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LIST OF ABBREVIATIONS

ACPERA	Antitrust Criminal Penalty Enhancement and Reform Act
CJEU	Court of Justice
EC	European Commission
EU	European Union
EUMR	European Union Merger Regulation
MS	Member State
NCA	National Competition Authority
SEC	Security and Exchange Commission
TFEU	Treaty on the Functioning of the European Union
USA	United States of America

INTRODUCTION

Competition is the center of market economy. Participation of two or more undertakings on the market results with a competition on the same market. Those undertakings are seen as rivals who compete between each other. Undertakings, entities engaged in economic activity, compete with prices and quality of the product they offer on the same market.¹

Why is market competition existence important for the economy? Markets develop because of the competition; undertakings are developing and innovating products and services in order to get competitive advantage on the market. If there is no fair competition on the market, economy and costumers will suffer losses.² Therefore, Competition Policy determinate rules on the market that need to be respected to reach efficient market competition. Main goal of Competition Policy is to protect consumers. If there is a competitive market, consumers will get more choices of innovative products and services for lower price and better quality.³

Competition in European Union (EU) internal market is important. In a case of the fair competition in the internal market, every undertaking in the Member State (MS) will have the same opportunities. Goal of EU is to have efficient and innovative market, which is not possible without competition rules.⁴ That is why Article 101 (1) TFEU is prohibiting all deals between undertakings which may have an impact on the trade between MS, and with the objection of preventing, restricting or distorting competition on the common market.⁵

European Commission (EC) is the regulatory body for Competition Law in European Union. EC is given a right to legislate, control competition and sanction infringement. EC cooperates with national authorities in their anticompetitive work.⁶

¹ Ljerka Mintas Hodak and others, *Europska Unija* (1th edn, MATE do.o., Zagreb) p 248

² Commission, "Why is competition policy important for consumers?",< https://competition-policy.ec.europa.eu/consumers/why-competition-policy-important-consumers_en > 12 November 2022

³ Ibid

⁴ Vlatka Butores Malnar and others, *Pravo Tržišnog natjecanja i državnih potpora* (2th edn, Pravni fakultet Sveučilišta u Zagrebu) p 20.

⁵ Ibid

⁶ Ibid

Cartels are organized groups which collude with each other to fix prices, rig bids, limit production, share markets or costumer. Cartels are viewed as most damaging for of anticompetitive behavior.⁷ When undertakings on the markets are part of the cartel, they don't compete between each other rather they make deals between each other. Outcome of the existence of the cartel is loss for the economy and customers. Therefore, cartels are illegal under the EU Competition Law.⁸

One of the main jobs of the EC is detection of Cartels. Cartels, as secret deals, are very hard to detect which make their detection a challenge for European Commission.⁹ EC has used many different tools in the past to detect cartels. The most efficient tool for detection of cartels was leniency program. Leniency is an opportunity given to cartel participants to expose their involvement in the cartel in order to get immunity from fines. European leniency program was introduced in 1996 and used by EC since then.¹⁰ Detection of cartels is a big plus for market competition efficiency, and therefore it outweighs fining cartel participants that step out.¹¹

Damage claims are private enforcement element to anticompetitive policy. With damage claims third parties affected by the existence of the cartel have a right to sue for the losses they suffered and ask for the compensation. Damage claims are additional cost for the infringement to the fine imposed by the EC.¹²

With the introduction of leniency program cartel detected by EC number got higher, leniency program was an efficient tool for detecting cartels. Nowadays leniency program is facing downwards trend.¹³ There is no right answer why is that so, but statistics show that with the introduction of damage claims in 2014 leniency application became less attractive for cartel participants. Even dough leniency applicant gets immunity from fines, he is still liable for damage

⁷ Commission, “Cartels Overview”, < https://competition-policy.ec.europa.eu/cartels/cartels-overview_en > 29 October 2022

⁸ Ibid

⁹ Ljerka Mintas Hodak and others, *Europska Unija* (1th edn, MATE do.o., Zagreb) p 267

¹⁰ J.D.Jaspers, “Leniency in exchange for cartel confessions”, < <https://journals.sagepub.com/doi/10.1177/1477370819874432> > 20 October 2022, p 106.

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

¹² Olivia Bodnar and others, „ The Effects of Private Damage Claims on Cartel Stability: Experimental Evidence“, < https://www.cresse.info/wp-content/uploads/2020/02/2019_ps1_pa3_EPDCCS.pdf > 20 November 2022, p 2.

¹³ Jean-Francois Laborde, “Cartel Damages Actions in Europe: How courts have assessed cartel overcharges”, < [https://www.laborde-advisory.com/PDF/Cartel%20damages%20actions%20in%20Europe%20-%20How%20courts%20have%20assessed%20cartel%20overcharges%20\(2021%20edition\).pdf](https://www.laborde-advisory.com/PDF/Cartel%20damages%20actions%20in%20Europe%20-%20How%20courts%20have%20assessed%20cartel%20overcharges%20(2021%20edition).pdf) > 29 November 2022, p 5.

claims by third parties.¹⁴ It is clear that there is some kind of interference between public and private enforcement, and solution should be found as soon as possible by the EC to continue with their good work in detecting cartels.¹⁵

¹⁴ Jean-Francois Laborde, “Cartel Damages Actions in Europe: How courts have assessed cartel overcharges”, <[https://www.laborde-advisory.com/PDF/Cartel%20damages%20actions%20in%20Europe%20-%20How%20courts%20have%20assessed%20cartel%20overcharges%20\(2021%20edition\).pdf](https://www.laborde-advisory.com/PDF/Cartel%20damages%20actions%20in%20Europe%20-%20How%20courts%20have%20assessed%20cartel%20overcharges%20(2021%20edition).pdf)> 29 November 2022, p 5.

¹⁵ Ibid

COMPETITION

Market Competition

Competition on the market is a foundation of every market economy. Market competition is a situation of competitive behavior and rivalry between undertakings on the specific market. Undertaking can be defined as any entity engaged in economic activity.¹⁶ Competition is possible only if there is more than one undertaking in the same market, at least two is needed. Competitors compete with different prices and quality of their products and services on the market. Effective market competition is a dynamic process in which undertakings continuously are trying to develop and innovate their products and services.¹⁷

Markets are evolving because of the competition, for that to be possible there needs to be Competition policy. Competition policy applies rules which have as an end result fair competition between companies and businesses. In order to reach efficiency on the market competition requires from competitors to act independently of each other.¹⁸

In the center of the attention of market competition are consumers rather than competitors, consumers are the ones who get most of the fair competition on the market. Competition makes companies offer products and services for lower price, better quality, with more choices and innovations to consumers.¹⁹ In a competitive market price will always be lower, competition pushes prices down. If companies offer better prices than their competitors, they will gain more customers. That situation favors consumers, but also encourages economy boost.²⁰ Quality of goods and services offered on the market can depend on different things; how long will they last, technical support, friendly service and many other similar factors.²¹ To attract they consumers competitors will need to work on their quality. In situation of real competition on the market, undertakings will be pushed to develop and innovate because new products and services will make

¹⁶ Ljerka Mintas Hodak and others, *Europska Unija* (1th edn, MATE do.o., Zagreb) p 248

¹⁷ Ibid

¹⁸ Commission, “Why is competition policy important for consumers?”, < https://competition-policy.ec.europa.eu/consumers/why-competition-policy-important-consumers_en > 12 November 2022

¹⁹ Ljerka Mintas Hodak and others, *Europska Unija* (1th edn, MATE do.o., Zagreb) p 248

²⁰ Commission, “Why is competition policy important for consumers?”, < https://competition-policy.ec.europa.eu/consumers/why-competition-policy-important-consumers_en > 12 November 2022

²¹ Ibid

them more interesting to consumers.²² With that consumers get more choice with good quality and affordable products for them. To conclude, ensuring competitiveness on the market results with advantages for consumers and economy.²³

Competition in EU

One of the main goals of EU is to have efficient internal market between member states. Internal market is essential for the functioning of EU, member states and their citizens are given more opportunities and varieties as part of the united market.²⁴ One of the key factors for functioning of EU internal market is fair competition between EU competitors. Every undertaking on the market should have same opportunities in every country as in their own.²⁵ Companies from one member state shouldn't make deals which will exclude other states companies from participating on that market. Uncompetitive behavior is forbidden by law in EU market. That doesn't mean that goal of EU is to leave every undertaking on the market, especially not the ones less efficient.²⁶ Goal is to have efficient, innovative and more qualified undertakings on the market which will boost economy. That kind of situation on the market is less possible without competition rules.²⁷

Competition Law

European competition law has primary and secondary sources of law. Primary sources of European competition law are articles 101.-109. TFEU. Article 101 prohibits all agreements between undertakings with the object or effect of preventing, restricting or distorting competition on the internal market which may have an impact on the trade between MS.²⁸ Article 102 prohibits market dominance and abuse of market power. Articles 103.-105. determinate power of the European Commission and the European Council to sanction and investigate unfair competition behavior on the common market.

²² Commission, "Why is competition policy important for consumers?",< https://competition-policy.ec.europa.eu/consumers/why-competition-policy-important-consumers_en> 12 November 2022

²³ Ibid

²⁴ Ibid

²⁵ Vlatka Butores Malnar and others, *Pravo Tržišnog natjecanja i državnih potpora* (2th edn, Pravni fakultet Sveučilišta u Zagrebu) p 20.

²⁶ Ibid

²⁷ Ibid

²⁸ Ibid p 37.

Secondary sources govern market concentration. One of the key secondary legislations is Council Regulation (EC) 139/2004 - EUMR.²⁹ Soft law, as notices and guidelines, is also important sources of competition law. European Commission is the author of the soft law, and uses it to closely explain secondary sources to the market participants. Soft law covers many important parts of the competition law on common market, for example how fines are determinate.³⁰

²⁹ Vlatka Butores Malnar and others, *Pravo Tržišnog natjecanja i državnih potpora* (2th edn, Pravni fakultet Sveučilišta u Zagrebu) p 37.

³⁰ *Ibid* p 38.

ANTITRUST PROCEDURE

Role of the EC in Antitrust procedures

In European Union main regulatory body for competition law is European Commission. European Commission has a right to legislate and also to control competition on the market and sanction in case of antitrust behavior. *Directorate General for competition* has a main role inside of EC on competition questions.³¹ European Commission cooperates with national competition authorities in their work as we have a growing internal market, they enforce competition rules together. National and EU authorities communicate through the European Competition Network (ECN) to be consistent in application of EU competition rules. European Commission make sure that competition rules are respected and that there is still place for innovation and new business on the EU market.³² To conclude, European Commission has a power to investigate, to start and lead a procedure and in the end to sanction if anticompetitive behavior was detected.³³

General Antitrust Procedure

Antitrust procedure can start *ex officio* or by a complaint. Afterwards Commission starts with the initial investigation. During initial investigation Commission has a right to examine business books, enter to company's land, enter to company's premises and examine employees. Based on the results of initial investigation case can be perused or closed.³⁴ If pursued, Commission starts In-depth investigation, statement of objection is sent and response of the parties is needed. Parties can give their response either by writing or by oral hearing. Finally, Commission reviews all the

³¹ Vlatka Butores Malnar and others, *Pravo Tržišnog natjecanja i državnih potpora* (2th edn, Pravni fakultet Sveučilišta u Zagrebu) p 50.

