



Concurrences

REVUE DES DROITS DE LA CONCURRENCE | COMPETITION LAW REVIEW

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Article | Concurrences N° 1-2018 | pp. 44-59

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ABSTRACT

The authors explore the reasons behind the reduction in immunity applications for cartels in Europe. This confirms the Commission's reliance on immunity applications to uncover cartels, discusses the features of the current regime for applicants in detail, and assesses whether the benefits and disadvantages of the immunity regime have changed over time. The analysis is based on a number of original and new statistics tracing the relative dependence on, and alleged benefits of, the European immunity regime. These have been compiled based on the Commission's cartel infringement decisions over recent years.

Les auteurs étudient les raisons derrière la réduction des demandes d'immunité pour les cartels. Cela confirme le recours de la Commission aux demandes d'immunité pour détecter les cartels, décrit en détail les caractéristiques des dispositions actuelles pour les demandeurs et fait le bilan d'éventuels changements au cours du temps des avantages et des inconvénients du régime d'immunité. L'analyse se base sur un nombre de statistiques nouvelles et originales retraçant la dépendance relative du régime d'immunité européen et ses avantages supposés. Ceux-ci ont été établis sur la base des décisions de la Commission relatives aux infractions du droit des ententes au cours des dernières années.

*The authors would like to thank Spyridon Goulielmos, Gemma Nash and Célia Agostini for their support in the analysis of the statistical data and assistance in drafting a number of the key sections. We are grateful to Kevin Coates for his useful comments.

I. Introduction

1. Behind this provocative title hides a worrying reality for anti-cartel enforcement by the European Commission—and possibly national competition authorities (“NCAs”) within the EU¹: the noticeable decrease of the number of immunity applications over the last several years, and the resulting impact on the Commission’s ability to detect cartels.² One—very optimistic—explanation is that the compliance message has finally hit home and companies engage less in cartel behaviour—and therefore fewer immunity applications are submitted. Probably, a more realistic explanation is that companies, upon discovering their involvement in illegal cartel behaviour, no longer have the knee-jerk reaction to engage in a race for immunity, but instead seek to find alternative ways to cease the behaviour and protect their interests, without necessarily combining that with an immunity application.

2. Let us be clear from the outset on two points. First, this article does not seek to justify in any way cartel practices. It is clear that, when confronted with a cartel situation, the board and executives of the company need to immediately find a way to put a stop to it. Aside from the harm to society, not doing so could result in substantial liability for the company and, potentially, result in personal criminal, civil and corporate liability. However, there is no concurrent legal obligation to report the situation to competition authorities and apply for immunity. Making an immunity application is the result of a complex weighing of the benefits and disadvantages—and a detailed risk analysis. Second, the immunity incentive equation is likely to be different in the case of global cartels where there is a substantial risk of individuals being indicted and incarcerated in the United States. In that case, the benefit of granting immunity to the executives involved in the cartel practice may outweigh all of the disadvantages we list below.

¹ There is currently not sufficient statistical material to assess the decline at the level of the NCAs. The statistics in this article are therefore limited to the European Commission.

² The concepts used are in line with the distinction made in the Commission Notice on Immunity from fines and reduction of fines in cartel cases, [2006] OJ C 298/17, pp. 17–22 (“2006 Leniency Notice”). Immunity refers to “first-in” immunity. Leniency refers to reduction of fines.

3. The purpose of this article is to assess whether and to what extent the immunity incentive equation in the EU has changed over time—and whether the balancing between benefits and disadvantages of applying for immunity has shifted.³ One of the key elements that influence the decision to apply for immunity is the degree of certainty that immunity applicants have when determining whether to make the—often corporate life changing—initiative to apply for immunity.⁴ Issues that are being considered are:

- legal certainty—will the behaviour the immunity applicant is reporting be considered to be a cartel and qualify for immunity?;
- jurisdictional certainty—will the authority the immunity applicant is reporting to take jurisdiction? Are other authorities likely to take jurisdiction?;
- certainty regarding liability and financial penalties—immunity no longer means immunity. It only means immunity from administrative fines. There is still a whole layer of private enforcement which the immunity applicant will need to face. This is particularly an issue in view of recent developments like the implementation of the Damages Directive;⁵
- certainty relating to timing—when will all of the investigations/procedures be over so that the immunity applicant can get on with its proverbial business life?;
- certainty relating to the ultimate outcome—will the immunity applicant ultimately obtain immunity, and what are the key steps to the outcome?;
- finally, add to that the inherent uncertainty when applying for immunity as to the extent, scope and precise nature of the cartel. Often, at that stage, the precise storyline is inconclusive and substantial additional fact-finding is necessary to deepen and broaden the precise fact pattern of the behaviour.

II. The importance of the leniency programme for anti-cartel enforcement

4. The European Commission, like other competition regulators, prides itself on delivering an annual success story of the number of cartels it has uncovered, and the number of infringement decisions and fines it imposed.⁶ However, these statistics do not refer to the number of immunity and leniency applications that were involved in such achievements, nor illustrate any general trends of the numbers of immunity and leniency applications it received in a given year.

5. According to *Global Competition Review's* Rating Enforcement Reports,⁷ the number of leniency applications (including immunity applications) has reduced by almost 50% over the last few years. In 2014 there were 46 leniency applications, which dropped to 32 applications in 2015, and finally only 24 applications have been registered in 2016. In a recent survey of 30 practitioners with extensive leniency experience, 83% of participants indicated that they sensed a decrease in interest from their clients to apply for leniency in recent years.⁸ The increased exposure to civil damages claims was the factor most frequently mentioned (36%). Other factors that contributed to the decline were the perceived uncertainty resulting from the publication of parallel enforcement proceedings (in Europe and beyond) (26%), perceived uncertainty in how authorities will grant leniency reductions (19%), perceived uncertainty in how authorities will calculate fines (14%), and perceived uncertainty in how authorities will deal with requests for access to file for leniency submissions (12%).

6. The problem for the Commission facing such a material drop in leniency applications is that up until now, the Commission has heavily relied on the information sourced from immunity applicants in order to uncover the cartel in the first place. Indeed, it is often highlighted that immunity and leniency applications prove the most effective source of information in terms of discovering a cartel. However, the question remains as to whether the Commission has now arrived at the point of over-reliance on the leniency programme as an essential tool for its cartel detection methodology. Almost all

3 For a detailed overview of the 2006 Leniency Notice, see W. Wils, *The Use of Leniency in EU Cartel Enforcement: An Assessment after Twenty Years*, *World Competition Law and Economics Review* 2016, 327, available at: <http://ssrn.com/author=456087>; and M. Siragusa and C. Rizza (ed.), *EU Competition Law Volume III: Cartels & Collusive Behaviour, Restrictive Agreements and Practices Between Competitors*, Claeys & Casteels Publishing (2012), see chapter 3.

4 P. Amador Sanchez and K. Hendriks, *The scope of EU leniency programmes; dealing with the open concept of a 'secret cartel'*, *CLPD* 2015, 71.

5 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, [2014] OJ L 349, pp. 1–19 (“Damages Directive”).

6 EU wide cartel statistics available on DG Competition's website: <http://ec.europa.eu/competition>.

7 *Global Competition Review*, Rating Enforcement 2017, Rating Enforcement 2016 (available at: <http://globalcompetitionreview.com/series/rating-enforcement>), and *Global Competition Review*, Rating Enforcement 2015 (available at: http://81.7.114.195/uploads/documents/files/administracine_informacija/naudos_vertinimas/nauda_gr_2014.pdf).

8 Survey prepared by Brussels Matters for its meeting: *The European antitrust leniency calculus c. 2016: still worth it?* (Brussels 16 June 2016), referred to in W. Wils' article, *Private enforcement of EU Antitrust Law and its relationship with Public Enforcement: Past, Present and Future*, *World Competition Law and Economics Review* 2017, 41.

of its infringement decisions in recent years are based on immunity applications, and if you run the numbers, it becomes clear that the regulator only exceptionally reaches a decision without the cooperation of the companies party to the cartel. Even in cases that come to the attention of the Commission through other sources, the investigated companies decide to cooperate (either through follow-on leniency, or settlements).

7. We conducted a review of cartel cases decided under the Commission's 2006 Leniency Notice, and this illustrates that for most years 100% of investigations were sourced from immunity applicants (see Table 1). And the two investigations that were not based on an immunity application (*Envelopes* and *Power exchanges*) were both decided under the settlement procedure, which meant that all parties acknowledged their participation and their liability in the cartel. In addition, in *Envelopes*, almost all investigated companies applied for follow-on leniency.

