

# LENIENCY POLICY IN EUROPEAN CARTEL ENFORCEMENT

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## Summary

Leniency programs stand for a rather easy collection of evidence and intelligence. Added value is achieved by hindering upcoming and maintaining cartels to develop an organizational structure. Leniency also increases uncertainty on the side of the cartel members and makes it more difficult for cartel participants to reach an agreement. Furthermore, the costs of adjudicating are decreased by the legal goal-oriented activity of whistle blowers. Therefore, the leniency programs of the EU and of the most member states proved to be a success story on the one hand. In contrary, there are a few adverse effects. In a theoretical approach, the notion of leniency is contradictory since blowing the whistle is the second best choice only. To make the exemption to become the rule gives wrong incentives to the market members to opt for the first best choice in order to build a cartel either not punished or not discovered and keep silent. For quite some principle reasoning such view would create an obstacle. Moreover practically, some adverse effects

have been discussed. For my part, the most crucial notion is that leniency programs are thought to help to find out well hidden cartels, in other words to encourage discovery in hard cases. Instead, leniency is not eligible to be the main tool of lazy cartel enforcement. For regular investigation, there are other incentives in the law of discovery, in procedural law, and last but not least in private enforcement due to the action provided by the legal order of member states. However, I would not hesitate to vote for its limited supplementary use in cartel matters.

Keywords: Leniency. Policy. Cartel.

## I. Introduction and case

Leniency appears to be a cornerstone of the enforcement policy of the European Commission and the National Competition Authorities. Allegedly, around 60 % of cartel infringements are discovered through leniency. The Commission claims that its efficiency and effectiveness could hardly be overestimated. In relation to Brazil, the subject matter appears of specific interest not only because there is a leniency program in Brazilian cartel law as

well.<sup>1</sup> Moreover, the European and Brazilian leniency program differ systematically in respect of the subsequent cartel law enforcement which relies on fines in the EU while Brazil counts criminal law punishment.<sup>2</sup> Indeed, in many cases, the leniency program of the EU and on a national level in the

meanwhile of about 28 member states became a success story.

To introduce to advantages and problems of the EU leniency system developed by administrative practice, the Air Cargo Cases might appear interesting.<sup>3</sup> High fines were imposed on major European airlines for taking specific common fees on airport security, fuel and other purposes out of the competitive process of price calculation without forwarding the advantages to other market participants. From their point of view, however, it made sense not to compete in price segments which were introduced on them by airport and/or public authorities. Nevertheless, their behavior was regarded to be a cartel caught by Art. 101 para I of the Treaty. Since Lufthansa and Swiss happened to blow the whistle they did not face any fines while others had to pay

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<sup>1</sup> For an overview: *Martinez, A. P., Brazil's Leniency Program: Challenges Ahead*, 2011, [http://www.levysalomao.com.br/files/publicacao/anexo/20110919184625\\_brazil-s-leniency-program-challenges-ahead.pdf](http://www.levysalomao.com.br/files/publicacao/anexo/20110919184625_brazil-s-leniency-program-challenges-ahead.pdf). Secretariat of Economic Law, Antitrust Division, Council for Economic Defense, Ministry of Justice, Brazil, *Fighting Cartels: Brazil's Leniency Program* (2009), 3rd ed. [http://www.cade.gov.br/upload/Brazil\\_Leniencia\\_Program\\_Brochure.pdf](http://www.cade.gov.br/upload/Brazil_Leniencia_Program_Brochure.pdf).

<sup>2</sup> *Martinez, Ibid.*

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<sup>3</sup> *EU Commission, Air cargo Decision C (2010), 7694 final of 9 November 2010. There is no public version available, see press release ([http://europa.eu/rapid/press-release\\_IP-10-1487\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-10-1487_en.htm?locale=en)).*

substantial sums, e.g. Air France 183 million €. One should evaluate these numbers of course world-wide, where Lufthansa did not blow the whistle in other markets to the result of facing potential sanctions elsewhere. Also, the application of the EU leniency program did not hinder private parties to sue for damages suffered from the price cartel on the next market level.<sup>4</sup> One might analyze that the advantage of constituting a case was contravened by the disadvantage that a big player has been treated much better than his cartel companions, giving him a kind of advantage by not fining him in relation to his competitors. In conclusion, the tool applied appears to be successful, nevertheless debatable. The transaction costs of the leniency programs are not irrelevant, potentially being capable of

challenging the justification of the tools applied.

## II. Leniency programs

The penalties on companies for infringement of competition rules can be very severe. Concerning EU cartel cases, the largest fine imposed on a single company came out over € 896 million; the largest fine imposed on all members of a single cartel numbers over €1, 3 billion<sup>5</sup>. By their very nature, secret cartels are often difficult to detect and to investigate without the cooperation of undertakings or individuals. Therefore, the Commission considers that it is in Community interest to reward undertakings involved in this type of illegal practices which are willing to put an

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<sup>4</sup> EuGH C-360/09, 14. 6. 2011, *Pfleiderer v. Bundeskartellamt*; C-602/11 P(I), 14. 6. 2012, *Schenker AG v Deutsche Lufthansa AG and Others*; C-365/12 P Urt. v. 27. 2. 2014 *Kommission / Enbw Energie Baden-Württemberg*.