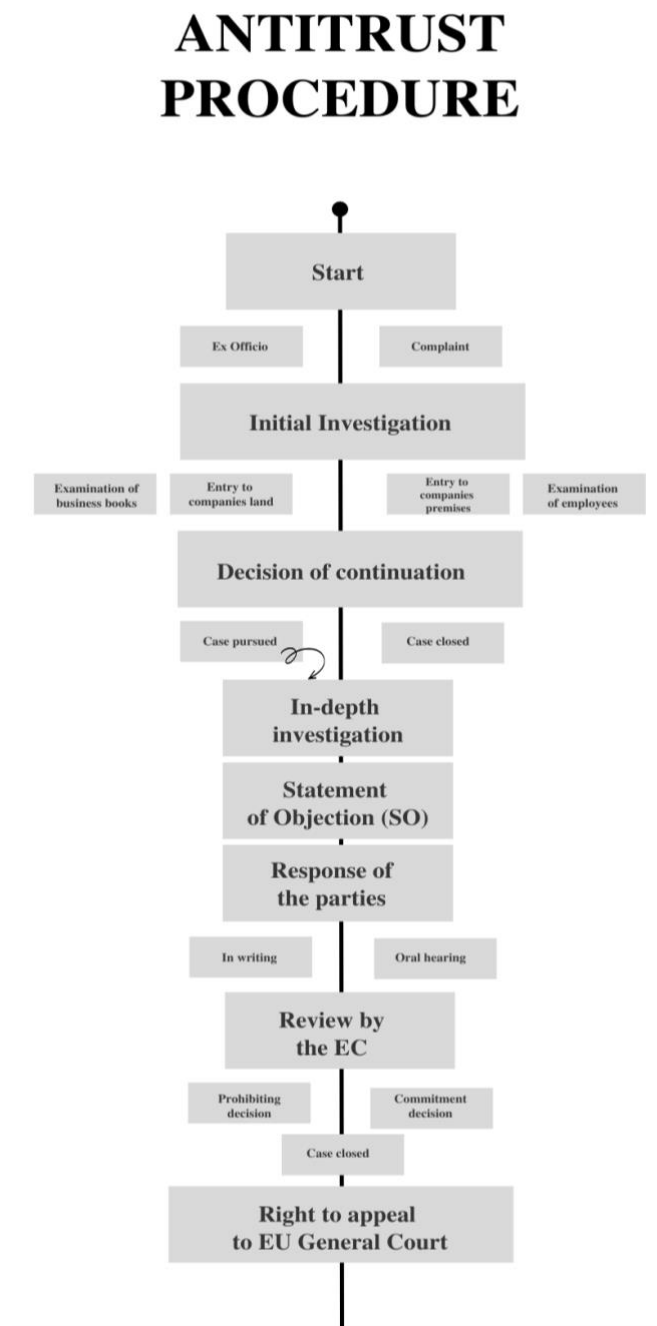
³² Commission, "Tržišno natjecanje", <https://ec.europa.eu/info/departments/competition_hr#responsibilities> 15 November 2022

³³ Vlatka Butores Malnar and others, *Pravo Tržišnog natjecanja i državnih potpora* (2th edn, Pravni fakultet Sveučilišta u Zagrebu) p 51.

³⁴ Vlatka Butores Malnar and others, *Pravo Tržišnog natjecanja i državnih potpora* (2th edn, Pravni fakultet Sveučilišta u Zagrebu) p 70.

evidence and parties' responses, and makes a decision.³⁵ Decision can be a prohibiting decision, commitment decision or case can be closed. Parties have a right to appeal to EU General Court.³⁶

Figure 1. Antitrust Procedure, Source: Vlatka Butores Malnar and others, *Pravo Tržišnog natjecanja i državnih potpora*



³⁵ Ibid

³⁶ Ibid

Start of the Procedure

European Commission can start procedure on their own initiative (*ex officio*), on the initiative of third party and in rare cases a procedure can be started based on the complaint of the member state.³⁷

Ex officio procedure are all the procedures started on initiative of European Commission without leniency program or complaint. ³⁸*Ex officio* procedure can be triggered by the collection of the publicly available information, leads by informants (individuals or companies who are aware of the conduct on the market), sector investigations, information gathered with Whistleblower tool and similar.³⁹

Start of a Commission procedure besides *ex officio* can be based on the complaint of the third party. Third party can be any citizen or firm who believes to be affected by the suspected infringement of competition rules, in that case formal complaint will be lodged.⁴⁰ In case that third party isn't affected by the anticompetitive behavior there is no need for formal complaint, third party will only provide information on a specific market in that case.⁴¹ In the end, Commission will decide if procedure will go through or not in case of groundless complaint. If there is enough information leading to anticompetitive behavior on the market gathered European Commission will officially open a proceeding and continue with the investigation.⁴²

³⁷ Vlatka Butores Malnar and others, *Pravo Tržišnog natjecanja i državnih potpora* (2th edn, Pravni fakultet Sveučilišta u Zagrebu) p 52.

³⁸ Commission, “Ex officio investigation and Sector Inquiries”, < https://competition-policy.ec.europa.eu/antitrust/sector-inquiries_en > 15 November 2022

³⁹ Commission, “Ex officio investigation and Sector Inquiries”, < https://competition-policy.ec.europa.eu/antitrust/sector-inquiries_en > 15 November 2022

⁴⁰ Commission, “Complaints”, < https://competition-policy.ec.europa.eu/antitrust/procedures/complaints_en > 17 October 2022

⁴¹ Commission, “Complaints”, < https://competition-policy.ec.europa.eu/antitrust/procedures/complaints_en > 17 October 2022

⁴² Vlatka Butores Malnar and others, *Pravo Tržišnog natjecanja i državnih potpora* (2th edn, Pravni fakultet Sveučilišta u Zagrebu) p 53.

Investigation

After opening a proceeding Commission will investigate possible anticompetitive behavior on the specific market. Commissions officials are entitled to examine the business books and other records related and also take copies of them. Furthermore, they have a right to enter companies land, premises and transport means.⁴³ Other than that, they are empowered to examine company representative or employees and record the answers. All the evidences gathered will be examined and used for determination if there is a doubt of an anticompetitive behavior present on the market.⁴⁴

Continuation and End of the Proceedings

After initial investigation case can be pursued as a matter of priority or in other case closed, if the case pursued is a cartel case Commission has a right to decide if that case is convenient for the settlement procedure.⁴⁵ Commission has a right to close a procedure for one or more parties if there are no legal assumptions to continue with it.⁴⁶ On the other hand, if Commission decides to continue a proceeding and in-depth investigation competition concern from the initial investigation is confirmed, a statement of objection is send to the parties concerned.⁴⁷

With statement of objection companies concerned are given a right to be heard and a right to defend themselves.⁴⁸ One of the rights given to the parties is access to the files gathered throughout Commission's investigation, all the non-confidential documents are available to them. Next step is on the parties, they may reply in writing in the deadline determined by the Commission to the statement of objection or they can require an oral hearing by Hearing Officer.⁴⁹ Objections by the

⁴³ Commission, "Tržišno natjecanje", < https://ec.europa.eu/info/departments/competition_hr#responsibilities > 20 October 2022

⁴⁴ Ibid

⁴⁵ Commission, " Competition: Antitrust procedures in anticompetitive agreements", < https://competition-policy.ec.europa.eu/system/files/2020-12/antitrust_procedures_101_en.pdf > 20 October 2022, p 1.

⁴⁶ Vlatka Butores Malnar and others, *Pravo Tržišnog natjecanja i državnih potpora* (2th edn, Pravni fakultet Sveučilišta u Zagrebu) p 62.

⁴⁷ Commission, " Competition: Antitrust procedures in anticompetitive agreements", < https://competition-policy.ec.europa.eu/system/files/2020-12/antitrust_procedures_101_en.pdf > 20 October 2022, p 1.

⁴⁸ Vlatka Butores Malnar and others, *Pravo Tržišnog natjecanja i državnih potpora* (2th edn, Pravni fakultet Sveučilišta u Zagrebu) p 62.

⁴⁹ Commission, " Competition: Antitrust procedures in anticompetitive agreements", < https://competition-policy.ec.europa.eu/system/files/2020-12/antitrust_procedures_101_en.pdf > 20 October 2022, p 1.

parties are reviewed by the Commission, if those objections or part of them are abandoned case can be closed.

In the case in which initial concerns are not completely or partially eliminated, Commission drafts a prohibiting decision for an infringement in accordance with Article 7 of the Antitrust Regulation. Other than prohibiting decision option of commitment decision is possible to be taken by the Commission, in order to return effective competition on the market in case.⁵⁰ In case of commitment decisions determination of the infringement of the antitrust rules and imposition of fines is not necessary by the Commission.⁵¹ Parties itself make commitments to compensate for the loses on the market because of their anticompetitive behavior, if Commission finds those commitments adequate, they are made legally binding by the decision. Commitments will only be accepted if they are proportional to the to the violation of the regulations and are necessary to eliminate competition loses.⁵²

Right of appeal is granted to parties, they have a right to appeal to the EU General Court. Commission fines can be reduced, increased or cancelled by the EU general Court. That judgment can also be appealed to the European Court of Justice, only to the questions of law.⁵³

⁵⁰ Commission, “ Competition: Antitrust procedures in anticompetitive agreements”, < https://competition-policy.ec.europa.eu/system/files/2020-12/antitrust_procedures_101_en.pdf> 20 October 2022, p 2.

⁵¹ Ibid

⁵² Ibid

⁵³ Ibid

FINES

European Commission wants to prevent anticompetitive behavior, fines are a tool for achieving that. If competition law is broken, fines can be imposed. Aim of fines it's not only to prevent, but also to punish and deter those who act against the law.⁵⁴ So, the question is; why do companies risk it? In case they are not detected anticompetitive behavior is profitable. Market participants who act in anticompetitive manner can earn more in much easier way, furthermore they are aware that sometimes detecting and proving that kind of the behavior on the market is hard.⁵⁵

Fines policy is based on the principle that fines should be proportional to the harm made, and not every breach has a same effect on the economy. For instance, breaches which affect high value of sales are subject to higher fines than those affecting low value of sales as their bad impact on the economy is more significant.⁵⁶

Article 103 TFEU gives a power to European Council to enforce a system of imposing fines for anticompetitive practices. Council gives the power to commission to enforce the rules of Council Regulation 1/2003 and impose fines to the parties liable.⁵⁷ Regulation defines that fines need to be calculated depending on the gravity and duration of the infringement in case and sets up the cap to 10% of company's turnover. European Commission has a practice of explaining in every decision how fines were set. Commissions decisions can be appealed to The European Court who reviews them and can deviate imposed fines. Commission has good statistics in front of the Court, 90% of the value of fines is maintained on appeal. ⁵⁸

⁵⁴ Commission, „Fines for breaking EU Competition Law“,
< https://ec.europa.eu/competition/cartels/overview/factsheet_fines_en.pdf> 20 October 2022, p 1.

⁵⁵ Commission, „Fines for breaking EU Competition Law“,
< https://ec.europa.eu/competition/cartels/overview/factsheet_fines_en.pdf> 20 October 2022, p 1.

⁵⁶ Ibid

⁵⁷ Commission, „Fines for breaking EU Competition Law“,
< https://ec.europa.eu/competition/cartels/overview/factsheet_fines_en.pdf> 20 October 2022, p 2.

⁵⁸ Ibid

Assessment of Fines

Assessment of the fine starts always with a percentage of value of relevant sales. Relevant sales are annual sales of the product affected by the infringement in a period of previous year. Percentage of those sales can be up to 30%, in cartel cases usually between 15%-20%, and it depends on the seriousness of the infringement.⁵⁹ To get correct percentage many factors are concerned as nature of the infringement, geographic scope and implementation of the infringement.⁶⁰ After assessment of the percentage of relevant sales, duration of the infringement is another important factor.⁶¹

Duration of the infringement in case expressed in years or months multiplies the percentage of the value of relevant sales and fine is calculated. Whit calculation like that it is obvious that the longer infringement on the market make more damage to the economy than those that last shorter.⁶² Furthermore, finest can be decreased or increased depending on the situation. Increase is possible in situations in which companies' infringement is not the first one on the record, and decrease is possible if for example company has a limited involvement in the infringement.⁶³

General cap for the fine is a 10% of the company's overall annual turnover. If the parent company is involved in the anticompetitive process their annual turnover can be a base for a cap limitation of the fine. Period from the end of the infringement to the investigation of it is 5 years.⁶⁴

In cartel cases leniency program can reduce fines up to 50%, moreover if a settlement is reached between company and Commission reduction of 10% is granted.⁶⁵ Anticompetitive company can also ask for a reduction of the fine if truthful evidence is provided proving that fine is going to significantly affect economic viability of the company.⁶⁶

⁵⁹ Commission, „Fines for breaking EU Competition Law“, < https://ec.europa.eu/competition/cartels/overview/factsheet_fines_en.pdf > 20 October 2022, p 1.