Table 1. Sources of investigations

Date	Cartel	Source of investigation
2017		
22.11.2017	39881 – Occupant Safety Systems*	Immunity applicant
27.09.2017	39824 – Trucks	Immunity applicant
21.06.2017	40013 – Lighting Systems	Immunity applicant
16.06.2017	39780 – Paper envelopes	Commission – Information received from an informant
17.03.2017	39258 – Airfreight	Immunity applicant
08.03.2017	39960 – Thermal Systems**	Immunity applicant
08.02.2017	40018 – Car battery recycling	Immunity applicant
Total % leniency applicants for 2017		92%
2016		
12.12.2016	39904 – Rechargeable batteries	Immunity applicant
07.12.2016	39914 – Euro Interest Rate Derivatives (EIRD)	Immunity applicant
29.06.2016	38589 – Heat stabilisers	Immunity applicant
25.05.2016	39792 – Steel abrasives	Immunity applicant
06.04.2016	39965 – Mushrooms	Immunity applicant
27.01.2016	40028 – Alternators and Starters	Immunity applicant
Total % leniency applicants for 2016		100%
2015		
21.10.2015	39639 – Optical Disc Drives	Immunity applicant
15.07.2015	40098 – Blocktrains	Immunity applicant
24.06.2015	39563 – Retail food packaging	Immunity applicant
17.06.2015	40055 – Parking heaters	Immunity applicant
04.02.2015	39861 – Yen Interest Rate Derivatives (YIRD)	Immunity applicant
Total % leniency applicants for 2015		100%
2014		
21.10.2014	39924 – Swiss Franc Interest Rate Derivatives (1)	Immunity applicant
21.10.2014	39924 – Swiss Franc Interest Rate Derivatives (2)	Immunity applicant
03.09.2014	39574 – Smart card chips	Immunity applicant
02.04.2014	39610 – Power cables	Immunity applicant
19.03.2014	39922 – Automotive bearings	Immunity applicant
05.03.2014	39952 – Power exchanges	Commission's initiative

29.01.2014	39801 – Polyurethane foam	Immunity applicant
Total % leniency applicants for 2014		86%
2013		
27.11.2013	39633 – Shrimps	Immunity applicant
10.07.2013	39748 – Automotive wire harnesses	Immunity applicant
Total % leniency applicants for 2013		100%
2012		
05.12.2012	39437 – TV and computer monitor tubes	Immunity applicant
27.06.2012	39611 – Water management products	Immunity applicant
28.03.2012	39462 – Freight forwarding	Immunity applicant
28.03.2012	39452 – Mountings for windows and window-doors	Immunity applicant
Total % leniency applicants for 2012		100%
2011		
07.12.2011	39600 – Refrigeration compressors	Immunity applicant
19.10.2011	39605 – CRT glass bulbs	Immunity applicant
13.04.2011	39579 – Consumer Detergents	Immunity applicant
Total % leniency applicants for 2011		100%
TOTALS		
Total Investigations under 2006 Leniency Notice	Total sources from leniency applicants	Total % sourced from immunity applicants
40	38	95%

Source: E. Sakkars and J. Ysewyn, *European Cartel Digest* (November 2017 supplement) and <http://ec.europa.eu/competition/cartels/cases/cases.html>

8. History shows that leniency often comes in waves, and one immunity application can often be the trigger to a whole host of related, but separate, cartels—for instance in the chemicals sector,⁹ the financial sector,¹⁰ and the auto-parts cartels.¹¹ Equally, many cartel investigations are being conducted on a global scale. In *Auto-parts* so far, companies have been fined in the United States, the EU, as well as from at least six other jurisdictions; China, Japan, Korea, Canada, Singapore and Australia.

9. Where an opportunity to uncover such “mega-cartels” spanning so many different products, and potentially jurisdictions, is lost due to the growing scepticism on the part of the potential immunity applicants, the results for global anti-cartel enforcement could be devastating.

* Occupant Safety Systems has been separated in to 4 separate infringements, and as such as been counted four times, as it involved more than one immunity applicant depending on the relevant infringement and product market.

** Thermal systems has been separated in to 4 separate infringements, and as such has been counted 4 times, as it involved more than one immunity applicant depending on the relevant infringement and product market.»

9 Case AT.37.773 – *Monochloroacetic Acid*, 19 January 2005; Case AT.38.443 – *Rubber Chemicals*, 21 December 2005; Case AT.38.620 – *Hydrogen peroxide*, 3 May 2006; Case AT.38.645 – *Methacrylates*, 31 May 2006; and Case AT.38.695 – *Sodium Chlorate*, 28 March 2012.

10 Case AT.39.861 – *Yen Interest Rate Derivatives (YIRD)*, 4 December 2013; Case AT.39.914 – *Euro Interest Rate Derivatives (EIRD)*, 6 April 2016; and Case 39.924 – *Swiss France Interest Rate Derivatives*, 21 October 2014.

11 Case AT.39.748 – *Wire Harnesses*, 10 July 2013; Case AT.39.881 – *Occupant Safety Systems*, 22 November 2017; Case AT.39.922 – *Bearings*, 19 March 2014; Case AT.39.960 – *Thermal Systems*, 8 March 2017; Case AT.40.028 – *Alternators and Starters*, 27 January 2016; and Case AT.40.013 – *Lighting Systems*, 21 June 2017.

III. The benefits of applying for immunity

10. To assess whether the immunity incentive equation in the EU has changed, one obviously has to start with the actual or perceived benefits when applying for immunity.

11. We have identified six benefits:

- immunity from fines;
- a less hostile relationship with the competition authority;
- a better investors’ reaction;
- the avoidance of appeal costs;
- the partial protection under the Damages Directive;
- the protection of individuals.

1. Immunity from fines

12. Undoubtedly, the core incentive for a company to apply for immunity under the current European leniency programme is immunity from fines. Indeed, as long as the immunity applicant meets all the requirements set out in the 2006 Leniency Notice,¹² applying for immunity is the only way for a firm to obtain 100% immunity from an antitrust fine. At a national level, all Member States, but for Malta, have adopted similar provisions. The leniency provisions at an EU level as well as the fact that almost all Member States have incorporated similar programmes into their national laws illustrate the uniform strategy that European competition authorities have adopted. From the authorities’ perspective, therefore, awarding immunity from fines to the cartel member who first contributes decisively to the opening of an investigation or to the finding of an infringement following a dawn raid is ultimately what the authorities are willing to offer as the coveted “carrot.”

13. This strategy is generally regarded as successful by European competition authorities, and the complete avoidance of antitrust fines remains the key motive for firms to come forward and apply for immunity. The incentive for a cartel member to seek redemption by unveiling itself and its co-cartelists is even further reinforced if we take into account the increased levels of Article 101 fines, especially over the last two decades. Indeed, the amount that could be potentially avoided is substantial: in *YIRD*,¹³ UBS received full immunity

12 2006 Leniency Notice, para. 8 to 22.

13 Case AT.39861 – *Yen Interest Rate Derivatives (YIRD)*, 4 December 2013; European Commission Press Release, Antitrust: Commission fines banks €1.49 billion for participating in cartels in the interest rate derivatives industry (4 Dec. 2013), available at: http://europa.eu/rapid/press-release_IP-13-1208_en.htm.

for revealing the existence of several linked cartels and thereby avoided a fine of around €2.5 billion for its participation in five of the seven infringements. More recently, in *Trucks*,¹⁴ MAN received full immunity for revealing the cartel, thereby avoiding an individual fine of around €1.2 billion.

14. As immunity from fines is the key benefit for applicants, it is critical that the Commission does not unnecessarily withdraw immunity for non-compliance with the conditions. It is, therefore, a positive development that, in spite of a number of concerns raised in Statements of Objections (“SO”) concerning compliance with the immunity conditions over the last few years, the Commission has only once—in a blatant example of failure to comply with the conditions¹⁵—ultimately withdrawn provisional immunity.

2. Less hostile relationship with the competition authority

15. In addition to the limitation of exposure to fines, leniency and immunity applicants also usually benefit from more constructive relations with the competent competition authority. In Europe, where competition authorities have significant discretion with regard to which cases should be prioritized, companies involved in a cartel investigation have an interest to be on the right side of the regulator and at the same time take advantage of the other benefits of the leniency programme. Furthermore, it could be argued that cooperation with the authority shows a high compliance standard, thus being beneficial to the company’s public image (notwithstanding the cartel conduct).

3. Better investors’ reaction

16. In addition to the direct advantages that companies can gain from being a successful immunity applicant, there are also indirect—negative—consequences towards the companies’ share price they can ultimately avoid.

17. Antitrust investigations in the EU involve a sequence of events which possibly affect the investigated firm’s market value—the dawn raid, requests for information (“RFI”), the SO, the hearing and the ultimate infringement/fining decision being the key ones. Depending on the exposure of such events to the press and the concomitant availability of public information, studies show that some of these events do have a negative impact on the company’s share prices.¹⁶

14 Case AT.39824 – *Trucks*, 27 September 2017; European Commission Press Release Antitrust: Commission fines truck producers €2.93 billion for participating in a cartel (19 July 2017), available at: http://europa.eu/rapid/press-release_IP-16-2582_en.htm.

15 C-578/11, *Deltafina v. Commission* [2014] ECLI:EU:C:2014:1742.

16 A. Günster and M. A. Van Dijk, The Impact of European Antitrust Policy: Evidence from the Stock Market (2011), available at SSRN: <https://ssrn.com/abstract=1598387>; L. Aguzzoni, G. Langus, and M. Motta, The Effect of EU Antitrust Investigations and Fines on a Firm’s Valuation, *The Journal of Industrial Economics* (2013) Vol. 61(2): 290.