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<sup>5</sup> For the revised guidelines in 2006, see Commission Notice on Immunity from fines and reduction of fines in cartel cases (2006/C 298/11). For data analysis connected to leniency programs, see: *Marrão, C.*, The EU Leniency Programme and Recidivism (March 31, 2014), <http://ssrn.com/abstract=2491172>

end to their participation and co-operate in the Commission's investigation, independently of the rest of the undertakings involved in the cartel. In official EU reasoning about its tool, the interests of consumers and citizens in ensuring that secret cartels are detected and punished outweigh the interest in fining those undertakings that enable the Commission to detect and prohibit such practices. For this reason, companies participating in illegal cartels do have a limited opportunity to avoid or reduce a fine by the leniency policy of the Commission. In brief, companies that provide information about a cartel in which they participated might receive full or partial immunity from fines.

The EU leniency program provides two levels of relief for the whistle blower by either full or partial immunity. In order to obtain full **immunity**, an undertaking must be the first one to inform the authorities by providing sufficient information to allow to launch an inspection at the premises of

the companies allegedly involved. If the authority is already in possession of sufficient information to launch an inspection or has already undertaken one, the whistle blower must provide evidence that enables the Commission to prove the cartel infringement. In any case, the undertaking must fully cooperate with the EU, provide the inspectors with all evidence in its possession and put an end to the infringement immediately. The benefits are not applicable, however, as the whistle blower took steps to coerce other undertakings to participate in the cartel.

In detail, the information disclosed must enable the authority either to carry out a targeted inspection<sup>6</sup> or to find

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<sup>6</sup> “The assessment of the threshold will have to be carried out *ex ante*, i.e. without taking into account whether a given inspection has or has not been successful or whether or not an inspection has or has not been carried out. The assessment will be made exclusively on the basis of the type and the quality of the information submitted by the applicant.” Art. 8 a), footnote 1, of *notice 2006/C 298/11*

an infringement of Article 101 AEUV in connection with the alleged cartel. For that purpose, the undertaking needs to furnish a corporate statement including a detailed description of the alleged cartel arrangement, its aims, activities and functioning; the product or service concerned, the geographic scope, the duration of and the estimated market volumes affected by the cartel; the specific dates, locations, content of and participants in cartel contacts, and all relevant explanations in connection with the pieces of evidence provided in support of the application.<sup>7</sup> The information must be complete and not misleading.<sup>8</sup>

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<sup>7</sup> Art. 9 a) of *notice 2006/C 298/11*

<sup>8</sup> For the requirement that the applicant provides accurate, not misleading, and complete information, see: judgment of the European Court of Justice of 29 June 2006 in case C-301/04 P, *Commission v SGL Carbon AG a.o.*, at paragraphs 68-70, and judgment of the European Court of Justice of 28 June 2005 in cases C-189/02 P, C-202/02 P, C-205/02 P, C-208/02 P and C-213/02 P, *Dansk Rørindustri A/S a.o. v. Commission*, para 395-399.

Furthermore, the name and address of the legal entity submitting the immunity application as well as the names and addresses of all the other undertakings that participate in the cartel must be given, furthermore the details of other individuals involved.

Also, additional evidence known to the whistle blower, e.g. the involvement of other competition authorities has to be provided. Again, the undertaking applying for full immunity must be the first one, while for the application of reduction of fines, only such information will be granted what the authority did not have yet. Furthermore, a set of behavior rules will adjust, like continued full cooperation and disclosure of all information of the whistle blower to the Commission during the procedure.

Instead of full relief, partial immunity results in a **reduction** of fines. In other words, undertakings disclosing their participation in an alleged cartel affecting the Community that do not meet the conditions for full immunity may still be eligible to benefit

from a reduction of fines that would otherwise have been imposed. This relief may be granted if undertakings provide evidence of significant added value to that already known to authority. The concept of "significant added value" is circumscribed by reinforcing the Commission's ability to prove the infringement. *It refers to the extent to which the evidence provided strengthens the Commission's ability to prove the alleged cartel. In this assessment, the Commission will generally consider written evidence originating from the period of time to which the facts pertain to have a greater value than evidence subsequently established. Incriminating evidence directly relevant to the facts in question will generally be considered to have a greater value than that with only indirect relevance. Similarly, the degree of corroboration from other sources required for the evidence submitted to be relied upon against other undertakings involved in the case will have an impact on the value of that evidence, so that compelling evidence will be attributed a greater value than evidence such as state-*

*ments which require corroboration if contested.*<sup>9</sup> In terms of procedure, the undertaking has to furnish a formal application to the Commission and it must present it with sufficient evidence. The first company to meet these conditions is granted 30 to 50% reduction, the second 20 to 30% and subsequent companies up to 20%.<sup>10</sup>

Further rules on both procedure taking place at the EU Commission Directorate General for Competition are to be applied.<sup>11</sup>

