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Leniency

Leniency and competition law: An overview of EU and national case law

PROCEDURES, AGREEMENT, ALL BUSINESS SECTORS, SANCTIONS / FINES / PENALTIES, LENIENCY, FOREWORD

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More than 20 years after the adoption of the first European Commission Leniency Notice, [1] the detection and sanctioning of cartels remains a key feature of the enforcement agenda of the European Commission (the “Commission”) and – the currently still 28 – European Union (“EU”) national competition authorities (“NCAs” or “CAs”). [2] Leniency programmes are a crucial tool in uncovering cartels, with a large majority of cartel decisions adopted by European competition authorities based on immunity and leniency applications. But for how long?

Leniency programmes offer companies involved in cartels the possibility to come forward and bring evidence to competition authorities in exchange for total immunity or leniency (i.e., a reduction of fines). They aim at detecting secret cartels but also at deterring companies from entering into such agreements. The purpose, based on the prisoner’s dilemma, is to create distrust amongst cartel participants as there is a constant threat that one of them may report the cartel to the authorities. Therefore, in combination with continuously increasing sanctions, leniency programmes maintain constant pressure on companies to cooperate with competition authorities.

While NCAs have usually shaped their leniency programmes in accordance with the Model Leniency Programme (“MLP”) adopted by the European Competition Network (“ECN”) in 2006 – and updated in 2012 [3] – some differences in the rules and/or their interpretation remain. Moreover, as will be discussed further below, the Court of Justice of the European Union (“CJEU” or “the Court”) recently confirmed the independence of national leniency programmes from the EU model [4].

Furthermore, despite the existence of national leniency programmes, a number of NCAs only have limited experience of such procedure. For example, the Croatian, Latvian and Romanian CAs only received their first leniency application and/or concluded their first case initiated through leniency applications in the last few years [5].

Finally, following declarations from Commission officials and the CJEU's judgment in DHL [6], it seems clear that no "one-stop-shop" system, under which a leniency application filed in one EU jurisdiction would be valid in other EU jurisdictions, will be adopted in the near future in the EU. That said, the Commission's so-called "ECN+ Directive proposal" published in March 2017 –following a large public consultation started in November 2015 – will, if adopted, further harmonise the national leniency programmes. [7]

The objective of this contribution is to provide an overview of the leniency programmes as applied by the Commission at EU level, as well as those applied by the NCAs at national level.

1. Scope Of The Leniency Programmes

1.1 The types of agreements concerned

Leniency programmes were created to increase the rate of detection of secret cartels, which by definition are difficult to discover. As a result, at the EU level and in most Member States, leniency only applies to hard-core secret cartels (i.e., with horizontal effects between two or more competitors), [8] excluding purely vertical agreements. The programmes generally extend to cartels that have both vertical and horizontal features, such as hub-and-spoke cartels. [9] When the MLP was revised in 2012, it was clarified that "[i]t is not excluded [...] that a cartel which includes vertical elements may be covered by the leniency programme". [10] Similarly, in 2016, Hungary updated its Leniency Guidelines clarifying that, in cases which also include vertical elements, it is essential that the applicants submit evidence of the horizontal infringement. [11] In Germany, leniency programmes do not formally cover vertical agreements. The Federal Cartel Office (FCO) has nevertheless, in some cases, granted immunity to companies in cases mainly comprising vertical restrictions. For example, the FCO fined a number of companies for vertical price fixing in the sale of beer. Two companies allegedly involved in the infringement benefited from immunity as a result of their cooperation with the FCO. The explanation was that although the "Leniency Programme is not relevant because it only applies to cartel proceedings relating to horizontal relationships between competitors and not to vertical relationships between producers/suppliers and their customers, as in this case, the [FCO] can, at its discretion, take the cooperation of individuals and companies in vertical cases into consideration and even grant immunity from a fine." [12].

That said, a few EU Member States such as Estonia and Poland, have adopted a broader approach, allowing immunity or leniency in relation to purely vertical agreements. For example, the Polish CA has granted a reduction of fines to an undertaking involved in minimum resale price maintenance with its distributors and, more recently, immunity to a company involved in a similar infringement [13]. This approach was followed in Lithuania, Romania as well as in the UK, where the leniency programme is applicable to vertical agreements, but only to those containing a pricing element. [14] In vertical cooperation cases, the authority will usually require termination or modification of the agreements concerned.

Leniency has also been granted in the context of purely vertical agreements in Member States that do not expressly provide for this possibility. However, this seems to be limited to very specific circumstances, such as in Hungary, where the CA refused to withdraw the benefit of leniency initially granted at a time where the exact nature of the infringement was unknown, although it was later identified as an exclusive supply agreement with vertical anti-competitive effects. [15]

1.2 The applicants concerned

While leniency programmes mainly concern the undertakings involved in a cartel, they increasingly concern individuals as well.

Availability of leniency programmes to undertakings

Leniency programmes are available to the undertakings that participated in a cartel and want to come forward with evidence of such cartel in exchange for a reduction of fines. However, not all such undertakings may benefit from these programmes. Under the MLP and the Commission's 2006 Notice, immunity or leniency is not available to undertakings which have taken steps to coerce others to participate in the cartel. Some Member States have adopted an even stricter approach by excluding the initiator (Czech Republic) or the sole ringleader of the cartel (Germany) from immunity. Ireland, Slovakia and Poland amended their legislation to allow undertakings that instigated cartels to apply for immunity. However, companies that coerced others to join or remain in the agreement are still excluded. [16]

Availability of leniency programmes to individuals

The availability of leniency programmes to individuals is essentially linked to two important developments. Firstly, individuals are increasingly at risk of being personally sanctioned for their involvement in anti-competitive practices, either through administrative or criminal sanctions. Indeed, while the Commission cannot impose criminal or financial penalties on individuals, an increasing number of EU Member States have introduced domestic legislations that provide for sanctions on company managers involved in anticompetitive agreements [17]. Secondly, some Member States have established reporting fees, which provide incentives for employees and managers of an undertaking to offer information about a cartel. In the UK, the financial reward depends on the value of the information provided but it can go up to £100,000 (subject to the whistleblower not being involved in the cartel) [18]. In Hungary and Slovakia, an individual can receive a reporting fee of 1% of the total amount of the fine imposed, unless it would exceed the established maximum (e.g., €100,000 in Slovakia). [19] If there were no immunity available to individuals, whistleblowers could receive a reward and at the same time be sanctioned criminally.

Some national leniency programmes extend the protection – under certain circumstances – to managers or employees of the undertaking benefitting from immunity or leniency. Nonetheless this may not be sufficient to incentivise individuals to blow the whistle, as illustrated by the situation in Slovakia. In 2010, the leniency programme was extended to criminal enforcement such that criminal law does not apply to individuals who provide information allowing the undertaking to obtain immunity or reduction of fines under the leniency programme. [20] However, this regime is limited to current employees. While former employees may want to provide information in order to receive the financial reward mentioned above, they can theoretically be sanctioned criminally at the same time [21].

Moreover, the scope of immunity from criminal sanctions for individuals – if available – is sometimes limited. For instance, the MLP advocates the importance of such protection for employees of immunity applicants as it indicates that “[i]n order to ensure that corporate leniency programmes work efficiently, it is however important to protect to the greatest extent possible employees and directors of the undertakings applying for immunity”. In contrast, the situation is less clear in relation to employees of leniency applicants as the MLP merely considers that “it may also be appropriate to offer protection from individual sanctions to employees and directors of applicants for a reduction of fine.” [22]

Certain Member States went further and created a leniency regime specifically designed for individuals, alongside the traditional corporate leniency regime. In the UK for instance, the Competition & Markets Authority (“CMA”) will grant “blanket” criminal immunity from prosecution to every co-operating current and former employee and director of the business that has been granted immunity. In addition, individuals can apply on their own account to obtain a “no-action” letter from the CMA granting them immunity from prosecution for the criminal cartel offence. [23] Similarly, in Poland, current and former managers can file for leniency on their own. The application will not cover the undertaking. [24] In Romania, the CA may offer – under certain conditions – immunity or a reduction of prison sentences for individuals who are considered as having intentionally conceived or organised cartel activities. [25] In Ireland, a revised Cartel Immunity Programme (“CIP”) came into effect on 22 January 2015, extending corporate immunity to directors, officers and employees who admit their involvement in the anti-competitive activity. Individuals can also apply on their own.