⁶⁰ Ibid

⁶¹ Ibid

⁶² Ibid

⁶³ Ibid

⁶⁴ Ibid

⁶⁵ Commission, „Fines for breaking EU Competition Law“, < https://ec.europa.eu/competition/cartels/overview/factsheet_fines_en.pdf > 20 October 2022, p 2.

⁶⁶ Ibid

Table 1 Fine Calculation, Source: Commission, „Fines for breaking EU Competition Law“,

Basic fine	Percentage of value of relevant sales (0-30%) x Duration (years or periods less than one year) + 15-25% of value of relevant sales: additional deterrence for cartels
Increased by	Aggravating factors e.g. ring leader, repeat offender or obstructing investigation
Decreased by	Mitigating factors e.g. limited role or conduct encouraged by legislation
Subject to overall cap	10% of turnover (per infringement)
Possibly further decreased by	Leniency: 100% for first applicant, up to 50% for next, 20-30% for third and up to 20% for others
	Settlement: 10%
	Inability to pay reduction

CARTELS

An organized group of similar and independent competitor companies which collude with each other to fix prices, limit production, share markets or costumers between each other, or rig bids is considered as cartel. Cartels work as a secret organization.⁶⁷ Cartels are looked as the most damaging form of anticompetitive behavior.⁶⁸ Each undertaking on the market should act on his own, and compete with other undertakings on the same market. In case of the cartel undertakings don't compete with each other, instead they rely on each other.⁶⁹ That results with loss for the market as such, consumers on that market and other companies which are not part of the cartel. Consumers get products or services for higher prices and lower quality, and other companies get in the situation where they can't be effective on the market. Competition should encourage progress on the market, and with cartels that progress is slower.⁷⁰ Existence of the cartel does not result with any good for the economy or the society, only cartel members benefit from it. So, we can look at them as serious crimes.⁷¹ Therefore, Cartels are considered illegal under EU competition law. European Commission is the institution which has competence over competition on the EU market.⁷² European Commission has defined fight against cartels as they're most important job, as they're are hard to detect and considered to be most harmful form of antitrust behavior.⁷³

Duration of Cartels

Cartel duration can be assessed by the different methods. Two types of cartel duration are legal and total cartel duration. Legal or Proven cartel duration is used for the calculation of the fines and it is defined as a period of cartel existence determined based on the evidence of antitrust authorities.⁷⁴ On the other hand, Total or True cartel duration is a period of time from when

⁶⁷ Commission, "Cartels Overview", < https://competition-policy.ec.europa.eu/cartels/cartels-overview_en > 29 October 2022

⁶⁸ Ibid

⁶⁹ Commission, "Cartels Overview", < https://competition-policy.ec.europa.eu/cartels/cartels-overview_en > 29 October 2022

⁷⁰ Ibid

⁷¹ Berinde Mihai, " Cartels- Between theory, leniency policy and fines", < <https://core.ac.uk/download/pdf/6227022.pdf> > 22 November 2022

⁷² Ljerka Mintas Hodak and others, *Europska Unija* (1th edn, MATE do.o., Zagreb) p 267.

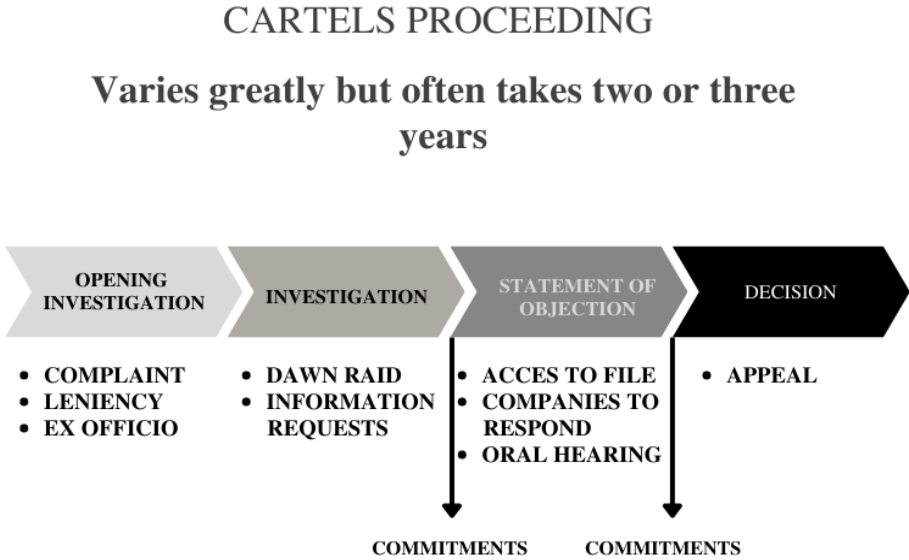
⁷³ Ljerka Mintas Hodak and others, *Europska Unija* (1th edn, MATE do.o., Zagreb) p 267.

⁷⁴ Hana Bistakova, "Detection and survival analysis of cartels. Evidence from the European Union." (2016), < <https://dspace.cuni.cz/handle/20.500.11956/81551> > 25 November 2022 p 7.

cartel was established until it has ended due to the natural death or due to the antitrust authority’s discovery of the cartel. In some of the cases cartels can stay active after they have been detected.⁷⁵As cartel duration affects sanctions and amount of the fines undertakings will never confess a true duration of a cartel, therefore it is on authorities to give their best to gather as much as possible evidence for determination of true cartel duration.⁷⁶ Legal period is usually shorter than the true one, De (2010) discovered that duration of the true cartels is 2.5 higher than the legal one. Moreover, according to the studies average duration of the global cartels is longer than international ones. Studies have shown that the average duration of the cartel is about 8 years.⁷⁷

Proceedings in Cartel Cases

Figure 2. Cartels Proceedings



⁷⁵ Hana Bistakova, “Detection and survival analysis of cartels. Evidence from the European Union.” (2016), <<https://dspace.cuni.cz/handle/20.500.11956/81551>> 25 November 2022 p 7.

⁷⁶ Ibid

⁷⁷ Ibid

Cartel cases can be triggered in three cases; in a case of a complaint, own-initiative investigation by the Commission or in case of the leniency application.⁷⁸ Leniency application is done by the first company that self-reports and gives authorities information and evidence of existing cartel, for that it gets no fines at all and immunity. Other participants of the cartel can also then come out and give authority good evidence on something that authorities still don't know and then they get reduced fines.⁷⁹ First undertaking to come out needs to give evidence and all the detailed information to the authorities. For many years that was number one detection method for cartels, trend in leniency application is going downward and there is new trend that is taking over called damages claim. In damage claims customers or competitors claim they were damaged by the cartel agreements and cartel undertakings need to pay for that damages which can be a high amount. The reason for lower trend in leniency applications is that they can pay damages.⁸⁰

Investigation in cartel cases can be opened on the basis of the complaint, leniency application or ex officio. Commission has 5 powers under Article 20 TFEU which were stated before. Companies need to be given truthful, complete and not-misleading responses and data to the authorities or they can get Obstruction penalties.⁸¹ Obstruction penalties are fines up to 1% of company's annual turnover for giving incorrect, incomplete and misleading information to the authorities. Procedure after investigation is followed by the statement of objection and prohibiting decision with a right to appeal.⁸²

In cartel cases there is also a possibility of the settlement which can be proposed by the parties or by the Commission itself. In a case of a party proposal Commission has a right to reject proposal for cases which finds inappropriate for settlement. Cartel parties are encouraged to settle due to the fine reduction of up to 10% and speedier process for a Commission.⁸³ In settlement proceed Commission presents all the evidence and fact gathered during the investigation and most likely fines and sanctions.⁸⁴ If parties agree with proposed they make an oral or written submission

⁷⁸ Commission, " Competition: Antitrust procedures in anticompetitive agreements", < https://competition-policy.ec.europa.eu/system/files/2020-12/antitrust_procedures_101_en.pdf> 20 October 2022, p 1.

⁷⁹ Iva Benko, „Competition Law class notes“

⁸⁰ Iva Benko, „Competition Law class notes“

⁸¹ Ibid

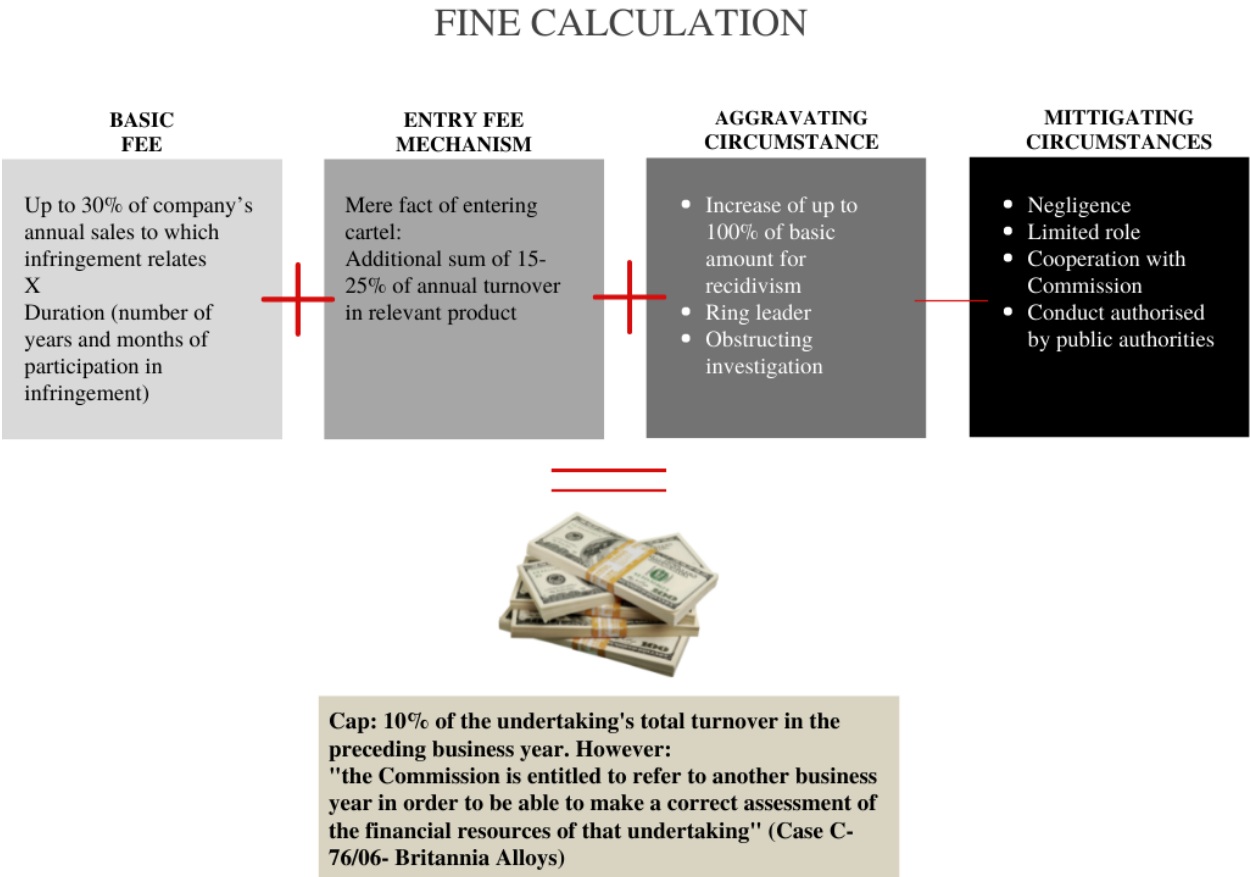
⁸² Ibid

⁸³ Commission, " Competition: Antitrust procedures in anticompetitive agreements", < https://competition-policy.ec.europa.eu/system/files/2020-12/antitrust_procedures_101_en.pdf> 20 October 2022, p 2.