## **Some general reasoning on the success of leniency programs**

### **1. Acclamation**

According to the EU Commission, secret cartels are otherwise difficult to detect. Thus, leniency programs are allowing the authority not

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<sup>9</sup> Art. 25 of notice 2006/C 298/11

<sup>10</sup> Notice 2006/C 298/11

<sup>11</sup> Art. 14 ff., 27 ff. of notice 2006/C 298/11 for the two procedures

only to pierce the cloak of secrecy in which cartels operate but also to obtain insider evidence of the cartel infringement.<sup>12</sup> Furthermore, the leniency policy has a deterrent effect on cartel formation and it destabilizes the operation of existing cartels as it seeds distrust and suspicion among cartel members. The interests of consumers and citizens in ensuring that secret cartels are detected and punished outweigh the interest in fining those undertakings that enable the Commission to detect and prohibit such practices. The Commission considers that the collaboration of an undertaking in the detection of the existence of a cartel has an intrinsic value. A decisive contribution to the opening of an investigation or to the finding of an infringement may justify the granting of immunity from any fine to the undertaking in question, on condition that certain additional requirements are fulfilled.<sup>13</sup>

Thus, leniency programs stand for a rather easy collection of evidence and intelligence.<sup>14</sup> Added value is achieved by hindering upcoming and maintaining cartels to develop an organizational structure. Leniency also increases uncertainty on the side of the cartel members and makes it more difficult for cartel participants to reach an agreement. Furthermore, the costs of adjudicating are decreased by the legal goal-oriented activity of whistle blowers.<sup>15</sup>

Moreover, a promising view is offered by OECD after investigating leniency programs, for an effective leniency program, a high degree of predictability, transparency

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<sup>14</sup> *Wouter, W.*, Leniency in antitrust enforcement: Theory and practice, in: *Schmidtchen, D./Albert, M./Voight, S.* [Eds], The more economic approach to European competition law, Conferences on new political economy 24, Tübingen 2007, 203.

<sup>15</sup> *Carmeliet, T.*, How lenient is the European leniency system? An overview of current (dis)incentives to blow the whistle, *Jura Falconis* (Jg. 48), 2011-2012, 464, 466; *Wouter* (Fn. 14), 203.

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<sup>12</sup> Notice 2006/C 298/11

<sup>13</sup> See notice 2006/C 298/11

and certainty appears necessary, together with a low burden of proof, heavy penalties and an emphasis on priority.<sup>16</sup> Compared to the remaining other possibilities in obtaining information for cartel enforcement, which are direct force and compulsion, whistle-blowing as the third option has clear advantages in respect of collecting intelligence and evidence.<sup>17</sup> Thus, together with the other advantages mentioned as there are lower costs of adjudication on the side of the authority and increased difficulties of creating and maintaining cartels, it does not astonish that leniency programs in cartel law mushroom all over the world and regardless of the system of cartel enforcement installed.

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<sup>16</sup> Cf. for recent data: OECD policy debate on ex officio cartel investigations and leniency programs, <http://www.oecd.org/daf/competition/exofficio-cartel-investigation-2013.pdf>. Moreover, a thorough overview on data and analysis of recent statistics provides *Marvão* (Fn. 5), 1, 3 – 30.

<sup>17</sup> *Wouter* (Fn. 14), 203.

## 2. Burden of proof and evidence in cartel matters

What would the situation of European and National authorities be without any leniency programme? There have been, however, some principles developed. Since the *Dyestuff*<sup>18</sup> case, for the matter of evidence, the burden of proof for cartel offences including concerted practice remains at the side of the authority, in this case of the EU-Commission. Due to rule of law principles this cannot be changed. However, a kind of compromise has been developed by a *prima facie* rule based on thorough study of the market in question. This does not result in any shift of burden of proof, since the *prima facie* assumption may easily be destroyed by sound explanation of the concerted behaviour in question. Any convincing *prima facie* reasoning in cartel cases inheres an

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<sup>18</sup> ECJ case 48-69, 14 July 1972, *Imperial Chemical Industries Ltd. v Commission*.



objective method of market analysis based on economic issues without applying fault-substituting criteria. On the first glance, it appears convincing that there are the above mentioned three modes of cartel enforcement. Seen more thoroughly, though, the objective analysis of markets should not be underestimated as it seems to be the more sophisticated tool.<sup>19</sup>

On the contrary, though, one may argue that quite some cases are not capable for applying objective criteria. Furthermore, a sound proof by

witness appears more convincing than economic theories of market behaviour. While the latter counter-argument is rather doubtful, the first constitutes a problem of the objective method. Consequently, there was some need to fill the gap by leniency programs in order to have more success in cartel investigation. This reasoning demonstrates, however, that leniency programs are good to compensate deficiencies of objective market analysis. They have not been thought to be the main instrument of cartel investigation. One should not become victim of his own success. Moreover, the notion of future development of markets as it is inherent to all cartel rules appears to be economic law where the logic of a policemen might not always be appropriate. This is the first issue for general reflection on the usefulness of leniency programs.