The situation is similar in Belgium. Since 2013, the Belgian CA can impose fines of up to €10,000 on individuals. While in practice the Belgian CA did accept leniency applications from individuals, the guidelines had to be updated. This was done in the 2016 Leniency Guidelines, which set out the practical conditions under which individuals can submit leniency applications. For example, individuals can only benefit from the leniency regime to the extent that an undertaking is also prosecuted and condemned for the same conduct.

In February 2018, the Austrian CA updated its Handbook on Leniency Programme to reflect legislative changes. Employees who have made an important contribution to the clarification of an antitrust infringement (to the Austrian CA, the European Commission or a CA of another Member State) may, under certain circumstances, obtain immunity against criminal proceedings. [26]

A need to better protect individuals?

The increase in immunity systems for individuals seems to be largely due to the fact that the absence of immunity from criminal suits for employees and directors may deter companies from applying for leniency. This issue was recently raised by officials at the Italian CA, when discussing the drop of leniency applications relating to bid-rigging practices. They explained that the lack of criminal immunity likely deters companies that engage in bid-rigging from applying for leniency, resulting in the CA having to increasingly rely on other types of evidence to detect bid-rigging [27].

While there are currently no rules requiring Member States to protect individuals who decide to cooperate with the NCAs, this may change on the basis of the Commission’s ECN+ Directive proposal of March 2017 (see, further detail on this proposal in Section 5.3, below). Article 22 of this proposal requires Member States to “*ensure that current and former employees and directors of applicants for immunity from fines to competition authorities are fully and immediately 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*” to the extent that they “*actively cooperate with the competition authorities concerned and the immunity application predates the time when the employees and directors were made aware by the competition authorities of the Member States of the criminal proceedings.*” By increasing the immunity protection for individuals, this proposal may create additional incentives for companies and their employees to apply for immunity. [28]

2. Conditions to benefit from the leniency programme

2.1 Procedure and conditions to benefit from immunity or leniency

Whether undertakings obtain full immunity or a reduction of fines depends on the timing of their application and the evidence they provide.

2.1.1 Submission and timing of the application

The timing of a leniency application is crucial, as only minutes can make the difference between full immunity and a partial reduction of the fine [29]. As a first step, undertakings can approach an authority on an anonymous basis to seek guidance on the application of the leniency programme. This can take place within a formalised framework, through hypothetical applications (e.g., at the EU level), or consist in an informal discussion on a no-names basis about a given factual matrix (e.g., in the UK and Latvia [30]).

(a) Growing use of anonymous whistleblowing tools Seeking to further incentivise the reporting of cartels, a number of competition authorities have developed whistleblowing systems designed to make it easier for individuals to inform authorities about competition law infringements, while remaining anonymous. The FCO launched a standardised online portal in June 2012, applicable to both alleged infringers and witnesses. [31] This tool led to a large number of investigations in Germany. Similarly, in 2015, the Hungarian CA set up an online anonymous contact system (the “Cartel Chat”), enabling undertakings (in particular SMEs) to raise questions and discuss anonymously with officials. [32] In April 2017, the Polish CA created a pilot programme designed to encourage whistleblowers to come forward, based on an anonymous dedicated hotline and e-mail address. [33] Noting the importance of anonymity, the CA is now working on potential legislative changes incorporating the concept of “whistleblower” into Polish competition law, thereby ensuring the protection of the identity and information provided by such informants. Similar systems exist in a number of Member States including, inter alia, Latvia (2013), Slovakia (2014), Spain (2014), Romania (2015), Sweden (2017) and, since February 2018, Austria. [34] Finland and Lithuania are planning on setting up such tools in the course of 2018. [35]

As part of its efforts to refine its detection tools, the European Commission also launched a dedicated online system in March 2017, enabling individuals to safely report cartels and other antitrust violations. This system protects their anonymity through a specifically-designed encrypted messaging system (run by an external provider) that allows two-way communications, thereby enabling the Commission to ask for additional information (a number of NCAs use a similar system). [36]

These tools appear to be widely successful. A Danish official recently reported that approximately 10% of the information received via the system set up in 2013 leads to investigations. [37] Similarly, in October 2017, Johannes Laitenberger (Director-General for Competition at the Commission) said that the Commission’s dedicated webpage had received about 9,000 visits in September 2017 [38]. The FCO received 1,852 “tips” through its platform since 2012, and the Danish CA received them on a daily basis. [39]

(b) The marker system

When submitting an application for leniency, undertakings can initially apply for a marker which protects the applicant’s place in the queue for a given period of time. This allows the applicant to gather the necessary information and evidence to meet the relevant evidentiary threshold. The application needs to be substantiated, such that the applicant must explain why the information cannot be provided immediately and justify the length of the marker period. The authority has discretion on whether or not to grant it. This marker system is now widely spread among ECN Member States. Under the EU Leniency Notice, the first company to meet the conditions to obtain a reduction of fine (as described below) is granted 50% to 30% reduction, the second 30% to 20% and subsequent companies up to 20%. In an effort to reduce disputes between leniency applicants over the timing of

their respective applications, the Commission recently opted for leniency applications to be filed via email (by contrast to applications by fax as it was previously the case) thereby ensuring “*that the precise time and date of the contact is duly recorded*”. [40] In any event, the Commission continues to encourage companies to contact a DG COMP official in advance of the submission of a leniency application. [41] Italy adopted a slightly different model. While the timeliness of the application is a relevant factor, the Italian regime does not provide for a range of discounts based on the order in which the application is made. In contrast, under the 2016 Belgian Leniency Guidelines, individuals (unlike undertakings) can obtain immunity regardless of the timing of their application.

In cases where an application has already been (or is about to be) submitted to the Commission, the MLP provides the possibility for applicants to introduce a “summary application” to NCAs. The summary application marker granted by the NCA secures the application at the national level (in case the Commission does not pursue its investigation of (a part of) the case) and operates as an indefinite marker. [42] While originally limited to immunity applicants, this option was open to leniency applicants as well by the revised MLP in 2012. Some of the NCAs that were not already providing for this possibility are now modifying their legislation in order to extend the admissibility for summary applications to leniency applicants. For example, the French (2015) and the Belgian (2016) competition authorities extended the scope of summary applications (previously reserved to immunity applicants) to leniency applicants, irrespective of their place in the queue, reflecting the changes brought about by the revised 2012 MLP. [43] The Croatian CA recently introduced summary applications into its leniency rules in relation to both applications for immunity and for reduction of fines.

The Commission wishes to increase legal certainty for undertakings through the introduction of a marker system across in all Member States. Article 20 of the ECN+ Directive proposal requires all Member States to introduce a marker system. To enable better access to undertakings, the proposal indicates that applications for a marker may be submitted in one of the respective official languages of the relevant NCA or in one of the working languages of the EU. The proposal also deals with summary applications, as further discussed in Section 5.3, below.

NCAs seem to be keen to reduce the asymmetry of information between companies active in the same sector and potentially part of the same conduct. The revised French and Belgian Leniency Guidelines both enable the respective NCAs to issue press releases after dawn raids have been conducted. The goal of this practice is to enable (usually smaller) undertakings who were not inspected to make an informed decision as to whether to apply for leniency [44]. Unlike the French and Belgian CAs, the Commission and the Dutch CA do not automatically publish press releases, but limits this possibility to situations where the fact that inspections have been carried out has been made public by other means [45].