18. However, the impact of each type of event on the firm's share price materially differs. This is because investors do not have inside information and rely solely on public information. For example, an RFI or an SO is highly unlikely to influence a firm's price, mostly because such events remain confidential between the stakeholders. On the other hand, dawn raids tend to be more visible, and thus if they are uncovered may attract the attention of the press. Finally, among all of the events described above, the announcement of the infringement decision is obviously the most visible event of all. Consequently, dawn raids and the infringement decision are most likely to trigger investors' negative reactions.¹⁷

19. Unfortunately, recent studies that discuss the effects of an antitrust investigation on the share prices of the companies involved in the cartel cases decided under the 2006 Leniency Notice are not available. However, older studies confirm that dawn raids as well as the adoption of an infringement decision by the Commission may have a statistically significant effect on the price of a firm's shares. In 2011, Günster and Van Dijk analysed a sample of 253 companies involved in 118 European antitrust cases over the period 1974–2004.¹⁸ They illustrate that there were substantial negative abnormal stock returns around the time of the dawn raid and around the date of the final infringement decision. Specifically, they reported average abnormal returns of -4.7% for the dawn raid and -1.9% for the final decision.¹⁹ Moreover, a more recent study by Aguzzoni, Langus and Motta found that a dawn raid reduces a firm's share price by 2.89%, while an infringement decision reduces it by 3.57%. Overall, they reported that the total effect of the antitrust action ranges from -3.03% to -4.55% of a firm's market value.²⁰

20. Aguzzoni, Langus and Motta go further and compare the investors' reaction to immunity applicants with the treatment they reserve for others. They explain that according to their data, the event of a dawn raid or the issuance of an infringement decision “do not affect in any statistically significant way [the share prices] of firms which have received immunity within the leniency programme.”²¹ In contrast, as explained above, for firms that are raided and ultimately fined the situation is materially different.²²

21. The results set out above could be interpreted to send a clear message to doubtful immunity applicants: if the cartel you participate in is becoming fragile, you should

seek immunity immediately, otherwise, in addition to a fine, you will also pay for the investors' negative reaction.

4. Avoidance of appeal costs

22. Obtaining immunity means a significant reduction in the costs of legal fees at the appeal stage since an immunity recipient will not normally appeal the authority's decision.

23. Past statistics speak for themselves. At a European level, from 2000 to date, only four immunity recipients filed an appeal. In *Italian Raw Tobacco*,²³ Deltafina lost its provisional immunity after it revealed its cooperation with the authorities to the other cartel members. Although the Commission nevertheless offered the company a hefty reduction for cooperation, Deltafina made an unsuccessful appeal.²⁴ In *Bathroom Fittings*²⁵ and in *Power Cables*²⁶ the whistleblowers contested the market definition adopted by the Commission as being too broad. In the first case, the appeal was dismissed by the General Court (“GC”),²⁷ while the second judgment is still pending having been heard in March 2017, and the judgment expected in the course of 2018.²⁸ Finally, in *Airfreight*,²⁹ the immunity recipient, Lufthansa, successfully appealed the infringement decision (which was ultimately readopted), even though it did not receive any penalty.³⁰

24. These very limited examples that we were able to identify over the last eighteen years corroborate that in the majority of cases, immunity recipients have no interest to appeal and, therefore, avoid the managerial, time and financial burdens of the appeal procedure.

5. Partial protection under the Damages Directive

25. By admitting cartel participation in recent years a company also exposes itself to damages claims from the victims injured by the cartel activity. Although the main purpose of the Damages Directive is to facilitate parties bringing actions for damages for infringements of competition law in Europe, it also sets out rules which—to a limited extent—protect immunity applicants in order to maintain the effectiveness and attractiveness of the European leniency programme. In particular, it denies access to immunity/leniency statements for the purpose

17 Op. cit. *supra* note 16, A. Günster and M. A. Van Dijk, see pp. 15–16.

18 Ibid., see p. 2.

19 Although Günster's and Van Dijk's aggregated statistics include all possible conduct under Articles 101, 102 and 106 TFEU, 75% of the cases considered are cartel infringements. Op. cit. *supra* note 16, A. Günster and M. A. Van Dijk, see p. 12.

20 Op. cit. *supra* note 16, L. Aguzzoni, G. Langus, and M. Motta, see pp. 306–311, 322.

21 Ibid., see p. 327.

22 Although an extended analysis of the reasons for such a discrepancy goes beyond the purpose of this article, we should note here that the results of this study firmly confirm that what is important for the investors' reaction is whether or not a company will ultimately receive a fine. This means that the event that triggers this negative reaction is not the investigation on its own (or any event in the sequence of them as described above), but whether or not the firm ultimately will have to bear the financial burden of paying a fine.

23 Case AT.38281 – *Italian Raw Tobacco*, 20 October 2005.

24 C-578/11, *Deltafina v. Commission* [2014] ECLI:EU:C:2014:1742.

25 Case AT.39092 – *Bathroom Fittings & Fixtures*, 23 June 2010.

26 Case AT.39610 – *Power Cables*, 2 April 2014.

27 T-378/10, *Masco and Others v. Commission* [2013] ECLI:EU:T:2013:469.

28 T-445/14, *ABB v. Commission* [2014] Application (OJ).

29 Case AT.39258 – *Airfreight*, 9 November 2010, and readopted infringement decision, 17 March 2017.

30 T-46/11 *Deutsche Lufthansa and Others v. Commission* [2015] ECLI:EU:T:2015:987.

of actions for damages, and largely removes joint and several liability for the immunity applicant.³¹ However, to what extent these provisions actually protect the immunity applicant from damages claims in practice is further discussed below.

6. Protection of individuals

26. To our knowledge, there have been no examples of individual sanctions at national level, following an EU investigation.³² In a number of cases, this is because the immunity applicant also seeks immunity in the countries which have criminal regimes. In a lot of other cases, no such immunity has been requested or is available. One might ask the question whether, at the Member State level, there is an implicit understanding that criminal cases will not be brought for cartels decided by the European Commission.

27. In any event, the fact is that, currently, there is no Europe-wide regime in force that dictates that Member States should grant criminal immunity to individuals that cooperate with the authorities. However, on 22 March 2017, the Commission presented its ECN+ Directive which is intended to empower Member States' NCAs to be more effective enforcers.³³ The proposed Article 22 reads: “*Member States shall ensure that current and former employees and directors of applicants for immunity from fines to competition authorities are protected from any criminal and administrative sanctions and from sanctions imposed in non-criminal judicial proceedings for their involvement in the secret cartel covered by the application, if these employees and directors actively cooperate with the competition authorities concerned and the immunity application predates the start of the criminal proceedings.*”

28. This proposal could significantly mitigate the legal uncertainty as to how undertakings employees can be shielded from individual sanctions. If this materializes, such protection would create a significant additional incentive for employees to come forward internally within their company to cooperate, and as a result potentially increase numbers of immunity applications to European competition authorities.

29. The benefit of protecting individuals is even more important in the context of global cartels where there is a substantial risk of individuals being indicted in the United States. In that case, that fact, in itself, may outweigh all of the disadvantages we list below.

³¹ 2006 Leniency Notice, *see* para. 38; Damages Directive, *see* Articles 6 and 11.

³² In *Marine Hoses*, a number of executives were allowed to execute their US-imposed prison sentence in the United Kingdom.

³³ Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, COM (2017) 142 final.

IV. The disadvantages of applying for immunity

30. The next element in the immunity incentive equation in the EU is the—again actual or perceived—disadvantages. This is where the needle has shifted the most over the last ten years.

31. We have identified ten disadvantages:

- the uncertainties around the cartel concept;
- the risk of losing a fighting chance;
- the uncertainty concerning jurisdiction;
- the very high administrative hurdle;
- the duration of cartel investigation and damage claims;
- the discretionary marker regime;
- the domino effect through the extension of the cartel into other markets and jurisdictions;
- the broader impact on the relationship with competitors;
- the implication of employees;
- the risk of private damages.

1. Uncertainties around the cartel concept

32. One of the basic requirements of every company decision to apply for immunity is that it has to pertain to “secret cartels.” Both of these elements create their own interpretative challenges which we will discuss below. These challenges have been there for the most of the last ten years and, by themselves, do not explain the drop in immunity applications. But, if there were more clarity on the interpretation of the cartel concept, and the scope it is given in the context of immunity programmes, that would certainly add to the incentives to apply for immunity.

1.1 The cartel concept

33. Most of the immunity applications at the EU level concern classic cartels with an array of different hardcore features: price-fixing, output limitation, market or customer sharing, bid rigging, etc. These are the classic hardcore cartel cases. The competitors meet in the proverbial smoke-filled room, they negotiate a cartel arrangement, agree on the terms and conditions and, ultimately, (try to) implement it.

34. In 2014, the term “cartel” was for the first time introduced in EU legislation through the Damages

Directive, which defines a cartel as “an agreement or concerted practice between two or more competitors aimed at coordinating their competitive behaviour on the market or influencing the relevant parameters of competition through practices such as, but not limited to, the fixing or coordination of purchase or selling prices or other trading conditions, including in relation to intellectual property rights, the allocation of production or sales quotas, the sharing of markets and customers, including bid-rigging, restrictions of imports or exports or anti-competitive actions against other competitors.”³⁴ While the Directive only refers to the classic cartel features, importantly it notes that the meaning of a cartel is “not limited” to these examples.

35. Indeed, there is little doubt that the conceptual cartel needle is moving and the cartel concept has broadened into scenarios where the fact pattern is less obvious, and the evidential threshold less straightforward. European competition authorities have recently started moving enforcement resources towards these less obvious types of cartels. Exchanges of strategic information, “hub-and-spoke” cases and price signalling are types of object infringements where the definition of the infringement is not as clearly delineated.

