák distinguishes in his opinion between corporate statements and preexisting documents. He finds that, where an NCA operates a leniency programme in order to ensure the effective application of Article 101 TFEU, parties adversely affected by a cartel may not, for the purpose of bringing civil-law claims, be given access to corporate statements.⁹⁰ Another opinion could, in his opinion, substantially reduce the attractiveness and thus the effectiveness of the authority’s leniency programme and in turn undermine the effective enforcement by that authority of Article 101 TFEU. The Advocate General recognises that the denial of such access may create obstacles to or hinder to some extent an allegedly injured party’s fundamental right to an effective remedy and a fair trial guaranteed by Article 47 in conjunction with Article 51(1) Charter of Fundamental Rights of the EU. He finds, however, that such interference with the allegedly injured party’s fundamental right is justified by the legitimate aim of ensuring the effective enforcement of Article 101 TFEU by NCAs and private interests in detecting and punishing cartels. According to the Advocate General, it would, however, run counter to the fundamental right to an effective remedy and a fair trial if the NCA would deny access to other preexisting

⁸⁸ http://ec.europa.eu/competition/ecn/model_leniency_programme.pdf, n° 62.

⁸⁹ Case C-360/09: Reference for a preliminary ruling from the *Amtsgericht* Bonn (Germany) lodged on 9 September 2009 — *Pfleiderer AG v Bundeskartellamt*, OJ 2009, C297/18.

⁹⁰ Described as ‘self-incriminating statements voluntarily provided by leniency applicants and in which the applicants effectively admit and describe to the authority their participation in an infringement of Article 101 TFEU’, Opinion AG Mazák in *Pfleiderer*, n° 48.

documents submitted by a leniency applicant in the course of a leniency procedure and which would assist parties allegedly adversely affected by a cartel in the establishment, for the purposes of a private action for damages, of the liability requirements (an illegal act in breach of Article 101 TFEU, damage to the victim and a causal link between the damage and the breach), at least as far as those documents do not contain any confidential business information.⁹¹

The Court of Justice did not follow the opinion of its Advocate General, but left more leeway to the national courts. According to the Court EU cartel law does not preclude a person who has been adversely affected by an infringement of EU competition law and is seeking to obtain damages from being granted access to documents relating to a leniency procedure involving the perpetrator of that infringement. The Court recognises that the effectiveness of leniency programmes could be compromised if documents relating to a leniency procedure were disclosed to persons wishing to bring an action for damages, but it stresses that it is settled case-law that any individual has the right to claim damages for loss caused to him by anticompetitive conduct. The Court also stresses that the principles of effectiveness and of equivalence need to be complied with and that the respective interests in favour of disclosure of the information and in favour of the protection of the information provided voluntarily by the leniency applicant need to be weighed. According to the Court, it is, however, for the national courts and tribunals on the basis of their national law, to determine the conditions under which access by a party adversely affected by an infringement of EU competition law and seeking to obtain damages to information voluntarily submitted by a leniency applicant must be permitted or refused by weighing the interests protected by European Union law.⁹²

3. NCAs as enforcers of national competition law

As the rules relating to leniency will often not be adopted by parliament, but will result from notices adopted by NCAs, they will normally not be able to set aside the rules of civil procedure which do result from acts of parliament. Whether Courts in the course of proceedings for damages for infringements of the competition rules may order an NCA to disclose leniency applications and whether an NCA may refuse to respond to such an order will depend on the rules of civil procedure (or more specific acts dealing with this issue).

The OFT, for example, states that it will firmly resist on public interest grounds, requests for disclosure of leniency material or the fact that leniency has been sought, where such requests are made in connection with private civil proceedings. But, where a court has made an order with which the OFT is bound to comply, it would – it states – ‘obviously’ discharge its duty to the court. It has, however, been argued that disclosure of leniency applications by the OFT might be refused on the grounds of

⁹¹ AG Mazák, Opinion in *Pfleiderer*, Case C-360/09, www.curia.eu, n° 48 *juncto* n° 21.

⁹² Case C-360/09, *Pfleiderer AG v Bundeskartellamt*, www.curia.eu, n° 26 *et seq.*

legal professional privilege⁹³ or on the ground of CPR 31.19 which provides for withholding disclosure and/or inspection on public interest grounds. The problem with CPR 31.19 would, however, be that it only applies to documents. It would not set aside CPR 22 which requires that in certain circumstances a statement of truth is given. On this basis even an oral leniency application might be revealed. Moreover, when an infringement decision is taken, the fact that a party to the proceedings has been granted leniency, together with the leniency information relied on by the OFT, will be apparent from the infringement decision. This will be notified to the parties and a non-confidential version will be published under the OFT's rules.⁹⁴ In addition, the OFT states that, in the course of the OFT's investigation, it may be necessary to disclose information provided by a leniency applicant to third party witnesses or to those suspected of direct involvement in the cartel.⁹⁵ When the OFT is conducting a criminal investigation it is required to disclose any material to which it wishes to refer or allude when interviewing suspects.⁹⁶ The fact that a party has applied for leniency, together with the information it has submitted and on which the OFT intends to rely will also be set out in the statement of objections issued to the other parties to the proceedings and, subject to the OFT's rules on the protection of confidential information, material submitted as part of the leniency application will be disclosed to the parties during the course of access to the file.⁹⁷

In Belgium, the Leniency Notice provides that access to corporate statements will only be granted to the addressees of the statement of objections provided they – and their solicitors – commit to use the obtained information only for the purposes of the procedure before the Competition Authority. The Leniency Notice does not provide access to corporate statements for third parties as long as the leniency applicant has not revealed the content of his application to third parties. The Leniency Notice is, however, only a communication from the Competition Authority taken in the execution of the power conferred to it by Article 11 § 3 Belgian Competition Act (hereinafter: WBEM).⁹⁸ This notice cannot set aside the provisions of the WBEM itself, or those of the Code of Civil Procedure. Under Article 877 Code of Civil Procedure, the Court may, when serious, determined and converging presumptions exist that a party or a third party possesses a piece that proves a relevant fact, order the submission of that piece or a certified copy thereof. A third party may refuse submission if he has a legitimate reason to do so. Article 36 WBEM provides that the members of the Belgian Competition Authority and its personnel are bound by professional secrecy except when they are called to testify before the courts. Professional secrecy will thus not in

⁹³ A Zuckerman, *Civil Procedure*, London, Thomson, 2006, 611.

⁹⁴ Leniency and no-action. OFT'S guidance note on the handling of applications, December 2008, OFT803, (hereinafter, OFT's Guidance on Leniency and no-action) n° 8.47 and 8.49.

⁹⁵ OFT's Guidance on Leniency and no-action, n° 8.43.

⁹⁶ OFT's Guidance on Leniency and no-action, n° 8.45.

⁹⁷ OFT's Guidance on Leniency and no-action, n° 8.46.

⁹⁸ Wet 10 juni 2006 tot bescherming van de economische mededinging, *Belgisch Staatsblad* 29 June 2006.

itself be sufficient to refuse submission of a document. In a judgment of 29 October 1991 the *Cour de cassation* held that where submission of documents is refused on the ground of professional secrecy, the Court needs to verify on the basis of the specific facts whether the professional secrecy is not diverted from the purpose for which it was intended.⁹⁹ There is no authority as to whether the proper functioning of the leniency programme would suffice to refuse submission of documents submitted in the course of a leniency application.

In other member states, the situation does not seem any clearer.

III. CURRENT RULES ON THE RELATIONSHIP BETWEEN LENIENCY AND THE AMOUNT OF DAMAGES

A. Principle: leniency programmes offer no protection, all cartelists are jointly and severally liable

At present, a successful leniency application made to the Commission will only result in immunity or reduction of fines; it will not protect the leniency applicant from the civil law consequences of his participation in an infringement of Article 101 TFEU.¹⁰⁰ This is also the position in the majority of the EU member states. Moreover, the general rules of tort law of all member states accept that where several persons are liable for the same legally relevant damage, they are all jointly and severally liable.¹⁰¹ This means that the victim is entitled to claim his entire loss from each of the liable persons. The liable person who has paid the victim may afterwards claim from his co-cartelists a sum corresponding with their share in the liability.

In the case of damage suffered as a result of a cartel infringement, the damage results in fact from the cartel agreement, from the fact that several suppliers conspired to charge prices above the competitive level. All cartelists took part in the infringement of the competition rules which caused the damage of each and every cartel victim. If the cartelists would be held jointly and severally liable, all cartel victims could claim from each cartelist, and thus also from the leniency applicant, their entire damage.

B. Exceptions

In the US the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (ACPERA), which has recently been extended until June 2020, limits the civil liability of leniency applicants to single damages (instead of treble damages) attributable to the leniency applicant's own sales to plaintiffs. Other co-cartelists remain jointly and severally liable for all damages including treble damages.¹⁰² It should be noted,

⁹⁹ *Arr. Cass.* 1991-92, 197.

¹⁰⁰ Leniency Notice, n° 39.

¹⁰¹ Art VI.-6:105 DCFR; DCFR, comments on Art VI.-6:105 DCFR, p. 3766.

¹⁰² J Green & I McCall, 'Leniency and civil claims', (2009) *Competition Law Insight*, 3-5; SW Waller, 'Towards a Constructive Public-Private Partnership to Enforce Competition Law', (2006) *World Competition* 367-381.

moreover, that in the US, the cartelists who compensate the victim has no right to claim contribution from his co-cartelists.¹⁰³

In Hungary, the immunity recipient may refuse to reimburse the damages caused by an infringement of the national or EU cartel prohibition until the claim can be collected from other undertakings being held liable for the same infringement and as far as the claim can be collected from those undertakings. This does not prevent the cartel victims to bring a joint action against all cartelists. However, lawsuits initiated to enforce claims against immunity recipients shall be stayed until the date on which the judgment reached in the administrative lawsuit upon request for a review of the decision of the Hungarian Competition Authority establishing an infringement becomes legally binding. Moreover, the liability of the immunity recipient becomes subsidiary in relation to the liability of the other cartelists: the cartel victim will only be able to enforce his claim against the immunity recipient to the extent that it cannot obtain compensation from other cartelists.¹⁰⁴ This rule is, however, considered not to affect the internal relationship between the immunity recipient and the other cartelists.¹⁰⁵ The other cartelist(s) who compensated the victims will remain able to claim contribution from the immunity recipient, to the extent of his fault. In the case of concurrent tortfeasors, in the absence of proof of the contrary, each tortfeasor's fault is presumed to be equal.¹⁰⁶

IV. PROPOSALS FOR REFORM

A. Introduction

The European Commission, the OFT and certain scholars have put forward a number of options to optimise the combined effect of leniency programmes and damages actions. The most important ones are discussed below. In the evaluation of these options I will repeatedly refer to the evaluation scheme used by the authors of the CEPS impact assessment study in their impact assessment of the Commission's Green Paper on Damages actions for Breach of the EC Antitrust Rules.¹⁰⁷ This evaluation

¹⁰³ *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981).

¹⁰⁴ Art 88D Hungarian Competition Act; CI Nagy, 'The new Hungarian rules on damages caused by horizontal hardcore cartels: presumed price increase and limited protection for whistleblower – an analytical introduction' [2011] 32(2) *ECLR* 66. Also G Fejes and Z Marosi, 'Hungary', *The International Comparative Legal Guide to: A practical cross-border insight into competition litigation work* 2011, 80.

¹⁰⁵ CI Nagy, 'The new Hungarian rules on damages caused by horizontal hardcore cartels: presumed price increase and limited protection for whistleblower – an analytical introduction', [2011] 32(2) *ECLR* 66; G Fejes & Z Marosi, 'Hungary', *The International Comparative Legal Guide to: A practical cross-border insight into competition litigation work* 2011, 80

¹⁰⁶ S. 344(1)-(2) Hungarian civil code; CI Nagy, 'The new Hungarian rules on damages caused by horizontal hardcore cartels: presumed price increase and limited protection for whistleblower – an analytical introduction' [2011] 32(2) *ECLR* 66.