⁸⁴ Commission, " Competition: Antitrust procedures in anticompetitive agreements", < https://competition-policy.ec.europa.eu/system/files/2020-12/antitrust_procedures_101_en.pdf> 20 October 2022, p 2.

confirming Statement of Objection stated by the Commission and taking responsibility for their anticompetitive behavior. Settlement process goes in Commissions favor allowing a faster procedure and allocation of resources to other relevant cases.⁸⁵

Figure 3. Fine Calculation



Assessment of fines in cartel cases is done based on the Fining Guidelines. Fines are calculated based on the revenues which were earned from the benefits of being part of the cartel. Fines are not intended to make companies bankrupt; they should make up for the loss on the market caused by the anticompetitive behavior. Therefore, cap for a fine is 10% of the total turnover in a present business year.⁸⁶

⁸⁵ Ibid
⁸⁶ Iva Benko, „Competition Law class notes“

LENIENCY

General

As cartels are highly secret organizations Commission is faced with a problem of detecting them without the cooperating with them. One of the tools European Commission is using for cartel detection is Leniency.⁸⁷ Leniency can be defined as a possibility for cartel participants to expose their participation in a cartel to get immunity or reduction of fine.⁸⁸ Leniency is most used tool for cartels detection in Europe, nearly sixty percent of them are discovered throughout leniency application. Most of the jurisdiction is using leniency program as part of their anti-competitive policies.⁸⁹

European leniency program is in action since 1996 to ensure the possibility for undertakings to reduce or completely avoid fines and make it easier for Commission to detect cartels.⁹⁰ European Commission has published “*Leniency Notice*” describing characteristics of Leniency program and setting the framework for rewarding the immunity for applicants.⁹¹ Leniency program gives Commission the possibility to get inside evidence of anti-competitive behavior. Furthermore, total or partial immunity from fines is granted to leniency applicant. Moreover, leniency has deterrent effect on the formation of cartels and it makes the trust between cartel members weaker.⁹²

It is in community interest to reward cartel participant which are willing to step out and help Commission in their investigation. Detection of cartels and stronger competition on the market outweighs fining cartel participant which co-operate with the Commission.⁹³ Commission is of the opinion that cooperation of undertakings has a significant value and should be rewarded if certain

⁸⁷ J.D.Jaspers, “Leniency in exchange for cartel confessions”, < <https://journals.sagepub.com/doi/10.1177/1477370819874432>> 20 October 2022, p 106.

⁸⁸ Ibid

⁸⁹ J.D.Jaspers, “Leniency in exchange for cartel confessions”, < <https://journals.sagepub.com/doi/10.1177/1477370819874432>> 20 October 2022, p 106.

⁹⁰ Commission, “Leniency”, < https://competition-policy.ec.europa.eu/cartels/leniency_en> 25 October 2022

⁹¹ Ibid

⁹² Ibid

⁹³ Commission, “ Commission Notice on Immunity from fines and reduction of fines in cartel cases” (2006/C 298/11), p 1.

requirements are fulfilled. Reduction of fines must reflect actual contribution to the investigation of an undertaking in terms of time and quality.⁹⁴

First leniency applicant will receive 100% immunity from fines. In a situation in which that undertaking who took a first step in leniency applying is a ring leader, undertaking who initiated cartel formation, no immunity from fines will apply to him.⁹⁵ To get full immunity leniency applicant needs to make sure that infringement is stopped, it needs to cooperate fully, continuously and expeditiously and none of the companies evidence should be destroyed, falsified or canceled.⁹⁶

Other participants of a reported cartel can also insure themselves with a reduced immunity from fines if they cooperate with Commission and present new evidence which add value to the investigation. “Significant added value” evidence is the one which reinforces ability to prove the infringement.⁹⁷ First company to subsequently apply can get between 30-50% reduction, second one between 20-30% and other up to 20%. Time is also one of the factors that has an impact on the fine reduction, earlier to apply makes it more possible for higher reduction. ⁹⁸

Requirement for immunity and fine reduction

For granting immunity to the leniency applicant some criteria are needed to be fulfilled. First of all, undertaking needs to submit evidence which enables the inspection for the Commission, and in the end to find infringement.⁹⁹ Commission is able to carry out an inspection if applicant has provided a corporate statement with a detailed description of a cartel, name and address of all legal entities and individuals involved and information which of the authorities have been approached.¹⁰⁰ Moreover, all other evidence proving infringement. In a case that Commission already has enough evidence for the start of the inspection or to find an infringement no immunity will be imposed to the applicant.¹⁰¹

⁹⁴ Ibid

⁹⁵ Commission, “Leniency”, < https://competition-policy.ec.europa.eu/cartels/leniency_en > 25 October 2022

⁹⁶ Ibid

⁹⁷ Ibid

⁹⁸ Ibid

⁹⁹ Commission, “ Commission Notice on Immunity from fines and reduction of fines in cartel cases” (2006/C 298/11), p 2.

¹⁰⁰ Ibid

¹⁰¹ Commission, “ Commission Notice on Immunity from fines and reduction of fines in cartel cases” (2006/C 298/11), p 2.

Secondly, few other conditions need to be met to get immunity. Applicant needs to give all the available information and evidence of cartel in case to Commission, also applicant needs to be available to answer any of the Commission's requirements relating to the case.¹⁰² Moreover, applicant's employees need to be available for interview and none of the relevant documents should be destroyed, falsified or canceled. Furthermore, disclosure of the application before statement of objection is prohibited.¹⁰³

Undertaking should end their involvement in the cartel in case after they apply, except if it is determined by Commission that staying in a cartel is necessary for the investigation. Ring leader, undertaking which initiated cartel formation, is not eligible for immunity.¹⁰⁴

If other undertakings, other than first applicant, present significant added value evidence to the Commission their fine's reduction is considered by Commission. Different factors can affect if the fine reduction is granted and the percentage of reduction.¹⁰⁵ Added value evidence are the ones that make it more likely for Commission to prove Cartel existence. Added value evidence are ones originating from the facts period, ones directly relevant to the facts and compelling evidence.¹⁰⁶

Time of the filing evidence will also be considered. Commission at the end of the procedure will determine percentage of fine reduction based on the evidence presented.¹⁰⁷ First undertaking to step out and provide significant added value evidence will get reduction from 30% to 50%. Second undertaking can get a reduction of 20% to 30%, any other undertaking has a possibility of up to 20% reduction of the fine.¹⁰⁸ In the practice, all the applicants that disclose evidence in an early stage and cooperate 100% are the ones with added value evidence and they get a reduction of fines.¹⁰⁹

¹⁰² Commission, "Commission Notice on Immunity from fines and reduction of fines in cartel cases" (2006/C 298/11), p 2.

¹⁰³ Ibid

¹⁰⁴ Ibid p 3.

¹⁰⁵ Ibid p 4.

¹⁰⁶ Ibid

¹⁰⁷ Ibid

¹⁰⁸ Ibid

¹⁰⁹ Commission, "Competition: Antitrust procedures in anticompetitive agreements", < https://competition-policy.ec.europa.eu/system/files/2020-12/antitrust_procedures_101_en.pdf > 20 October 2022, p 8.

Procedure of Leniency Application

Commissions Directorate General is one repressible for taking leniency application. Potential leniency applicant can apply for a marker, other option is to submit formal application to the Commission. Commission has a right to refuse any application submitted after the statement of objection was issued.¹¹⁰ In a case of a marker application applicant place in the queue is marker protected to enable gathering of the relevant information. Marker applicant need to bring forth information about his name and address, other participants of the cartel, territories and products affected, duration of cartel in case and the information about cartel conduct nature.¹¹¹

When applicant qualifies for a market protection Commission needs to specify the period in which applicant has to submit evidence and information to be suitable for immunity. In a case of successful marker perfection in a determinate time period evidence will be treated as they are submitted on the date marker was granted.¹¹² A cartel participant which decides to make a formal immunity application needs to provide all the available evidence and information related to the cartel, including corporate statement.¹¹³ Those evidence and information can at first be presented in hypothetical terms with a detailed description of the evidence that will be disclosed in the exact time in the future. After the Directorate General for Competition receives the application, it will issue acknowledgment of receipt determining date and time of the application.¹¹⁴

In a case that evidence and information provided by the applicant to the Commission are in line with the requirements, conditional immunity will be granted to the applicant.¹¹⁵ On the other hand, if the requirements were not reached Commission will also inform undertaking in a writing that immunity can't be granted. That gives a right to applicant to withdraw documents disclosed to the Commission.¹¹⁶ Commission also retains right to withdraw immunity from fines if it is subsequently discovered that applicant was a ring leader or coercer.¹¹⁷

¹¹⁰ Commission, "Commission Notice on Immunity from fines and reduction of fines in cartel cases" (2006/C 298/11), p 3.

¹¹¹ Commission, "Commission Notice on Immunity from fines and reduction of fines in cartel cases" (2006/C 298/11), p 3.

¹¹² Ibid

¹¹³ Ibid

¹¹⁴ Ibid

¹¹⁵ Ibid

¹¹⁶ Ibid

¹¹⁷ Ibid p 4.

Contacting Commission

In a case in which Undertaking is considering to apply for leniency and it is not sure whether to do it or not to do it few options are possible. Cartels Directorate has a Leniency Officer who is usually first to contact if considering application. Leniency officer is entitled to give informal advices and to discuss possible applications with legal representatives on a “no-names” basis.¹¹⁸

First of all, informational exchange is available to the undertaking considering leniency. Undertakings legal representative can exchange information with the Commission about the possibility of getting immunity without undertakings name, sector or participants disclosure.¹¹⁹ Only disclosure legal representative will do is the one about the product concerned. Legal representative needs to make sure if Leniency Officer confirms possible immunity his client will then as soon as possible submit the leniency application.¹²⁰

Secondly, hypothetical application can also help undertaking make decision. In this case cartel participant can present detailed list with evidence described that will be disclosed in the future. With hypothetical application undertaking is not revealing his or others participants identity until evidence are disclosed.¹²¹ On the other hand, sector, geographic scope and duration of the cartel needs to be disclosed. If Commission is of the thinking that those evidence are triggering immunity it will inform hypothetical applicant and ask him to disclose evidence.¹²²

Possible undertakings should carefully consider which of the options suits them best. Moreover, they should be aware that hypothetical application is disclosing some of the information which makes it easier for Commission to start the investigation without the applicant’s final disclosure if immunity is not possible.¹²³ Undertaking can also decide to make an application without anonymously contacting Commission first, if in that case immunity is not possible, he has two

¹¹⁸ Commission, “Frequently Asked Questions (FAQs) on Leniency”(2022), <https://competition-policy.ec.europa.eu/system/files/2022-10/leniency_FAQs_2.pdf> 2 November 2022, p 5.

¹¹⁹ Ibid p 4.

¹²⁰ Ibid p 5.

¹²¹ Commission, “Frequently Asked Questions (FAQs) on Leniency”(2022), <https://competition-policy.ec.europa.eu/system/files/2022-10/leniency_FAQs_2.pdf> 2 November 2022, p 4.

¹²² Commission, “Frequently Asked Questions (FAQs) on Leniency”(2022), <https://competition-policy.ec.europa.eu/system/files/2022-10/leniency_FAQs_2.pdf> 2 November 2022, p 4.

