A critical analysis of the procedural fairness of the leniency instrument: finding the right balance between efficiency and justice in EU competition law

Tine Carmeliet

Onder wetenschappelijke begeleiding van Prof. Dr. Wouter Devroe

1. INTRODUCTION

1.1. FORMULATION OF THE PROBLEM AND QUESTION OF INQUIRY

ANTI-CARTEL PROVISIONS – Since the inception of the European Economic Area, Articles 101 and 102 TFEU, further elaborated upon in secondary legislation, provide the Commission with powerful tools to ensure a fair level of competition in the EU. Indeed, Regulation 1/2003 has entrusted the Commission with far-reaching investigative, prosecutorial and decision-making powers. Thus, the Commission has the mandate to investigate as well as to sanction the misconduct of undertakings by imposing fines.

FAR-REACHING ENFORCEMENT POWERS – These extensive powers have raised from the start many criticisms by those subject to them. Undertakings claim to be subdued to an absolute discretion of the Commission, who is barely restricted in using its powers. The typical issues in this respect relate to the dawn raids in the undertaking's premises and the sweeping possibilities to request information from the undertakings.[1] These criticisms are part of the long-held debate about the efficiency of enforcement on the one hand and the Commission's duty to provide justice on the other hand. While most attention has been given to optimize the efficiency and the effectiveness[2] of the

[1] The Commission itself has described its powers as being far-reaching: European Commission, "Dealing with the Commission, Notifications, Complaints, Inspections and Fact-Finding Powers under Articles 85 and 86 of the EEC Treaty", Luxembourg, 1997, 38, available at http://europa.eu.int/comm/competition/publication/dealen1_en.pdf [Accessed on 30 April 2013]; F. ARBAULT and E. SAKKERS, "Cartels" in J. FAULL and A. NIKPAY (eds.), *The EC Law of Competition*, Oxford, Oxford University Press, 2007, 857-917; W. WILS, "Self-Incrimination in EC Antitrust Enforcement: A Legal and Economic Analysis", *World Competition* 2003, 568-573.

[2] As shall be explained *infra* efficiency and effectiveness do not have the same meaning. While efficiency relates to the relationship between the aims and the means, effectiveness concerns the level of the aims achieved. Since a certain measure is only efficient if it is effective, the author considers for the purpose of this paper, the concept of effectiveness as being part of efficiency.

Commission's enforcement practice, it is often argued that the Commission, in enforcing the competition rules, should also guarantee a fair procedure.

PROCEDURAL RIGHTS – In their plea for a fair procedure, undertakings have been supported by the CJEU and the ECtHR, which have steadily extended the reach of the human rights instruments to the business context. It needs little clarification that these human rights, which put a cap on the Commission's discretion in the enforcement of cartels, relate primarily to procedural rights. Because of the severe enforcement policy of the Commission, in combination with the future accession of the EU to the ECHR, respect for procedural rights in competition law has nowadays become a hot debated topic.[3]

LENIENCY SYSTEM – In order to enhance the detection and the enforcement of cartels, the Commission introduced in 1996 the leniency system in its cartel enforcement armamentarium. This instrument, installed by the Commission's so-called Leniency Notice,[4] essentially comes down to the granting of a lenient treatment to an undertaking, in exchange for its cooperation with the Commission, enabling the latter to enforce the cartel. Nowadays, leniency seems to be one of the most efficient but at the same time also perhaps the most controversial enforcement instrument of the Commission. While it has proven to be very efficient in uncovering cartels, the leniency system evokes serious questions as to the respect of the procedural rights of the undertakings. In particular, rather than being able to rely on their procedural guarantees, undertakings feel surrendered to the enormous discretion of the Commission, who does not guarantee them a fair procedure.

QUESTION OF INQUIRY – This paper is therefore focused on the central question whether procedural fairness is satisfactorily respected in the Commission's leniency system. Does the procedure as such comply with the requirements of procedural fairness, and does the Commission respect the procedural guarantees of undertakings in enforcing its leniency instrument? In second instance, it is questioned whether this system is legitimate, and thus succeeds in striking a fair balance between efficiency and justice. The question of inquiry is in this paper therefore twofold. On the one hand, the extent of the leniency system's procedural fairness is assessed. On the other hand, efficiency and justice are the benchmark in determining the legitimacy of the system.

1.2. PERTINENCE AND METHODOLOGY

PARTICULAR IMPORTANCE OF INQUIRY – The heavy impact of the Commission on undertakings is of course not an exclusive feature of the leniency system.

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[3] *Infra*.

[4] Commission Notice on immunity from fines and reduction of fines in cartel cases [2006] *OJ C 298/17*.

As aforementioned, criticisms on the far-reaching powers of the Commission are also present in *ex officio* enforcement. However, two aspects render the request for procedural fairness of greater importance in the leniency system in particular than in cartel enforcement in general. First, due to the increased use of investigative powers and the more vigorous fining policy of the Commission, leniency nowadays attracts many undertakings that are part of a cartel. Initially conceived as an exceptional regime to uncover hard-core cartels that otherwise would remain undetected, leniency is today more rule than exception in the enforcement of cartels.[5] Secondly, the leniency instrument is not based on the EU treaties or on a Council Regulation, but rather seems to be part of the Commission's discretionary policy competences.[6] Consequently, the Commission's recourse to leniency does not rely on a broad societal consensus, but is rather a system set up by some Commission officials. Considering the enormous impact that the leniency system these days has on undertakings, there is an urgent need for a thorough investigation of its procedural fairness, and consequently also of its legitimacy.