### 3. The prisoner's dilemma utilized

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<sup>19</sup> The critique concern modes of behavior of the cartel authority. The question of collecting evidence gets much more interesting in relationship to other, namely private modes of cartel enforcement and the question of individual liability of cartel members, see chapter IV. Decisions of the European Court of Justice see at Fn. 4. For a recent critical approach, see *Wardhaugh, B.*, Cartel Leniency and Effective Compensation in Europe: The Aftermath of Pfliegerer, *Web Journal of Current Legal Issues*, Vol. 19 (3) Sept. 2013, <http://webjcli.org/article/view/251>, 1, 9 ff.

Another, more academic issue is to employ economic analysis. Leniency may appear to be applied game theory, where the prisoner’s dilemma is intended to describe decisions.<sup>20</sup> The illustration goes that two prisoners were arrested for a crime and interrogated separately. If both remain silent each will be

convicted of a relatively minor offence, and spend a year in prison. If both confess, each will receive five years for being cooperative, although envisaging a much more serious offence. If only one fully confesses but the other remains silent, the confessor will go free on leniency, whilst the other, non-cooperative will receive a ten-year sentence. Obviously, both actions are interrelated by our small social model of non-equivalent values.

*Pay-off table:*

	<i>(Version first prisoner)</i>
	<i>Second prisoner</i>
	remains silent confesses
<i>First prisoner</i>	
Remains silent	1, 1 10, 0
Confesses	0, 1 5, 5

Assume the prisoners will decide rationally, so each may try to achieve his first preference. It is useful to set out the preference-ordering of the first prisoner and the consequence for the second prisoner of each of the former’s preferences:

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<sup>20</sup> The suggestion of making use of game theory in order to analyze cartel leniency programs has been developed long ago. “The basic intuition being that leniency policy places the cartel firms in a prisoners dilemma. This is not the case, every firm in the cartel is actually better off if no one runs to the court-house, including the firm that runs. The argument put forth for leniency policy can only work under conditions of unwarranted mutual distrust”: For a thorough economic analysis, cf. *Ellis, Ch. J. /Wilson, W. W., Cartels, Price-Fixing, and Corporate Leniency Policy: What Does not Kill Us Makes Us Stronger*, pg. 4 ([https://editorialexpress.com/cgi-bin/conference/download.cgi?db\\_name=IIOC2008&paper\\_id=339](https://editorialexpress.com/cgi-bin/conference/download.cgi?db_name=IIOC2008&paper_id=339)). For views of prior approaches to the game theorist views on leniency programs, see: *Motta, M., Competition Policy: Theory and Practice*, Cambridge 2004, 544 f.

1st preference	2nd preference
3rd preference	4th preference

First prisoner	
	0, 10
	1, 1
	5, 5
	10, 0

(Second prisoner	10, 0
	1, 1
	5, 5
	0, 10)

It is not rational to remain silent whilst the other prisoner confesses, so the likely outcome is that each will confess, with the consequence that each satisfies only his third preference. What makes the decision interesting is that each could do better by agreeing to remain silent. Furthermore, a gain for one prisoner does not result in an equivalent loss for the other. In cartel matters, the explanation of how, through cooperation with other cartel members, each member might move from his third to his second preference is another description of the contractual nature of cartels. The third preference represents the non-cooperative charac-

teristic, the agreement to remain silent is – again – equivalent to the contract as such, and the satisfaction of the second preference equates to make concessions. In social theory, these are the advantages and burdens in submitting to the state as such, here the model is misused to demonstrate the rational of the “mafia-state”. However, only the one-side cooperation with the authority of the leniency program gives full advantage to prisoner 1 and most disadvantage to prisoner 2. At the same time, it reflects the limits and a few of the problems of blowing the whistle as soon as other cartel members are likely to prefer the same behavior, represented by choice 3. And again, the most rational decision of our cartel members is the choice of staying silent, to cooperate with each other, means, not to cooperate with the cartel offices. In conclusion, though, one must concede that the logics of leniency programs appear pretty much obscure. However, this model demonstrates the inner con-

tradition of leniency programs being a success story on its surface only.<sup>21</sup> In order to neutralize at least against some of these effects, the EU has introduced a marker system. A marker must contain the type and duration of infringement, the product and geographic markets affected, the identity of the involved persons or undertakings, and must disclose applications with other competition authorities. Although, it is doubtful whether the EU marker system may compensate negative effects of the leniency procedure since the Commission exercises a high degree of administrative discretion in exercising the system. Thus, the marker system has been criticised for the excessively detailed information required and for its free discretion used in respect of detailed evidence requirements which

would deter prospective applicants from applying.<sup>22</sup> Although, in taking some distance from the legal context of this debate, there is indeed high practical relevance of a marker system. Seen from the theoretical approach discussed on the prisoner's dilemma, the marker relates very to the rational, the individual outcome of the whistle blower's motivation. The new EU Model Programme sets up a discretionary marker system for immunity applicants<sup>23</sup>. In fact, all immunity and leniency applications start with a marker. In respect of timing, the marker appears decisive for the status of the leniency application. It can be placed

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<sup>22</sup> *Riley, A.*, The modernization of EU anti-cartel enforcement: will the Commission grasp the opportunity?, CEPS special report (<http://www.ceps.eu>) 2010, 7

<sup>23</sup> European Competition Network, ECN MODEL LENIENCY PROGRAMME REPORT ON ASSESSMENT OF THE STATE OF CONVERGENCE, Art. 51, see [http://ec.europa.eu/competition/ecn/model\\_leniency\\_programme.pdf](http://ec.europa.eu/competition/ecn/model_leniency_programme.pdf).