(c) Handling leniency applications in “concurrency regime” jurisdictions – the UK example

In the UK, competition law enforcement is based on a concurrency regime where a number of sectoral regulators, alongside the CMA, have competition powers to in their respective sectors. Sectoral regulators that are members of the UK Competition Network include, *inter alia*, Ofcom, Ofgem, Financial Conduct Authority, etc.

Last year, the CMA launched a consultation on the handling of leniency applications between the CMA and these sectoral regulators. [46] Following this consultation, the CMA published a new information note on cartel leniency applications [47]. Initially, the leniency system was based on informal arrangements operating on a case-by-case basis and involving the operation of a “single queue” system, in which applicants needed only apply to one authority in order to secure their place in the queue for leniency. To limit uncertainty and avoid inconsistency, the information note clarifies the arrangements between the CMA and sectoral regulators and establishes the CMA as the first point of contact for all leniency applicants, regardless of the sector in which they operate. The leniency

applicant must approach the CMA. In the event that an application is made to a sectoral regulator, the regulator will immediately direct the applicant to the CMA. This system relies on close cooperation between the CMA and sectoral regulators. The ultimate decision regarding the leniency award is made by the authority to which the case has been allocated.

2.1.2 Submission of evidence

The quality and nature of the evidence are crucial. In order to obtain full immunity, a company must provide sufficient information (i) to allow the authority to launch an inspection at the premises of the companies allegedly involved in the cartel (Type 1 A immunity), [48] or (ii) if the authority is already in possession of enough information, to launch an inspection or has already undertaken one, to enable the authority to prove the cartel infringement (Type 1 B immunity). In 2007, the French CA granted immunity to two companies simultaneously (a company and its subsidiary) as they had both provided sufficient evidence to qualify for immunity. [49] Companies which do not qualify for immunity may still benefit from leniency if they provide evidence that represents “significant added value” to that already in the CA’s possession, reinforcing the latter’s ability to prove the infringement.

Contrary to certain jurisdictions such as the US, [50] the MLP and the Commission’s 2006 Notice [51] do not provide for a Leniency Plus programme which rewards an undertaking providing information on a different and – until then secret – cartel with a further reduction of the fine. However, Bulgaria and more recently Slovakia and Poland have adopted such programme. [52] In Poland, a company that applies in a second or subsequent position – and thus cannot benefit from immunity – can obtain a further reduction of 30% in fines by disclosing information about another cartel arrangement which was unknown to the regulator. The Commission may however provide “partial immunity” in specific circumstances. Where an applicant for a reduction of fine is the first to submit compelling evidence, which the Commission uses to establish additional facts increasing the gravity or the duration of the initial infringement, the Leniency Notice enables the Commission to not take such additional facts into account when setting the fine imposed on this applicant. [53]

Undertakings submit evidence through corporate statements, [54] which can be made orally or in writing. Under the Commission’s 2006 Notice, applicants cannot provide oral statements if they have already disclosed the content of the statement to third parties. [55] The possibility for undertakings to provide oral corporate statements was only recently integrated into “hard law” by the revision of the Implementing Regulation. The new Article 4a now confirms that pre-existing contemporaneous evidence (information existing irrespective of the Commission’s proceedings) cannot be part of a leniency corporate statement, even if submitted to the Commission by an undertaking in the context of its immunity or leniency application [56].

Oral disclosure of information is, however, generally a slower means of providing evidence, as illustrated by *Hydrogen Peroxide*. Between the moment Solvay asked for a meeting to submit oral evidence and the actual meeting – held the very next day – Arkema sent the Commission a written leniency application by fax. As a result, Arkema obtained the third position and received a fine reduction of 30% whereas Solvay, being fourth, only received a 10% reduction. [57]

Regardless of the manner of approaching the CA, confidentiality remains a crucial aspect of leniency applications in view of the increasing risk of private enforcement. It covers both written and oral statements. Pursuant to the MLP and the Commission’s 2006 Notice, no access shall be granted to any records of statements before a statement of objections has been issued. Third parties will also not be granted access to corporate statements. The new Article 16a of the Implementing Regulation confirms that access to leniency corporate statements can only be granted for the purpose of exercising the rights of defence in proceedings before the Commission. A

similar approach was adopted by the Finnish Supreme Administrative Court, which expressly denied access to leniency statements requested by a cartel participant while the investigation was still on-going [58]. In December 2015, the Dutch Trade and Industry Appeals Tribunal ordered the Dutch CA to provide access to oral leniency statements to the defendants in the Dutch flour cartel. In principle, defendants are granted access to transcripts of oral statements at the CA premises but they are not allowed to make copies. They must also commit to only use the information for their defence in the cartel proceedings. However, the Dutch court considered that the protection of the leniency programme was less important than the protection of the rights of defence such that the other parties to the proceedings could retain the transcripts of the oral statements. [59]

2.2 Conditions attached to the immunity and leniency

The MLP lists several conditions that must be met by an applicant to benefit from immunity or leniency.

Firstly, following the application, and throughout the procedure, the applicant is first expected to cooperate fully, genuinely, expeditiously, on a continuous basis and in a sincere spirit of cooperation. A subset of this condition is that the applicant is obliged to collect all relevant information and materials that may be in possession of an employee or a director prior to their (voluntary or involuntary) departure. Furthermore, the MLP encourages the applicant to inform the CA of any contemplated dismissal of any such employee or director.

Secondly, the applicant must terminate its participation in the infringement as of the date of the application. However, if necessary, the CA will authorise a derogation from that duty to discontinue participation. [60] For example, the Hungarian Leniency Guidelines expressly enable the CA to require the undertaking to continue its participation in the cartel if this is necessary for the CA to carry out dawn raids and to collect evidence. [61]

Thirdly, the applicant is prohibited from destroying evidence. The starting point of this obligation is unclear and seems to be earlier than that of the two previous conditions. It kicks in when the undertaking is contemplating making a leniency application. [62] Both practitioners and competition authorities may face the difficulty of determining the exact moment as of which destruction of evidence will preclude a successful leniency application.

Finally, the applicant is prohibited from disclosing the existence of the leniency application. In 2014, the CJEU confirmed the possibility for the Commission to withdraw immunity for that reason. In *Deltafina*, the immunity applicant had informed the National Association of Italian Tobacco Processors of its application with the Commission prior to dawn raids being conducted and lost its immunity as a result. [63]

3. Leniency Decision

Upon examination of all the applications in the same alleged cartel, the authority can issue a conditional decision granting the benefit of immunity to an applicant. If the latter breaches one of those conditions, the authority can withdraw the immunity [64]. In this case, the applicant is allowed to retrieve the evidence originally disclosed but one can assume that the authority can nevertheless investigate the cartel of which it has been made aware.