¹⁰⁷ Center for European Policies Studies, Erasmus Universiteit Rotterdam and Libera Università Internazionale degli Studi Sociali Guido Carli, *Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios* (hereinafter: CEPS impact assessment study), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2008:405:FIN:EN:PDF>.

scheme is based on the potential prisoner's dilemma emerging in collusive agreements and the pay-off structure needed to sustain the collusive agreement (this is called the 'incentive compatibility constraint'). The incentive compatibility constraint takes into account that the cartel is sustainable only if the expected pay-off from continuing the cartel is greater than the pay-off from defecting and collaborating with the competition authorities. The basis equation used is:

$$\frac{p(\pi^c a - \pi^c b \beta - f) + (1 - p)\pi^c a}{1 - \Gamma} \geq \pi^s - \pi^c b - f + R$$

where:

p = probability of detection and administrative conviction

π^c = overall profits of the cartel

a = market share of firm A

b = share of damages paid by firm A

β = probability of civil conviction

f = fine

Γ = probability-adjusted discount factor (probability of an ongoing interaction of the cartelists)

π^s = firm A profits from deviation

R = reward offered for collaborating with the competition authority

The left side of the equation shows that with probability p , firm A will be caught by the enforcing agency and will be obliged to subtract from the cartel profits relating to its part of the market, the fine imposed (f) and the likely part of the damages it will need to pay due to follow-on actions ($\pi^c b \beta$).

With probability $(1 - p)$, the cartel will not be discovered and full cartel profits ($\pi^c a$) will be collected by firm A. These future collusive profits need to be discounted for $1/(1 - \Gamma)$, in order to be compared with the immediate profits from defection (π^s), i.e. its profits in case it charges prices below the cartel price thereby increasing its market share to the detriment of the other cartelists.

Leniency programmes increase the pay-off of defecting and collaborating with the competition authorities, which has a destabilizing effect on the collusive agreement. Leniency programmes will also increase the deterrent effect as they increase the risk of detection. They may, however, also have the adverse effect of reducing the magnitude of the expected fine, which would decrease the deterrent effect of fines.¹⁰⁸

An increased probability of a court order to pay damages increases the deterrent effect and may contribute to stopping collusion between undertakings. On the other hand, once a collusive agreement is in place, an increased probability of a court order to pay

¹⁰⁸CEPS impact assessment study, 497. There would according to this publication also be a risk that undertakings apply for leniency and contextually maintain the collusive agreement for the future.

damages may strengthen the collusive agreement, as it will make it less attractive to defect and cooperate with the competition authority.¹⁰⁹

B. Excluding the discoverability of leniency applications

A first option put forward by the Commission in its Green Paper is to exclude the discoverability of corporate statements. Excluding the discoverability of preexisting documents submitted by the leniency applicant is not considered to be justified as this would allow the applicant to use the leniency programme in order to prevent the disclosure of these documents which are otherwise discoverable. The Commission considers, however, that it might be necessary to prohibit a claimant seeking through disclosure the documents in the form submitted by the leniency applicant to a competition authority with regard to their use in a leniency programme. Although these documents might still be discoverable under other (more general grounds), it might be detrimental to the leniency applicant if his choice of documents, as submitted to a competition authority, were to become known to the damaged parties.¹¹⁰

This option received wide support from stakeholders. Only a few responses to the Commission's Green Paper considered that leniency applications should be made available in private actions since they contain critical evidence, or doubt whether such protection is at all needed, in particular since leniency applications can be made orally.¹¹¹

The CEPS impact assessment study stresses that the limitation of the disclosure of leniency statements is essential in order to limit the risk that private enforcement negatively influences the incentives to apply for leniency. The study points out, however, that the limitation of disclosure of leniency statements bears an effect on claimants' litigation costs as access to the leniency application would represent a valuable source of information for private litigation. Also, limitation of access to leniency statements might have negative effects on error costs, if the existence of the infringement or its causation cannot be assessed through the information contained in the public agency decision. This risk would, however, be limited as regards the establishment of the infringement once the public decision is issued.¹¹²

In its White Paper the Commission withheld the proposal to exclude the discoverability of leniency applications. It is the Commission's view that the exclusion of discoverability should not only apply when leniency is sought from the Commission, but that it should extend to all leniency applications related to an infringement of Article 81 EC (now Art 101 TFEU), regardless of which competition authority within the European Competition Network receives the leniency application; including cases of parallel application of national competition law. Such extension of the exclusion of

¹⁰⁹CEPS impact assessment study, 501.

¹¹⁰Commission staff working paper accompanying the Green Paper, n° 233-234.

¹¹¹Commission staff working paper accompanying the White Paper, n° 282.

¹¹²CEPS impact assessment study, 500-501.

discoverability would ensure consistency in the application of Article 101 TFEU; it would increase legal certainty for leniency applicants, limit forum shopping and enhance the efficiency of the system. The extension of the rule to national competition authorities would also be coherent with the trend within the ECN towards soft harmonisation of the existing leniency programmes.¹¹³

The Commission proposes to apply the protection against disclosure to all corporate statements, meaning all voluntary presentations, by or on behalf of an undertaking to the competition authority, of the undertaking's knowledge of a cartel and its role therein, which are drawn up especially for submission under the Commission's leniency programme or that of a competition authority within the ECN.¹¹⁴

The protection should not only apply to corporate statements of immunity applicants but also to those of applicants for a reduction of fines. The protection should continue to apply even where the application is rejected by the competition authority and to any decision on the infringement.¹¹⁵

The Commission further reiterated its policy to take corporate statements orally and not to provide the applicant with a copy of his statement.¹¹⁶ Referring to the reasons set out in its Leniency Notice, the Commission further stresses that it will itself never disclose to parties in private litigation any statements it received in the context of its Leniency Notice.¹¹⁷ Undertakings subject to the investigation in public proceedings need to be given access in order to ensure their right of defence, but they will not receive a copy of the corporate statements and the information obtained can only be used for the purposes of judicial or administrative proceedings for the application of Article 101 TFEU,¹¹⁸ not including civil litigation.

In order to protect the public investigations, the Commission finds it important to preclude (voluntary) disclosure of corporate statement by leniency applicants from the date of the leniency application at least until the issuance of the statement of objections.¹¹⁹

In order to safeguard the Community interest in having an efficient leniency programme the Commission finds it further important to protect leniency applicants

¹¹³ Commission staff working paper accompanying the White Paper, n° 288-293.

¹¹⁴ Commission staff working paper accompanying the White Paper, n° 295. The Commission's working paper refers in fact only to leniency applications under the Leniency Notice, but this seems inconsistent with its proposal to apply the same rules of protection against disclosure to applications made to the Commission as to NCAs within the ECN.

¹¹⁵ Commission staff working paper accompanying the White Paper, n° 296-297.

¹¹⁶ Commission staff working paper accompanying the White Paper, n° 298.

¹¹⁷ Commission staff working paper accompanying the White Paper, n° 299.

¹¹⁸ Art 15(4) Regulation 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ L 123, 27 April 2004, 18; Commission staff working paper accompanying the White Paper, n° 300.

¹¹⁹ Commission staff working paper accompanying the White Paper, n° 301.

against court orders requesting disclosure or reproduction of corporate statements before or after the issuance of the statement of objections, and even after a decision is taken by a competition authority.¹²⁰

If the EU legislator would introduce such a rule, it would be effective on a European level. As indicated before, the EU cannot, however, guarantee that US or other non-EU courts will not order discovery. As far as the US has jurisdiction over a person who has or has ever seen a copy of the corporate statement, US courts may even order disclosure of the statement or its content for the purpose of use in damages actions before European courts.

C. Rebate on damages for the leniency recipient

A second option put forward by the Commission in its Green Paper is to grant the successful leniency applicant the right to claim a rebate on damages claims facing him in return for helping claimants bring damages claims against all cartel members. The claims against the other infringers, who would remain jointly and severally liable for the entire damage, would remain unchanged. Someone who was granted leniency could for example, in return for helping claimants with evidence, receive a rebate of 50% on any damages claim in a follow-on action. It is worth noting that the Commission was, at that time, still thinking of introducing punitive or at least multiple damages for infringements of the competition rules. In a system of double damages, granting the leniency applicant a 50% rebate would restore the applicant's liability for single damages.¹²¹

The option to grant the leniency applicant a rebate on damages in return for helping the damaged parties bring damages actions against all cartel members provoked diverging opinions.

Some responses to the Commission's public consultation gave arguments in favour of such an option, in particular since this would increase the attractiveness of leniency programmes. Of these respondents, some stressed, however, that the efficient functioning of leniency programmes should not be at the expense of the injured parties. Indeed, many respondents pointed out the importance of the principle of full compensation for the harm suffered by the victims. In a situation where double damages became available, the respondents usually agreed that the successful leniency applicant could benefit from a rebate in the form of a de-doubling of the amount of damages, since this would not prevent full compensation. Some submissions also underlined the necessity to limit such award only to the successful immunity applicant, given his contribution in the uncovering of the cartel, as opposed to leniency applicants only benefiting from a reduction in fine.¹²²

¹²⁰ Commission staff working paper accompanying the White Paper, n° 302.

¹²¹ Commission staff working paper accompanying the Green Paper, n° 235.

¹²² Commission staff working paper accompanying the White Paper, n° 275.

A rebate system would increase the gap between the position of the successful leniency applicant and that of non-collaborating firms. The collusive pay-off will decrease as the colluding firms would be more exposed to damages, also in lieu of the leniency applicant. The collaborating pay-off will increase due to the fact that the leniency applicant will not only get a reduction of fines but also a rebate on damages.¹²³ It would seem that this rule would increase the destabilising effect, but reduce the deterrent effect, because the amount of money an undertaking risks to lose is reduced at least if it defects and collaborates with the competition authority. This might increase the risk that undertakings take part in a collusive agreement, intending to defect and collaborate with the competition authorities.¹²⁴ The risk of exploitation of a leniency programme which offers the leniency applicant a rebate on damages could, however, be reduced by reserving the rebate to the first successful immunity applicant as this would increase the deterrent effect (the probability that a cartel member would need to pay the full amount of damages) and the destabilising effect (the differential between the collusive and the collaborating pay-off) and thus the rush to be the first to collaborate with the competition authority. To avoid exploitation of the leniency programmes, rebates should also be reserved to applications filed before the opening of a formal investigation. Firms should not count on being able to obtain a rebate by collaborating with the competition authority once a formal investigation has been opened. The duty of the leniency applicant to cooperate with the victim in civil litigation increases the probability that co-infringers are ordered to pay damages, which widens the gap between the collaborative and the collusive pay-off. The overall impact of the introduction of damages rebates coupled with a duty to collaborate with victims on deterrence would be positive. This option also increases the victims' chances to obtain compensation. It would, however, require a harmonisation of leniency programmes and the recognition of foreign NCA decisions on leniency by national courts. Depending on the extent to which the leniency applicant is required to assist the victims with evidence against the other cartel members, the litigation costs of the victims may decrease. Increased litigation might, however, result from discussions as to whether the collaboration duty is complied with and from the fact that other cartel members might have a greater incentive to challenge the administrative leniency decision. The collaboration duty will also increase the leniency applicant's administrative costs.¹²⁵

¹²³CEPS impact assessment study, 501-502.

¹²⁴In reality, however, the CEPS report points out, the effect of such a rule might be more complex when undertakings of different sizes take part in the collusion. For smaller firms, the deterrent effect may be larger, as they risk facing liability for the share of the larger undertakings. For large firms, the destabilising effect may be more significant than the increase in the sanction since the reduction of damages in case of collaboration is higher than the increase of civil damages in case of non-collaboration (CEPS impact assessment study, 502). The CEPS report apparently assumes that the damages an undertaking would need to pay in the absence of a rule introducing a rebate on damages are proportionate to the size of the firm, which is not necessarily the case. The proportion of damages an undertaking needs to pay in the absence of a rebate rule depends on the applicable rules as to contribution in the internal relationship between the cartel member, and on the solvency of the co-cartel members.

¹²⁵CEPS impact assessment study, 501-515 and 531.

In addition, it would facilitate damages claims by providing claimants with significant evidence. Finally, the risk of incomplete compensation for victims due to the existence of the rebate would be limited since the victims could claim their entire loss from the other cartel members.¹²⁶ Only if all other cartelists held liable for the same infringement were insolvent, would cartel victims have to be content with partial compensation by the leniency recipient. In the view of some respondents, however, even this exceptional situation of only partial compensation is unacceptable. Also, the fact that the rebate system would limit the victim's choice as to the identity/number of co-cartelists from which he could recover his whole damage, is considered problematic. Moreover, in the absence of double damages, compliance with the principle of full compensation of the victims, would imply that any rebate awarded in a damage claim be paid by the other cartel members, jointly and severally liable for the entire damage. Some respondents find this unfair and discriminatory.¹²⁷ Furthermore, some respondents opposed, as a matter of principle, a situation in which successful leniency applicants could be rewarded on the civil side as a result of their application, arguing that public enforcement and private proceedings should be independent from each other. Some respondents also argued that it would be unfair to reward a member of a cartel in civil proceedings, even if he had applied for leniency.¹²⁸

On the balance of these arguments, the Commission considers it inappropriate to grant leniency applicants a rebate on damages, at least as long as it is not demonstrated that an enhanced level of damages actions unduly affects leniency programmes and that such a strong reward is necessary to safeguard the effectiveness of these programmes.¹²⁹

D. Limiting the liability of the leniency recipient to his direct and indirect purchasers

In its Green Paper, the Commission also put forward for discussion the option to remove the joint liability of the successful leniency applicant, thus limiting the latter's exposure to damages.¹³⁰ The Commission explains that generally, under the rules of civil liability applicable to antitrust damages actions, cartel members are jointly and severally liable for the damage caused by the cartel agreement. This means, for example, that a victim having suffered harm due to an illicit agreement may claim his entire damage not only from his trading partner(s), but also from any of the other parties to the illicit agreement. However, between the co-cartelists, the liability is several, which implies that the cartelist who compensated the entire harm has a right to seek

¹²⁶ Commission staff working paper accompanying the White Paper, n° 276.