¹²³ Ibid p 5.

options. First option is to withdraw the evidence and the second one is to ask for reduction of fines consideration.¹²⁴

E-Leniency

As we are living in a period in which everything is technologize and made to be easily used Commission is also making their leniency application available online. E-leniency is Commissions online Platform for submitting leniency and marker applications. Undertakings are given a possibility to make their statements online through secure system and furthermore to upload relevant documents.¹²⁵ All the information is typed and it is not possible to copy or paste it. In the moment application is submitted it is automatically deleted from applicant's computer, no trace is left, only Commission can see the application afterwards. Submitted statements are protected from discovery and civil litigation.¹²⁶ The platform makes all the process much easier and practical to applicant, oral statement in person is not needed. E-leniency has been upgraded as of the October 2022.¹²⁷ New version allows the parties involved access to corporate statements and documents which can usually only be seen in Commission office. Moreover, all the changes in the procedure and decisions made are notified throughout the platform. E-leniency is the most used tool for leniency submission.¹²⁸

European and International Coordination of Leniency Application

Commission and National authorities both have a competence in parallel. Leniency applicant who makes application to one authority is not considered as an applicant for other authority. It would be in applicants interest apply to all the authorities which have a competence over it.¹²⁹ In a case of application which covers more than 3 MS, applicant can submit a full application to Commission and summary of it to the *National Competition Authorities* (NCA).¹³⁰ With that

¹²⁴ Ibid p 5.

¹²⁵ Commission, "Frequently Asked Questions (FAQs) on Leniency"(2022), <https://competition-policy.ec.europa.eu/system/files/2022-10/leniency_FAQs_2.pdf> 2 November 2022, p 6.

¹²⁶ Ibid

¹²⁷ Ibid

¹²⁸ Ibid

¹²⁹ Commission, "Frequently Asked Questions (FAQs) on Leniency"(2022), <https://competition-policy.ec.europa.eu/system/files/2022-10/leniency_FAQs_2.pdf> 2 November 2022, p 14.

¹³⁰ Commission, "Frequently Asked Questions (FAQs) on Leniency"(2022), <https://competition-policy.ec.europa.eu/system/files/2022-10/leniency_FAQs_2.pdf> 2 November 2022, p 14.

leniency applicant will protect his position if case is relocated from Commission to NCAs. On the other hand, if Commission decides to continue with the case NCAs are relieved of the competence and Commission formally initiated the proceeding. Furthermore, if few NCAs pursue a case in parallel Commission has coordinating role to achieve consistency.¹³¹

Applicant while making a submission to the Commission should provide full waiver of confidentiality, meaning he needs to inform about applying to any other authority. Then Commission knows with which authorities can confidential information be shared.¹³²

Leniency Plus

Leniency plus is available to those undertakings that are under investigation for antitrust conspiracy and can't get leniency. With leniency plus those parties can get some credit for substantial assistance reporting their involvement in other antitrust conspiracy that is available for leniency. In other words, Commission uses this tool to attract findings about other anticompetitive behavior while investigating other one.¹³³

In a case of Leniency plus court takes into consideration cooperation of applicant in both cases and then calculates the fine.¹³⁴ While determining cooperation credit for the leniency plus applicant authorities will consider few facts. First of all, it depends on the cooperation presented and facts of the case. Secondly, strength of the evidence presented by the defendant will be considered.¹³⁵ Moreover, significance of the anticompetitive conspiracy reported will be taken into consideration; commerce involved, geographic scope of the infringement, and number of the undertakings involved.¹³⁶ Finally, authorities will also consider what are the chances that the Division would uncover conspiracy without the reporting. Authorities take into consideration these three factors while assessing cooperation credit, but the first two are the more important ones.¹³⁷

¹³¹ Ibid

¹³² Ibid p.15

¹³³ Department of Justice, „Revised Leniency Policy FAQs“, < <https://www.justice.gov/atr/page/file/1490311/download> > 20 November 2022, p 32.

¹³⁴ Department of Justice, „Revised Leniency Policy FAQs“, < <https://www.justice.gov/atr/page/file/1490311/download> > 20 November 2022, p 32.

¹³⁵ Ibid p 33.

¹³⁶ Ibid

¹³⁷ Ibid

Assumption about Leniency Policy

Three theoretical assumptions about leniency program exist.

Table 2. Assumptions about leniency policy, Source: J.D.Jaspers, “Leniency in exchange for cartel confessions

Theoretical assumptions about leniency	Alternative empirical explanations
Firms are rational and unified entities with centralized decision-making	The distribution of responsibilities within firms complicates centralized decision-making and moral ambiguity distorts rational decision-making
Cartelists have accurate information on the expected benefits of the cartel	Firms use leniency strategically if and when they confess
Deterrent penalties and a credible threat of detection make leniency attractive	Leniency applications pose additional risks and uncertainties to cartelists and lead to increased exposure to private enforcement

First assumption says that cartel participants make rational choices and their behavior on the market is determined by the profit incentives. Furthermore, firms are looked as unified entities which know when to enter, leave or report a cartel, and their process of making decisions is centralized.¹³⁸ On the contrast, firms are actually complex entities and their process of making decisions is decentralized. Smaller firms have less resources available for compliance program, but they have less difficulty in monitoring cartel conduct within the firm as it is smaller.¹³⁹ On the other hand, larger firms have more resources to comply with the policy, but it is harder for them to monitor cartel conduct in larger company.¹⁴⁰ Size of the firm determinates the legal awareness, which in the end has an impact on the cartel awareness. In accordance with the studies low competition legal awareness causes interaction with leniency.¹⁴¹

¹³⁸ J.D. Jaspers, “Leniency in exchange for cartel confessions ”(2029), <<https://journals.sagepub.com/doi/10.1177/1477370819874432#body-ref-bibr12-1477370819874432>> 5 December 2022

¹³⁹ Ibid

¹⁴⁰ Ibid

¹⁴¹ Department of Justice, „Revised Leniency Policy FAQs“, <<https://www.justice.gov/atr/page/file/1490311/download>> 20 November 2022, p 32.2022

Second assumption about the Leniency is of the thinking that cartel participants dispose with the necessary information about the cartel benefits, and can easily assume likelihood of detection and imposition of fines. Leniency is presented by European commission as an attractive solution for cartel participant. Leniency is assumed to destabilize active cartels.¹⁴² In contrast, studies show that only 6 percent of the cartels end after leniency application, most of them have already ended before application. In that case reporting to the authorities is a strategic decision, and not a way to stop a cartel existence.¹⁴³ Leniency applicant can adjust their confession to the authorities in order to get immunity. Reporting to authorities in some cases can be seen as business opportunity.¹⁴⁴

Third assumption says that leniency is effective only when combined with penalties that are capable of deterring. Leniency policy is interacted with other enforcements as damage claims and criminal liability. In one hand, it can be beneficial confessing and getting immunity from fines for leniency applicant.¹⁴⁵ On the other hand, immunity granted is not applicable for civil damage claims. Private damage claims against leniency applicant are available to parties in other jurisdictions. Private enforcement is something that makes cartel participants think twice before applying, and in the end, it can make them turn away from confession.¹⁴⁶

To summarize, leniency policy has few theoretical assumptions, but in theory few alternative assumptions challenge the theoretical ones. In theory firms are rational and make centralized decisions, but in practice centralized decision making can be disturbed by division of responsibilities within the firm which leads to the un-rational behavior.¹⁴⁷ Furthermore, theoretically cartel participants have accurate information about the benefits they will get with the confession. In practices, leniency is used by undertakings strategically. Moreover, in theory leniency application is beneficial for applicant as it gets immunity, but in practice follow-up private claims are still possible and no immunity is granted for them.¹⁴⁸

¹⁴² Ibid

¹⁴³ Ibid

¹⁴⁴ Ibid

¹⁴⁵ Ibid

¹⁴⁶ Ibid

¹⁴⁷ Department of Justice, „Revised Leniency Policy FAQs“,
< <https://www.justice.gov/atr/page/file/1490311/download> > 20 November 2022, p 32.

¹⁴⁸ Ibid

Disincentives to apply for Leniency

Leniency applications seem very attractive option for cartel participants to avoid negative consequences of getting caught by European Commission. In practice few of the factors can make leniency less attractive for possible applicants. Cartel participants can find themselves in a situation called prisoners dilemma, they are not sure whether to apply or not for leniency.¹⁴⁹ In most cases when cartel participants trust each other 100%, and are sure their secret agreements are safe and not likely to be detected they will not involve themselves in leniency application. Some of the reasons why cartel participants decide not to play a game are: cost and time-consuming investigation, cartel damages, criminal liability, cultural objections.¹⁵⁰

Table 3. Incentives and Disincentives to apply for Leniency, Source: J.D.Jaspers, “Leniency in exchange for cartel confessions

Incentives to apply for leniency	Disincentives to apply for leniency
Full disclosure in light of the Mergers & Acquisition process	Insufficient evidence
Opportunistic response	Social: response in the market
	Cultural objections
	Costly and time-consuming
	Follow-on damage claims

Firstly, if possible, leniency applicant can give to the authorities facts and circumstances that indicate an infringement, and after initial investigation there is a too little evidence to prove infringement leniency will not be granted. If applicant is not available to give enough evidence to prove infringement, leniency application will be less attractive to him.¹⁵¹

¹⁴⁹ J.D. Jaspers, “Leniency in exchange for cartel confessions ”(2029), <<https://journals.sagepub.com/doi/10.1177/1477370819874432#body-ref-bibr12-1477370819874432>> 5 December

¹⁵⁰ Ibid

¹⁵¹ Ibid

Secondly, some markets depend a lot on the trust between participants on that same market. By reporting to the authorities, applicant could and probably will lose the trust of other participants.¹⁵² That loss of the trust could then affect every future activity of applicant in the market. If undertakings assess that that trust is more important than immunity, he could get he will probably not report.¹⁵³

Furthermore, cultural objections with social dimension have a significant impact on decision making while thinking about the leniency. Being seen as a betrayer on the market by other businesses is something nobody wants. Leniency applicant usually will not be considered benefactor, rather he will be considered as a betrayer.¹⁵⁴

Leniency process can be costly and timely consuming for firms. Process like this can have a negative impact on other business activities firm that firm is dealing with at the same time. Before applying for leniency company will always try to assume the amount of possible fines, period of time and other factors that will affect them in the process.¹⁵⁵ After the analysis company will decide is it worth it or not to apply.¹⁵⁶

Lastly, and probably most important, private enforcement has a big impact on possible leniency applicant decision whether to apply or not. Civil litigation can end up with the liability for damages in the amount that is 4 or 5 times the amount of fines imposed by Commission.¹⁵⁷ Civil litigation can also be time and costly consuming. Impact of damage claims on leniency can be viewed from applicant's eyes; for leniency applicant leniency application with possible damage claims is seen as beginning and not as a closure.¹⁵⁸

¹⁵² J.D. Jaspers, "Leniency in exchange for cartel confessions "(2029), <<https://journals.sagepub.com/doi/10.1177/1477370819874432#body-ref-bibr12-1477370819874432>> 5 December

¹⁵³ Ibid

¹⁵⁴ Ibid

¹⁵⁵ Ibid

¹⁵⁶ Ibid

¹⁵⁷ Ibid

¹⁵⁸ Ibid

DAMAGE CLAIMS

Damage claims have added private enforcement element to anti-cartel policy. Damage claims give right to any third party involved to sue for the losses they faced because of the existence of the cartel.¹⁵⁹ Damage claims were barely used in the past, but they are gaining more and more attention in Europe.¹⁶⁰ Private enforcement was considered first time by the Commission in 2005 with a Green Paper, In 2018 all MS have implemented “*Directive on Antitrust Damages*” into their national laws.¹⁶¹ Damage claims complement public enforcement, they are additional cost for the undertakings to the fine imposed. They are viewed as an additional sanction which should reduce anticompetitive behavior on the market.¹⁶² Although they are considered as a positive tool, some concerns about damage claims exist. There are concerns that private and public liabilities for the identical conduct could accelerate to the over enforcement.¹⁶³ Furthermore, undermining of public enforcement could happen because of the private enforcement, leniency program could be undermined.¹⁶⁴ Leniency program gives applicant a c chance of total or partial reduction of fines, but for third party damage claims only limited protection is possible. As undertakings are liable for damages caused to third parties compensation for it can't be caped.¹⁶⁵

¹⁵⁹ Olivia Bodnar and others, „ The Effects of Private Damage Claims on Cartel Stability: Experimental Evidence“, < https://www.cresse.info/wp-content/uploads/2020/02/2019_ps1_pa3_EPDCCS.pdf> 20 November 2022, p 2.