36. The introduction of these new cartel concepts creates a challenge for immunity applicants and their advisors.

1.1.1 Information exchange

37. The European Commission’s decisional practice, supported by the CJEU,³⁵ considers that exchanges of strategic information which are capable of removing uncertainty about the intended conduct of the competitors are tainted with an anticompetitive object.³⁶ The concept of information exchange as an infringement by object is, however, not straightforward. There are types of information exchange which are clearly not illegal, e.g., exchanges of historic, generic or publicly available information.³⁷ On the other hand, exchanges of information among competitors with the object of fixing prices or quantities “will normally be considered and fined as cartels.”³⁸ It is clear that the Commission, again supported by the CJEU, adopts a very broad definition of illegal information exchange, but there is no clear dividing line. Some authors have suggested that the Commission has turned down leniency applications concerning information exchanges on the basis of the suggestion that it was insufficiently certain that it would be able to establish a serious violation of the

cartel prohibition.³⁹ If that is correct, that would clearly contribute to the uncertainty which the immunity process should avoid.

1.1.2 Signalling

38. Signalling is another complex concept within the cartel sphere which is gaining increased interest from competition authorities in Europe. Usually, unilateral public announcements—in stark contrast to the private sharing of sensitive commercial information among competitors—should not infringe European competition law rules. However, the recent *European Liner Shipping* investigation,⁴⁰ which resulted in commitments from the various parties, shows that even unilateral price announcements can, in certain circumstances, be considered to be an object infringement. In *European Liner Shipping*, the parties regularly announced their intended future price increases three to five weeks in advance, and such announcements would generally be made around the same time, for similar routes, and similar levels of increase with the same implementation date. The Commission found that these announcements were of little use to customers, but had concerns that they allowed the parties to explore each other’s pricing intentions and to coordinate behaviour. In its Preliminary Assessment the Commission therefore raised the concern that this signalling practice may amount to a restriction of competition by object.⁴¹

39. However, the position adopted by the authorities in relation to signalling is in flux—even in *European Liner Shipping* no hard infringement decision and fine was imposed, and instead commitments agreed. While this does widen the potential concept of the traditional cartel model going forward, it also throws into question what immunity applicants can identify as behaviour that is affirmatively an infringement of Article 101, and thereby worthy of the time and effort to make an immunity application. This is likely to make things more complicated, and thereby represent a deterrent to any potential immunity applicant coming forward.

1.2 “Secret cartels”

40. As mentioned above, the leniency programme at the EU level is only available for “secret cartels.” The 2006 Leniency Notice states: “This notice sets out the framework for rewarding co-operation in the Commission investigation by undertakings which are or have been party to secret cartels affecting the Community.”⁴²

34 Damages Directive, see Article 2(14).

35 C-8/08, *T-Mobile Netherlands BV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECLI:EU:C:2009:343; C-286/13, *Dole Food and Dole Fresh Fruit Europe v. Commission* [2015] ECLI:EU:C:2015:184.

36 Op. cit. supra note 35, *T-Mobile Netherlands BV*, see para. 43.

37 Guidelines on the applicability of Article 101 of the TFEU to horizontal cooperation agreements (“Horizontal Guidelines”), [2011] OJ C 11/1, see para. 86.

38 Horizontal Guidelines, [2011] OJ C 11/1, see para. 59.

39 Christopher R.A. Swaak and Rein Wesseling, Reconsidering the leniency option: if not first in, good reasons to stay out, *ECLR* (2015) Vol. 36(8): 346, see p. 347.

40 Case AT.39850 – *Container Liner Shipping*, 7 July 2016.

41 Ibid., see para. 55.

42 2006 Leniency Notice, see para. 1. The ECN Model Leniency Programme also “concerns secret cartels,” see ECN Model Leniency Programme (as revised in November 2012) available at: http://ec.europa.eu/competition/ecn/mlp_revised_2012_en.pdf, para. 4 and 11.

41. The use of the word “secret” is intended to limit the application of the leniency programme to only those companies that are involved in cartels that “would otherwise be difficult to detect.”⁴³ The Damages Directive also emphasizes the secret nature of a cartel and underscores the key role that leniency applications play in being able to expose a cartel that otherwise would have been difficult to bring to an end; in doing so the Directive affords protection to those applicants that come forward.⁴⁴ As such, agreements between undertakings containing anticompetitive restraints that have been made public will not be considered to be “secret.”⁴⁵ In the same vein, under EU law, the leniency programme generally only applies to horizontal agreements, and will not apply to agreements which are purely vertical as these can reasonably be detected in ways other than via an immunity application.⁴⁶ However, it is accepted that it may still apply to cartel arrangements that have vertical elements. The ECN Model Leniency Programme was specifically revised in 2012 to read: “*It is not excluded (...) that a cartel which includes vertical elements may be covered by the leniency programme.*”⁴⁷ However, in national leniency programmes there is no consistent reference to a “secret cartel” and in fact there is variation as to whether the programmes extend to both horizontal and vertical agreements.⁴⁸ The uncertainty around the notion of a “secret cartel,” and divergence at national level of its application to national leniency programmes, means that this creates an additional layer of complexity in the decision-making process around the immunity conundrum.

1.2.1 Hub-and-spoke cartels

42. An example of a horizontal-vertical hybrid is a hub-and-spoke cartel. Much as there remains uncertainty over the scope of a “secret cartel,” what constitutes a hub-and-spoke cartel is also still an issue of fierce debate before a number of higher courts in Europe. And it is undoubtedly a complex discussion. Hub-and-spoke cartels are essentially an indirect cartel (the horizontal element) in which the exchange of information and intentions between the competitors occurs through a third party, either a supplier or a distributor (the vertical element). This is not a straightforward infringement to establish. It is very common, especially in highly consolidated markets, for competitor pricing information to be widely available through the negotiation process with customers and suppliers. In addition, it is inherent in distribution relationships for there to be intensive

contact and negotiations about the optimal distribution strategy. At what time that negotiation process turns into a hub-and-spoke cartel is still heavily debated.

43. UK decisional practice was a front-runner in this area. In the UK a hub-and-spoke agreement is established, in the context of fixing prices, where: (i) retailer A discloses to supplier B information on future pricing intentions under circumstances in which A would intend for B to pass that information on to retailer C; (ii) B passes the information on to retailer C, who is aware that the information was disclosed by A to B; and (iii) C uses the information to determine its own pricing.⁴⁹ In this scenario all three parties (A, B and C) are parties to a concerted practice and as such are infringing competition law. The key element is the intention and understanding of parties A and C, which can be difficult to prove. Whether all three circumstances are satisfied may not be immediately obvious to any party involved, and as such the decision on whether to apply for immunity is also not an obvious one. We have seen similar cases in Spain, Germany, Italy and Belgium.

44. Interestingly, at the EU level the Commission and the European courts have found an involved third party who operates in a different market to those in the horizontal cartel to be liable for its involvement in the cartel, but instead of using the hub-and-spoke theory, the third party is instead considered a “*facilitator*.”⁵⁰ A recent decision from the Commission and the GC in illustrating this is *YIRD* where ICAP (an interdealer broker) was initially fined €14.9 million for “*facilitating*” the cartel.⁵¹ However this case has been considered by one US commentator to be an example of EU level enforcement against hub-and-spoke agreements,⁵² even though there is no reference in the Commission’s decision or the GC’s judgment to a hub-and-spoke mechanism.⁵³ This further muddies the much needed legal certainty as to what actions constitute a real cartel infringement and as such whether immunity is available.

45. Leniency may therefore be the right option for the classic “smoke-filled room” hardcore cartels. But what about the above information exchange, price signalling, or hub-and-spoke cases? In those situations, the regulator depends primarily on the cooperating companies to corroborate the evidence obtained from one party. In

43 Op. cit. *supra* note 3, M. Siragusa and C. Rizza (ed.), *see para.* 3.14.

44 Damages Directive, *see recital* 38.

45 Case AT.39839 – *Telefonica/Portugal Telecom*, 23 January 2013, *see para.* 327 and 491. In this decision the Commission considered an agreement between competitors containing a non-compete clause which was made public could not be a “secret cartel.”

46 Case COMP/35.587 – *Video Games*, 30 October 2002; Case COMP/35.706 – *POI Nintendo Distribution*, 30 October 2002 and Case COMP/36.321 – *Omega/Nintendo+1*, 30 October 2002, *see para.* 454. The decision was upheld by the General Court in *T-13/03, Nintendo Co Ltd and Nintendo of Europe GmbH v. Commission of the European Communities* [2009] ECLI:EU:T:2009:131; *op. cit. supra* note 4, *see p.* 73.

47 Op. cit. *supra* note 42, ECN Model Leniency Programme, *see para.* 14.

48 Op. cit. *supra* note 4, *see p.* 75.

49 Case 2005/1071, 1074 and 1623, *Argos Limited and Littlewoods Limited v. Office of Fair Trading and JJB Sports Plc v Office of Fair Trading* [2006] EWCA Civ 1318, *see para.* 141.