¹²⁷ Commission staff working paper accompanying the White Paper, n° 278.

¹²⁸ Commission staff working paper accompanying the White Paper, n° 277.

¹²⁹ Commission staff working paper accompanying the White Paper, n° 279.

¹³⁰ Commission staff working paper accompanying the Green Paper, n° 236.

contribution from the other co-cartelists. It is therefore at the contribution stage that the respective share of ultimate liability of each co-cartelist is determined.¹³¹

Removing the joint liability of the successful leniency applicant was meant to pursue a two-fold objective. It was, firstly, to give the successful leniency applicant a procedural advantage, by not requiring him to seek contribution from the other cartelists because his ultimate liability would no longer be determined only at the contribution stage. Secondly, it was to give him an advantage in cases of (partial) insolvency of one or some of the cartel member(s), since the successful leniency applicant would be the only cartel member not having to bear an increased financial burden as opposed to the other solvent cartelists who are jointly and severally liable for the entire damage.¹³²

The objective pursued by this option received support from various respondents. However, certain respondents rightly expressed concerns on the effectiveness of the measure to achieve the objective, as well as on the criteria to be used for determining the scope of the liability of the successful leniency applicant.¹³³ Removing joint and several liability will indeed not in itself have as a consequence that the person who paid an overcharge due to the cartel infringement may only claim compensation from his contracting party and/or his suppliers. The right of the cartel victim to claim damages from all cartel members is not only a result of the rules on joint and several liability, it is the result of the fact that not (at least not only) selling at a supra competitive price is an illegal act, but concluding a cartel agreement as such. It is the cartel agreement and not the downstream sales contract that infringes Article 101 TFEU. As far as the cartel agreement is considered under the applicable rules on causation to have caused the harm resulting from the overcharge, all cartel members are liable towards the downstream purchasers. The question that arises then is whether the purchaser can claim his entire loss from a single cartel member or whether he has to claim from each cartel member a fraction of his loss, corresponding to the extent in which each cartel member took part in causing the loss. It is this question that is solved by the rules of joint and several liability. Under the rules of joint and several liability the purchaser may claim his entire loss from each of the co-cartelists. The rules on contribution subsequently deal with the internal relationship between the cartelists and provide that the party who has paid the victim may claim redress from his co-conspirators. The rules on contribution vary between the member states and are sometimes even controversial in a single member state. The amount which the party who paid the victim may recover from his co-cartelists may e.g. depend on the seriousness of the co-cartelists fault, or his impact on the total amount of the damage. If the Commission wants to limit the liability of a cartel member to the losses suffered by his direct contracting partners and the subsequent purchasers of the product or service, it has to do so explicitly and not by 'removing the joint and several liability'.

¹³¹ Commission staff working paper accompanying the White Paper, n° 280-281.

¹³² Commission staff working paper accompanying the White Paper, n° 282.

¹³³ Commission staff working paper accompanying the White Paper, n° 283.

Other respondents, were not entirely against this proposal, but wanted to limit the benefit of the removal of joint liability to the successful immunity applicant, as opposed to successful leniency applicants in general. Still other respondents stressed that incentives given to successful leniency applicants should not be granted at the expense of the victims.¹³⁴ An important drawback of this option is indeed that it may complicate the cartel victims' opportunities to obtain compensation. Even if the other cartelists are solvent, and their participation in the cartel has been established by the competition authority due to the information provided by the leniency applicant, obtaining compensation from them may be difficult and costly, for example when they are domiciled and/or have all their assets in another EU member state, or even outside the EU.¹³⁵

According to the CEPS impact assessment the removal of joint liability would lead to a slight increase of the pay-off of defecting and collaborating with the competition authorities, which would increase the probability of detection and deterrence. Victims would also be more likely to bring damages claims against the non-collaborating firms which would remain jointly liable. These would then bear the risk of insolvency of the other cartelists, which would lead to a slight increase of deterrence in their regard. As the removal of joint liability would increase detection, it would increase the number of follow-on actions and thus the number of compensated victims. It might also lead to an increase of settlements which would provide victims with more accurate information leading to more accurate compensation. On the other hand, it would increase the risk that victims do not receive compensation due to insolvency of the non-collaborating firms and the fact that the leniency applicant is no longer jointly liable. The option would also lead to a slight increase of the number of claims and entail a risk of excessive litigation on the allocation of liability to the various co-cartelists since the risk of recoupment would be shared between a smaller number of co-cartelists. The option would further require a harmonisation of leniency programmes which would lead to an alleviation of administrative burdens.¹³⁶

At the moment of the Commission staff working paper accompanying the White Paper, the Commission considered such a measure not necessary. The Commission recognised that, if any measure concerning the immunity recipient was to be proposed at a later stage, the removal of joint liability as proposed in the Green Paper, might not be sufficient to effectively limit the immunity recipient's liability to a certain share of the harm caused. The Commission therefore no longer discusses this option in its White Paper but sets out for further reflection a limitation of the immunity recipient's civil liability to the damage caused to his direct and indirect contractual partners. The immunity recipient would thus no longer be liable for the damage caused to victims

¹³⁴Commission staff working paper accompanying the White Paper, n° 283.

¹³⁵In this sense: OFT, *Private actions in competition law: effective redress for consumers and business*, Discussion paper, April 2007, OFT916, http://www.of.gov.uk/shared_of/reports/comp_policy/oft916.pdf, n° 7.19 on a similar proposal put forward by the OFT.

¹³⁶CEPS impact assessment, 517-529 and 532.

who did not directly or indirectly purchase cartelised products from him. For example, where 30% of a victim's total purchases of cartelised products originate from the immunity recipient, the latter would only be liable for 30% of the total harm suffered by this victim due to the overcharge of the cartelised products. The burden of proving to which extent his liability is limited would have to be borne by the immunity recipient. At this stage, the Commission calls for further reflection on the need for such incentive and on the impact of such measure on the position of victims of cartels and that of co-cartelists, in particular other leniency applicants. According to the Commission it should be ensured that the victim's right to full compensation is not unduly affected and that other cartelists' liability is not unduly increased.¹³⁷ It should be noted that the limitation of the liability of the leniency recipient to his direct and indirect contracting partners, would have as a consequence that, when the other cartelists are all insolvent, only the direct and indirect purchasers of the leniency recipient would obtain compensation. The other victims would be left completely uncompensated. It would seem more appropriate to determine that each cartel victim could claim compensation from the leniency recipient to the extent that he would be liable at the contribution stage. In that case, all cartel victims would be able to obtain partial compensation from the leniency recipient in case all the other cartelists were insolvent. If that is not the case, cartel victims would probably claim full compensation of the other cartelists who remain jointly and severally liable.

The European Parliament is strongly opposed to the full removal of joint and several liability of co-operative witnesses. In a resolution of 26 March 2009 on the White Paper on damages actions for breach of the EC antitrust rules it stated that 'full exemption of cooperative witnesses from joint and several liability is contrary to the system' and that it 'rejects such exemption categorically as prejudicial to many victims of breaches of the EC competition rules'.¹³⁸

E. Removal of the joint and several liability of the immunity recipient if other cartelists are solvent

In its Discussion paper *Private actions in competition law: effective redress for consumers and business* the OFT proposed the complete removal of the joint and several liability of the immunity recipient provided the other infringing undertakings have sufficient financial resources to meet the claim in full.¹³⁹ This is a refined version of the Commission's proposal to remove the joint and several liability of the immunity recipient. The OFT rightly points out that this option would present a number of potential issues as to, for instance, how to determine the liability of the immunity recipient if he is not jointly and

¹³⁷ Commission staff working paper accompanying the White Paper, n° 304-306.

¹³⁸ European Parliament resolution of 26 March 2009 on the White Paper on damages actions for breach of the EC antitrust rules (2008/2154(INI)) <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2009-0187+0+DOC+XML+V0//EN>, n° 21.

¹³⁹ OFT, *Private actions in competition law: effective redress for consumers and business*, Discussion paper, April 2007, OFT916, http://www.of.gov.uk/shared_of/reports/comp_policy/of916.pdf, n° 7.18-7.19.

severally liable.¹⁴⁰ As pointed out above, it does indeed not follow from the removal of joint liability that the immunity recipient is (only) liable for the (entire) overcharge paid by his purchasers and their downstream business partners and clients. This option mainly has the benefits and drawbacks set out when discussing the related Commission proposal. It slightly increases, however, the position of the victims that did not directly or indirectly purchase from the immunity recipient as they may turn to the immunity applicant if the other cartelists who remain jointly and severally liable were insolvent.

This option was supported by many of the respondents. They agreed that it would enhance the incentive to apply for leniency as it would remove concerns that potential applicants for immunity would have to compensate the whole of the damage caused by the cartel. Although this option would increase litigation as claimants would have to sue a greater number of defendants in order to recover the whole damage, in practice other cartelists could be joined into the proceedings in any event or the claimant could sue another cartelist who is jointly and severally liable.¹⁴¹

The OFT recommended in the end that immunity recipients would not be jointly and severally liable, so that they would only be liable for the harm they caused. The OFT did, not, however, indicate what is in its opinion exactly ‘the harm caused’.¹⁴² The back-up liability in case of insolvency of the other cartel members seems not to have been withheld.

F. Introducing a right for the immunity recipient to obtain up to 100% contribution from non-leniency recipients

A second option proposed in the OFT’s Discussion paper is to allow claimants to bring an action against an immunity recipient under normal principles of joint and several liability, whilst empowering the court to allow the immunity recipient, in turn, to seek contributions of up to 100 per cent from non-leniency recipients.¹⁴³ The OFT finds it important to preserve incentives to apply for other types of leniency for firms which do not qualify for immunity. Therefore, it proposes to seek contribution from other leniency recipients according to the normal contribution rules. The example given by the OFT explains its true meaning. Assuming that (1) A, B and C entered into a cartel; (2) A received immunity and B received another type of leniency; (3) a cartel victim brings a successful claim against A; (4) under normal contribution rules each firm would be liable for 1/3,¹⁴⁴ then, A would be able to recover 1/3 from B, and the Court

¹⁴⁰ OFT, *Private actions in competition law*, n° 7.20.

¹⁴¹ OFT, *Private actions in competition law*, n° 9.7-9.8.

¹⁴² OFT, *Private actions in competition law*, n° 9.9-9.10.

¹⁴³ OFT, *Private actions in competition law*, n° 7.18.

¹⁴⁴ According to s. 2(1) of The Civil Liability (Contribution) Act 1978 the amount of contribution is to be determined according to what is just and equitable having regard to the extent of that person’s responsibility for the damage in question. This leaves the courts a wide discretion. The most important criteria used by the courts to determine a person’s responsibility for the damage are the extent to which a party has profited or retained gains from the wrongdoing, the causative potency of the wrongdoer’s action vis-à-vis the plaintiff’s

could order that A recovers 2/3 from D, who received no leniency. This option would be more favourable for the cartel victims as it does not deprive them from the benefit of the joint liability of the immunity applicant.¹⁴⁵ This option found some support among the respondents to the OFT's discussion paper, but others argued that this option would not provide immunity recipients with the same certainty as the previously discussed option as they might be liable for the entire amount in the first place, whereas the subsequent possibility of recoupment from co-infringers and the related litigation costs could be highly uncertain; it would create contingent liabilities and would lead to further litigation.¹⁴⁶ Compared to the situation where the leniency applicant is jointly and severally liable without a possibility to recoup 100% by means of the contribution rules, this option would decrease the deterrent effect of the totality of the fines and damages on entering into a cartel. Once a cartel is in place, the incentive to apply for immunity would increase compared to the situation of 'normal' joint and several liability. At the same time, this would increase the instability of the cartel.