¹⁶⁰ Olivia Bodnar and others, „ The Effects of Private Damage Claims on Cartel Stability: Experimental Evidence“, < https://www.cresse.info/wp-content/uploads/2020/02/2019_ps1_pa3_EPDCCS.pdf> 20 November 2022, p 2.

¹⁶¹ Ibid p 3.

¹⁶² Ibid p 3.

¹⁶³ Damian Geradin, Laurie-Anne Grelier, „ Cartel Damages Claims in European Union: Have we only seen the Tip of the Iceberg?“, < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2362386> 20 November 2022, p 2.

¹⁶⁴ Damian Geradin, Laurie-Anne Grelier, „ Cartel Damages Claims in European Union: Have we only seen the Tip of the Iceberg?“, < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2362386> 20 November 2022, p 2.

¹⁶⁵ Olivia Bodnar and others, „ The Effects of Private Damage Claims on Cartel Stability: Experimental Evidence“, < https://www.cresse.info/wp-content/uploads/2020/02/2019_ps1_pa3_EPDCCS.pdf> 20 November 2022, p 3.

Legal Framework in EU for antitrust damage claims

Crehan case from 2001 and EU Court of Justice (CJEU) ruling on it was a start of development of antitrust damage claims. CJEU in *Crehan* case has decided that effectiveness of competition law enforcement is higher if there are private antitrust damage claims available to third parties.¹⁶⁶ CJEU was of the opinion, that third parties affected by anticompetitive behavior have a right to get a compensation for a damage they suffered because of the cartel existence.¹⁶⁷ As there was no EU legislation on that topic, CJEU thought that every member state should set up their antitrust damage claims legal framework, but those damage claims should be proportional to damage made and practical. Afterwards, Commission decided to take things in their hands and started working on development of EU Antitrust damage claims legislation.¹⁶⁸ Commissions goal was to reach effectiveness of private claims. Commission got to the point that antitrust damage litigations was underdeveloped because of procedural and legal obstacles. In light of that Commission proposed solutions how to solve those obstacles. In 2008 Commission issued a White Paper containing proposed measures and policies for antitrust damage claims.¹⁶⁹

Commission proposed single compensation, rather than multiple one. Furthermore, protection of leniency statement measures was presented.¹⁷⁰ European Parliament was concerned about Commissions independent development of antitrust damage litigations, following that European Parliament should be involved in development of legal framework if it includes collective redress. Following that Commission renounced presentation of the directive they been working on.¹⁷¹

Parallel with Commission some member states have also worked on the development of antitrust damage claims litigation. Germany, The United Kingdom and Netherlands are an example of fast-growing development in cartel damage claims. Growing trend in private antitrust actions can be connected to the plaintiff-friendly legal regimes.¹⁷² Other than these three countries, other member

¹⁶⁶ Damian Geradin, Laurie-Anne Grelier, „ Cartel Damages Claims in European Union: Have we only seen the Tip of the Iceberg?“, < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2362386> 20 November 2022, p 2.

¹⁶⁷ Ibid

¹⁶⁸ Ibid

¹⁶⁹ Damian Geradin, Laurie-Anne Grelier, „ Cartel Damages Claims in European Union: Have we only seen the Tip of the Iceberg?“, < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2362386> 20 November 2022, p 23

¹⁷⁰ Ibid

¹⁷¹ Ibid

¹⁷² Ibid

states have also been working on the development of damage claims slower. Other member states don't have that plaintiff-friendly regimes, which makes private litigation less attractive.¹⁷³ Differences in private litigations between member states and lack of the EU legislation for antitrust damage claims has been a concern for EU Commission. Minimum level playing field should have been established in European Union for private antitrust damage claims.¹⁷⁴

In 2014 Commission has presented *Antitrust Damages Directive*. Directive was presented to reach two goals. Firstly, removal of practical obstacles for compensating all third parties that suffered because of the anticompetitive behavior. Secondly, Commission wants to establish a balance between public and private enforcement in EU anticompetitive market.¹⁷⁵ All member states have implemented *Antitrust Damages Directive* by 2018. Afterwards, Commission has also presented a report on the implementation of the *Antitrust Damages Directive* to help companies and third parties claim damages. Report covers core implementation rules of the Directive as: the right to full compensation, disclosure of evidence, limitation periods and more.¹⁷⁶ In report it also states that since 2014 when Directive was presented damage claim cases are more often in EU than before. Directive has strengthened the right of the antitrust infringement victims. Commission intends to continue development of private damage claims framework in EU and monitor Member States.¹⁷⁷

¹⁷³ Damian Geradin, Laurie-Anne Grelier, „Cartel Damages Claims in European Union: Have we only seen the Tip of the Iceberg?“, < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2362386> 20 November 2022, p 7.

¹⁷⁴ Ibid

¹⁷⁵ Commission, „Antitrust: Commission publishes report on implementation of Damages Directive“, < https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2413> 26 November 2022

¹⁷⁶ Ibid

¹⁷⁷ Ibid

Methods for assessing damages used by Courts

In June 2013 European Commission has presented “*Practical guide on quantifying Harm in Actions for Damages*”. Fair damages are hard to assess for Judges, therefore Commission has published this Guide to help them in their work. Judges use in practice methods presented in Commissions Guide for assessing damages caused because of cartels existence in the market.¹⁷⁸

Methods from Commissions Guide used by Courts in many different awards are¹⁷⁹:

- Comparison over time
- Comparison with an unaffected market
- Cost-based and financial method
- Regression analysis
- Simulation model
- Other methods

Comparison over time

Comparison over time is also called “before and after” method. This is a most used method in practice, and it is based on comparing prices in different time periods. Austrian, French, German, Italian and Spanish damage claims judgments were many times based on this method.¹⁸⁰

In most of the cases the counterfactual price is found after the infringement. On the other side, for short living cartels price is found before the infringement. Furthermore, some cases use before and after prices.¹⁸¹

¹⁷⁸ Jean-Francois Laborde, “Cartel Damages Actions in Europe: How courts have assessed cartel overcharges”, <[https://www.laborde-advisory.com/PDF/Cartel%20damages%20actions%20in%20Europe%20-%20How%20courts%20have%20assessed%20cartel%20overcharges%20\(2021%20edition\).pdf](https://www.laborde-advisory.com/PDF/Cartel%20damages%20actions%20in%20Europe%20-%20How%20courts%20have%20assessed%20cartel%20overcharges%20(2021%20edition).pdf)> 29 November 2022, p.8

¹⁷⁹ Ibid

¹⁸⁰ Ibid

¹⁸¹ Ibid

Commercial Court of Vienna in their judgment from 2022 has stated that in some situations using “before and after” method could be challenging. In a case of technical innovations have happened on the market and in a case when order quantities have varied, this method is not applicable.¹⁸²

Comparison with unaffected markets

Comparison with unaffected markets is also called “yardstick” method. This method is not as used as previous one in practice. This method compares market affected by the cartel with unaffected market of same kind in different territory. Courts mostly challenge if claimed counterfactual scenarios in other country is applicable.¹⁸³ Commercial Court of Pontevedra (Spain) has in one of their judgments questioned similarity with unaffected market in Mexico. Furthermore, Athens Court of Appeal stated that price can't be compared in German and Greek market, considering different prices of inputs.¹⁸⁴ Comparison with unaffected markets is mostly used when compared unaffected markets have been in the same country, but in different region.¹⁸⁵

Regression analysis

Regression analysis is a statistical technique for identification of different economic variables and what effect they have on the market when separated. In damages cases regression analysis separates the effect of cost of production and cartel effect on the product price.¹⁸⁶ This method is hard to use in practice for judges, it is not reliable. On the other hand, economist use this method to quantify damages that are a product of cartel existence.¹⁸⁷

¹⁸² Jean-Francois Laborde, “Cartel Damages Actions in Europe: How courts have assessed cartel overcharges”, < [https://www.laborde-advisory.com/PDF/Cartel%20damages%20actions%20in%20Europe%20-%20How%20courts%20have%20assessed%20cartel%20overcharges%20\(2021%20edition\).pdf](https://www.laborde-advisory.com/PDF/Cartel%20damages%20actions%20in%20Europe%20-%20How%20courts%20have%20assessed%20cartel%20overcharges%20(2021%20edition).pdf)> 29 November 2022, p.8

¹⁸³ Ibid

¹⁸⁴ Ibid

¹⁸⁵ Ibid

¹⁸⁶ Spyros Droukopoulos, Barbara Veronese and Stefan Witte, „Here to stay: regression analysis in follow-on cartel damages“, < <https://www.oxera.com/insights/agenda/articles/here-to-stay-regression-analysis-in-follow-on-cartel-damages/#:~:text=Regression%20analysis%20is%20a%20powerful,on%20damages%20claims%20in%20Europe.>> 10 December 2022

¹⁸⁷ Ibid

Regression analysis should give us an answer if infringement has, and by how much, effected the difference in the market. Also, it gives us an answer how much how other factors contributed to the difference, as labor cost, input price, and other.¹⁸⁸

Regression analysis is not highly used method, but it has a potential to be used in damage estimations for few reasons. Firstly, it gathered results that can be tested against the real outcomes.¹⁸⁹ Secondly, it can also give us many uncertain estimates where. The factual outcome can vary. Moreover, results from Regression analysis are replicable.¹⁹⁰

Economist could help judges to reach a conclusion using regression analysis. Economist would make the analysis and concisely explain the results to the judge.¹⁹¹

In 2020 the Provincial Court of Madrid in their infringement case has accepted the result of this kind of analysis presented by the defendant. There is the future of the greater use of regression analysis in damage assessment.¹⁹²

Simulation Model

It is rare case when simulation method is used, but in the judgment by the Regional Court of Cologne it was used. The Court has used an expert opinion and, in the end, based on that opinion claims were dismissed.¹⁹³

¹⁸⁸ Spyros Droukopoulos, Barbara Veronese and Stefan Witte, „Here to stay: regression analysis in follow-on cartel damages“, < [¹⁸⁹ Ibid](https://www.oxera.com/insights/agenda/articles/here-to-stay-regression-analysis-in-follow-on-cartel-damages/#:~:text=Regression%20analysis%20is%20a%20powerful.on%20damages%20claims%20in%20Europe.> 10 December 2022</p></div><div data-bbox=)

¹⁹⁰ Ibid

¹⁹¹ Ibid

¹⁹² Jean-Francois Laborde, “Cartel Damages Actions in Europe: How courts have assessed cartel overcharges”, < [¹⁹³ Ibid](https://www.laborde-advisory.com/PDF/Cartel%20damages%20actions%20in%20Europe%20-%20How%20courts%20have%20assessed%20cartel%20overcharges%20(2021%20edition).pdf> 29 November 2022, p.8</p></div><div data-bbox=)

Overcharge in Cartel Damage Litigation

Assessing the harm that claimant has experienced because of the cartel existence can be very challenging. Claimant should be compensated for all the harm suffered, but are the overcharges by cartels been passed on someone else by claimant? Cartel participants claim that the overcharge is passed on the supply chain.¹⁹⁴ Therefore, Commission issued “*Guidelines for national courts on how to estimate the share of overcharge which was passes on the indirect purchaser*”, so called “*Passing-on Guidelines*”. Passing-on Guidelines should answer a question how the passing-on of overcharges should be estimated in practice.¹⁹⁵