50 C-194/14 *AC-Treuhand AG v. Commission* [2015] ECLI:EU:C:2015:717.

51 Case AT.39861 – *Yen Interest Rate Derivatives*, 4 February 2015; and T-180/15, *ICAP v. European Commission* [2017] ECLI:EU:T:2017:795. Note that while the GC restated the position in *AC-Treuhand* and confirmed that ICAP had committed an infringement by acting as a “*facilitator*,” it did annul the fine imposed on ICAP due to the Commission’s failure to provide sufficient reasoning on the calculation of the fine. The Commission now has twelve months in which to recalculate the fine.

52 E. Prewitt and G. Fails, *Indirect information exchanges to hub-and-spoke cartels: enforcement and litigation trends in the United States and Europe*, *Competition Law & Policy Debate* (May 2015) Vol. 1(2): 63, *see pp.* 66–67.

53 In fact, the decision of the Commission and the General Court apply the “*facilitation test*” as established in *AC-Treuhand*.

those circumstances, companies might wonder what is in their best interest: going in for immunity and cooperating, exposing themselves to fines and damages claims? Or letting the regulator do its own fact-finding, dealing with legal concepts that are in flux and fighting the case?

2. Losing a fighting chance

46. By applying for immunity, companies lose the chance of the conspiracy “never coming out” or—at least—of the company “not being convicted.”

47. This raises two issues: (i) the complex—and by now well developed—issue of the prisoner’s dilemma, but

also, and more importantly, (ii) the substantially less researched question of the balance of outcomes between companies that fight and companies that don’t and apply for immunity. To rephrase the question: what are the chances of companies that fight, to get off?

48. In order to address this point, we conducted research on the outcome of European Commission cartel investigations in which the Commission adopted an infringement decision following the date of entry into force of the Damages Directive—namely, 25 December 2014. The results showed that for those companies that were investigated but did not apply for immunity or leniency, the chance of escaping a fine was nearly 70%.

Table 2. Win/loss statistics of cartel investigations since entry into force of the Damages Directive

Total Companies Investigated	Total Companies Fined	Leniency			Settlement (only)	Non-Leniency		
		Total Applicants	Total Not Fined – Immunity	Total Fined	Total Fined	Total	Total Not Fined	Total Fined
143	86	75	16	59	7	61	41	20
100%	60%	52%	11%	41%	5%	43%	29%	14%
		Percentage No fine / fine	21%	79%		Percentage No fine / fine	67%	33%

Table 2 contains the total number of companies that were investigated and which led to infringement decisions adopted by the Commission between 25 December 2014 (date of entry into force of the Damages Directive) and 21 December 2017. This includes a total of 18 cartel decisions during this period.* The total number of companies investigated were found by reference to those contained in the Commission’s decisions, as well as those that were reported to have been investigated using publicly available sources.** As this is limited to publicly available sources the actual number of companies investigated is likely to be higher, and as such the total number of companies that escaped fines may also be much higher.

The number of companies that were fined under the leniency and/or settlement process, as well as those companies that received immunity under the leniency programme, has been obtained using the Commission’s decisions (decisions that have been annulled by the courts and readopted by the Commission in the relevant period have been included—but these annulments have not been counted in the category of “escaping a fine”). The number of companies that did not apply for leniency and were not fined has been determined through their absence from the final Commission decision. Annex 1 provides a more detailed breakdown of the statistics for each cartel decision.

49. We undoubtedly need to be careful in interpreting these statistics. It is likely that, in most cases, the companies that fought the cartel finding were on the fringe of the cartel behaviour or that there was simply not sufficient evidence to support a cartel finding. On the other hand, it does show that companies need to be very careful in balancing the pros and cons of the decision to apply for immunity—and for that matter leniency.

3. Uncertainty concerning jurisdiction

50. The decentralized leniency system across Europe entails a number of risks with potentially very serious consequences. Since there is no EU-wide system of harmonized leniency programmes, an application for leniency to a given competition authority is not to be considered as an application for leniency to any other competition authority in Europe.⁵⁴ Also, as regards the interaction between the Commission and the Member States, if the Commission grants immunity to a company, this does not automatically guarantee that the company will be granted immunity again, should the Commission refer the case to the NCAs.⁵⁵

* The cartel decisions reviewed include: *Occupant Safety Systems* (39881), *Trucks* (39824), *Lighting Systems* (40013), *Paper envelopes* (39780), *Airfreight* (39258), *Thermal Systems* (39960), *Car battery recycling* (40018), *Rechargeable batteries* (39904), *Euro Interest Rate Derivatives* (39914), *Heat stabilisers* (38589), *Steel abrasives* (39792), *Mushrooms* (39965), *Alternators and Starters* (40028), *Optical Disc Drives* (39639), *Blocktrains* (40098), *Retail food packaging* (39563), *Parking heaters* (40055) and *Yen Interest Rate Derivatives* (39861). Available at: <http://ec.europa.eu/competition/cartels/cases/cases.html>. For a more detailed breakdown of the statistics for each case, see Annex 1.

** Publicly available sources includes online competition news journals such as MLex and PaRR, and publicly available corporate documents.

54 D. Henry, *Leniency Programmes: An Anaemic Carrot for Cartels in France, Germany and the UK?*, *ECLR* (2005) Vol. 26(1): 13, see section 4.

55 Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 001, 4.1.2003, p. 1, see Articles 11 and 12; and Commission Notice on co-operation within the Network of Competition Authorities, OJ C 101, 27.4.2004, see para. 39–42.

51. Cartel participants are thus advised to apply for immunity to several competition authorities to avoid the risk of “missing a jurisdiction.” We have seen a number of jurisdictional “battles” between authorities. In *Consumer Detergents*, for example, the Commission and the French Competition Authority (“FCA”) both launched investigations, and both imposed a fine but for different aspects of the cartel.⁵⁶ The parties appealed the FCA decision on the grounds that they had already been fined by the Commission, but this appeal was rejected by the Paris Court of Appeal, which confirmed that the two separate decisions addressed different cartel infringements.⁵⁷ Another example is the *Trucks* case which was first launched in the UK in September 2010⁵⁸ swiftly followed by the opening of an investigation by the Commission in January 2011.⁵⁹ While, in January 2011, the OFT declared that the two investigations were different in scope and were being conducted separately, it finally closed its investigation in June 2012,⁶⁰ allowing the Commission to take over the probe following which it imposed a fine in July 2016.⁶¹ Finally, in 2003 the Dutch Competition Authority fined various undertakings for their involvement in the *Shrimps* cartel;⁶² the fine was limited to the parties’ activities in the Dutch market. The Commission then launched an investigation in March 2009,⁶³ and this was followed by a second investigation by the Dutch Competition Authority (“DCA”).⁶⁴ The investigation by the DCA was ultimately dropped and the Commission imposed a fine in 2013.⁶⁵

52. The currently decentralized system can obviously lead to discrepancies among the Member States’ treatment of the same cartel which, in turn, can lead to the undertakings’ uncertainty as to where they should apply for immunity and with which authorities they should collaborate.

56 Case AT.39579 – *Consumer Detergents*, 13 April 2011; and Autorité de la concurrence Press Release, 8 December 2011: Laundry detergents cartel (8 December 2011), available at: http://www.autoritedelaconurrence.fr/user/standard.php?id_rub=389&id_article=1735.

57 Paris Court of Appeal judgment on 30 January 2014, Case No. 11-D-17, available at: <http://www.autoritedelaconurrence.fr/user/avisdec.php?numero=11-D-17>.

58 Case CE/9349-10 – *Commercial vehicle manufacturers*, 1 September 2010, available at: <https://www.gov.uk/cma-cases/commercial-vehicle-manufacturers-civil-cartel-investigation>.

59 European Commission Press Release, Antitrust: Commission confirms unannounced inspections in the truck sector (18 January 2011), available at: http://europa.eu/rapid/press-release_MEMO-11-29_en.htm.

60 Op. cit. *supra* note 58.

61 Op. cit. *supra* note 14, European Commission Press Release.

62 Dutch Competition Authority Press Release, NMa Fines Shrimp Wholesalers and Shrimp Fishery Industry Due to Price Agreements (14 January 2003), available at: <https://www.acm.nl/en/publications/publication/5980/NMa-Fines-Shrimp-Wholesalers-and-Shrimp-Fishery-Industry-Due-to-Price-Agreements>.

63 European Commission Press Release, Antitrust: Commission confirms unannounced inspections in the North Sea shrimps sector (31 March 2009), available at: http://europa.eu/rapid/press-release_MEMO-09-142_en.htm?locale=en.

64 Dutch Competition Authority Press Release, NMa presses Dutch shrimp-fishing industry for explanation (19 October 2010), available at: <https://www.acm.nl/en/publications/publication/6283/NMa-presses-Dutch-shrimp-fishing-industry-for-explanation>.

65 European Commission Press Release, Antitrust: Commission fines four North Sea shrimps traders €28 million for price fixing cartel (27 November 2013), available at: http://europa.eu/rapid/press-release_IP-13-1175_en.htm.

53. The thorny issue of the relationship between different EU leniency programmes was also recently addressed by the CJEU in 2016 in *DHL*,⁶⁶ which illustrated the serious consequences of inconsistencies between an immunity application to the Commission and parallel summary applications in the context of the European Competition Network (“ECN”) framework. DHL submitted an immunity application concerning several infringements in the international freight forwarding sector to the Commission, and was awarded conditional immunity for the entire sector, covering maritime, air and road transport. In parallel it also submitted a summary application to the Italian competition authority, but this failed to specify the road transport sector, until it was supplemented almost a year later. In the meantime, however, another party had submitted a summary immunity application for road transport and was ultimately awarded immunity for that sector by the national authority.