Given the fact that this option would practically imply that the cartel victims would sue the leniency recipient in order to obtain full compensation of their damage as soon as the Commission decision identifying the leniency recipient is published, while the latter would be likely only to obtain contribution from his co-cartelists after lengthy appeals of the Commission decision followed by lengthy proceedings on contribution between the co-cartelists, this option may, however, not be sufficient to prevent the potential leniency applicant from refraining from coming forward.

G. The best way forward

When the number of damages claims for infringements of competition law continues to rise, the measures proposed by the Commission to guarantee the undiscoverability of the leniency application may be insufficient to prevent potential leniency applicants from being discouraged to apply for leniency out of fear for damages actions. This is in particular the case as the identity of the leniency applicant would still be mentioned in the final Commission decision on the infringement. Moreover, the EU cannot guarantee that non-EU member states do not order the leniency applicant or a third party to disclose leniency information.

The option to grant the immunity recipient a rebate on damages will diminish the potential leniency applicant's fear to come forward, but it has the main disadvantage that in case of insolvency of the other cartelists, the victims will not be fully compensated even when the immunity recipient has sufficient means to provide for redress.

loss and the relative degrees of blameworthiness, see N Dunleavy, 'Contribution among Antitrust Defendants in English Law', [2009] *ECLR* 23.

¹⁴⁵ OFT, *Private actions in competition law*, n° 7.21-22.

¹⁴⁶ OFT, *Private actions in competition law*, n° 9.7; CEPS impact assessment, 504.

The option to limit the leniency applicant's liability to the damage caused to his direct and indirect purchasers, will also diminish his fear to come forward, but it has the main disadvantage that, in case of insolvency of the other cartelists, only the direct and indirect purchasers of the leniency applicant, with the exclusion of all other cartel victims may obtain compensation.

The main disadvantage of the option to remove the joint and several liability of the leniency applicant, is that the consequences of this option are uncertain. The same goes for the proposal to remove the joint and several liability of the immunity recipient if the other cartelists are solvent.

The option to leave the rules on joint and several liability in place in the relationship between the leniency recipient and the victims but to introduce a right for the immunity recipient to obtain up to 100% contribution from the non-lenieny recipients, offers the leniency recipient a serious relief of his civil liability without undermining the rights of cartel victims to obtain compensation. Given the fact that this option would practically imply that the cartel victims would sue the leniency recipient in order to obtain full compensation of their damage as soon as the Commission's decision identifying the leniency recipient is published, while the latter would be likely only to obtain contribution from his co-cartelists after lengthy procedures for appeal of the Commission's decision and afterwards on the issue of contribution between the co-cartelists, this option may, however, not be sufficient to prevent the potential leniency applicant from refraining from coming forward.

The Hungarian model aims to prevent the immunity recipient from having to compensate the victims immediately after the decision which identifies him is published while not being able to obtain contribution from the other cartelists until after lengthy appeal proceedings by staying the lawsuit to enforce damages claims against the immunity recipient until the date on which the judgment reached in the administrative lawsuit upon request for a review of the decision of the Hungarian Competition Authority establishing an infringement becomes legally binding and by offering the successful immunity applicant the right to refuse to pay compensation for the damage as long as the claim can be collected from other undertakings being held liable for the same infringement.¹⁴⁷ This rule, however, is considered not to affect the internal relationship between the immunity recipient and the other cartelists.¹⁴⁸ The other cartel(s) who compensated the victim(s) may claim contribution from the immunity

¹⁴⁷ Art 88D Hungarian Competition Act; CI Nagy, 'The new Hungarian rules on damages caused by horizontal hardcore cartels: presumed price increase and limited protection for whistleblower – an analytical introduction', [2011] 32(2) *ECLR* 66. Also G Fejes and Z Marosi, 'Hungary', *The International Comparative Legal Guide to: A practical cross-border insight into competition litigation work* 2011, 80.

¹⁴⁸ *Ibid.*

recipient, to the extent of his fault. In the case of concurrent tortfeasors, in the absence of proof of the contrary, each tortfeasors' fault is presumed to be equal.¹⁴⁹

Admittedly, the possibility for leniency applicants to be released from their duty to make compensatory payments as long as the claim can be collected from other undertakings being held liable for the same infringement results in a reduction of the deterrent effect compared to the situation where the normal rules on joint and several liability apply. It would, however, not reduce the deterrent effect compared to the prior situation where there was no or hardly any fear of having to pay compensation at all. The Hungarian model even increases the deterrent effect compared to that situation, because the leniency applicant will have to pay his share of the damages at the contribution stage, and if the other cartelists prove to be insolvent even more than that.

The Hungarian model also increases the gap between the immunity recipient and the other cartel members, which will destabilise cartels. As regards the cartel victims, the Hungarian model will result in a delay of the moment at which they will effectively obtain compensation. It will, however, contrary to several other options discussed above, prevent the victims (or certain categories thereof) being deprived of compensation when all cartelists except the immunity recipient are insolvent.

Some support for this option can be found in the OFT's Recommendations where it was suggested to completely remove the joint and several liability of the immunity recipient provided the other infringing undertakings have sufficient financial resources to meet the claim in full. The Hungarian model is, however, more clear as to its practical meaning.

On the balance of these arguments, the Hungarian model seems to be superior to the other systems discussed above in terms of reconciling leniency incentives with the victims' right to obtain compensation for damage caused by competition law infringements. The model could be further refined by extending the benefit granted to the immunity recipient to other leniency recipients, whereby it could be provided that in case of insolvency of the non-leniency recipients, victims should address the leniency recipients in the reverse order of their leniency application (the latest leniency recipient, would have to be addressed first). If an even stronger incentive would be required to convince potential leniency applicants to come forward, it could be considered to deprive the other cartelists from their right to claim contribution from the leniency recipients. It should, however, be noted that this measure should only be taken when the benefit granted to the immunity recipient is extended to other leniency recipients; if not it could result in a disincentive for subsequent leniency applicants to come forward.

If the EU and/or its member states would adopt one of these measures, they would, however, only apply when the law of the EU and/or its member states applies. They cannot prevent a decision by a US court holding an undertaking who applied in the EU

¹⁴⁹S. 344(1)-(2) Hungarian civil code; CI Nagy, 'The new Hungarian rules on damages caused by horizontal hardcore cartels: presumed price increase and limited protection for whistleblower – an analytical introduction', [2011] 32(2) *ECLR* 66.

for leniency liable for treble damages for infringement of the Clayton Act. The EU cannot even prevent US courts from ordering the leniency applicant to disclose a leniency application made to the Commission and use this as evidence in proceedings for damages.¹⁵⁰ To overcome this, it has been suggested to insert a claw back provision into Regulation 1/2003:

‘which would permit European leniency applicants to claw back the non-compensatory element of any foreign damages claim in the courts of the Member States where the damages claim involved a discovery order by a foreign court permitting discovery of documents that were generated by the leniency applicant in pursuance of its leniency application before the European Commission. This would include a written corporate confession and responses to art.18 decisions’.¹⁵¹

This seems to be, however, a measure which is difficult to reconcile with international comity as it would undermine the rights of victims based on non-EU law, and insofar as treble damages for infringement of US antitrust law are concerned, the effective enforcement of US antitrust law. Admittedly, as far as there would be a practice of US courts to order disclosure of leniency applications made to the Commission and considered undiscoverable by EU law in order to guarantee the effective enforcement of EU competition law, this does not mesh with international comity either. The application of a sort of retaliation principle (an eye for eye) albeit effective, does not, however, appear to be the most elegant response, nor to lead to the most equitable results. The system of treble damages is an essential element of the US system of antitrust enforcement. Undermining it may cause serious harm to the effective enforcement of US antitrust law. On the other hand, the possibility of having to pay treble damages in the US because of an infringement of US antitrust law does not seem so unfair to the European leniency applicant. Indeed, even without a claw back provision, the European leniency applicant has an opportunity to escape treble damages in the US by being the first to claim leniency in the US.

VI. CONCLUSION

Although leniency programmes and damages actions, at least to a certain extent, serve the *same purpose* of increasing compliance with the competition rules, it has been argued that an increasing number of damages actions may *undermine* the leniency programmes, because the risk of follow-on damages actions may discourage potential leniency applicants from coming forward.¹⁵²

¹⁵⁰ Although this risk should not be overestimated, *cf.* section II.A.2.

¹⁵¹ A Riley, ‘The Modernisation of EU Anti-cartel enforcement: Will the Commission Grasp the Opportunity?’, (2010) *ECLR* 196.

¹⁵² C Hodges, ‘Competition enforcement, regulation and civil justice: what is the case?’, (2006) 43(5) *CMLRev* 1390.

To ensure the successful co-existence of leniency programmes and damages actions, the law can interfere at two stages: it can prevent disclosure of leniency applications and it can decrease the risk of having to pay damages or the amount of damages to be paid by leniency recipients. In this contribution, I first explained the current rules on these matters and subsequently, I analysed a number of proposals for reform.

The current state of the rules on disclosure of documents relating to leniency proceedings before the Commission is highly uncertain given the recent judgement in *Pfleiderer*. The Commission has a tradition of strongly protecting leniency related documents. It will normally not disclose documents or statements received from a leniency applicant, neither on the basis of the Transparency Regulation, nor on the basis of the Network Notice, nor on the basis of its duty to cooperate with the national courts of the EU member states. The Commission is also unlikely to be compelled to disclosure under the US discovery rules. The Commission will, however, provide the recipients of the statement of objections with access to the leniency application (although they may not make copies of it and the use they can make of the information obtained is limited) and it will disclose the identity of the leniency applicant and its role in the cartel in the published version of its infringement decision, although in recent years, the Commission became more careful and takes into account the confidentiality of the sources of its information when publishing the details of infringing conduct. Moreover, the *Pfleiderer* case raises the question whether the Commission may without more refuse to submit leniency documents at the request of national courts. It also raises the question whether, when the Commission intends to refuse an allegedly injured party access to leniency documents on the basis of the Transparency Regulation, it should not enable that party to prove that on the basis of the weighing of interests as explained in *Pfleiderer*, it is entitled to obtain access to the document requested.

Pfleiderer also raises the question whether the leniency recipient, under the conditions set out in that judgement, may be ordered by national courts to disclose leniency documents and it might change the tendency amongst US courts not to order the disclosure of EU leniency documents. To prevent the leniency recipient from being ordered to disclose the leniency application, the Commission may accept oral applications. The Commission will make a transcription of this application, but it will not provide the leniency applicant or other recipients of the statement of objections with a copy. A person can of course not be compelled to produce a document which he does not possess. He may, however, arguably on the weighing of interests as explained in *Pfleiderer* be ordered by the national courts of the Member States to make statements about the content of those documents or his participation in the cartel. *A fortiori*, courts of non-EU countries could order such testimonies.

As to leniency applications received by NCAs, a distinction is to be made between the cases where the NCA acts as an enforcer of European competition law and cases where it acts as an enforcer of purely national competition law. As to the first situation the Court of Justice decided that EU cartel law does not preclude a person who has been adversely affected by an infringement of EU competition law and seeks to obtain

damages from being granted access to documents relating to a leniency procedure involving the perpetrator of that infringement. It is, however, for the national courts and tribunals, on the basis of their national law, to determine the conditions under which such access must be permitted or refused by weighing the interests protected by EU law. When only national competition law is concerned, the national rules on leniency and on civil procedure are decisive. It should be noted, that even if the national leniency rules provide for the undiscoverability of leniency applications, they will not always be able to set aside the rules of civil procedure. Often the leniency rules will be included in notices adopted by national competition authorities and not by acts adopted by parliament; in that case they will normally not be able to set aside the rules of civil procedure which will normally be based on parliamentary acts.

In principle, leniency rules do not affect the amount of damages and all cartelists are solidarily liable. Hungary, however, introduced a limitation of the immunity recipient's liability providing that the lawsuit to enforce damages claims against the immunity recipient is stayed until the date on which the judgment made in the administrative lawsuit upon request for a review of the decision of the Hungarian Competition Authority establishing an infringement becomes legally binding and by offering the successful immunity applicant the right to refuse to pay compensation for the damage as long as the claim can be collected from other undertakings being held liable for the same infringement, the rules on contribution remaining unaffected.