Determination of Harm

Cartels cause harm, it is on Courts to assess the existence of harm and the right amount of that harm. In the process of the determination of the correct amount of harm, burden of proof is on the claimants, they need to bring evidence. Judges have the power to assess harm when enough evidence is presented to them.¹⁹⁶ This *prima facie* evidence approach is inspired by the German case law. Few Member states go beyond that by providing for a rebuttable presumption that cartels make an overcharge of fixed percentage.¹⁹⁷ In Hungary it is 10 %, and in Romania it is 20%. Hungary has presented this approach even before the implementation of the Directive in the Hungarian Competition Act.¹⁹⁸

¹⁹⁴ Guenter Bauer and Rober Wagner, „Cartel damages claims: European Commission guidelines to estimate the passing-on of harm caused by cartels“, < <https://www.wolftheiss.com/insights/cartel-damages-claims-european-commission-guidelines-to-estimate-the-passing-on-of-harm-caused-by-cartels/>> 28 November 2022

¹⁹⁵ Ibid

¹⁹⁶ Peter van Wijck and Franziska Weber, „The abstract presumption of harm in the Damages Directive: overconcern of overcompensation“, < <https://www.tandfonline.com/doi/pdf/10.1080/17441056.2021.1979777>> 15 December 2022, p.3

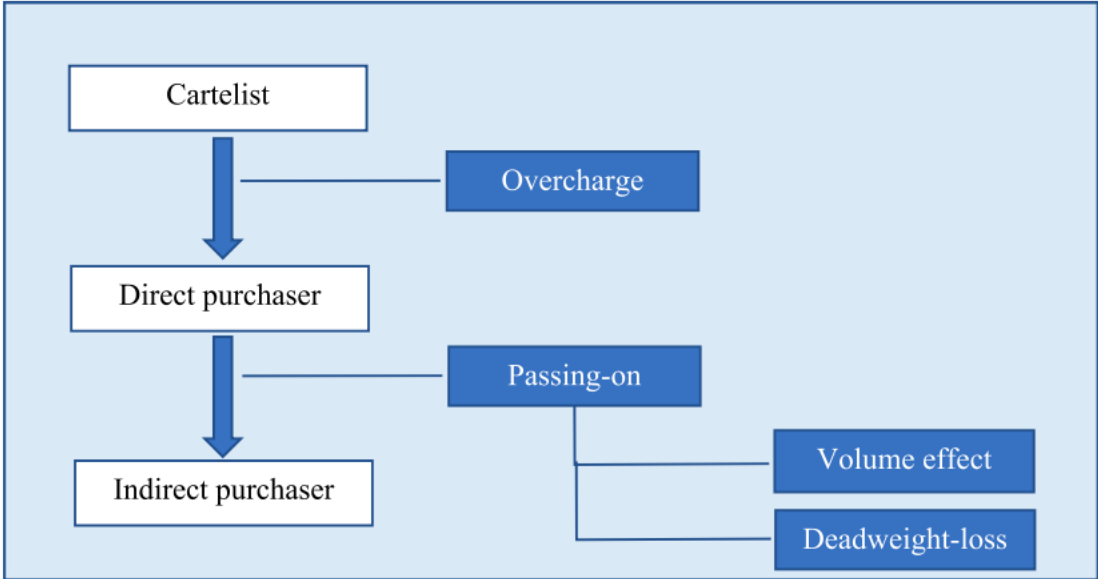
¹⁹⁷ Ibid

¹⁹⁸ Ibid

Types of Harm

When assessing the amount of the harm caused by the cartel there are few types of harm: overcharge, the passing-on effect, the volume effect and the deadweight loss.¹⁹⁹

Figure 4. Types of Harm, Source: Peter van Wijck and Franziska Weber, „The abstract presumption of harm in the Damages Directive: overconcern of overcompensation “



Cartelist is given the possibility to demand a higher price because of the existence of the cartel, so called the counterfactual price. That higher price causes higher cost for direct purchaser. The overcharge is that extra cost purchaser is paying because cartel existence.²⁰⁰

¹⁹⁹ Peter van Wijck and Franziska Weber, „The abstract presumption of harm in the Damages Directive: overconcern of overcompensation“, < <https://www.tandfonline.com/doi/pdf/10.1080/17441056.2021.1979777>> 15 December 2022, p.5

²⁰⁰ Ibid

After the overcharge is done to direct purchaser, he can pass on part of that cost to indirect purchaser. Overcharges can affect direct purchasers, but also indirect ones. Direct purchasers are considered customers, and indirect purchasers are buyers down the supply chain.²⁰¹ In a situation in which direct purchaser has bought higher price cartel product, it has a possibility to charge higher prices to his customers for that product if reselling, or a product with cartelized input if producing.²⁰² That situation is called passing-on the cartel overcharge from direct purchaser to indirect one. Cartelist can use that as part of their defense.²⁰³ Passing-on defense can be used as a shield against damage claims in the way that harm suffered by the claimant, direct purchaser, is reduced for part of the overcharge that was passed on his indirect purchaser.²⁰⁴ In contrast, indirect purchaser can use passing-on as a sword. In that situation indirect purchaser will claim damages from a cartel participant.²⁰⁵

Passing on leads to volume effect: increase of the prices results with the lower demand for the product. In other words, direct purchaser ends up with lower profits because of the lower demand by the indirect purchasers.²⁰⁶ Higher prices lead to the deadweight loss: the loss of the indirect purchaser that buys the higher price product that would be cheaper if cartel didn't exist.²⁰⁷

²⁰¹ Guenter Bauer and Rober Wagner, „Cartel damages claims: European Commission guidelines to estimate the passing-on of harm caused by cartels“, < <https://www.wolftheiss.com/insights/cartel-damages-claims-european-commission-guidelines-to-estimate-the-passing-on-of-harm-caused-by-cartels/>> 28 November 2022

²⁰² Ibid

²⁰³ Ibid

²⁰⁴ Ibid

²⁰⁵ Ibid

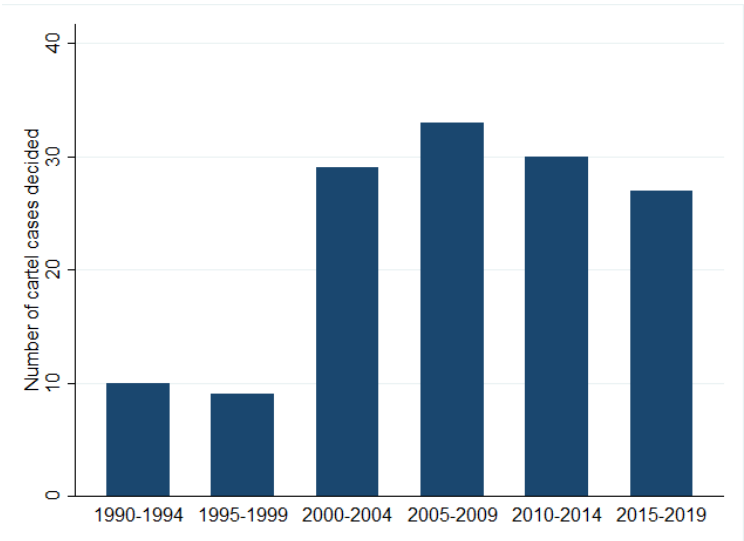
²⁰⁶ Peter van Wijck and Franziska Weber, „The abstract presumption of harm in the Damages Directive: overconcern of overcompensation“, < <https://www.tandfonline.com/doi/pdf/10.1080/17441056.2021.1979777>> 15 December 2022, p.5

²⁰⁷ Ibid

TRADE-OFF BETWEEN PUBLIC AND PRIVATE ENFORCEMENT

What effect private damage claims have on the leniency program? Leniency application can increase a risk of a successful private damage claims. Firstly, evidence that are presented by the applicant in the leniency process, if not protected against civil law consequences, can be used by third parties to prove antitrust infringement that has affected them.²⁰⁸ Secondly, leniency applicant can't challenge infringement decision by authorities as they contributed. Leniency applicant may be exempt from fines by Commission, but that could be compensated by damage payments.²⁰⁹ In a case in which parties are liable for private damages, leniency application appears less desirable. If expected damage claims are higher, there is less chance that firms will apply for leniency.²¹⁰ On the other hand, there is also thinking that damage claims improve effectiveness of leniency program. Limiting right of third parties harmed by cartels is not necessary and conflict between private and public enforcement is apparent. Third-party claims could actually go in favor of the effectiveness of leniency because civil liability for whistleblowers is minimal.²¹¹

Figure 5. Cartel Cases detection by EC, Source: European Commission (2020, section 1.9).



²⁰⁸ Catarina Marvao, Giancarlo Spagnolo, Paolo Buccirossi, „Leniency, damages, and EU competition policy“, < <https://cepr.org/voxeu/columns/leniency-damages-and-eu-competition-policy>> 26 November 2022

²⁰⁹ Catarina Marvao, Giancarlo Spagnolo, Paolo Buccirossi, „Leniency, damages, and EU competition policy“, < <https://cepr.org/voxeu/columns/leniency-damages-and-eu-competition-policy>> 26 November 2022

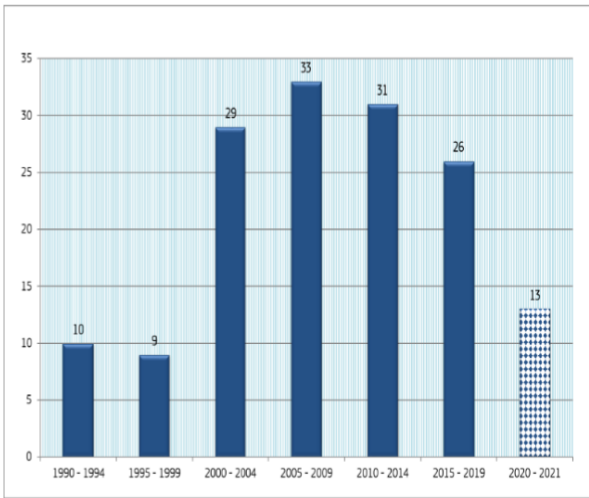
²¹⁰ Olivia Bodnar and others, „ The Effects of Private Damage Claims on Cartel Stability: Experimental Evidence“, < https://www.cresse.info/wp-content/uploads/2020/02/2019_ps1_pa3_EPDCCS.pdf> 20 November 2022, p 4.

²¹¹ Ibid

There is no right answer to question whether private damage claims affect in negative or positive way public enforcement. From one point of view, as they are additional cost to fines, they could lower number of cartels. From the other point of view, they could render leniency applications.²¹²

Figure 6. Number of Cartel Cases Decisions by EC, Source: “Cartel Statistics”, European Commission

Period	Decisions
1990 -1994	10
1995 - 1999	9
2000 - 2004	29
2005 - 2009	33
2010 - 2014	31
2015 - 2019	26
++2020-2021++	13**)
total	151

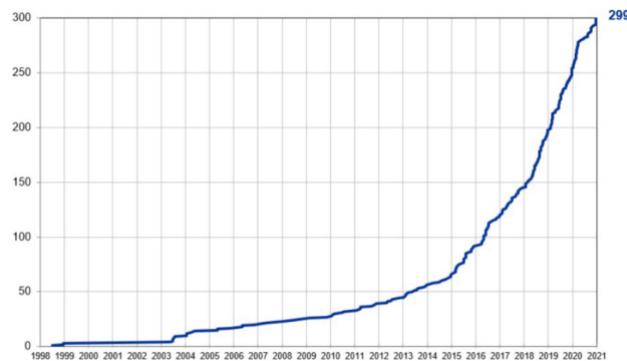


Statistics show that after the introduction of the leniency program from 2000 to 2004 cartel detection number got significantly higher, from 9 to 29 cases. Indicating that Leniency program is one of the most important, if not the most important, tool to detect cartels.²¹³

²¹² Ibid

²¹³ Ibid

Figure 7. Number of Cartel Damage Cases, Source : “Cartel Damages Actions in Europe”, Jean-Francois Laborde



Recently cartel cases have faced a drop as damage claims have been introduced. Since introduction of damage claims in 2014, 299 damage claims have been filled until 2021. 134 of these cases have been dismissed, 14 cases are pending, 93 cases were with established liability and in 58 cases damages were awarded.²¹⁴ After the *Antitrust Damages Directive* has been presented in 2014, cases decided by EC have faced a drop from 31 to 26. Will that drop be continued? Is it possible that damage claims triggered that decline?²¹⁵ That question can be answered correctly, but statistics show that there is some kind of interconnection between leniency and damage claims.