While the Leniency Notice is silent on whether an applicant who fails to comply with its obligations for immunity can still qualify for a reduction of fine, the Commission concluded in *Italian Raw Tobacco* that this was not possible. The Commission's reasoning is based on express indications in the Leniency Notice and on the logic and purpose of the Notice. Moreover, allowing a reduction of fine after violation of the immunity conditions would preclude "*any meaningful interpretation of the co-operation obligation imposed on undertakings enjoying conditional immunity status*", as undertakings would be able to make a calculated choice at any stage of the

procedure between continuing to cooperate or other options (reduction of up to 50% being available in any event). [65] However, the undertaking's general conduct and the evidence submitted were considered as a mitigating circumstance justifying a reduction of the fine by 50% outside the leniency notice. This approach was upheld by the Court of Justice. [66]

Several parties may want to challenge a leniency decision: cartel participants who received smaller reductions, or third parties in the context of private follow-on damages claims. [67] It seems to us that undertakings cannot seek the annulment of the conditional decision granting immunity to another cartel participant, as conditional decisions are not challengeable acts [68]. That said, undertakings that did not benefit from the leniency programme or that did not obtain a sufficient reduction of their fine can successfully argue the existence of discrimination. [69] Therefore, a possible way to challenge the immunity granted to a competitor could be to prove that the applicant failed to receive immunity itself, because of a wrongful decision to grant it to another undertaking. In Italy, the Regional Administrative Tribunal of Latium found that undertakings have no standing to challenge the immunity or fine reductions granted to other undertakings as they would not derive any benefit from the withdrawal of leniency. [70] Similarly, a Hungarian Court refused to examine whether the legal basis on which immunity had been granted to one of the undertakings was appropriate, as the fine imposed on the appellant resulted from its own infringement of competition rules, not from the other undertaking receiving immunity [71]

4. Leniency and fining

4.1 Balancing the principles of efficiency and deterrence

The benefits of a successful immunity or leniency application can be very significant. This should however be balanced against the objective of deterrence, which constitutes the very reason for the development of leniency programmes. It could be argued that only a limited number of companies which were part of a cartel can benefit from immunity and fine reductions. If all the companies involved were to benefit, this would cast doubt on the effectiveness of the deterrent effect of cartel enforcement. To avoid this risk, competition authorities need to motivate their decisions, not only in relation to the establishment of the infringement, but also in relation to the value of the evidence submitted. The latter, combined with the timing of the application, should be reflected in the size of the fine, latecomers often receiving smaller – or no – reductions. [72] The (at the time) UK OFT's approach in the construction cartel case provides an interesting illustration. During the investigation – and more than one year before issuing a statement of objections to the 112 undertakings involved – the OFT announced that in view of the extent and quality of the evidence obtained, it would accept no more leniency applications.- [73]

4.2 Leniency and the settlement procedures

Applying leniency does not prevent the authority from granting further reductions when the undertakings offer commitments or seek to engage in settlement. In the EU, companies can obtain an additional 10% reduction if they engage in a settlement. The leniency and settlement procedures are different but complementary, as they both aim to increase efficiencies and reward cooperation. Further, it is easier to reach a settlement when the cartelists all apply for leniency, thus acknowledging their involvement in the infringement. [74] In May 2016, the Belgian CA fined two river cruise companies for having implemented market-sharing agreements. Both companies cooperated with the Belgian CA not only through the leniency procedure but also by reaching a settlement in order to terminate the proceedings. Their cooperation and the settlement were taken into account as mitigating factors in the calculation of the fines. [75] A refusal to settle should however not be regarded as a breach of the undertaking's duty to cooperate. Such an approach would confuse the fundamentals of both procedures.

5. Multiplicity of Leniency Programmes – A Response to Calls for Further Harmonisation?

5.1 A need for clarifications on the summary application system

In November 2015, the Commission launched a public consultation to assess the effectiveness of national agencies' antitrust enforcement powers, addressing in particular leniency programmes. [76] The results of the public consultation indicated that half of respondents consider divergences in the implementation of summary applications to be a problem in terms of the effective and consistent application of EU rules, legal certainty for business and incentives to apply for leniency. [77]

This was echoed by Competition Commissioner Vestager in November 2015: *"if every ECN member has its own leniency programme, how can a company be sure it is the first to approach every single relevant authority? We have a system to deal with that, based on short applications that should protect an applicant's place in line. But some competition authorities don't recognise those applications, or they treat them in different ways. So it isn't always clear who is first in the queue."* [78]

The question whether the potential adoption of a "one-stop-shop" system – under which a leniency application filed in one EU jurisdiction would be valid in other EU jurisdictions – would solve these issues is a much debated topic.

Some argue that divergences amongst leniency programmes may lead to uncertainty – in particular with regard to the use of summary applications. For example, submitting comments to the Commission's public consultation, the American Bar Association Sections of Antitrust Law and International Law encouraged the Commission *"to consider a "one-stop shop" for leniency applicants, in which such applications could be filed with the EC and ECN for dissemination to the NCAs that may have an interest in the leniency application found, for example, that additional harmonisation of leniency programs would help effectively empower of the NCAs."* Under such system, *"[i]f the application does not sufficiently qualify as a Community matter, a lead NCA could act on behalf of the other NCAs in processing the application and granting amnesty status. This measure would eliminate the burden of separately contacting individual NCAs and facilitate the coordination of investigations and settlements among NCAs. It would avoid inconsistent results and increase legal certainty for defendants, which would in turn bolster the credibility of NCA enforcement."* [79]

In contrast, a number of NCA officials consider that the current system establishes a sufficient level playing field, ensuring an efficient implementation of leniency programmes. For example, in 2016 Andreas Mundt, President of the German FCO, rejected the idea of an EU one-stop-shop system, while acknowledging that the summary application system created by the MLP may need some *"fine-tuning"*. [80] Similarly, in April 2016, Eric Van Ginderachter, DG COMP Director responsible for anti-cartel enforcement, made it clear that the Commission does *"not believe [a] one-stop-shop is possible in the EU."* More recently, a Commission official warned that having a one-stop-shop is not a *"good idea"*, explaining that it would be *"very difficult in practice actually to put it in place in a way that will allow for a swift decision at a very crucial moment in time"*. [81]

5.2 Some clarifications from the EU Courts

Two months after the launch of the Commission's public consultation, the CJEU was called upon to clarify the relationship between the different EU leniency programmes. The CJEU *DHL* judgment [82] illustrates the serious consequences of any inconsistencies between the immunity application to the Commission and parallel summary

applications to national competition authorities within the context of the European Competition Network ('ECN') framework.

DHL had submitted an immunity application concerning several infringements in the sector of international freight forwarding 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 for immunity to the Italian competition authority, the AGCM, but without explicitly referring to road transport. Almost a year later, it submitted an additional summary application which expressly extended to road freight. In the meantime, however, Schenker had submitted a summary immunity application to the AGCM concerning road freight forwarding in Italy. Ultimately, in the AGCM's infringement decision in relation to the international road freight forwarding sector to and from Italy, Schenker was awarded full immunity for road freight forwarding as it was the first to have applied for immunity. DHL disagreed, appealed the decision of the AGCM and claimed that it should be accorded full immunity, as it had been the first to apply under the national leniency programme. It argued that the rules and instruments of the ECN are binding on the AGCM and that the principles of EU law require a national authority that receives a summary leniency application to assess it, taking into account the main application for immunity that that company submitted to the Commission (which, *in casu*, did include the road freight forwarding sector).

However, in the context of a request for a preliminary ruling by the Consiglio di Stato (Italian Council of State), the CJEU held that the instruments adopted in the context of the ECN, in particular the ECN Model Leniency Programme, are not binding on NCAs. [83] Moreover, due to the independent nature of leniency programmes, there is no legal link between a leniency application submitted to the Commission and a summary application submitted to an NCA concerning the same cartel. Hence there is no requirement on the NCA to assess the summary application in light of the application submitted to the Commission, irrespective of whether the content of both applications is identical. [84] The CJEU also added that NCAs are allowed, under EU law, to accept a summary application for immunity, not only from immunity applicants but also from second-in leniency applicants. [85]

The key take-away of this judgment is that, according to the Court, EU and national leniency programmes are fully independent, which means that obtaining immunity/leniency in an EU cartel investigation does not automatically entitle the beneficiary of leniency at the EU level to similar treatment in related national investigations.

It is for the undertakings themselves to ensure that they file summary applications in all the jurisdictions potentially concerned by the cartel. Undertakings must ensure that their applications are "*devoid of ambiguities as to [their] scope.*" [86] Against the background of *DHL*, it is now even more important for immunity applicants who seek to make applications both in the EU and with NCAs, to align their summary applications as much as possible with the main application.