To improve the co-existence of leniency programmes and damages actions the Commission proposed in its Green Paper on damages actions three options: (1) excluding the discoverability of damages actions; (2) granting the leniency applicant a conditional rebate on damages in return for helping the victims bring claims against all cartel members; (3) removing the joint liability of the leniency applicant. Only the first and the third option recurred in the Commission's White Paper. The OFT proposed two additional options: (1) removing the joint and several liability of the immunity recipient if other cartelists are solvent and (2) introducing a right for the immunity recipient to obtain up to 100% contribution from non-leniency recipients. These options seem, however, inferior to the Hungarian solution, which provides a more optimal balance between the interests of the immunity recipient and cartel victims. The model could be further refined by extending the benefit granted to the immunity recipient to other leniency recipients, whereby it could be provided that in case of insolvency of the non-leniency recipients, victims should address the leniency recipients in the reverse order of their leniency application (the latest leniency recipient, would have to be addressed first). If an even stronger incentive would be required to convince potential leniency applicants to come forward, it could be considered to deprive the other cartelists from their right to claim contribution from the leniency recipients. It should, however, be noted that this measure should only be taken when the benefit granted to the immunity recipient is extended to other leniency recipients; if not it could result in a disincentive for subsequent leniency applicants to come forward.

A provision allowing the European leniency applicant to claw back the non-compensatory element of damages to which he is convicted by a non-EU court where

the damages claim involved discovery of documents that were generated by the leniency applicant in pursuance of its leniency application before the Commission seems difficult to reconcile with international law.

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Leniency and Individual Liability: Opening the Black Box of the Cartel

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The purpose of this article is to examine the interplay between two competition policy enforcement instruments - leniency policy and individual liability, by opening the 'black box' of the cartel, with the analysis of interactions both among the cartel members and within each company. The interplay of these instruments translates into a two-dimensional system: the horizontal dimension is formed by the cartel members; the vertical one by the interactions within each cartel member. We base our analysis on the theory of the firm, advocating the separation of ownership and control, and on the theory of agency that states the principles of inherent moral hazard problems between the principal (owner) and the agent (manager). The reasoning is carried out along economic and legal literature on collusive agreements, leniency programmes and individual liability. The economic literature also gives key insights on corporate governance issues that are relevant in cartels, through game theoretical approaches. Theoretical insights will help us to understand why cartel activity is a matter of agency and governance issues. The subsequent section will be dedicated to the examination of individual liability and corporate leniency policy, in the light of agency issues. Individual leniency policy will be assessed in the last section. Individual leniency programmes are in practice never used by individuals of companies of a cartel. Nonetheless, such programmes are efficient in the way they undermine both the relations between cartel members and those inside the companies. We show how opening the 'black box' of the cartel is of primary importance when assessing the efficiency of leniency and individual liability. Agency issues shape the interactions between actors operating in both dimensions of the system under consideration, which are the principals and the agents of the firms of the cartel.

INTRODUCTION

Leniency policy and individual liability have been increasingly adopted by various jurisdictions.

[In the jurisdiction of the European Union] The term 'leniency' refers to immunity as well as a reduction of any fine which would otherwise have been imposed on a participant in a cartel, in exchange for the voluntary disclosure of information regarding the cartel which satisfies specific criteria prior to or during the investigative stage of the case.¹

The efficiency of this public enforcement mechanism has been widely acknowledged. This is consistent with the fact that in the European Union, detection of cartels mainly relies on leniency applications. Another instrument of antitrust enforcement which is

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¹ European Commission Notice on Immunity from fines and reduction of fines in cartel cases (2006/C 298/11).

increasingly used in cartel cases is individual liability. Individual liability entails the possibility for a current or former employee, or director of a firm to be prosecuted for illegal market conduct. Individual liability ranges from fines imposed on individuals, to imprisonment. The synthesis between the two instruments is the individual leniency policy: such an instrument opens the possibility for individuals to apply for leniency separately from their company.

Leniency programmes are intended to undermine cartel stability, by modifying the incentives of cartel members and amending the interactions of the system they participate in. Individual liability, however, addresses the incentives of individuals. Individual liability modifies the interactions between persons inside or outside the firm. In this situation, the actors are individuals. When considering the interplay between individual liability and leniency, we come to opening the ‘black box’ of the cartel. Cartel participation is now a multi-agent system² interacting on different levels: the horizontal one between cartel members, and a vertical system between the members of the firms. This analysis is restricted to the case where the firm is composed of two actors: a manager and an owner. *Figure 1* represents the two-dimensional system.

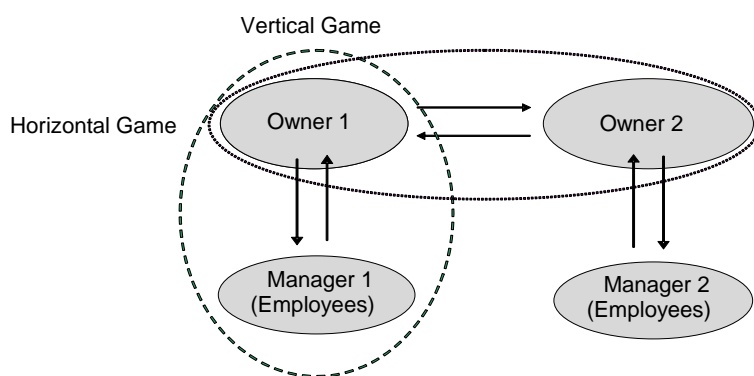


Figure 1 - The Interplay of Leniency and Individual Liability: A Two-Dimensional System

The interplay between individual liability and leniency gives the chance to ask about interactions of a particular nature – those arising from the organisation of the firm, and also gives access to a key ingredient approaching relevant issues concerning leniency policy and individual liability.

After giving an overview of competition policies, we will show that cartel activity is all about governance issues: interactions between cartel members, but also within each company (corporate governance). Second, we will show that both leniency policy and individual liability are efficient if they exploit cartels’ and companies’ governance issues. The synthesis of both enforcement instruments will be eventually assessed in light of the previous outcome: a leniency programme is nonetheless efficient by affecting both the interactions between cartel members and within companies.

² The term ‘system’ here employed, referring to the interactions between actors, is only preferred to ‘game’ for the sake of scientific rigour.

1. ANTITRUST POLICIES IN EUROPE

The concept of leniency has to be understood as a ‘catch-all’ term that refers to all the types of immunity and reduced fines available under various competition policies.³ In European Union competition policy, the *2006 Commission Notice on Immunity from fines and reduction of fines in cartel cases* sets the framework for leniency. This programme grants total immunity from fines to the first company that brings convincing evidence of its cartel participation. The fine reduction for the first undertaking meeting the requirements amounts to 30 to 50% of the fine which would have been imposed. The second successful applicant can claim up to 20% fine reduction. In the European Union, all the Member States have a corporate leniency programme in their competition system, apart from Malta.

The original version of the US Sherman Act imposed criminal sanctions on individuals, from fines to imprisonment. Since 2004, an individual involved in a cartel can be imprisoned for up to ten years.⁴ In the United Kingdom, disqualification, imprisonment and criminal fines are sanctions faced by individual price-fixers. Imprisonment is a possible sentence in Austria and Germany, but for bid-rigging only. In the latter country, individuals can also have fines imposed on them, but of a non-criminal nature. In the Netherlands, fines can be imposed on natural persons since the new Fining Code came into force in 2007.⁵ In Belgium, individuals can be imposed with fines and/or imprisonment of between two months and five years, for misuse of documents related to cartel activity.⁶ In Ireland, individuals face imprisonment penalties of up to five years.⁷ In Spain, an individual who directly took part in the decision to collude faces a fine.⁸ The Danish Competition Act entails the possibility of criminal fining to individuals involved in a cartel, and the first prosecution occurred in 2005. As for Portugal, individual liability is expressly stated.⁹ In Malta, liability of directors can be joined to that of the firm, and individuals can be sanctioned by criminal fines as a consequence. Some countries have opened the possibility of prison sentences for individuals, but have not actually imposed such a penalty. This is the case for France, Cyprus and the Slovak Republic. The Estonian Competition Act entails the possibility of sanctioning individuals through fines or detention of up to three years.¹⁰ In Slovenia, individual fines can be levied on responsible persons.¹¹ In Latvia, infringement of

³ R Whish, *Competition Law*, 6th ed, Oxford, Oxford University Press, 2009.

⁴ WPJ Wils, ‘Is Criminalization of EU Competition Law the Answer?’ (2005) 28(2) *World Competition L & Econ Rev* 117.

⁵ Dutch Competition Act, 2007, section 57.

⁶ M Holmes and L Davey, *A Practical Guide to National Competition Rules Across Europe*, 2nd ed, The Hague, Kluwer Law International, 2007.

⁷ The Competition Act, 2002, Article 10.

⁸ Competition Act, 2007, Article 63.

⁹ Law No. 18/2003, Article 47.

¹⁰ Competition Act, 2006, para 148.

¹¹ Competition Act, Article 30.

competition can be sanctioned by up to two years imprisonment, and between four months and six years in Romania.¹² In Greece and Hungary, competition policy provides for criminal sanctions, including imprisonment.¹³ All the other countries have an enforcement regime addressing sanctions only to undertakings.

Among the countries referred to, only some of them have an individual scheme for leniency. In the United States, a programme of individual leniency has been established since 1994. If an individual is the first to self-report illegal market conducts, he can be granted amnesty from any criminal sanction that would have been levied on him otherwise. The programme also encompasses the possibility of considering statutory or informal immunity from criminal sanction, this being decided on a case-by-case basis.¹⁴ In the United Kingdom, an individual programme was introduced in December 2008. The *Leniency and No-action* guidance, released by the Office of Fair Trading, expressly considers the individual leniency application outside the *blanket* criminal immunity that is granted automatically to current and former employees and directors by corporate leniency. An individual can benefit from such a programme if he is the first to self-report, provided that anti-competitive conduct was unknown to the Office of Fair Trading. If investigations have already started, there is still the possibility to be granted immunity if the individual adds significant value to the investigation of the case. The guidance also states that if an individual application is undertaken, immunity for other individuals of the firm as well as for the undertaking as a whole cannot be guaranteed.¹⁵ In the Netherlands, the introduction of individual fining in 2007 has been coupled with the possibility for an individual or a group of individuals active in the same firm to undertake leniency on their own. The rules for leniency are the same whether the applicant is a firm or an individual acting on his own behalf. The amount of reduction of fines depends on the position of the application, whether the investigation has started, as well as on the quality of evidence and cooperation. The reduction can go up to 100% of the fine if the applicant is the first to self-report. If the undertaking blows the whistle, individuals can still apply on their own behalf, and will be considered as 'co-applicants'.¹⁶ In Germany, since 2006, the leniency programme can now be applied for by natural persons, in order to be in line with the individual liability regime. Individual applicants are under the same rules as corporations. When the undertakings blow the whistle, individuals are also covered by the corporate programme.¹⁷

2. AGENCY RELATIONS IN CARTELS

Anti-competitive collusive practice is a form of corporate crime. Corporate crime, such as the Enron scandal, illustrates corporate governance problems. We will show here

¹² M Holmes and L Davey, *op cit*, n 6.

¹³ Article 29, Law 703/1977 for Greece; the 2005 Criminal Code for Hungary.

¹⁴ Department of Justice, *Leniency Policy for Individuals*, 1994.

¹⁵ *Leniency and No-action guidance note*, 2008, section 7.

¹⁶ *Leniency Guidelines*, 2007.

¹⁷ Section A, *Leniency Notice No. 9/2006*, 2006.

that cartel activities may interact with governance issues on specific dimensions which have to be elucidated in terms of welfare impact. This analysis combines therefore elements related both to the theory of industrial organisation and the theory of corporate finance.

2.1 Corporate governance and agency relations issues

All the analysis that will be carried out relies on the theory of modern organisation of the firm: where management and ownership are separated. Issues inherent to the ‘modern corporation’ have been analysed by Berle and Means:¹⁸ distinction of ownership and management leaves room for discretion of the manager, which can be abused, especially if the firm is owned by dispersed shareholders. The idea that management can hurt ownership interest through its action is widespread in the economics literature. Such misbehaviour can range from taking over risky action that engages the whole firm to insufficient effort in commitment to the interest of the firm and to financial expenses serving its private interest. These are examples of agency relations issues: the interest of the ‘agent’ (the insider of the firm: the manager) and the ‘principal’ (owner, outsider) may not be aligned. In other words, the manager has no natural incentive in maximising ownership utility, which determines the value of the firm.

From a financial point of view, corporate governance relates to the way investors in companies assure themselves of getting a proper return from their shares.¹⁹ Corporate governance can be seen as the institutional arrangement addressing inherent agency relations problems. It includes *ex ante* and *ex post* mechanisms aimed at orientating agency relations in an optimal way. Contracts between agent and principal aim at shaping behaviours *ex ante*, while monitoring and rewarding schemes are examples of *ex post* mechanisms. However, information is not perfect; there is a limited observability of the agent’s action by the principal.²⁰ Such an asymmetry of information is fundamental in explaining why opportunistic behaviour cannot be eliminated, but only reduced, and remains an issue of corporate governance, whatever contracts and mechanisms there are. Opportunism that is likely to arise between principal and agent is called *moral hazard*. Moral hazard indeed relates to such situation where the agent does not bear the full cost of its action and has incentive not to act in the best interest of the principal.