Cartel detection is a challenging job for Commission, if private enforcement is negatively affecting public enforcement, Commission needs to find a balance between them to reach a goal of effective competition on the European market.

²¹⁴ Jean-Francois Laborde, “Cartel Damages Actions in Europe: How courts have assessed cartel overcharges”, < [https://www.laborde-advisory.com/PDF/Cartel%20damages%20actions%20in%20Europe%20-%20How%20courts%20have%20assessed%20cartel%20overcharges%20\(2021%20edition\).pdf](https://www.laborde-advisory.com/PDF/Cartel%20damages%20actions%20in%20Europe%20-%20How%20courts%20have%20assessed%20cartel%20overcharges%20(2021%20edition).pdf)> 29 November 2022, p 5.

²¹⁵ Olivia Bodnar and others, „ The Effects of Private Damage Claims on Cartel Stability: Experimental Evidence“, < https://www.cresse.info/wp-content/uploads/2020/02/2019_ps1_pa3_EPDCCS.pdf> 20 November 2022, p 4.

Different Jurisdiction Solutions

Problem of interference between efficiency of leniency application and damage claims is present in every jurisdiction. Two main questions need to be answered. Firstly, should leniency applicant have the same liability as other undertakings?²¹⁶ Secondly, should documents gathered throughout leniency program be available to the third party while claiming damage claims? Different jurisdictions have found different solutions for the problem; USA, EU and Hungary have presented their solutions.²¹⁷ Can only one jurisdiction have the best solution, or maybe a mix of different jurisdictions solutions could be most effective?

USA

The USA Congress authorized the *Antitrust Criminal Penalty Enhancement and Reform Act* (ACPERA) to make sure efficient of leniency program while be possible parallel to damage claims. Leniency applicant is free of treble damage claims and join liability.²¹⁸ But still it is liable for single damages and documents are disclosed, and available to use in the claim, to the third parties claiming damages.²¹⁹

EU

In EU *Antitrust Damages Directive* states that leniency applicant is liable for both joint and several liable to direct and indirect provider or purchaser. Furthermore, applicant is also liable to other parties that suffered because of the anticompetitive behavior in a situation in which other cartel members are not capable to fully compensate.²²⁰ In contrast to the USA, leniency statement and

²¹⁶ Catarina Marvao, Giancarlo Spagnolo, Paolo Buccirossi, „Leniency and damages: Where is the Conflict?“, <<https://www.journals.uchicago.edu/doi/abs/10.1086/711392>> 29 November 2022, p 2.

²¹⁷ Catarina Marvao, Giancarlo Spagnolo, Paolo Buccirossi, „Leniency and damages: Where is the Conflict?“, <<https://www.journals.uchicago.edu/doi/abs/10.1086/711392>> 29 November 2022, p 2.

²¹⁸ Ibid p 3.

²¹⁹ Ibid p 3.

²²⁰ Catarina Marvao, Giancarlo Spagnolo, Paolo Buccirossi, „Leniency and damages: Where is the Conflict?“, <<https://www.journals.uchicago.edu/doi/abs/10.1086/711392>> 29 November 2022, p 4.

settlement submissions can't be disclosed to claimant. National courts of Member States should protect leniency documents or deem them in the process of damage claims.²²¹

Hungary

Hungary had their rules for the trade-off between damage claims and leniency program before Directive. Hungary granted liability pop last resort to the leniency applicant, meaning it was only liable to victims if other cartel members weren't able to compensate them fully. Hungary gave a right for leniency evidence disclosure to the claimants.²²²

To reach the efficiency in a legal system which has as a possibility leniency program and damage claims in the same time balance needs to exist. Balance would be minimizing liability of the leniency applicant for damage claims, and maximizing documentation gathered during leniency application and disclosed to the claimants.²²³ In this balanced regime injured parties would still get compensated for the losses because of the existence of the cartel. Moreover, leniency applicant would have full immunity from fines and damages claims and their incentive to report to authorities would be stronger.²²⁴

²²¹ Ibid

²²² Ibid

²²³ Ibid p 6.

²²⁴ Ibid

Fair Founds as Solution

Fair Founds are known from US Security Law, the US Security and Exchange Commission (SEC) compensates third parties negatively affected by security law violation. SEC collects money from public fines and uses it for victim compensation. In EU model of Fair Founds could be used for claimant compensation to reach effectiveness of anticompetitive actions.²²⁵ Fair Founds have shown effectiveness and success, in most of the cases fair founds have compensate victims more effectively than private litigation. Currently in EU fines that are gathered by the Commission or National authorities go to their budget.²²⁶ In contrast, Fair Founds would be collected by authorities, but in the end injured third parties would get those fines as their compensation.²²⁷

Commission's goal is to enforce competition law and to achieve better and more effective competition on the market. Fair Fund could go in favor to the Commission to reach that goal. Fair Found could be used in EU legal regime as an additional option to follow on damages.²²⁸ In a situation in which other cartels are not possible to compensate injured party fully, money from Fair Found would be used for compensation.²²⁹ Meaning leniency applicant is 100% sure he will not be liable for damage claims and his will to apply for leniency would be stronger. Fair Funds are one of the possible solutions to solve the problem of downwards trans in leniency application resulting as lower cartel discovery in EU.²³⁰

²²⁵ Lena Hornkohl, „A Solution to Europe's Leniency Problem: Combining Private Enforcement Leniency Exemptions with Fair Funds, < <http://competitionlawblog.kluwercompetitionlaw.com/2022/02/18/a-solution-to-europes-leniency-problem-combining-private-enforcement-leniency-exemptions-with-fair-funds/>> 29 November 2022

²²⁶ Ibid

²²⁷ Ibid

²²⁸ Ibid

²²⁹ Ibid

²³⁰ Ibid

CONCLUSION

Competition in EU Market is without a doubt very important for the functioning of internal market. Without the competition rules and sanctioning of the anticompetitive behavior, both customers and the economy would suffer. It is on the authorities to make sure competition on the European market is effective, making economy boost and going into the favor of the consumers.²³¹

Cartels are not rare thing, and their effect on the market is damaging. European Commission has a challenging job of cartel detection. Throughout the years Commission was successful in detecting cartels with leniency program. European Commission in the last few years is faced with the lower number of cartel detection. Many different factors impact the decision of the possible leniency applicant whether to apply or not. Some of the disincentives to apply for the leniency are insufficient evidence, cultural objections, social response on the market, costly and time-consuming process and probably most important one follow-on damage claims.²³² Leniency application can be profitable for the applicant if he gets the immunity from fines, but the follow-on damage claims can make it less profitable.²³³ Leniency application has made a detection of cartels easier since it was introduced in 1996. Leniency application was developed throughout the years by EC to be more attractive and easier process for undertakings, e-leniency is one of the pros of that. With all the efforts and development leniency program should be more used than before. On the contrast, leniency program is becoming less popular and attractive for possible applicants. Since 2015 detection of cartels by EC is going downwards year by year. The reason of the lowering number in cartel detection can't be defined with 100% certainty, but it can be assessed based on the statistics.²³⁴

²³¹ Commission, "Why is competition policy important for consumers?," < https://competition-policy.ec.europa.eu/consumers/why-competition-policy-important-consumers_en > 10 December 2022

²³² J.D. Jaspers, "Leniency in exchange for cartel confessions "(2029), < <https://journals.sagepub.com/doi/10.1177/1477370819874432#body-ref-bibr12-1477370819874432> > 5 December

²³³ Catarina Marvao, Giancarlo Spagnolo, Paolo Buccirossi, „Leniency, damages, and EU competition policy“, < <https://cepr.org/voxeu/columns/leniency-damages-and-eu-competition-policy> > 10 December 2022

²³⁴ Olivia Bodnar and others, „ The Effects of Private Damage Claims on Cartel Stability: Experimental Evidence“, < https://www.cresse.info/wp-content/uploads/2020/02/2019_ps1_pa3_EPDCCS.pdf > 10 December 2022, p 4.

In 2014 damage claims have been introduced to public as they right to demand compensation for all the losses suffered because of the infringement. Since then, 299 damage claims have been filled. It is clear that in the time of damage claims introduction, detection of the cartels through leniency program has dropped. In cartel detection trade-off between public and private enforcements exists. If expected damage claims are higher, there is a lower chance for leniency application.²³⁵

To conclude, European Commission is faced with a problem of the cartel detection. European Commissions next step should be finding a new solution that will balance between public and private enforcement. With the balanced approach number of detected cartels will face a rise. Fair Finds have a potential to achieve that balance in EU Anticompetitive market.²³⁶

²³⁵ Ibid

²³⁶ Lena Hornkohl, „A Solution to Europe's Leniency Problem: Combining Private Enforcement Leniency Exemptions with Fair Funds, < <http://competitionlawblog.kluwercompetitionlaw.com/2022/02/18/a-solution-to-europes-leniency-problem-combining-private-enforcement-leniency-exemptions-with-fair-funds/>> 21 December 2022

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ANNEX 1

Abstract

This paper is discussing the importance of efficient competition on the EU market, cartels and changing trend in their detection. Competition on the EU market is primarily important for customers. If there is no real competition, customers are the ones that lose lower price, better quality and innovative products. Furthermore, economy is not developing and innovation on the market is slowly progressing. One of the most damaging forms of anticompetitive behavior are Cartels. Cartels are organized groups which collude with each other to fix prices, rig bids, limit production, share markets or customer. Detection of the cartels is a challenging job for EC. Since the introduction of leniency program in 1996 number of cartels detected has grown significantly. That has changed when private damage claims were introduced in 2014. Since then, cartel detection is becoming more challenging for EC, and number of cartels detected is lowering. Interference between public and private enforcement is becoming a problem for detection of cartels. European Commission can resolve that problem by finding a balance between leniency application and damage claims to continue the good work in detecting European cartels.

ANNEX 2

Abstract

In diesem Papier wird die Bedeutung eines effizienten Wettbewerbs auf dem EU-Markte, Kartelle und die sich ändernden Tendenzen bei ihrer Aufdeckung diskutiert. Der Wettbewerb auf dem EU-Markt ist vor allem für die Kunden von Bedeutung. Wenn es keinen wirklichen Wettbewerb gibt, sind es die Kunden, die niedrigere Preise, bessere Qualität und innovative Produkte verlieren. Darüber hinaus entwickelt sich die Wirtschaft nicht und die Innovation auf dem Markt schreitet langsam voran. Eine der schädlichsten Formen wettbewerbswidrigem Verhalten sind Kartelle. Kartelle sind organisierte Gruppen, die miteinander in Absprache treten, um Preise festzulegen, Angebote zu manipulieren, die Produktion zu begrenzen, Märkte oder Kunden zu teilen. Die Aufdeckung der Kartelle ist für die EG eine herausfordernde Aufgabe. Seit der Einführung des Nachsichtprogramms 1996 ist die Zahl der festgestellten Kartelle deutlich gestiegen. Das hat sich geändert, als 2014 private Schadensersatzansprüche eingeführt wurden. Seitdem wird die Aufdeckung von Kartellen für die EG schwieriger und die Zahl der aufgedeckten Kartelle sinkt. Die Einmischung öffentlicher und privater Strafverfolgungsbehörden wird zu einem Problem bei der Aufdeckung von Kartellen. Die Europäische Kommission kann dieses Problem lösen, indem sie ein Gleichgewicht zwischen der Anwendung von Nachsicht und Schadensersatzansprüchen findet, um die gute Arbeit bei der Aufdeckung europäischer Kartelle fortzusetzen.