54. DHL appealed, claiming that it should have been awarded full immunity since it had been the first to have applied for immunity in Italy. In doing so, it argued that the rules and instruments of the ECN were binding on the national authority, and that its assessment must take account of the main immunity application submitted to the Commission (which had included road transport from the outset). However, in its preliminary ruling, the CJEU concluded that instruments adopted in the context of the ECN, and in particular the ECN Model Leniency Programme, represented only soft law and as a result are not binding upon NCAs. In addition, the court confirmed that due to the independent nature of leniency programmes, there was no legal link between a leniency application submitted to the Commission and a summary application submitted to an NCA concerning the same cartel. As a result, obtaining immunity/leniency in an EU cartel investigation did not automatically entitle the beneficiary to similar treatment in related national investigations.

55. However, following a long consultation process, the recently proposed ECN+ Directive addresses “empowering” European competition authorities, and specifically supports the coordination of leniency programmes across Europe. While stopping far short of introducing a one-stop-shop system for leniency like in merger control, the current proposal aims at codifying the ECN leniency model into legislation—which represents a long-overdue and welcome development—and NCAs will now be forced to recognize a previous leniency application submitted to the Commission. The legislative proposal also formalizes the process and legal relevance of summary applications at a Member State level, following the outcome in *DHL*.⁶⁷

66 C-428/14 *DHL Express (Italy) Srl and DHL Global Forwarding (Italy) SpA v. Autorita Garante della Concorrenza e del mercato* [2016] ECLI:EU:C:2016:27.

67 By which an applicant can make a full leniency application to the Commission and only lodge a summary application with NCAs unless and until the Commission decides that it will not act on the case.

56. Nevertheless, while representing a very welcome development, such a promising ECN+ proposal cannot completely rule out repeats of the above scenarios, for instance, pursuant to differing opinions on the nature of the single and continuous infringement by the Commission and NCAs respectively. Further, once adopted, it will likely take a significant amount of time for the new system to work effectively in practice, and for companies to start to regain the much needed faith in the system.

4. Very high administrative hurdle

57. Immunity and leniency applicants are expected to cooperate throughout the investigation, giving the European Commission substantial leverage.

58. In practice, this cooperation obligation requires a significant investment of companies' resources. Immunity or leniency applicants have to collect evidence of alleged infringements which took place years ago, and which were often kept secret, they have to interview employees, and face awkward choices with clearly implicated employees—should they dismiss them, or retain them to obtain cooperation in the investigation?

59. It goes without saying, for anyone who has been involved as a serious contender in the EU immunity or leniency process, that companies must also materially earmark significant investment time and money into making the immunity or leniency process a success.

60. This means, in addition to potentially significant fees to external advisors, that similarly material amounts of management and employee time must be invested into investigating the behaviour.

61. Increasing numbers of scenarios involve multiple investigations across different product markets and different jurisdictions. This commonly drives up the numbers, the data, and the input from the external lawyers and forensic experts needed. It similarly does so for the company's internal investigation team, which needs to be effectively coordinated—potentially spanning many of its offices—for what will, at least in the first instance, likely be a highly secretive operation.

62. It is therefore unsurprising that, it may well simply not be possible to justify the huge amounts of time and expenses going in for (potential) immunity will need (for a yet undiscovered cartel), and that such a move is overruled at executive level.

5. Duration of cartel investigations and damages claims

63. The European Commission itself has acknowledged that it is important that, relatively soon after the initiation of the investigation, companies can get on with their “business life.” That goes to the heart of the settlement

procedure and has always been presented as one of the advantages of the settlement process for companies.⁶⁸

64. It is clear that that duration has become very unpredictable. Even for companies who do engage in settlement procedures, the duration of the investigation, decisional process and the follow-on damages claims can take many years. Cases that are not considered for the settlement procedures and that are appealed before the EU courts can take even more time to get resolved.

6. Discretionary marker regime

65. One of the main innovations that the 2006 Leniency Notice introduced is the marker system. According to the Notice, “*An undertaking wishing to apply for immunity from fines should contact the Commission's Directorate General for Competition. The undertaking may either initially apply for a marker or immediately proceed to make a formal application to the Commission for immunity from fines (...)*.”⁶⁹ In essence, the marker system provides a potential immunity applicant with the opportunity to protect its place in the queue from other applicants provided that the applicant provides the Commission with some embryonic information, such as the names of the parties to the alleged cartel, the affected products, etc. within a given time frame.⁷⁰ Following its application for a marker, the immunity applicant will be informed by the Commission on whether he is the first to apply and on where his application stands with respect to the other applications, if any. This should allow the applicant to maintain his chances of receiving immunity once the marker is perfected.

66. The main objective of the marker system is to provide legal certainty and predictability. However, the system is widely criticized for not reaching this goal at all.⁷¹ First, there is no guarantee that applicants will effectively obtain a marker. Rather, the Commission enjoys a wide discretion as to whether or not it will grant a marker and, in practice, the Commission seems to have been quite reluctant to grant markers.⁷² Second, the time frame within which the applicant is required to perfect the marker is set by the Commission on a case-by-case basis and, therefore, it is not a standard time frame. In fact, sometimes the time frame within which the applicant is

68 See, e.g., Vice President Joaquín Almunia's Speech, Looking back at five years of competition enforcement in the EU, Global Antitrust Enforcement Symposium, Washington, 10 September 2014.

69 2006 Leniency Notice, see para. 14.

70 Ibid., see para. 15.

71 P. Verma and P. Billiet, Why would cartel participants still refuse to blow the whistle under the current EC leniency policy?, *Global Antitrust Review* (2009) 1-20, see pp. 2-6.

72 According to Neelie Kroes's speech delivered at International Cartel Workshop (organized by the American Bar Association in February 2008), the Commission granted only 7 markers out of 13 marker requests received in 2007. See also, *op. cit. supra* note 3, M. Siragusa and C. Rizza (ed.), see chapter 3, p. 458, para. 3.180.

required to perfect the market can be remarkably short.⁷³ All this uncertainty can easily deter companies from requesting a marker or from applying for immunity in the first place.⁷⁴

7. Domino effect through the extension of the cartel into other product markets and jurisdictions

67. The increased likelihood of cartels spilling over into different product markets and different jurisdictions also needs to be considered in the immunity decision process. Often other implicated companies will also initiate their own separate investigations, which means that an immunity applicant in one case could be hit with later infringement accusations regarding a separate or related infringement, where other parties claim immunity on the basis of additional evidence. Such evidence may not have been available or accessible to the initial immunity applicant.

68. A recent example of a European cartel, involving more than one product market and more than one successful immunity applicant, is the *Occupant Safety Systems* case.⁷⁵ This particular case involved four separate infringements for the sale of different car safety equipment to different suppliers, and two different immunity recipients. Notably, company A was successful as immunity applicant in three of the infringements, but in the fourth only came in as first leniency applicant, the immunity position having been secured by company B. Conversely, in one of those three infringements for which company A successfully obtained immunity, company B was only able to obtain the position of first leniency applicant.

69. Programmes like “amnesty plus”⁷⁶ set up in various jurisdictions—following its successful introduction in the US—represent another strong incentive to reel in implicated parties to further alert the competition authorities to infringements on unrelated markets. This mechanism is often promoted as a tool having “*the potential to bring a series of cartels tumbling down like a house of cards,*” and is considered to have been behind the initiation of the numerous investigations

in the financial sector and in the auto-parts cartels.⁷⁷ It involves a situation where a party reveals information about participation in another cartel distinct from the one which is the subject of its first leniency application (where it has not been awarded immunity), in exchange for increased lenient treatment in the first case. It was recently observed by the US Department of Justice that its Leniency Plus programme is currently likely to account for at least half of the leniency applications received by the DOJ.⁷⁸ This scheme has not yet been adopted by the Commission,⁷⁹ but that does not mean that its extensive reach cannot have a significant negative impact on companies implicated in cartel activity and which trade on an international basis.

70. These different types of domino effects mean that once having secured immunity (in spite of all of the above listed risks), an undertaking could still face significant fines where it is involved in a related infringement, where another party takes the immunity position, or via an amnesty plus programme.

71. In addition, companies need to take into account their exposure under criminal and other administrative and supervisory regimes, such as financial and stock exchange regulators. In the *YIRD* cartel, UBS was granted full immunity by EU and US competition authorities, but its Japanese subsidiary was charged with wire fraud by the DOJ and paid significant fines to the US Commodity Futures Trading Commission and the then UK Financial Services Authority.

8. Broader impact on the relationship with competitors

72. Beyond the domino effect, there is, of course, the more general effect on the relationship with competitors. Companies that rely on joint ventures with competitors, have supply relationships with competitors or work through trade associations may, at least in the short term, be ostracized in their business relationships.

9. Implication of employees

73. A number of concerns may arise in relation to the potential implication of employees.

74. On the one hand, it is important to consider that many companies will want to immediately discontinue the employment of the individuals involved in the cartel.