Jensen and Meckling’s theory²¹ focuses on the impact of such divergence of interests within the firm: ‘agency costs’ reflect the loss in terms of value of the firm due to agency relations problems. The concept of agency costs is relevant to the extent that it

¹⁸ AA Berle and GC Means, *The Modern Corporation and Private Property*, New York, Harcourt, Brace and World, 1932.

¹⁹ A Shleifer and RW Vishny, ‘A Survey of Corporate Governance’ (1997) 52(2) J Fin 737.

²⁰ J Roberts, *The Modern Firm: Organizational Design for Performance and Growth*, Oxford, Oxford University Press, 2004, p 123.

²¹ MC Jensen and WH Meckling, ‘Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure’ (1976) 3(4) J Fin Econ 305.

not only states the problem of asymmetry of information and interest, but also goes into its practical consequence. Costs are those borne by the firm in addressing ex ante and ex post the informational problems and resulting opportunism. Costs are also those of agency residual problems: informational problems can only be reduced, contracts and mechanisms are imperfect, and this has a cost, included in the 'agency costs'.

2.2 Corporate crimes, a matter of corporate governance

Moral hazard, like an iceberg, has a 'tip' and a 'submerged part'.²² The tip is the misbehaviour of a manager. The submerged part is constituted by all corporate governance arrangements aimed at addressing management misbehaviour: institutional structure of the organisation, contracts, incentives-targeting schemes etc. Moral hazard has roots in the intrinsic divergence of interests between agent and principal. Moral hazard also occurs because of dysfunctional corporate governance, located at the 'submerged' level of the iceberg. The lack of transparency, tenuous link between performance and compensation, and accounting manipulations have recently led to corporate crimes such as those brought to light with the Enron, Worldcom and Parmalat scandals. In these cases, not only the internal system of governance failed, but also the external institutional structure.

In the case of the Enron scandal, the corporate governance arrangement failed at two stages: both the internal and external structures have been the 'submerged parts'. Firstly, shareholders failed to fulfil their mission of controlling management. This was not a matter of lack of information on management practices, but rather a matter of excessive trust in the CEO and Chairman Kenneth Lay, misled by his charisma and reliance on the apparent excellent results of the firm. Secondly, as for the external aspect, auditing failed its mission of ensuring good accounting practice: Arthur Andersen complied with the accounting manipulations of its client Enron. Finally, corporate scandals exacerbate situations where moral hazard is particularly severe. Agency costs are of multiple origins: loss of efficiency, reputation, cost of legal sanction all affecting the intrinsic value of the firm. At the extreme, this can lead to the failure of the firm.

Illegal cartel participation is a form of corporate crime or fraud. In criminology, a corporate crime is an illegal behaviour perpetrated either by a corporation, or by individuals legally identified with a business entity. Participation in cartels is sanctioned by competition policy schemes, as a form of corporate crime. We see here that 'common' corporate crimes are about corporate governance issues. They relate to situations where moral hazard is too severe, and fails to be addressed by corporate governance schemes. As a corporate crime, cartels are surely related to corporate governance.

²² J Tirole, *The Theory of Corporate Finance*, Princeton, Princeton University Press, 2006, p 17.

2.3 Cartel activity, an issue of corporate governance

Why is cartel participation related to corporate governance? We will give here some intuitive arguments that derive from logic similar to the one that concludes that corporate crime is about agency relation issues. The comparison between cartels and other forms of organised crime can be found in the work of Spagnolo:²³

As an illegal activity involving many agents, cartels can be considered a form of organized crime, certainly not the most harmful. Long term corruption (where at least two parties are repeatedly involved, a briber and a bribee), collusion between agents and supervisors (e.g. between auditors and management or regulators and regulated firms), large scale frauds (including financial ones), and most kinds of illegal trade (in drugs, arms and people trafficking, where at least a buyer and a seller repeatedly interact) are similar to cartels in terms of the incentive structure they generate for the involved agents, and the social costs of these activities to society are enormous.

As a classic corporate crime, cartel activity can be intuitively seen as benefiting managers in particular, who make the most of the low visibility of their actions from shareholders. Managers have as a primary objective to make profits, and are held to account through their achievements to shareholders. This was a central motive behind corporate crimes such the Enron scandal. Cartel participation, if successful, brings higher profits to a firm because it allows companies to price at higher than competitive levels. The margin between price and marginal cost being greater, profits are higher. Why can moral hazard lead to participation in a cartel? One of its consequences is that incentives are not aligned because costs and benefits are not allocated similarly between agent and principal.

The benefits of cartel membership are common to shareholders and managers alike: any increase in revenue to a company results in an increase in share value. Managers also gain from an increase in a firm's value; the extent of gain is determined by the remuneration scheme in place. In terms of costs, the picture is different. In the absence of individual sanctions, detection leads in most jurisdictions to administrative and/or monetary fines, borne by the firm as a whole. Shareholders bear all the prejudice, while managers may avoid direct personal punishment for their actions completely. Furthermore, by the time the involvement of a corporation in a cartel is detected and sanctioned, the responsible manager may have left the company.²⁴ From the managerial viewpoint, a decision to take part in a cartel involves several parameters: the expected profits, the expected cost of detection (i.e. sanction) and the probability of being detected. When considering the possibility of cartel-like behaviour, managers balance the costs and benefits, and *ceteris paribus*, managers stand to benefit financially more than shareholders, who also bear any financial burden of cartel detection (including,

²³ G Spagnolo, 'Divide et Impera: Optimal Leniency Programs' (2004) CEPR Working Paper No. 4840, p 5.

²⁴ CR Leslie, 'Cartels, Agency Costs, and Finding Virtue in Faithless Agents' (2008) 49(5) Wm & Mary LRev 1621.

amongst others, fines and loss of share value). An asymmetry of interests is typical of corporate crime-associated behaviour, and this is also the case with cartels.

Illegal collusive practice, as found in classic corporate crime, involves agency relation issues and is therefore a matter of corporate governance. Shareholders are deemed to bear the cost of managerial misbehaviour. However, the story is not as simple as it seems; the principal may not always be the innocent victim of an agent's crime. As Aubert says: 'Collusion is a particular violation of the law for which firm owners are particularly likely to gain'.²⁵ Suggesting that cartel practice is about agency relation issues because it involves opportunism encourages further analysis: what are the implications of the specificities of this type of corporate crime? As our study focuses on agency issues, we will explore the nature of opportunism and its implications.

2.4 Specific agency relationship issues in cartels

We will first focus on the specific nature of moral hazard associated with collusive practice, referring primarily to Aubert.²⁶ In her model the author assumes that there are two sources of moral hazard: intensity of effort and market conduct (either pro or anti-competitive) that the manager can choose privately. An owner is deemed not able to distinguish whether profits come from legal managerial effort, or from illegal market conduct. Opportunism arises from the fact that a manager has natural incentives to substitute illegal market conduct for effort.²⁷ If shareholders want to decrease managerial incentives to collude, they need to reduce any incentives that promote the substitution of effort by collusion. In other words, the greater the effort expected from an agent, the greater is the incentive to find a substitute for it, e.g. by colluding. This idea has an impact on welfare that is neglected if the process ignores agency relations and drivers to collusion. This idea also impacts on problems identified with particular remuneration schemes, such as the distribution of stock options. Recent studies have highlighted the fact that cartel participation often comes from decisions of top management.²⁸ Senior managers especially are remunerated by a mix of benefits including bonuses and stock options, which are both types of financial arrangement that potentially facilitate collusive practice and its maintenance.²⁹ This is ironic because stock options were originally implemented with the objective of attenuating corporate governance issues and providing managers with incentives to optimise levels of effort to maximise a firm's value. The finding that such schemes have perverse effects when considered in terms of moral hazard market conduct is consistent with the finding that such schemes may be at the origin of corporate fraud, such as in the Enron scandal.

²⁵ C Aubert, 'Managerial Effort Incentives and Market Collusion' (2007) Toulouse School of Economics Working Paper No. 09-127, p 3.

²⁶ Ibid.

²⁷ Ibid, p 5.

²⁸ JE Harrington, 'Optimal Corporate Leniency Programs' (2008) 56(2) J Ind Econ 215.

²⁹ P Buccirossi and G Spagnolo, 'Corporate Governance and Collusive Behaviour' (2007) CEPR Working Paper No. 6349, p 9.

Another specificity of agency relations in collusive practice relates to the nature of agency costs. As stated before, cartel participation can be seen as a profitable crime for the firm as a whole, and accordingly desired by the owners. We will thus take the problem from the owner's point of view: what kind of benefit could an owner expect from inducing an agent to engage in a cartel? Cartel participation may not always favour the manager, and as it is argued by Mullin and Snyder,³⁰ such misbehaviour may be the result of owners' incentives. We can distinguish two reasons that might explain an owner's interest in collusive practice: a revenue effect, and agency relationship effects. First, the revenue effect relates to benefit accrued by the firm as a whole, as when collusive practice leads to increased profit. Second, corporate governance issues may induce shareholders to provide an agent with incentives to engage in such misbehaviour. Beyond the question of the nature of the benefits from cartel participation to owners, we will now focus on the specificity of corporate governance issues in cartels.

We assume that an owner wants to participate in cartel-like activity.³¹ Corporate governance arrangements may then serve the objective of inducing and maintaining collusive agreement. We will first consider the case of remuneration schemes, such as stock options, and then the implications of the theory of strategic delegation. The argument concerning stock options relates to the implicit information and signals that are given by stock options to competitors: in an oligopolistic market, incentives to tacit collusion are high. Stock options give useful information to competitors by linking 'manager's present compensation to the stock market's expectations about the firms' future profitability'.³² For example, competitors can anticipate from the magnitude of stock options whether there is significant fluctuation in the market's anticipation of a price war in the case of a firm breaching an agreement. Thus stock options not only induce the substitution of effort by collusive behaviour, but also sustain tacit and explicit colluding agreements through stock market-associated mechanisms.

Fershtman et al argues that delegating decision rights about market conduct to agents increases the sustainability of collusive practice.³³ When there is no separation of control and decision making the main challenge of the collusive agreement is to overcome the natural incentive to cheat. The incentive to cheat is reduced by the delegation of decision-making. The principal can threaten the agent to not pay him in case the latter adopts a cheating behaviour. What about the principal's incentives to cheat? Since such a decision is delegated, the principal can only induce his agent to deviate, in the particular design of incentive contracts. However, the agent knows that

³⁰ WP Mullin and CM Snyder, 'Targeting Employees for Corporate Crime and Forbidding Their Indemnification' (2005) George Washington University Working Paper.

³¹ This situation would suggest that there is no agency issue if the owner considers that participating in a cartel increases the value of the firm. However this serves the idea that the relation between the agent and principal can be peculiar in cartels.

³² P Buccirosi and G Spagnolo, *op cit*, n 29, p 10.

³³ C Fershtman, KL Judd and E Kalai, 'Observable Contracts: Strategic Delegation and Cooperation' (1991) 32(3) *Int Econ Rev* 551.

from the moment he cheats, cooperation with other companies terminates,³⁴ in which case rather than achieving any benefit he is likely to bear responsibility and be liable for any infringement of competition rules; depending on what liability scheme is in place.³⁵ Corporate governance arrangements, such as strategic delegation, can signal the sustainability of a firm's engagement in a cartel.

These arguments serve to stress that collusion agreement outcome can also be considered a matter of corporate governance, in a game where not only do firms need to make sure that their partners respect an agreement, but that all the operators within the firm will also do so. Therefore, cartel activity is all about governance issues, that are, interactions between cartel members, and also within each company.

3. INDIVIDUAL LIABILITY AND CORPORATE LENIENCY POLICY IN AN AGENCY PERSPECTIVE

3.1 Individual liability

Individual sanctions are of several types and features, which can be either administrative or criminal, ranging from monetary fines to prison penalties. For the sake of simplicity, we will assume that individual sanctions encompass all type of sanctions towards individuals of the firms (i.e. managers or employees), as opposed to administrative and monetary fines levied against corporations as an entity.³⁶

The use of individual sanctions is deemed to increase the efficiency of antitrust enforcement for several reasons. One of those relates to a corporate governance issue: it can be argued that individual sanctions solve some agency problems,³⁷ and in particular reduce moral hazard between the principal and the agent in cartel participation. The aim of this part is to show that corporate governance issues particularly matter in the perspective of sanctioning individuals on top of, or separately from, corporations.