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<sup>21</sup> A task which hopefully justifies our superficial use of the theory, for a deeper insight cf. the authors cited *Ibid.* (Fn. 20).

verbally or in writing and in the language of an EU member state or in English. A marker can even be noted as late as during an on-going inspection.

On a national level, many agencies use marker systems in their leniency programs since markers have even more advantages.<sup>24</sup> They provide the applicants for immunity or fine reduction at least some time to gather information. As long as a person holds the marker for a particular cartel infringement, no other person involved in the same behaviour will be allowed to require the marked place in queue even if the other could satisfy the demand of the authority on the spot. For these and other reasons, the marker system is one of the connection lines between theory and practical relevance, although, its reality in administrative practice has been challenged.<sup>25</sup>

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<sup>24</sup> Ibid., European Competition Network, Art. 51.

<sup>25</sup> Critical remarks on the marker system will be discussed in chapter IV. 3. c)

#### **IV. Debate on leniency programmes**

Due to the growing number of leniency programs on the one hand and leniency applications on the other, the system is increasingly criticised, and seems to suffer from certain issues that might function as disincentives to blow the whistle.

##### **1. Institutional problems in relation to member states: insufficient harmonization**

As mentioned above, the current leniency system - which dates back from 2006 - was not framed to attract a large amount of leniency applicants. While leniency should in fact speed up the decision making process of the competition authorities, the latter are now facing a major backlog of leniency applications. In addition to this success, the judicial landscape has changed enormously since 2006. Nowadays, people believe their self to live more than ever in a globalized world where globalized car-

tels are the standard norm. Due to Regulation 1/2003, in these days at least 20 member states' different leniency systems are in play in the EU, as a consequence of which leniency suffers from problems such as the lack of a one-stop shop or shortage of information that can be easily uncovered, just to name a few.<sup>26</sup> The national systems are not perfectly coordinated with the European system, and concerning global cartels, there are leniency systems e.g. in the in Brazil, in Japan, in Australia, and, of course, in the United States. This situation is far away from the one one-stop-shop. There can be no reliance that the settlement of a case would prevent other cartel procedures elsewhere which rises not only economical problems and adverse effects, but refers soon to a delicate relationship with the principle *ne bis in idem* and other constitutional rights and procedural principle. For Europe, two therapies were applied, the Euro-

pean competition network, ECN, and the model leniency programme. All members of the European Competition Network («ECN») have embraced anti-cartel fight working together in order to reach convergence and consistency. The ECN sets out a framework for rewarding the cooperation of undertakings which are party to agreements and practices falling within its scope. The ECN works coordinated by the Director General for Competition. Furthermore, the model leniency program plays a pivotal role. Allegedly, it has reduced discrepancies between leniency programmes that may have had a chilling effect on potential applicants.

Both measures, however, are moreover road-signs than solutions. In global respect, activities by WTO for harmonization did not even reach that far.<sup>27</sup> In conclu-

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<sup>26</sup> *Carmeliet* (Fn. 15), 464, 466, 471 ff.

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<sup>27</sup> See OECD policy debate on ex officio cartel investigations and leniency programs (Fn. 16), *passim*; for an empirically based scientific analysis, see: *Marrão* (Fn. 5), 1 ff.

sion, the missing one-stop shop for undertakings appears to be a common obstacle of leniency programs which, however, could be resolved by unification or at least by more harmonization and reduction of quantity.

## 2. Rule of law and basic principles

a) There is a general discussion on the question whether the high fines in cartel matters raise problems with the due process clause.<sup>28</sup> This discussion is linked to quite the same fundamental or human right background as the discussion on the effects of leniency. Intermingling these issues would thus have inadequate results, where it might appear that leniency is the adequate and successful tool while the high fines of the cartel authority may ap-

pear problematic due to the human rights issue. Therefore both, although related, should be distinguished.

b) Due to the incorporation of the human rights charter by the Lisbon Treaty and the commitment of the EU to accede to the ECHR, more and more, a human rights culture has arisen. Human rights issues have become of prime importance and violations have increasingly become an internal constitutional matter. This is not a new development since the European institutions have employed human rights and fundamental principles which were common to all European member states long before. The fines and other means of enforcing European competition law are no criminal law sanction according to Art. 23 V of Reg. 1/2003. Nevertheless, they are sanctions of criminal nature within the autonomous interpretation of Art. 6 European Convention of Human Rights

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<sup>28</sup> *Soltész, U.*, Due process and judicial review – mixed signals from Luxembourg in cartel matters, *European Competition Law Review* 2012, 241; *Schwarze, J. / Bechtold, R. / Bosch, W.*, *Deficiencies under EU Competition Law*, Stuttgart 2008.