The Hungarian CA followed a similar approach in its Leniency Guidelines which provide that, while an undertaking can file leniency application in multiple Member States, the CA will only review applications based on the information filed with it and not in view of information filed with other NCAs.

5.3 Commission's ECN+ Directive proposal and summary applications

Following a long consultation process, the Commission published its ECN+ Directive proposal in March 2017, aiming to empower NCAs to be more effective enforcers. Better enforcement requires, amongst other things, more legal certainty for companies wishing to apply for leniency. To achieve this goal, the Commission proposes to reduce the differences between the national leniency programmes by codifying the MLP into law, ensuring that all

NCAs can grant immunity and reduction from fines, and accept summary applications under the same conditions. According to the Commission, this will help maintaining the companies' incentives to cooperate with the Commission and the NCAs. [87]

As explained in Section 2.1.1(b), above, following Article 20, all NCAs will have to introduce a marker system. Article 21 requires that all NCAs enable companies that have applied for leniency to the European Commission to file summary applications in relation to the same cartel with other NCAs. The summary application must have the same product, geographic and durational scope as the application filed with the Commission. The NCAs must accept applications that contain a minimum set of information in relation to the alleged cartel and should refrain from requesting additional information beyond this minimum (at least before they require the submission of a full application). To increase certainty, the NCA(s) concerned must provide an acknowledgment stating the date and time of receipt, and inform the applicant whether they have already received a previous summary or leniency application in relation to the same cartel, except where it would adversely affect the integrity of an investigation.

That said, the proposal does not go as far as introducing a one-stop-shop leniency system in the EU. In fact, it merely formalises the process the relevance of summary applications made at a national level, following the outcome of *DHL*. [88] If the Commission decides not to act on a case, the NCAs concerned must enable the applicant to submit a full leniency application (the information will be deemed to have been submitted at the time of the summary application).

6. The Commission's over-reliance on leniency programmes as a detection tool?

The importance of leniency programmes in the detection of cartels was stressed in 2016 by Eric Van Ginderachter, Director for Cartels at the Commission's Directorate-General for Competition, who indicated that approximately 70% to 75% of cartel cases were spurred by companies seeking leniency in Europe. [89] This reliance on leniency to detect potential cartel cases may in fact be problematic for the Commission.

A recent review of cartel cases in the EU by Ysewyn and Kahmann illustrates the fact that the Commission has relied extensively on information provided by immunity and leniency applicants to detect potential cartels. In fact, most years, all the Commission's cartel investigations were sourced from immunity applicants. The two investigations that were not based on such application (the *Envelopes* and *Power Exchanges* cases) were decided under the settlement procedure. Therefore, "*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*". [90]

7. Conclusion

The developments over the past years illustrate a high level of harmonisation of the leniency policies at European and national levels both in terms of legislation – where the Model Leniency Programme has become a benchmark and will likely become hard law – and of implementation.

Nevertheless, some of the remaining differences should not be overlooked. The approach to an individual's position in a leniency application – as opposed to that of an undertaking – still varies across the EU. Firstly, not all Member States provide for sanctions against individuals. Secondly, those that do, have addressed their protection differently in their leniency programmes.

A topic, which is outside the scope of this contribution, is the question of disclosure of leniency material to third parties either in the public version of the Commission's decision, or through requests for access to file in the context of damages claims. Suffice it to say this remains contentious. The recently adopted Directive on Antitrust Damages Actions [91] offers absolute protection to corporate statements which cannot be disclosed. This protection was integrated into EU procedural law through the revision of the Notice on Access to File [92] and the Notice on Cooperation with National Courts. [93]

Both confirm that the Commission will not transmit leniency corporate statements to national courts for use in competition damages actions. This is an important change to the previous version of the Notice which stated that information voluntarily submitted by leniency applicants would not be transmitted "without consent". [94] The Notice on Cooperation with National Courts makes it clear that disclosure should not "unduly affect" the effectiveness of enforcement of competition rules, and in particular that it should not interfere with pending investigations nor with the functioning of the leniency programmes and settlement procedures. However, contemporaneous documents (often submitted as annexes to corporate leniency statements) do not enjoy extra protection and, as confirmed by the CJEU in Evonik [95], can potentially be disclosed under the conditions set out in the Directive. [96]

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Note from the Editors: although the e-Competitions editors are doing their best to build a comprehensive set of the leading EU and national antitrust cases, the completeness of the database cannot be guaranteed. The present foreword seeks to provide readers with a view of the existing trends based primarily on cases reported in e-Competitions. Readers are welcome to bring any other relevant cases to the attention of the editors.

[1] European Commission Notice on the non-imposition or reduction of fines in cartel cases, 1996, OJ C 207.

[2] European Commission, Statement by Commissioner Vestager on the envelopes cartel settlement decision, Brussels, 11 December 2014.

[3] European Competition Network Model Leniency Programme ("ECN MLP"), November 2012. See *Céline Gauer, Maria Jaspers, The European Competition Network publishes results of its work on the model leniency programme setting out the basis for soft harmonisation of all European leniency programmes, 29 September 2006, e-Competitions Bulletin September 2006, Art. N° 36532.*

[4] Case C-428/14 *DHL Express (Italy) v Autorità Garante della Concorrenza e del mercato* [2016], at paras. 38.

[5] See "Croatia's competition agency receives first leniency applications this year", 23 December 2015, PaRR, available at <https://app.parr-global.com/intelligence/view/1344033> ↗. The Romanian competition authority concluded its first case in the field of bid rigging in 2015, see Szolnoki Leo,

Romania concludes first leniency case, *Global Competition Review*, 28 January 2015. This is also the case of the Latvian competition authority in 2014, see Maskalans Ivo, *Latvia procedure – leniency program*, *European Competition Law Review*, 2015, vol. 36, No 5.

[6] Case C-428/14 *DHL Express (Italy) Srl and DHL Global Forwarding (Italy) SpA v Autorità Garante della Concorrenza e del mercato* [2016].

[7] Commission's Proposal for Directive to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market ("ECN+ Directive" proposal), 22 March 2017, COM(2017) 142 final.

[8] Case T-13/03 *Nintendo and Nintendo of Europe GmbH v Commission* [2009] II-975. See *Augustijn Van Haasteren*, *The European Court of First Instance reduces the fines imposed by the European Commission against leading Japanese video games manufacturer (Nintendo)*, 30 April 2009, *e-Competitions Bulletin April 2009*, Art. N° 35035.

[9] The Belgian Leniency Guidelines published in March 2016 make it clear that they only apply to cartels and do not cover vertical agreements or horizontal practices that do not correspond to the definition of a cartel. However, similarly to the 2007 Guidelines, the definition of a cartel includes agreements or concerted practices between competitors in which also one or more "non-competing undertakings" are participating. See *Autorité Belge de la Concurrence*, *Lignes directrices sur la clémence de l'Autorité belge de la Concurrence*, 1 March 2016 available at http://www.abc-bma.be/sites/default/files/content/download/files/20160301_lignes_directrices_clemence.pdf ↗.

[10] ECN MLP, para. 14.

[11] Notice No 2/2016 of the President of the Hungarian Competition Authority and the Chair of the Competition Council of the Hungarian Competition Authority on the application of the rules on leniency pursuant to Article 78/A of Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices, 7 June 2016, available at http://www.gvh.hu/en//data/cms1034640/szakmai_felhasznaloknak_kozlemenyek_2_2016_a.pdf ↗.

[12] FCO, Case Summary of 14 December 2016 relating to "Fines imposed on account of vertical price fixing in the sale of beer", available at http://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2016/B10-20-15.pdf?__blob=publicationFile&v=3 ↗.