73 S. Suurnäkki and M. L. Tierno Centella, Commission adopts revised Leniency Notice to reward companies that report hard-core cartels, *Competition Policy Newsletter* (Spring 2007), No. 1, pp. 7–15, available at: http://ec.europa.eu/competition/publications/cpn/2007_1_7.pdf, see p. 10:“(…) when making the application, a marker applicant could be asked to submit immediately the information and evidence it has on the alleged cartel.”

74 P. Billiet, How lenient is the leniency policy? A matter of certainty and predictability, *European Competition Law Review* (2009) Vol. 30(1): 14, see pp. 14–17; J. S. Sandhu, The European Commission’s leniency policy: a success?, *European Competition Law Review* (2007) Vol. 28(3): 148, see p. 150.

75 Case AT.39881 – *Occupant Safety Systems*, 22 November 2017.

76 Also known as: “leniency plus,” “amnesty plus” or “immunity plus.”

77 M. Martyniszyn, Leniency (Amnesty) Plus: A Building Block or a Trojan Horse?, *Journal of Antitrust Enforcement* (2015) Vol. 3(2): 391, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2500843, see p. 2.

78 The Acting Deputy Assistant Attorney General at the New York State Bar Association Antitrust Section Annual Meeting on 25 January 2018.

79 International Competition Network, Anti-Cartel Enforcement Template, Cartels Working Group, Subgroup 2: Enforcement Techniques, European Union 4/12/15, available at: <http://ec.europa.eu/competition/international/multilateral/template.pdf>, see p. 13.

This raises, however, a number of issues. First, it is critical to check whether, under local applicable employment law, this is feasible without exposing the company to damage actions by the employee and potential further publicity around the cartel involvement. In addition, in view of the potential immunity applicant's duty of continued cooperation under the 2006 Leniency Notice, companies are still expected to cooperate with the Commission throughout the investigation. This can result in having to retain the employee in order to support the company's duty of ongoing cooperation, and respond fully and accurately to the Commission's RFIs throughout the case.

75. The wave of criminalization also means that increasingly companies and, most importantly, individuals cooperating under the European leniency programme, can find themselves exposed to major criminal sanctions at a national level.⁸⁰ For example, in the UK officers and employees may face five years' imprisonment, and/or an unlimited fine for their involvement in a cartel.⁸¹ Similarly, a cartel offence committed in Ireland carries a ten-year maximum prison sentence, and/or an unlimited fine.⁸² Other Member States have criminal cartel offences for bid rigging. This results in the application of a non-uniform system of criminalization across the different Member States, with no assurances on the likely outcome (except potentially in those jurisdictions which have not yet introduced criminalization at the time the cartel conduct had ceased). Adding to such uncertainty is indeed the diverse levels of application, and to some extent, of the failure of criminal cartel cases at Member State level.⁸³ Such a risk may create significant disincentives to make use of leniency programmes.⁸⁴

10. The risk of private damages

76. And then the major game changer: private damages. Whereas, in the past, damages claims used to be virtually non-existent in the EU, over recent years they have become the new reality, especially in the business-to-business area. This is expected to continue following the Damages Directive. At the time of writing, 25⁸⁵ of the EU28 Member States have already transposed the Damages Directive into national law.⁸⁶ As illustrated in a recent academic study,⁸⁷ courts in Europe have

handed down judgments on the merits in at least 98 cartel damages claims across 30 European countries, and more than 40 of those judgments have been rendered since January 2016. In addition, there is a confidential undercurrent of private claims being settled out of court.

77. As a result, the EU courts and legislature have been struggling to find a new balance between public and private enforcement. While as a result deterrence may have increased, the EU system is now very much at risk of becoming a victim of its own success, and companies may actually be better off not cooperating at all than risk the potentially wide associated damages claims made following a cartel case.

10.1 Protection of immunity/leniency information

78. The first main issue facing potential immunity applicants is the protection of their immunity statement(s) and contemporaneous documents provided to the competition authority as the basis for their application. We do have doubts as to the actual usefulness of the bulk of the information in the immunity and leniency applications for the calculation of damages. It normally does not give any information on the counterfactual and the overcharge—which are both key in the damages assessment. However, the fact that claimants and claimant firms have prolonged battles through the courts to obtain access to the information contained in immunity statements must mean that they view it as useful in their claims.

79. The concern is that such information can be at significant risk of being disclosed in two different ways: (i) in the public version(s) of the Commission's infringement decision released on the Commission's website, and further (ii) through third parties claiming access to leniency statements and other incriminatory documents on the Commission's file.

80. Taking a step back, pre-existing EU legislation provides some form of protection for business secrets through Article 28 or 30(2) of Regulation 1/2003,⁸⁸ and even offers a broader protection of professional secrecy through Article 339 TFEU. However, such basic protections are currently limited in their application for damages claims due to the competing interests involved. The effectiveness and the attractiveness of the leniency programme, guaranteed by the protection of confidential information, has to be balanced with the right to obtain compensation—for which claimants seek access to the leniency statements and evidence to establish a causal link between the infringement and the harm suffered. In two heavily criticized judgments, the CJEU ruled

80 T. Carmeliet, How lenient is the European leniency system? An overview of current (dis)incentives to blow the whistle, *Jura Falconis* (2011-12) 48, 463, see pp. 471–474.

81 Enterprise Act 2002, see section 190(1).

82 Irish Competition (Amendment) Act 2012, see section 8.

83 For instance, the UK's CMA has only secured three cartel convictions, while in Germany the use of the criminal penalty is widespread for bid rigging—which is regarded as the most attractive of European enforcers of criminal law when it comes to bid rigging.

84 See M. O'Kane and N. Querée, Has individual criminal liability in Ireland and the UK discouraged prospective leniency applicants, *CLPD*, 2015, 61.

85 See <http://eur-lex.europa.eu/legal-content/FR/NIM/?uri=CELEX:32014L0104&qid=1513085036614>.

86 Outstanding countries include Bulgaria, Greece, and Portugal.

87 J.-F. Laborde, Cartel damages claims in Europe: How courts have assessed overcharges, *Concurrences Review* No. 4-2017, Art. No. 84981, see para. 6–17.

88 Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 001, 4.1.2003, p. 1.

in *Pfleiderer*⁸⁹ and *Donau Chemie*⁹⁰ that it is up to the national courts to balance those interests, and that EU law does not prevent access to leniency documents by damages claimants.

81. Since then, through the Damages Directive, legislators have tried to limit the scope of these judgments and offer full protection to sensitive documents such as leniency statements—see recital 26 and Article 6(6). However, in practice, this has not so far provided the high level of protection hoped for by immunity/leniency applicants. As explained above, two main avenues of access to sensitive information carry a material risk for immunity/leniency applicants—which still exist to some extent despite the Damages Directive.

82. First, the Commission will publish a public version of its infringement decision that complies with the requirements of Article 30(2) of Regulation 1/2003 and does not violate the protection of professional secrecy. Strict limitations also apply to the disclosure of evidence pertaining to oral and written statements presented by companies in the context of immunity or leniency applications, established by Article 6 of the Damages Directive. However, in practice, such so-called protection increasingly still does not provide the protective shield needed by immunity/leniency applicants. The Commission retains a wide discretion in choosing which information will be published, albeit within the limitations of the strict cumulative conditions of professional secrecy.⁹¹ This means that while a leniency document itself may be protected from disclosure, the information it contains does not necessarily enjoy the same full protection. The recent CJEU *Evonik* decision supports such a position.⁹² The Commission's recent public versions of cartel decisions set out a fairly detailed account of incriminatory information relating to the infringement: the place, the date, the parties who attended the meeting, the product, and the customers.

83. The European courts have only reinforced this uncertainty for immunity/leniency applicants in their judgments. The GC recently ruled in *Akzo*⁹³ that since the infringement decision published by the Commission is not limited in time or to a single publication, leniency applicants may not legitimately expect that this decision would not be revised as a more detailed version at a later date. A related argument that information should be protected from disclosure on the basis that it was contained in the leniency application was also refused.

89 C-360/09 *Pfleiderer AG v. Bundeskartellamt* [2011], ECLI:EU:C:2011:389, see para. 30.

90 C-536/11 *Bundeswettbewerbshörde v. Donau Chemie AG and Others* [2013], ECLI:EU:C:2013:366, see para. 31.

91 Three conditions must be fulfilled: (i) information is known only to a limited number of persons; (ii) its disclosure is liable to cause serious harm to the person who has provided it or to third parties; (iii) the interests liable to be harmed by disclosure are, objectively, worthy of protection.

92 C-162/15 *Evonik Degussa v. European Commission* [2017], ECLI:EU:C:2017:205.

93 T-345/12 *Akzo Nobel NV and Others v. European Commission* [2015], ECLI:EU:T:2015:50, see para. 129.

Moreover, the European courts also ruled in *Evonik*⁹⁴ and *Pilkington*⁹⁵ that after five years, information is regarded as historical and does not remain either secret or confidential—unless immunity/leniency applicants prove otherwise.

84. Secondly, the information that claimants seek to obtain via “access to file” or demands before national courts have so far enjoyed slightly better protection. As previously noted, *Pfleiderer*⁹⁶ and *Donau Chemie*⁹⁷ had ruled that national courts must weigh the right to obtain compensation for damages claimants with the effectiveness of the leniency programme on a case-by-case analysis when claimants ask to be granted access to file.