Some arguments in favour of individual sanctions relate to the limited liability of firms. Empirical studies have been carried out in order to determine the optimal level of fine capable of deterring corporations from taking part in cartel activity. Variables under examination relate to expected gain from price-fixing: price increase caused by the collusive agreement, price elasticity of demand faced by the companies and their turnover for the product considered, as well as duration of cartel activity.³⁸ Probability

³⁴ Under the assumption that he can be caught cheating.

³⁵ Z Chen, 'Cartel Organization and Antitrust Enforcement' (2008) CCP Working Paper No. 08-21, University of East Anglia, pp 3-4.

³⁶ For more details on the criminal nature of sanctions, see WPJ Wils, *op cit*, n 4.

³⁷ CR Leslie, *op cit*, n 24.

³⁸ WPJ Wils, *The Optimal Enforcement of EC Antitrust Law: Essays in Law and Economics*, The Hague, Kluwer Law International, 2002, p 200.

of detection is also necessary in order to determine the optimal level of fine needed to deter cartels. As Wils says:³⁹

Assuming a 10% price increase, and a resulting increase in profits of 5% of turnover, a 5-year duration and a 16% probability of detection and punishment, the floor below which fines will generally not deter price-fixing would be in the order of 150% of the annual turnover in the products concerned by the violation.

Individual sanctions may be desired because the optimal level of fine is not conceivable to be given to the firms, for many reasons. One reason relates to the limited liability regime and the probable inability of firms to pay such amount of money, coupled with undesirable side-effects and consequences.

The justification of the need of individual sanctions relates to agency problems: it is argued that corporate sanctions fail to address the incentives of individuals in an optimal way. As we stated above, the intuition coming from the parallelism done with common corporate fraud, says that there is a moral hazard problem between the principal and the agent in cartel participation. On this ground, individual sanctions may be a useful instrument in aligning incentives, and thus reducing moral hazard problem.⁴⁰ Managers, who, according to simple intuition are the wrongdoer, will then have reduced incentives to misbehave, since they fear a personal conviction. In other words, individual sanctions bring about symmetry in costs and benefits of such activity in the agency relations.

There are also corporate governance considerations that give arguments against automatic individual sanctions of cartels: as it was stated before, agency problems have specific features in cartel participation; shareholders can benefit from it at the expense of managers. Thus, the possibility of sanctioning managers may not decrease shareholder's incentives in taking part in a cartel, and may not be the relevant legal instrument.⁴¹ Another point made by Spagnolo⁴² and Aubert⁴³ is that individual liability may undermine cartel stability by affecting internal cartel governance: this can create agency problems by widening the asymmetry of interests between shareholders willing to collude, conversely to managers willing not to.

Finally, this seems also to be a matter of different corporate governance systems across countries: Spagnolo⁴⁴ establishes distinction between Europe and the United States. In the former region, shareholders seem to be residual claimants of cartel profits, and managers are much less likely to gain from such misbehaviour than in the system of

³⁹ Ibid, p 252.

⁴⁰ CR Leslie, op cit, n 24.

⁴¹ G Spagnolo, 'Criminalization of Cartels and their Internal Organization' in K.J. Cseres, M.P. Schinkel and FOW Vogelaar (eds), *Criminalization of Competition Law Enforcement: Economic and Legal Implications for the EU Member States*, Cheltenham, Edward Elgar, 2006, p 142.

⁴² Ibid.

⁴³ C Aubert, op cit, n 25.

⁴⁴ G Spagnolo, op cit, n 41.

corporate governance prevailing in the United States. Then we might raise the question of the existence of a link between corporate governance systems and efficiency of particular enforcement instruments, following the logic of the link established between legal systems and corporate governance, by La Porta et al.⁴⁵

Individual liability is about agency issues in several respects: arguments in favour or against its use deal with corporate governance practices, and their relevance as enforcement instrument may depend on the corporate governance system considered.

3.2 Corporate leniency policy

Cartel activity is a form of corporate crime involving various actors. As stated above, cartel activity can be considered as a two-dimensional system in which incentives are of primary importance. Leniency is an enforcement instrument, which aims at undermining cartel stability. We will here argue that such enforcement instrument is all about agency problems that are inherent to such organisation.

Two concepts will be distinguished here: *corporate governance* and *cartel governance*. Both are defined by the necessity of addressing opportunisms arising from asymmetry of information in such relations. *Corporate governance* relates to institutional arrangements of the firm that ensure that managers will act in a way that maximizes the value of the firm. *Cartel governance* relates to all relational arrangements enforcing cartel stability between the members. They particularly address the natural incentive of each firm to deviate from what had been agreed upon in terms of prices. Retaliation and monitoring mechanisms are examples of such incentive schemes that may sustain cartel agreements. Observation of each member's effective pricing, and the knowledge that price wars can be triggered help the maintenance of cartels. In other words, the dynamic feature of such games guarantees that cartels are sustainable (to a certain extent).⁴⁶ In terms of cartel governance, this is one feature of the actors' interactions: 'criminal activity takes the form of an ongoing relation: ... this delivers future benefits and damages'.⁴⁷ Another specificity of agency relations in the cartel governance relates to their illegal nature, which brings about constraints on the way they organise the cartel. As a consequence, parties cannot rely on legally enforceable contracts, this providing an extra source of moral hazard within the governance system of the cartel. The third feature of such cartel relations identified by Spagnolo relates to the resulting information that each cartel member possesses on each other.⁴⁸

⁴⁵ R La Porta, F Lopez-de-Silanes, A Shleifer and RW Vishny, 'Legal Determinants of External Finance' (1997) 52(3) J Fin 1131.

⁴⁶ According to the Prisoner's Dilemma theory, the fact that the game is repeated makes the cartel sustainable, on the basis of conditional cooperation between the members. Cooperative outcome occurs only if cooperative behaviour is observed from the other party, and non-cooperation in the other option. There is a tendency of seeing non-cooperative outcome when there is an expectation of end of the game. See JM Perloff, *Microeconomics*, 3rd ed, New York, Pearson, 2004, and N. Eber, *Théorie des jeux*, 2nd ed, Paris, Dunod, 2007.

⁴⁷ G Spagnolo, *op cit*, n 23, p 6.

⁴⁸ *Ibid.*

By reducing fines or even granting immunity to a cartel member which self-reports, leniency programmes are about exploiting such intrinsic agency problems. From a game theory point of view, leniency aims at modifying the expected payoffs of cartel participation, and consequently the outcome of the game. As regards relations between the actors, leniency targets ongoing incentives problems so that parties play against each other.⁴⁹ Well-designed leniency programmes will make the most of opportunism which is intrinsic in such agency relations, by ‘making more severe the free-rider problem that plagues all legally non-enforceable cartels’.⁵⁰

Perverse effects of leniency programmes are highlighted in the economics literature: Motta and Polo⁵¹ argue that if the leniency programme is moderate, the cartel is actually strengthened by the fact that the expected fine from cartel participation is lowered. Depending on the probability of being detected, leniency programmes can have adverse effects along agency relations features identified above: being aware of the possible motivation of self-reporting, a cartel member can use information and proof of illegal practice as hostage, as a way to align incentives of cartel members against deviation by cheating or confessing. In other words, cartel members can be prevented from deviating, if they know that other members hold evidence that could make their application for leniency successful. Equilibrium can be sustained, contributing to maintain the trust between cartel members.⁵²

The specificity of corporate governance issues in cartels is also of primary importance. When the principal is in favour of collusion against the agent’s will, corporate leniency programmes may be inefficient. Such programmes eventually make the principal better, since the agent cannot undertake it on its own absent reward schemes for individuals. Amnesty decreases the expected sanction of competition policy infringement for the principal. In this case, cartels are more robust and profitable.⁵³

Leniency programmes are all about agency issues: their efficiency relies on the way they are designed so that they optimally exploit agency problems inherent to cartel organisation. If specific issues of governance in cartels are neglected, leniency may bring about adverse effects, such as the improvement of the robustness of cartels.

4. INDIVIDUAL LENIENCY POLICY

Until now, we have been examining relevant elements concerning individual leniency. The first point of the argumentation developed in the third section showed that cartel activity may have some impact on corporate governance issues. The second point showed that enforcement instruments have to be designed so as to take this into

⁴⁹ Ibid.

⁵⁰ P Buccirossi and G Spagnolo, *op cit*, n 29, p 21.

⁵¹ M Motta and M Polo, ‘Leniency Programs and Cartel Prosecution’ (2003) 21(3) *Int J Ind Organ* 347.

⁵² C Aubert, P Rey & WE Kovacic, ‘The Impact of Leniency and Whistle-blowing Programs on Cartels’ (2006) 24(6) *Int J Ind Organ* 1241, p 1263.

⁵³ Z. Chen, *op cit*, n 35, p 5.

account. We now come to individual leniency programmes. Governance issues matter for individual liability and leniency, considered separately from each other. What about their interplay? What about individual leniency policy as an instrument? This section will examine the relevance of individual leniency as an enforcement instrument. Is individual leniency an efficient instrument in terms of undermining cartel stability? What are the negative side-effects of such an instrument? Through these questions, we will see that individual leniency is a question of agency relations.

4.1 The interplay between leniency and individual leniency, in the absence of an individual programme

What can be said by the interaction between leniency programmes and criminal sanction? Does individual liability enhance the effect of leniency programmes? We consider here the case where corporate leniency grants immunity from corporate as well as from individual sanctions. Once again, agency issues are important. Let us first consider the case where the manager wants to collude. The threat of individual sanction may provide more incentive in blowing the whistle. As a result, antitrust enforcement coupling individual sanction and leniency programmes is more efficient in detecting cartels. However, if the owner prefers collusion, the picture is different. The threat of individual sanction may not be directly deterrent for the owner, since he is not the one who fears individual sanctions. The impact of individual sanction in leniency applications may here be limited. Thus, corporate governance is of primary importance: of course, if ownership and control are not separated, the owner-manager, under the threat of individual sanction has significant incentive to blow the whistle. In the case considered – separation of ownership and control – things are different. The specific relations and interest in cartel participation help explain the role of individual sanctions in an overall leniency programme.

4.2 Individual leniency - an efficient instrument

Individual leniency brings about efficiency, by causing an increased use of corporate leniency and by increasing costs of collusion.

4.2.1 Individual leniency: towards more corporate leniency applications

Individual leniency programmes feature a request to the antitrust authority made by an individual distinctively from its company. Cooperation with the programme can grant him immunity from any criminal sanction that he may get from cartel activity. Once involved in the cartel, the individual balances the cost and benefits of continuing the illegal activity. In jurisdictions where individual sanction entails imprisonment, the incentive for individuals to blow the whistle is strong. In terms of game theory, individual leniency makes the prisoner's dilemma even more complex because it affects the two-dimensional system: the horizontal one between cartel members, and the vertical one between individuals within the firm.⁵⁴ Not only are payoffs and outcome

⁵⁴ CR Leslie, *op cit*, n 24.

modified in the cooperative game between cartel members, but also within the firm. What impact does the introduction of individual leniency in the ‘box of a cartel’ have?

4.2.1.1 A two-dimensional system: The introduction of individual leniency policy

Acknowledgment and caveat: The aim of this part is to set the architecture of a system within which actors make decisions about cartel activity. We intend to schematise in a simple way the possible interaction of actors. The assumptions are straightforward and the reasoning does not pretend to follow the convention and requirements of game theory analysis. Acknowledging what such analysis requires we intentionally do not use the term ‘game’ here, even though the nature of strategic interactions that arise here may fit well under this concept; with actors considered as ‘players’.