[13] Since IMS was the initiator of the infringement it was not eligible for immunity under the Polish leniency programme but did obtain leniency. Decision of the Polish CA, 30 August 2012 (*IMS Sofa*). See *Tomasz Feliszewski*, *The Polish Competition Authority changes its approach towards vertical agreements (IMS Sofa)*, 30 August 2012, *e-Competitions Bulletin August 2012*, Art. N° 51499. In 2016, the Polish CA granted immunity to Intersport (store network) in a case relating to minimum selling price fixing in cooperation with Fordex (a ski equipment manufacturer), see *Bartosz Turno, Katarzyna Bojarojć*, *The Polish Competition Authority fines ski equipment wholesaler for vertical pricing restraints (Fordex)*, 23 December 2016, *Bulletin e-Competitions December 2016*, Art. N° 83574.

[14] Office of Fair Trading, *Applications for leniency and no-action in cartel cases*, OFT's detailed guidance on the principles and process, July 2013, at para. 2.3. See LexMundi World Ready, *Global Practice Guide*, "Leniency Program", 2013.

[15] The Hungarian authority considered that a subsequent rejection of the leniency application would jeopardise legal certainty. Decision of the Hungarian CA, 18 December 2007 (Kortex/Olympus). See **Gábor Báthory**, *The Hungarian Competition Authority invokes cartel rules and leniency policy with regard to an exclusive distribution agreement in the healthcare sector (Kortex/Olympus)*, 18 December 2007, *e-Competitions Bulletin December 2007*, Art. N° 15514.

[16] In Slovakia, it seems that reductions of fines (but not immunity) are also available to undertakings that forced other undertakings to participate.

[17] This is for instance the case in Poland since the entry into force of a new legislation in January 2015. Until then, the liability of natural persons was limited to procedural violations. The financial sanctions can go up to PLN 2 million, approximately €0.5 million, see OECD, *Strengthening Competition in Poland*, Economics Department Working Papers No. 1125, 4 June 2014. This is also the case in Belgium. Since 2013, individuals who participated in a cartel can be subject to fines of up to €10,000. In France, any person who fraudulently takes a personal and decisive part in the conception, organisation or implementation of anti-competitive practices can be subject to a prison sentence of up to four years and a fine of up to €75,000 (Article L.420-6 of the French Commercial Code).

[18] In February 2008, the OFT announced a new possibility enabling it to offer a financial reward to anyone who could provide information in relation to cartels. In March 2017, the CMA launched an campaign advertising the chance to “earn a reward of up to £100,000” (“Crack down on cartels”), see <https://stopcartels.campaign.gov.uk/>.

[19] The Polish CA may be developing a financial incentive scheme. See ICLG, *Cartels & Leniency* 2018, 11th edition, at p. 11.

[20] European Competition Network Brief, Slovakia: Leniency extended to Criminal Enforcement, April 2010.

[21] See **Katerina Schenkova**, *The Slovak National Council introduces a whistleblower program in the context of a substantial amendment of the competition act*, 14 May 2014, *e-Competitions Bulletin May 2014*, Art. N°67465.

[22] ECN MLP, Explanatory Notes, at para. 15 (emphasis added).

[23] Blanket criminal immunity is granted only when the undertaking concerned obtained a Type A immunity or a Type B immunity/leniency and is related only to the activity to which that immunity/leniency has been granted, see OFT, *Quick Guide to Cartels and Leniency for Individuals*, July 2013.

[24] See **Aleksander Stawicki**, *The President of Poland approves amendments to the Polish Competition Act introducing the possibility to impose fines on the managers of companies involved in anticompetitive agreements*, 30 June 2014, *e-Competitions Bulletin June 2014*, Art. N°67797.

[25] In order to benefit from immunity, the concerned individual must (i) inform the prosecution authorities of his or her participation in the infringement; (ii) at the time of the signalling by the interested individual, the criminal proceedings must not already have been started; and (iii) the individual's cooperative action must lead to the identification and sanctioning of other participating individuals. If the criminal proceedings have already started, the interested individual may still benefit from a reduction to half of the initial sanction, provided that the other conditions are met.

[26] Handbook of the Federal Competition Authority (BWB) on the Application of Section 11b para. 1 to 4 of the Austrian Competition Act (WettbG) (“Leniency Programme”), Section 6, available at

https://www.bwb.gv.at/fileadmin/user_upload/PDFs/Leniency_Handbook_final_version.pdf ↗. See **Hungarian Competition Authority**, *The Hungarian Competition Authority publishes new notices on fines in an effort to incentivise companies to cooperate to reduce their fines*, 9 January 2018, *e-Competitions Bulletin January 2018*, Art. N° 86001.

[27] See “Italy, faced with flagging leniency applications for bid-rigging, looks to economic data for detection”, 25 July 2017, PaRR, available at <https://app.parr-global.com/intelligence/view/prime-2474977> ↗.

[28] See **Johan Ysewyn, Siobhan Kahmann**, *The decline and fall of the leniency programme in Europe*, February 2018, *Revue Concurrences N° 1-2018*, Art. N° 86061, pp. 44-59, [fr] at p. 49.

[29] Decision of the Spanish CA, 21 January 2010 (*Fabricantes de gel*). See **Casto Gonzalez-Paramo, Rosana Aragón-Plaza**, *The Spanish Competition Authority fines the five major producers of bath and shower gel for a price-fixing cartel in its first successful leniency case (Fabricantes de gel)*, 21 January 2010, *e-Competitions Bulletin January 2010*, Art. N° 31019. For another example of leniency applications made within 24 hours, see Case T-186/06 *Solvay SA v. Commission* [2011] ECR II-2839, at paras. 356-382.

[30] See Latvian CA’s Guidelines on Leniency Programme published in March 2018, available at <https://www.kp.gov.lv/lv/aktualitates/832-kp-sagatavo-vadlinijas-par-iespeju-kartelu-dalibniekiem-atzities-parkapuma-un-sanemt-atbrivojumu-no> ↗.

[31] See Article from **European Competition Network Brief**, *The German Competition Authority sets up anonymous whistleblowing system*, 1 June 2012, *e-Competitions Bulletin June 2012*, Art. N° 48456. See also, “Leniency and Cartel Detection – The German Experience”, Juliane Schulze Wehninck, November 2014, available at http://www.idee.ceu.es/Portals/0/Investigacion/Cartels/27_11_2014_Madrid_BKARTA.pdf ↗.

[32] http://www.gvh.hu/en/press_room/press_releases/press_releases_2015/leniency_policy_to_detect_cartels.html ↗; <http://www.internationalawoffice.com/Newsletters/Competition-Antitrust/Hungary/Schoenherr-Rechtsanwlte/The-lofty-promises-and-drawbacks-of-the-leniency-programme-guidelines-for-applicants> ↗.

[33] See “Poland introduces anonymous cartel whistleblower policy”, 10 April 2017, PaRR, available at <https://app.parr-global.com/intelligence/view/prime-2415656> ↗.

[34] https://www.bwb.gv.at/en/cartels_and_abuse_control/whistleblowing_system/ ↗.

[35] See “Cartel whistleblower tools on the rise in Europe – survey”, 23 April 2018, PaRR, available at https://app.parr-global.com/intelligence/view/prime-2624601?src_alert_id=74435 ↗.

[36] European Commission Press Release, “Commission introduces new anonymous whistleblower tool”, Brussels, 16 March 2017, available at http://europa.eu/rapid/press-release_IP-17-591_en.htm ↗.

[37] See “Anonymous whistleblower tool yields results for Danish antitrust probes”, 30 March 2017, MLex, available at <http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=877787&siteid=190&rdir=1> ↗.

[38] Johannes Laitenberger’s Speech, “Enforcing EU competition law – recent developments and a glance to the future”, CMS EU Competition Conference, Brussels, 19 October 2017, http://ec.europa.eu/competition/speeches/text/sp2017_18_en.pdf ↗.