85. However, reassuringly for immunity/leniency applicants, the Commission's policy so far has been to fully refuse access to leniency materials on its file for third parties, in order to protect the effectiveness of its leniency programme. This view has been confirmed in the CJEU's *EnBW* decision.⁹⁸ Additionally, cartel investigation documents have a special protection on the basis of the exceptions to right of access provided for in the Regulation 1049/2001.⁹⁹ They are similarly awarded protection via the “blacklist” mechanism provided in Article 6(6) of the Damages Directive, which will hopefully provide greater certainty than for Commission public version infringement decisions. However, the extent to which third parties can ultimately gain access to the Commission's file at national court level remains to be tried and tested—and constitutes a serious ongoing concern for immunity/leniency applicants.¹⁰⁰

10.2 Immunity applicant is not jointly and severally liable

86. The Damages Directive also attempts to balance the facilitation of damages claims with incentives for potential immunity or leniency applicants to come forward, by limiting successful immunity applicants' exposure to unlimited damages. Recital 38 states that

94 T-341/12 *Evonik Degussa GmbH v. European Commission*, 28 January 2015, ECLI:EU:T:2015:51, see para. 162; and C162/15 *Evonik Degussa v. European Commission* [2017], ECLI:EU:C:2017:205.

95 T-462/12 *Pilkington Group Ltd v. European Commission*, 15 July 2015, ECLI:EU:T:2015:508, see para. 58.

96 C-360/09 *Pfleiderer AG v. Bundeskartellamt* [2011], ECLI:EU:C:2011:389, see para. 30.

97 C-536/11 *Bundeswettbewerbshörde v. Donau Chemie AG and Others* [2013], ECLI:EU:C:2013:366, see para. 31.

98 C-365/12 P *European Commission v. EnBW Energie Baden-Württemberg AG* [2014], ECLI:EU:C:2014:112, see para. 86–87.

99 The Commission is entitled to use these exceptions as a “general presumption” for refusing access to a set of documents without the need to carry out a specific, individual analysis of each document in the file, as the disclosure of such documents will undermine the protection of the commercial interests of the undertakings and the protection of the purpose of the investigations. C-365/12 P *European Commission v. EnBW Energie Baden-Württemberg AG* [2014], ECLI:EU:C:2014:112, see para. 93.

100 For a detailed overview of the access issues, see K. Fountoukakos, K. Dietzel, S. Wisking, and K. Krissinel, “If you would keep a secret from an enemy, tell it not to a friend”: disclosure of sensitive information and the chilling effect on leniency, *CLPD* 2015, 34–46.

successful immunity applicants should be relieved from joint and several liability for the entire harm caused by the cartel, and the contribution it should make vis-à-vis its co-infringers must not exceed the harm caused to its direct and indirect purchasers. It is further provided in the body of the Damages Directive again that companies having received immunity from fines should be protected from undue exposure to damages claims pursuant to Article 11.

87. However, this too is largely insufficient to keep the offer of immunity attractive. In practice, this does not take away the fact that, in view of the timing of cartel cases, immunity applicants remain more exposed than the other cartel members: on the one hand, immunity applicants are commonly the only parties who do not have any interest in appealing the Commission's infringement decision. This has the effect of rendering the infringement decision final towards them much earlier than vis-à-vis other infringers—who enter into the appeals process that can be drawn out for years—leaving the immunity applicant as an easy target for damages actions.¹⁰¹ It also means that the immunity applicant will remain subject to the terms of the original infringement as set out in the Commission's initial decision—while the other parties have a chance of getting different aspects reduced (if not completely annulled), which could have a knock-on effect to the level of damages actions they are ultimately liable for.

88. One academic opinion¹⁰² suggests, in recognition of this increased risk of damages for immunity applicants, that further limiting immunity applicant's damages liability would be better than restricting plaintiff's access to documents. The OECD further observes¹⁰³ that if the exposure to easy/easier damages claims is the direct consequence of entering the leniency programme, this will affect the incentives of potential immunity/leniency applicants. It rightly recognizes the material risk this poses to the future of the leniency programme, in that the increased risk of private enforcement may result in parties simply refraining from applying for immunity/leniency in the first place.

89. In conclusion, additional measures still appear to be needed to rebalance public and private enforcement in the EU. It is clear that immunity applicants are at a significantly increased risk of exposure pursuant to the increasing popularity of competition damages claims, and the insufficient protection mechanisms which claim to shield them.

V. Concluding remarks

90. So, where does all of this leave us? For companies, it is clear the immunity route is no longer the only route available. In this context, an interesting question for companies that have, in the past, applied for immunity is whether, confronted with the same fact pattern and—now—in the full knowledge of the consequences of their decision, they would do it again. And, if not, which parameters have changed. This point has not yet been researched but could be the topic of further analysis.

91. In any event, making an immunity application is now less obvious and companies are looking for other ways to protect their interests. One way is to make sure that once the company's participation in the cartel stops, a file is “ready to go” in case the authorities open an investigation so as to benefit at least from a 50% fine reduction as the first-in leniency applicant, without benefiting from full immunity. In practice, this means that they are playing the “waiting game” in order for the five-year statute of limitation period¹⁰⁴ to expire.

92. For authorities, the debate is more complex and more challenging. High-ranking officials within the Commission have warned against over-reliance on leniency stating that “*leniency is not a substitute but a complement to other methods of collecting intelligence and evidence of cartel infringements.*”¹⁰⁵ Authorities are responding to this and are looking for alternative ways to obtain information on cartels. In 2017 the Commission launched its anonymous whistleblowing tool, which seems to be a big success with 9,000 hits per month.¹⁰⁶ The UK Competition and Markets Authority in the UK has decided to continue the Office of Fair Trading's policy of cash rewards (up to £100,000) for cartel whistleblowers. Certainly something that should be reconsidered is the introduction of an amnesty plus programme which could incentivize companies that are already involved in ongoing cartel investigations to bring additional cases to the attention of the authorities. Another route which may be worth re-examining is to introduce criminal sanctions—though this remains within the remit of the Member States.

93. But ultimately, the European Commission and the NCAs may need to start being more proactive. They may need to start “shaking the tree”—initiate investigations on the basis of their own suspicions and hope that then results in companies cooperating and coming forward with evidence. ■

101 OECD Working Party No. 3 on Co-operation and Enforcement, Relationship Between Public and Private Antitrust Enforcement (15 June 2015) DAF/COMP/WP3(2015)14, available at: [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3\(2015\)14&doclanguage=en](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3(2015)14&doclanguage=en), see para. 67.

102 P. Buccirosi, C. Moura Pinto Marvão and G. Spagnolo, Leniency and Damages (2015), available at SSRN: <https://ssrn.com/abstract=2566774>, see p. 5.

103 Op. cit. *supra* note 101, see para. 68.

104 Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 001, 4.1.2003, p. 1, see Article 25.

105 Op. cit. *supra* note 3, W. Wils, see p. 25.

106 Director-General Laitenberger's Speech, Enforcing EU competition law – recent developments and a glance to the future, CMS EU Competition Conference, Brussels, 19 October 2017.

Annex 1

Table 3. Cartel leniency statistics for original Commission infringement decisions for Article 101 adopted following the date of entry into force of the Damages Directive

Date	Cartel	Companies Involved	Companies Fined	Leniency Applicants		Non-Leniency Applicants		
				Immunity	Fined	Fined under settlement	Fined no settlement	Not fined
2017								
22.11.2017	39881 – Occupant Safety Systems*	7	5	2	4	0	1	2
27.09.2017	39824 – Trucks	6	5	1	3	1	1	0
21.06.2017	40013 – Lighting Systems	3	2	1	2	0	0	0
16.06.2017	39780 – Paper envelopes (re-adopted)	6	5	0	4	1	0	1
17.03.2017	39258 – Airfreight (re-adopted)	30	11	1	10	0	1	18
08.03.2017	39960 – Thermal Systems	6	5	2	5	0	0	0
08.02.2017	40018 – Car battery recycling	6	3	1	3	0	0	2
2016								
12.12.2016	39904 – Rechargeable batteries	4	3	1	3	0	0	0
07.12.2016	39914 – Euro Interest Rate Derivatives (EIRD)	7	6	1	3	0	3	0
29.06.2016	38589 – Heat stabilisers	13	9	1	4	0	5	3
25.05.2016	39792 – Steel abrasives	5	4	1	0	3	1	0
06.04.2016	39965 – Mushrooms	4	3	1	2	1	0	0
27.01.2016	40028 – Alternators and Starters	3	2	1	2	0	0	0
2015								
21.10.2015	39639 – Optical Disc Drives	11	5	1	1	0	4	5
15.07.2015	40098 – Blocktrains	7	2	1	2	0	0	4
24.06.2015	39563 – Retail food packaging	13	9	1	6	0	3	3
17.06.2015	40055 – Parking heaters	2	1	1	1	0	0	0
04.02.2015	39861 – Yen Interest Rate Derivatives (YIRD)	10	6	2	4	1	1	3

*Note that for *Occupant Safety Systems*, *Thermal Systems* and *YIRD* there were multiple infringements in which some parties received immunity for one infringement and leniency for other infringements. In *Occupant Safety Systems* and *YIRD* no party received complete immunity, as they all still

received a fine for at least one infringement, whereas in *Thermal Systems* there was one undertaking that was only found to be involved in one infringement and received full immunity under the 2006 Leniency Notice.

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