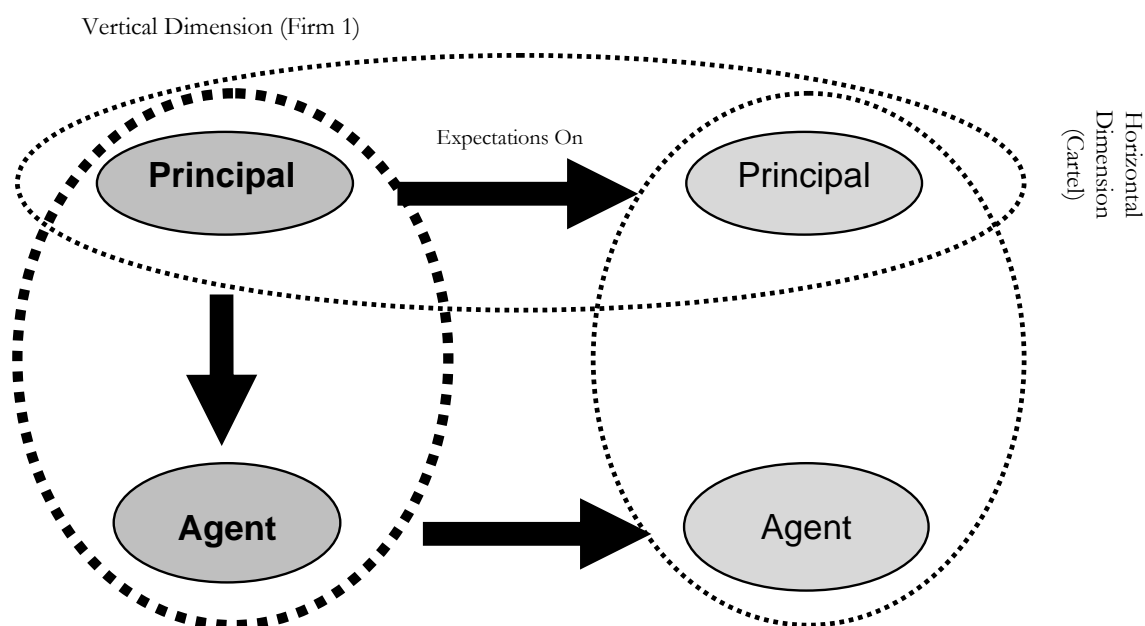


Figure 2 - A Two-Dimensional System

The vertical dimension comprises the strategic interactions between the principal and the agent within the firm. The horizontal dimension is the interactions between the two members of the cartel: represented legally by the principals of the firms. There are two firms in the cartel, represented within vertical circles. Both have separate ownership and control functions. Each firm has one principal, that we will call ‘she’, and one agent ‘he’. We primarily consider the point of view of the actors of Firm 1, represented at the left-hand side of *Figure 2*.

The story is as follows: cartel activity begins, then an individual leniency programme is introduced. What are the options faced by each actor?

- The agent can either choose the continuation of the cartel, or choose to apply for individual leniency.

- The principal can either choose the continuation of the cartel, or choose to apply for corporate leniency.

Thus, we consider here the question of *ex post* efficiency of individual leniency in the detection of cartels.

Here are some basic assumptions that support our analysis: firstly, let us assume that the costs of being detected correspond to the cost of the sanctions imposed. Secondly, the manager benefits from cartel participation, which the owner is aware of. Thirdly, this is a one period system, as where costs and benefits elements are considered given parameters for all the actors. Fourthly, the *corporate* leniency programme is available, and we consider the introduction of individual leniency along with it. Finally, the corporate leniency programme entails immunity for both firms and the individuals.

The scenario can be explained as follows: the agent (manager) balances the costs and benefits of continuing the cartel. In absence of individual liability, costs he has to incur are those of detection, entailing individual sanctions. Benefits stem from increased revenue. With the introduction of individual leniency, benefits remain unchanged, while expected costs are mitigated by the possible immunity granted by individual leniency. In this context there seems to exist incentives to blow the whistle. What does he expect from other actors of the system? Other actors are not only the partners in his firm who are also involved in the cartel activity, but also individuals occupying similar positions within Firm 2. If these individuals adopt the same rationality as him, they will also lean to the option of blowing the whistle. From the principal (owner) point of view, the benefit of the cartel is increased revenue; the cost of detection is the administrative fine. With the introduction of individual leniency, benefits and costs are both unchanged *ceteris paribus*. What does the principal expect from the other actors? She comes to the same conclusion as individuals: there are increased chances that each individual will go for cartel termination. The other principal expects the other principal will also expect cartel termination.

Figure 3 summarises the steps in reasoning.

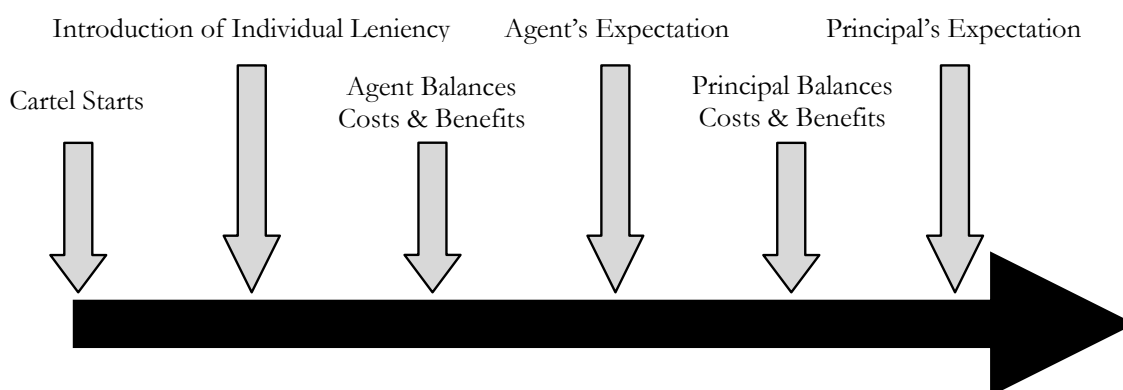


Figure 3 - Development of the System

We assume that the principal of the firm anticipates all the individuals' actions, in which they all get protection while she doesn't. Individual leniency does not protect the firm

as a whole, but only the individuals. As a consequence, she will have to face the incrimination procedure, and get sanctioned for antitrust infringement. The outcome seems to be the termination of the cartel anyway; she chooses the less costly option, which entails applying for corporate leniency, where the firms as well as individuals get immunity. Consequently, the system tends to evolve towards a race for corporate leniency between the principals of the members of the cartel.⁵⁵

4.2.1.2 Further analysis

The outcome reached previously is expressed by Hammond, ‘The real value and measure of the Individual Leniency Program is not in the number of individual applications we receive, but in the number of corporate applications it generates’.⁵⁶ Hammond gives further practical details on this, emphasizing the scope individual leniency can have within a firm engaged in cartel activity.⁵⁷ Even individuals not exposed to such sanctions, and not directly involved in the cartel activity may seek corporate leniency. This author takes the example of an employee who is engaged in a price-fixing agreement. The upper management is aware of such conduct, because a secretary, in charge of transmitting related information to competitors, reports it. Absent individual leniency, the firm itself could sanction the errant employee, and internalise the cost of its illegal behaviour. With an individual leniency programme, management finds itself put at risk by the conduct of his employee: the latter is individually liable, and may have the incentive to blow the whistle on its own. Anticipating this, the firm as a whole has every incentive to seek application for the corporate programme. It is then all about the non-observability of actions, which is the key ingredient of agency problems.

Many questions as to the practical use of individual leniency arise: why would individual leniency be undertaken on its own? Could one think of circumstances in which individual leniency would be effectively applied for? First of all, individual leniency is shaped by the procedure of application: who precisely can go for it. Is the first applicant the only one benefiting from immunity? Is it possible to undertake it once the investigation of the cartel has started? What kind of cooperation is needed in order to get immunity from sanction? What is the level of proof required? Several scenarios may be identified: an individual wants intentionally to put his company under the risk of a cartel prosecution, knowing that he cannot himself fear anything anymore. For example, this could be the case of an individual who, once he left the company, blows the whistle because he kept incriminating evidence.⁵⁸ Asymmetry of information and expectations may best explain this scenario: divergent expectations between owner and managers or between managers and employees may induce the actors to reach different

⁵⁵ CR Leslie, *op cit*, n 24.

⁵⁶ SD Hammond, ‘Cornerstones of an Effective Leniency Program’, speech delivered to ICN Workshop on Leniency Programs, Sydney, 2004, (text available at www.justice.gov/atr/public/speeches/206611.pdf).

⁵⁷ *Ibid*, p 13.

⁵⁸ C Aubert, P Rey and WE Kovacic, ‘The Impact of Leniency and Whistle-blowing Programs on Cartels’ (2006) 24(6) *Int J Ind Organ* 1241, p 1251.

conclusions, and to act according to it, believing it is consistent with the other actor expectation. Arguments which can be found are of the same nature as those explaining why one company applies for corporate leniency before other cartel members. Asymmetry of information seems thus to be the only rational answer available.

4.2.2 Individual leniency increases costs of collusion

The efficiency of individual leniency is also all about agency relations: it helps align incentives towards better market conduct, while increasing costs of collusion. Firstly, the programme seems to have been designed to increase cartel detection, by acting on managerial incentives. Without an individual leniency programme, individual liability seems to be efficient only in the case where managers favour cartel participation at the expense of shareholders. Indeed, we said that shareholders can also benefit from and may want to induce such practice. In this situation, the intuition is as follows: if I am a manager involved in cartel activity, I fear individual sanctions. In the absence of individual leniency, I may want to terminate the cartel, against the will of the shareholders. Thus, I am not able to benefit from any amnesty because self-reporting can only come from the legal representative of the firm, i.e. the owner. The interest of individual leniency is as follows: in case individual liability is not coupled by an individual programme of leniency, there is much room for moral hazard between the principal and the agent, at the expense of the latter. Individual leniency may then help align agent and principal's interests towards further antitrust compliance.⁵⁹

Secondly, when deciding whether to participate in a cartel, the individual will balance costs and benefits of collusion. Information costs are significantly increased in presence of an individual leniency programme. For example, a manager willing to enter a collusive agreement will need to take into account the implications of individual leniency on his costs. The possibility that an employee has to blow the whistle on his own induces different types of costs for the company: firstly, the cost of being prosecuted and sanctioned. Secondly, it gives rise to the necessity of paying information rent to employees, in order to avoid relevant information being used in a leniency application. This type of agency costs considerably increase costs of collusion and so the deterrence of such instrument.⁶⁰

Aubert et al stress the efficiency of individual leniency if coupled with a corporate leniency programme.⁶¹ The model developed by the authors sets up conditions for cartel sustainability. Several parameters of relevance are identified and taken into account: profits from collusion, the probability of getting evidence of collusion, the amount of fine, and the time (accounted for by a discount rate), the rewards granted by individual and corporate leniency programmes, as well as the number of employees informed, and the rent the firm has to pay to them in order to secure the information. This model first considers the absence of corporate leniency, while looking at the effect

⁵⁹ CR Leslie, *op cit*, n 24.

⁶⁰ P Buccirossi and G Spagnolo, *op cit*, n 29, p 23.

⁶¹ C Aubert, P Rey and WE Kovacic, *op cit*, n 52.

of individual programme. A relevant remark is that that the number of informed employee matters for efficiency. The firm needs to pay each of them the same rent of information, to an amount at least equivalent to what they can expect from blowing the whistle. What can we conclude from this? First, the more agents involved in a cartel, the more governance problems that are created. Second, this shows that individual leniency in particular, is nothing but playing along agency costs: in individual leniency, such costs are multiplied by the number of agents, conversely to corporate leniency. This is consistent with our argument that cartels are about agency problems. Costs of collusion are thus determined by agency costs.

Absent corporate leniency, individual leniency decreases cartel profitability. This does not suffice to make it terminate though, because the firm as a whole would still be prosecuted by the antitrust authority, and still has the incentive to compensate its informed employee. Hence, the use of both programmes is needed to increase antitrust enforcement efficiency, ‘even when each instrument, taken separately, would not have been sufficiently effective’.⁶²

The efficiency of individual leniency entails triggering more corporate leniency applications and increasing the costs of collusion. This is all about agency problems: influencing agency costs and creating a moral hazard within the cartel’s organisation so that the two-dimensional game leads to a satisfactory outcome. Not only are corporate governance issues of primary importance for the success of the programme, but their negligence may explain negative outcomes or side-effects.

5. CONCLUSION

In the black box of a cartel, we found a complex widget. We looked at its architecture, which can be represented by a two-dimensional structure. We first separated the widget into two pieces and then assembled the two parts in order to examine its whole functioning. The conclusion of such manipulation is as follows: it is all about articulations. Agency relations in cartels are like the articulations of a widget; not only do they shape the interactions between actors, but also they are of significant importance in the overall functioning of the system. Governance issues are a parameter of analysis that should be given full consideration when assessing antitrust instruments. Institutions need to master the system and its subtleties in order to win the fight against cartels. This may give the ingredients for further discussion on antitrust and governance issues, *à la manière* La Porta et al,⁶³ for example. These authors link corporate finance and the legal system. They argue that the distinction between common law and civil law systems matter in the structure of external finance. Similarly we may ask whether a similar link can be established between corporate governance and antitrust policies in different countries. Are antitrust policies shaped by similar drivers that determine

⁶² C Aubert, P Rey and WE Kovacic, op cit, n 52, p 16.

⁶³ R La Porta, F Lopez-de-Silanes, A Shleifer and RW Vishny, op cit, n 45.

corporate governance? If this is the case this can further stress that corporate governance matters in antitrust policies issues.