[39] See “Cartel whistleblower tools on the rise in Europe – survey”, 23 April 2018, PaRR, available at https://app.parr-global.com/intelligence/view/prime-2624601?src_alert_id=74435 ↗.

[40] See, <http://ec.europa.eu/competition/cartels/leniency/leniency.html> ↗.

[41] See, <http://ec.europa.eu/competition/cartels/leniency/leniency.html> ↗.

[42] ECN MLP, at paras. 24-26. See also, European Commission, Competition: European Competition Network refines its Model Leniency Programme – Frequently Asked Questions, 2012.

[43] French competition authority, Procedural Communication on the French Leniency Program, 3 April 2015. Belgian Competition Authority, Guidelines on Leniency, 1 March 2016

[44] See **Deirdre McEvoy, Vivian Storm**, *The French Competition Authority updates its leniency program, 6 April 2015, e-Competitions Bulletin April 2015, Art. N° 73396*.

[45] Jan Blockx and Ivan Pico, “New Belgian Leniency Guidelines Open Door to Individual Applicants”, 2 June 2016, Kluwer Law Competition Blog.

[46] <https://www.lexology.com/library/detail.aspx?g=8cba12a3-6605-4b7b-84f2-43b68491abb1> ↗. See **Peter Broadhurst, Ajit Kainth, Nathdwarawala Shachi**, *The UK Competition authority launches a consultation relating to a new proposal for handling leniency applications, 30 June 2017, e-Competitions Bulletin June 2017, Art. N° 84566*.

[47] CMA, Information Note – Arrangements for the Handling of Leniency Applications in the Regulated Sectors, 3 November 2017, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/656905/information-note-on-arrangements-for-handling-of-lenieny-applications.pdf ↗.

[48] The recently updated Hungarian guidelines require the first leniency applicant to submit evidence enabling the CA to conduct dawn raids.

[49] Decision n° 07-D-48 of the French CA, 18 December 2007 (*déménagement national et international*).

[50] The US Leniency Plus programme is reported to likely account for approximately half of reported cartels, “Leniency Plus’ accounts for more than half of the DOJ cartel leniency applications, official says”, 25 January 2018, MLex, available at <http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=957586&siteid=191&rdir=1> ↗. See also Leniency Plus programmes in South Korea and Switzerland.

[51] European Commission, Notice on Immunity from fines and reduction of fines in cartel cases, 8 December 2006, OJ C 298.

[52] For Bulgaria, see *Article from European Competition Network Brief, The Bulgarian Competition Authority adopts new leniency programme ensuring greater transparency on granting immunity or fines reduction, 8 March 2011, e-Competitions Bulletin March 2011, Art. N° 36637*. For Poland, see *Aleksander Stawicki, The President of Poland approves amendments to the Polish Competition Act introducing the possibility to impose fines on the managers of companies involved in anticompetitive agreements, 30 June 2014, Bulletin e-Competitions June 2014, Art. N°67797*.

[53] Leniency Notice, at para. 26.

[54] European Commission, Delivering oral statements at DG Competition, 8 October 2013, http://ec.europa.eu/competition/cartels/leniency/oral_statements_procedure_en.pdf ↗.

[55] Commission's 2006 Notice, at para. 32.

[56] See also *Rachel Cuff, The European Commission adopts amendments to the EU antitrust procedural rules to better reflect EU Damages Directive, 3 August 2015, e-Competitions Bulletin August 2015, Art. N° 75888*.

[57] Case T-186/06 *Solvay SA v. Commission* [2011] ECR II-2839, at paras. 355-382.

[58] See *Mikko Eerola, Kirsi Peltomäki, The Finnish Supreme Administrative Court rules on right of access to documents related to cartel investigations on the basis of the Finnish Act on Openness of Government Activities (Skanska Asfaltti Oy - Metsäliitto Ossuskunta), 12 April 2006, e-Competitions Bulletin April 2006, Art. N° 12127*.

[59] See, for example, Erik Pijnacker Hordijk, Jolling de Pree, Jaap de Keijzer, Bart de Rijke, Gurgen Hakopian and Willemijn Jonker, "Transcripts of oral leniency statements should be disclosed", 13 January 2016, available at <http://www.lexology.com/library/detail.aspx?g=b4b47e61-5f0a-4b74-b825-9ebf6a3e93d4> ↗.

[60] See, for example, 2016 Belgian Guidelines, at para. 28.

[61] Notice No 2/2016 of the President of the Hungarian Competition Authority and the Chair of the Competition Council of the Hungarian Competition Authority on the application of the rules on leniency pursuant to Article 78/A of Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices, 7 June 2016, Section IV.3, available at http://www.gvh.hu/en//data/cms1034640/szakmai_felhasznaloknak_kozlemenyek_2_2016_a.pdf ↗.

[62] The 2016 Leniency Guidelines align the Belgian rules on the MLP. The requirement provided for in the previous guidelines was the destruction or falsification of evidence was forbidden "before the application".

[63] *Bernard E. Amory, The European Court of Justice upholds the European Commission's first withdrawal of immunity for cartel whistleblower but finds the General Court failed to timely adjudicate (Deltafina and FLS Plast), 19 June 2014, Bulletin e-Competitions June 2014, Art. N°68520*. This obligation will however not be considered as breached if (i) the fact or content of the leniency application is communicated to another CA in the ECN or (ii) external counsel is

involved for the purpose of seeking legal advice (provided that the applicant ensures that the external counsel does not disclose any information relating to the leniency application to any third party).

[64] See *Article from European Competition Network Brief, The Austrian Cartel Court imposes fines on printing chemical wholesalers (Donau Chemie, DC Druck-Chemie, Brenntag, Ashland)*, 14 April 2010, *e-Competitions Bulletin April 2010*, Art. N° 33454.

[65] European Commission Decision of 20 October 2005 in Case COMP/C.38.281/B.2 – *Raw Tobacco Italy*, at paras. 461-484.

[66] Case C-578/11 P *Deltafina SpA v European Commission* [2014].

[67] We will not discuss access to leniency documents in the context of private follow-up damage claims in this article, as even a quick overview of this topic would require at least a separate article.

[68] Case C-60/81 *IBM v Commission* [1981] ECR 2639. See *Gabriel Bleser, The Luxembourg administrative Court issues final clarification on the leniency procedure*, 24 January 2008, *e-Competitions Bulletin January 2008*, Art. N° 15714.

[69] Case T-45/98 *Krupp Thyssen Stainless v Commission* [2001] ECR II-3857 and T-48/98 *Acerinox v Commission* [2001] ECR II-3859. See, in France, judgment of the Paris Court of Appeal of 30 January 2014 which upheld the French CA Decision n°11-D-17 of 8 December 2011 (*Laundry detergents cartel*): because of a lack of cooperation, the CA granted an undertaking a 25% fine reduction even though it was the first applicant for leniency.

[70] The cartel participant claimed that other undertakings should not have received leniency because of the unreliability of their statements. Regional Administrative Tribunal of Latium (Italy), 17 November 2011, *Reckitt Benckiser Holdings (Italia) v AGCM*. See *Michele Giannino, An Italian administrative court upholds the Competition Authority granting of full immunity and fine reductions to participants in the cosmetic and health care products cartel under the leniency programme (Reckitt Benckiser)*, 17 November 2011, *e-Competitions Bulletin November 2011*, Art. N° 40928.

[71] Metropolitan Court of Appeal (Hungary), 17 November 2010, *Kortex Mérnöki Iroda v CA*. See *Márton Horányi, The Hungarian Metropolitan Court of Appeal upholds an infringement decision of the NCA concerning an exclusive supply and purchasing arrangement and finds that the addressees of the decision have no standing to challenge immunity granted to another party (Kortex Mérnöki Iroda)*, 17 November 2010, *e-Competitions Bulletin November 2010*, Art. N° 34794.