(ECHR).<sup>29</sup> Therefore, the human rights of Art. 6 will apply to leniency programs varying the sanctions imposed by the authority. Even without the assumption of a criminal nature, it would be possible to apply Art. 6 ECHR and the principles connected thereto, including the EU Charter, for a full judicial review since there is no area in European law free of fundamental rights.<sup>30</sup>

(1) Consequently, for leniency programs as a part of EU competition procedure, by applying Art. 6 ECHR the right to a fair trial has to be envisaged.<sup>31</sup> Thus, reasonable time requirement, independent and impartial judge, presumption of innocence, privi-

lege of non-incrimination, the right of defence including the right to have access to the file of the Commission, the right to be heard, the right to a lawyer, and the right of summon witness have to be taken into account. As far as the judicial control by the European Courts in respects of action of the EU Commission as European cartel authority is given, there should be not too many problems with these principles.<sup>32</sup> The same counts for the competence of the cartel authorities of the member states. Maybe, this view deems superficially. Anyway, this perspective demonstrates that the source of the human right issue is much more virulent than one might expect in a core field of European market law. Its relevance, though, unsurprisingly covers the complete field of competition law enforcement, thereby not being limited to the leniency aspect.

(2) As mentioned before, the *ne bis in idem* principle appears of specific relevance to leni-

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<sup>29</sup> *Öztürk v. Germany* [1984] 6 E.H.R.R. 409 at [56]. *Carmeliet* (Fn. 15), 464, 485 ff., also argues for the present state of applying Art. 6 ECHR in European cartel procedure under the “upgrade” of the human rights issue by the Lisbon Treaty. For specifically critical use of these arguments against EU fines in cartel matters, cf. *Schwarze/Bechtold/Bosch* (Fn. 28).

<sup>30</sup> *Soltész* (Fn. 28), 244

<sup>31</sup> *Soltész* (Fn. 28), 241

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<sup>32</sup> *Carmeliet* (Fn. 15), 464, 485 ff.



ency programs. It may be derived from jurisdiction based on the ECHR or by the summary of rule of law principles as the common essence of legal principle of the EU Member States. The cases on airfreight demonstrate the problem sufficiently. *Lufthansa* might be well off concerning the application of the EU leniency program and granting full immunity. It will for its very same behaviour, however, face sanctions in other parts of the world. Disclosing information in the frame of the EU leniency program could in the extreme cause even more sanctions in other parts of the world. Despite some activities on side of the EU in resolving the situation, this problem still prevails inside Europe and even more in taking a global view<sup>33</sup>.

(3) Other human right issues as the right to privacy derived from Art. 8 ECHR could be employed by facing the massive tools which the EU and its inspectors actually have.

This point again faces European cartel prosecution as such and is not typical for leniency programs.

(4) More procedural principles derived from the rule of law are procedural fairness and legal certainty which may be touched by the EU leniency program, due to its experimental nature of trial and error.<sup>34</sup> In contrary, there are also arguments pro whistleblowing to be excerpted from general principles. Most interestingly, take Art. 10 ECHR, where a whistleblower is protected by freedom of opinion. The European Court of Human Rights found the termination of employment contracts in rewarding of whistle-blowing to be void.<sup>35</sup>

In summary, procedural principles might be seriously concerned by the EU leniency program whilst the danger of

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<sup>34</sup> *Carmeliet* (Fn. 15), 464, 505 ff.

<sup>35</sup> ECHR 21. 7. 2011 – 2827/08 *Heinisch*; cf. *Momsen, C. / Grützner, T.*, Whistleblowing als außerordentlicher Kündigungsgrund, ZIS 2011, 754.

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<sup>33</sup> *Carmeliet* (Fn. 15), 464, 502.

violation of human rights according to 6 and Art. 8 ECHR has to be envisaged, although not being likely. Even to the contrary, human rights might protect whistleblowers at least for specific groups of cases.

c) Others argue, much more far-reaching, that there should a system of criminal sanctions in cartel matters, maybe similar to the US. From a European point of view, one tends to oppose such a view, nevertheless, since the criminal law approach should be deemed to have a better conclusiveness. As pointed out before, a mere criminal law view on the cartel enforcement system would contradict any broad application of the leniency programs.<sup>36</sup> More specifically, it is argued, first, that the cur-

rent use of non-criminal law sanctions within the EC concerning such arrangements leads to ineffective law enforcement of an activity that causes serious harm to consumers and the economy; and, second, that this deficiency should be rectified through the use of criminal punishment as reinforcement for other less controversial antitrust law.<sup>37</sup>

d) Nevertheless, integrating criminal law thinking might otherwise produce interesting results on the EU leniency tools in cartel matters. On the one hand, there has been quite some critique against leniency programs in criminal law. On the other hand, cartel law is no criminal law, some authors claim that indeed not the rule of law arguments were of good use neither the principle of equality, instead the principle of responsibility and fault. In criminal law view, the latter could be used to adjust the range of lenien-