[72] European Commission Decision of 20 July 2010 in Case COMP/38.866 – *Animal Feed Phosphates*; Decision of the French CA, 8 December 2011 (*detergent manufacturers*). See *Olivier Beddeleem, The French Competition Authority fines the four major laundry detergent manufacturers for violating cartel legislation (Unilever, Procter & Gamble, Henkel and Colgate Palmolive)*, 8 December 2011, *e-Competitions Bulletin December 2011*, Art. N° 43693.

[73] See *Maria Kamnaki, The UK Office of Fair Trading, following its biggest investigation to date, names and shames 112 construction companies in a statement of objections formally accusing them of participation in widespread bid rigging (Construction Industry Cartels)*, 17 April 2008, *e-Competitions Bulletin April 2008*, Art. N° 19969.

[74] The first settled case on the EU level was started following an immunity application. See European Commission Decision of 19 May 2005 in Case COMP/38.511 – *DRAMs*. See also, for example, European Commission Decision of 7 December 2011 in Case COMP/39.600 – *Refrigeration Compressors*; Decision of the German CA, 1 August 2012 (*sweets*); Decision of the French CA, 28 May 2013 (*commodity chemicals*). See **Article from European Competition Network Brief, The German Competition Authority fines a confectionery manufacturer for anti-competitive exchange of information (Haribo), 1 August 2012, e-Competitions Bulletin August 2012, Art. N° 49689** and **Article from European Competition Network Brief, The French Competition Authority fines cartel among major distributors of commodity chemicals (Brenntag, Caldic Est, Univar and Solvadis), 28 May 2013, e-Competitions Bulletin May 2013, Art. N° 53280**.

[75] See **Belgian Competition Authority, The Belgian Competition Authority adopts a settlement decision concerning market sharing agreements concluded between SMEs in the regular river cruise sector (Dinant / Les Bateaux mouches), 27 May 2016, e-Competitions Bulletin May 2016, Art. N° 79881**.] Similarly, in January 2014, the FCO imposed fines against breweries for price fixing, with many of the companies involved cooperating through both the leniency and settlement procedures. The FCO also imposed fines on sugar manufacturers for agreements on sale areas, quotas and prices, see **Steve Szentesi, The German Competition Authority imposes fines on five beer manufacturers and seven individuals in a beer price-fixing case (Breweries Cartel), 13 January 2014, e-Competitions Bulletin January 2014, Art. N° 62238**. In February 2014, Nordzucker AG cooperated extensively with the FCO within the scope of its leniency programme and obtained extensive immunity from fines. All the companies concerned agreed to have the proceedings terminated by settlement. See **Steve Szentesi, The German Competition Authority finds that the sugar cartel agreement has been implemented under the umbrella of the national industry association (Pfeifer / Südzucker / Nordzucker), 18 February 2014, e-Competitions Bulletin February 2014, Art. N° 63959**.

[76] http://europa.eu/rapid/press-release_IP-15-5998_en.htm ↗.

[77] European Commission, Summary Report of the Replies to the Commission's Public Consultation on Empowering the national competition authorities to be more effective enforcers, available at http://ec.europa.eu/competition/consultations/2015_effective_enforcers/Summary_report_of_replies.pdf ↗.

[78] Speech of Commissioner Vestager, "Perspectives on Europe", London School of Economics, 20 November 2015, available at http://ec.europa.eu/commission/2014-2019/vestager/announcements/perspectives-europe_en ↗.

[79] Comments of the ABA Sections of Antitrust Law and International Law on the European Commission's Public Consultation on Empowering the National Competition Authorities to be More Effective Enforcers, 12 February 2016, available at http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_salsil_20160212.authcheckdam.pdf ↗.

[80] Global Competition Review, "European enforcers doubt one-stop leniency", 20 May 2016, available at <http://globalcompetitionreview.com/news/article/41098/european-enforcers-doubt-one-stop-leniency/> ↗.

[81] "EC official says one-stop leniency shop against corporate interest", 14 September 2017, PaRR available at <https://app.parr-global.com/intelligence/view/prime-2501821> ↗.

[82] Case C-428/14 *DHL Express (Italy) Srl and DHL Global Forwarding (Italy) SpA v Autorità Garante della Concorrenza e del mercato* [2016].

[83] *Ibid.*, at paras 31-44.

[84] *Ibid.*, at paras 54-67.

[85] *Ibid.*, at paras 74-84.

[86] *Ibid.*, at para. 64.

[87] Chapter VI of the Explanatory Memorandum of the ECN+ Directive proposal, on pp 17-18. According to the Commission, “*The experience of the last decade has shown that such cross-border legal certainty cannot be sufficiently achieved by Member States individually. Divergences in leniency programmes still lead to different outcomes for leniency applicants in terms of whether they benefit from immunity from fines or even from fines reductions at all. Companies which are considering reporting cartel behaviour to a number of jurisdictions in return for more lenient treatment lack the certainty they need about whether and to what extent they will benefit from this. EU action is needed to ensure that a leniency system is available and applied in a similar way in all Member States.*”, Explanatory Memorandum of the ECN+ Directive proposal, at p. 6.

[88] See **Johan Ysewyn, Siobhan Kahmann**, *The decline and fall of the leniency programme in Europe, February 2018*, *Revue Concurrences N° 1-2018*, Art. N° 86061, pp. 44-59, at p. 53.

[89] See, “*Antitrust regulators depend on leniency regimes to detect cartels – Tokyo Cartel Workshop*”, 5 February 2016, PaRR, available at <https://app.parr-global.com/intelligence/view/1360468> ↗. See also, DG Competition’s website, “*In recent years, most cartels have been detected by the European Commission after one cartel member confessed and asked for leniency, though the European Commission also successfully continues to carry out its own investigations to detect cartels*”, available at http://ec.europa.eu/competition/cartels/overview/index_en.html ↗.

[90] See **Johan Ysewyn, Siobhan Kahmann**, *The decline and fall of the leniency programme in Europe, February 2018*, *Revue Concurrences N° 1-2018*, Art. N° 86061, pp. 44-59 [fr].

[91] Directive 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014, p. 1-9.

[92] Commission Notice of 22 December 2005 on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, OJ C 325, 22.12.2005, p. 7-15, as amended by Communication from the Commission, OJ C 256, 5.8.2015, p. 3-4.

[93] Commission Notice of 27 April 2004 on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, OJ C 101, 27.4.2004, p. 54-64, as amended by Communication from the Commission, OJ C 256, 5.8.2015, p. 5-5. Amendments were also made to the Implementing Regulation (Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ L 123, 27.04.2004), the Leniency Notice (Commission Notice of 8 December 2006 on Immunity from fines and reduction of fines in cartel cases OJ C 298,

8.12.2006, p. 17-22) and the Settlement Notice (Commission Notice of 2 July 2008 on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, OJ C 167, 2.7.2008, p. 1–6).

[94] See, new Article 35a of Notice on Immunity from fines and reduction of fines in cartel cases.

[95] Case C-162/15 P *Evonik Degussa GmbH v European Commission* [2017], at para. 87: “[...] *the publication, in the form of verbatim quotations, of information from the documents provided by an undertaking to the Commission in support of a statement made in order to obtain leniency differs from the publication of verbatim quotations from that statement itself. Whereas the first type of publication should be authorised, subject to compliance with the protection owed, in particular, to business secrets, professional secrecy and other confidential information, the second type of publication is not permitted in any circumstances.*” See, also, Case C-517/15 P *ACG Glass Europe and Others v European Commission* [2017].

[96] See also, Directive 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, http://ec.europa.eu/competition/antitrust/actionsdamages/damages_directive_final_en.pdf ↗.