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<sup>36</sup> *Whelan*, A principled argument for personal criminal sanctions as punishment under EC cartel law, *The Competition Law Review* Volume 4 (2007), 7: *The article of Whelan formulates a principled criminalisation framework in order to argue for the necessity of criminal sanctions as punishment under EC cartel law.*

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<sup>37</sup> *Whelan* (Fn. 36), 7.

cy programs especially in respect of immunity.<sup>38</sup>

### 3. Adverse effects contra substantial cartel law

a) Since leniency programs reduce fines to undertakings that reveal information to the authority, they make enforcement more effective, but they may also induce collusion, since they decrease the expected cost of misbehaviour.<sup>39</sup> Such is especially the case if the authority has limited resources.<sup>40</sup> In such environment the desired degree of deterrence could be re-

duced by the mere existence of different layers of leniency programs<sup>41</sup>: An economically acting player could outweigh the cost of being caught against the advantages of undesired behaviour, small probability of being caught and the possibility of achieving immunity under one of the leniency programs.

b) Even outside much calculation, there remains a moral hazard problem caused by the notion that in some cases prohibited behaviour remains free of sanctions. Leniency programs may deter collusion. Some authors believe in the impact of reduced fines and positive rewards and argue that rewarding individuals, including firm employees, can deter collusion in a more effective way to the result that reward programs could heal adverse effects by providing additional incentives.<sup>42</sup> In this respect, har-

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<sup>38</sup> *Steinberg, G.*, Schuldgrundsatz versus kartellrechtliche Kronzeugenregelungen?, *Wirtschaft und Wettbewerb* 2006, 719. The author comments technical details of German criminal law in respect of leniency programs, a method which offers aspects not to be underestimated even in the context of fine-based systems of cartel enforcement.

<sup>39</sup> *Cf. chapter III. 3.* on prisoner's dilemma.

<sup>40</sup> *Motta/Polo*, Leniency programs and cartel prosecution, *International Journal of Industrial Organization* 21 (2003), 347.

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<sup>41</sup> *Carmeliet* (Fn. 15), 464, 466 f.

<sup>42</sup> *Aubert, C./ Rey, P./ Kovacic, W. E.*, The impact of leniency and whistle-blowing programs on cartels, *International Journal of Indus-*

monisation and clear rules would be helpful.

c) The marker system was introduced by the Commission to increase rationality of the leniency regime.<sup>43</sup> Indeed, most cartel authorities use markers. They are a counter-measure against some side-effects of the leniency system by granting to the applicants a limited period of time in order to demonstrate that they satisfy the requirements for immunity. As long as an applicant holds the marker no other person involved in the same cartel will be capable of taking the place in the “immunity queue”. Nevertheless, the marker system is criticized because it has been made responsible for adverse effects by bringing a high degree of administrative discretion, uncertainty and unpredictability into the leniency process.<sup>44</sup>

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trial Organization 24.6 (2006), 1241.

<sup>43</sup> For the necessity of markers in the frame of a leniency program, see III.3.

<sup>44</sup> *Carmeliet* (Fn. 15), 464, 483 f.

d) Inter-relation of the cartelists – adverse “private enforcement”

Since leniency clauses are offering cartelists legal immunity if they blow the whistle on each other, there is misuse not unlikely. While the authorities wish to thwart cartels and promote competition, this effect is not evident, however, because whistleblowing may enforce trust and collusion by providing a tool<sup>45</sup> for cartelists to punish each other.<sup>46</sup> This broad statement might overdue it, although, there is a true core of adverse effects which cannot be eliminated.

(1) Procedural laws are not harmonized, to the effect that divergences could be misused

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<sup>45</sup> For critical claims on compensation against cartel members, see: EuGH C-360/09, 14. 6. 2011, *Pfleiderer v. Bundeskartellamt*; C-602/11 P(I), 14. 6. 2012, *Schenker AG v Deutsche Lufthansa AG and Others*; C-365/12 P Urt. v. 27. 2. 2014 *Kommission / Enbw Energie Baden-Württemberg*.

<sup>46</sup> *Apestequia, J./Dufwenberg, M./Selten, R.*, Blowing the whistle, *Economic Theory* (2007) 31, 143; *Wardhaugh* (Fn. 19) *passim*.

by insiders to cause adverse effects.

(2) The granting of immunity from penalties or the reduction of penalties for antitrust violations in exchange for cooperation with the antitrust enforcement authorities has beside its positive effects also negative outcome on optimal antitrust enforcement, and the extent to which these effects can be measured.<sup>47</sup>

(3) Immunity from administrative fines cannot guarantee immunity from private action based on the violation of Art. 101 AEUV. Although, EU encourages market members to employ private action by other market member, exactly this phenomenon could create an adverse effect of leniency programs because the whistle-blower may have to face private claims on the information disclosed.<sup>48</sup> An

example for the EU application of the leniency program has been in the air freight case where the whistle-blower *Lufthansa* faced private action of its freight contractor *Schenker* and other distributors of the goods transported since the advantages of the cartel have not been forwarded to the next market level.<sup>49</sup> The recent Directive on compensation of damages intends to enhance private enforcement of cartel matters while protecting the position of the first whistle blower only.<sup>50</sup> Such a balance act pays the price of highly systematic damages imposed on principles of national civil law in general and tort law in especially.<sup>51</sup>

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<sup>49</sup> EuGH C-602/11 P(I), 14. 6. 2012, *Schenker AG v Deutsche Lufthansa AG and Others*.

<sup>50</sup> See the upcoming new Directive 2014/.../EU of the European Parliament and of the Council 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 (P7\_TA-PROV(2014)0451).

<sup>51</sup> *Steinle, Chr., Kartellschadensersatzrichtlinie* –

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<sup>47</sup> *Wils, W., Leniency in antitrust enforcement: theory and practice*, in: *The More Economic Approach to European Competition Law*, Conferences on New Political Economy 24, Tübingen 2007, 203.

<sup>48</sup> *Carmeliet* (Fn. 15), 464, 482

#### 4. Adverse economic view on cartel enforcement

a) Some voices give a very clear and debatable statement on enhancing public cartel enforcement by arguing that the European Commission's Directorate General for Competition is facing acute problems in its investigation and prosecution of cartels, which stem from a prior successful cartel busting era.<sup>52</sup> Allegedly, this has been the case because the Commission's procedures emerged at a time when the aim was to consult extensively on the development of competition law, and not to prosecute and fine delinquent business entities. These procedures, which have not been substantially reformed since they came into force 1963 involve extensive documentary responses in which the Commission acts as investigator, prosecutor and judge and

only allow the Commission to hand down half a dozen decisions condemning cartels per year. Therefore, it is argued for a comprehensive modernisation of the Commission's anti-cartel regime, stripping away the limitations on the application of the leniency programme; streamlining the contentious procedure to encourage greater throughput of cases and reforming the sanctions regime to allow individual sanctions to ensure personal accountability for price-fixing by corporate executives.<sup>53</sup> If a personal remark is allowed, I guess that one of the troubles of European law and its procedure is caused by a dominating public or constitutional legal thinking. One should not forget that market law or economic law deals with the interrelationship of private parties which is the traditional core sphere of private law and its procedure.

b) Therefore on the contrary, the value of administrative action appears a kind of

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Auf dem Weg zu einem Sanktions-Overkill, *EuZW* 2014, 481 ff.

<sup>52</sup> *Riley* (Fn. 22), CEPS Special Report/January 2010, 7 ff.

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<sup>53</sup> *Ibid.*

overestimated, while private action in cartel matters seems to be almost hidden. At least in criminal law, leniency programs are a rather problematic and debated matter. They should not be used to change the character of economic law to become administrative or even criminal prosecution. Anyway, private action under national law caused on violation of EU or national cartel law is on the rise.<sup>54</sup> Private action should be more encouraged what is possible by using a few minor incentives. In view of the success of leniency programs, private action has been seen by some authors as a disturbing, almost irrational element. I would take the opposite position in order to install a self-executing system of private action, where leniency programs as a part of public investigation are just one of several additional tools on the side of the latter.

Facing the European discussion and very different from some national experiences, the advantage of private ac-

tion in competition law appears completely underestimated, maybe for the reason that the core fields of the law of civil procedure still are not a part of unified European law. Seen from the point of view of a full arranged legal and procedural system, such position is inadequate for the legal treatment of complex western states and societies, where the economy is ruled by the ratio of market mechanism instead of inner logics of a mushrooming bureaucracy.

## V. Summary

Leniency programs stand for a rather easy collection of evidence and intelligence. Added value is achieved by hindering upcoming and maintaining cartels to develop an organizational structure. Leniency also increases uncertainty on the side of the cartel members and makes it more difficult for cartel participants to reach an agreement. Furthermore, the costs of adjudicating are decreased by the legal goal-oriented

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<sup>54</sup> See recently: *Wardhaugh* (Fn. 19).

activity of whistle blowers. Therefore, the leniency programs of the EU and of the most member states proved to be a success story on the one hand.

In contrary, there are a few adverse effects. In a theoretical approach, the notion of leniency is contradictory since blowing the whistle is the second best choice only. To make the exemption to become the rule gives wrong incentives to the market members to opt for the first best choice in order to build a cartel either not punished or not discovered and keep silent. For quite some principle reasoning such view would create an obstacle. Moreover practically, some adverse effects have been discussed. For my part, the most crucial notion is that leniency programs are thought to help to find out well hidden cartels, in other words to encourage discovery in hard cases. Instead, leniency is not eligible to be the main tool of lazy cartel enforcement. For regular investigation, there are other incentives in the law of discovery, in procedural law,

and last but not least in private enforcement due to the action provided by the legal order of member states. However, I would not hesitate to vote for its limited supplementary use in cartel matters.