SOCIETAL RELEVANCE – Due to the fact that leniency is essentially a system with practical implications, this paper goes along with and even tries to anticipate on the day-to-day reality, with which the undertakings and the Commission are confronted. The topicality value and societal relevance of this paper are therefore high. In contrast to what can be found in the legal literature, this paper shall strive to make a neutral analysis of the leniency system. It needs little clarification that this paper is therefore also to a certain extent also a pioneering endeavor. An effort will be made to identify, highlight and discuss key questions and issues, rather than providing definite answers, which are not always available at this time. The analysis will however not be without engagement or commitments: if shortcomings are identified, suggestions for possible remedies will be offered.

CASE LAW AND COMMISSION'S DECISIONS – To formulate an answer to the aforementioned questions, the current legislation, case law and legal doctrine shall be thoroughly assessed.[7] Because leniency is from a legislative viewpoint

[5] It is an open secret that at EU level, today almost 60 per cent of the cartel infringements are discovered through leniency, see *e.g.* J. YSEWYN, "Immunity Programs in the EU", presentation, 2009, available at http://www.agcm.it/trasp-statistiche/doc_download/2421-ven-0423intervento-ysewyn.html [Accessed on 30 April 2013]. Former Commissioner N. KROES, Answer to a Parliamentary Question from Sharon Bowles, MEP, Written questions: E-0890/09, E-0891/09, E-0892/09, 2 April 2009. A. JONES and B. SUFRIN, *EC Competition Law. Text, Cases and Materials*, Oxford, 2011, 879; P. BILLIET, "How Lenient is the EC Leniency Policy? A Matter of Certainty and Predictability", *ECLR* 2009, 14; A. RILEY, "The Modernization of EU Anti-Cartel Enforcement: Will the Commission Grasp the Opportunity?", *ECLR* 2010, 191-192.
[6] *Infra*.
[7] Since most member states of the EU have adopted a leniency policy inspired by the European example, this paper's principle reference framework shall be the leniency policy of the Commission. There shall only be referred to the leniency system of member states if it strongly deviates from this system in a relevant manner. A list of the competition authorities of the EU member states that have adopted a leniency program can be found on the website of the

poorly defined, the general denominator of this paper will focus on the case law of the Courts in Luxembourg and Strasbourg and the decision practice of the Commission.[8] In assessing the leniency system, a 'neutral' conception of procedural fairness shall be given, which shall be the benchmark in analyzing the different aspects of the leniency system.

PRACTICE-BASED – Finally, in order to reveal the obstacles of the leniency system, the different arguments and criticisms of the practitioners shall be the starting point of the analysis. Therefore, several practitioners of the Commission and the undertakings (represented by their lawyers) were interviewed.[9] Besides providing strengths and opportunities, it is equally important to stress that such an empirical approach has its weaknesses and limitations – a consideration that must be kept critically in mind when reading this paper. Both the Commission as well as the law firms have their own interests to defend and cases to win, and therefore may provide a (somewhat) biased opinion. The criticisms given by the lawyers have thus to be taken with a grain of salt. Leniency was introduced in the competition rules in order to enhance cartel enforcement and to create a higher level of competition. No one likes to compete, and many undertakings are understandably frustrated if one can secure the highly desired immunity. On the other hand, it can be expected that the Commission fiercely defends its leniency system as it is the jewel in the crown of its cartel enforcement policy. Both viewpoints are thus not free of conflicts of interest, and should therefore also be regarded in this light. This clarifies why the undertaking's and Commissioner' viewpoints are the starting point of the inquiry, but shall be assessed against a neutral criterion of procedural fairness.

OVERVIEW – In the following sections, the first part shall shortly introduce the basic tenants of the leniency system. In the second part, the fairness of the leniency system shall be assessed. The analysis is thereby centered on the Leniency Notice itself, the consequences of a leniency application and the protection of the undertaking's procedural rights. In the final part, the level of legitimacy shall be (re)considered and suggestions are made to strike a new balance between efficiency and justice.

Commission:
http://ec.europa.eu/competition/antitrust/legislation/authorities_with_leniency_programme.pdf [Accessed on 30 April 2013].

[8] It should be noted that, contrary to the prohibition decisions of the Commission, the leniency applications of the undertakings themselves are not publicly accessible. The decisions of the Commission on these leniency applications that are mentioned throughout this paper can however be freely consulted on the Directorate-General's Competition's website: http://ec.europa.eu/dgs/competition/index_en.htm [Accessed on 30 April 2013].

[9] Both a Hearing Officer as well as members of the Legal Service of the Commission and several members of the Directorate-General for Competition were contacted. The author has also engaged in conversations with various members of the Belgian Competition Authority. In these conversations, the undertakings were always represented by their lawyers, members of both national and international law firms, which are or have a department specialized in competition law.

2. THE LENIENCY INSTRUMENT IN A NUTSHELL

2.1. A METHOD OF CARTEL ENFORCEMENT

DIFFERENT DETECTION METHODS – Cartel enforcement is at any time in its history one of the highest priority issues on the agenda of the Commission.[10] However, due to the secretive nature of cartels, their detection poses formidable challenges. Attempts to uncover these cartels often terminate in expensive and long-lasting, yet unsuccessful investigations.[11] The traditional detection and investigation methods such as investigations *ex officio* or investigations by a claim are not efficient but are moreover very costly and time consuming. Facing such difficulties, the Commission decided in 1996 to introduce the possibility for cartel members to voluntarily blow the whistle by providing them incentives, rather than to opt for more *ex-officio* enforcement.[12] This novel system, known as leniency applications, nowadays guides the Commission's cartel prosecution policy to a large extent. [13]

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[10] European Commission, "Report on Competition Policy 2008. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions", COM [2012] 253 final, para. 5-14, available at http://ec.europa.eu/competition/publications/annual_report/2008/en.pdf [Accessed on 30 April 2013]. The expression of this was among others the creation in June 2005 of a Cartel Directorate within DG Comp, responsible for prosecuting cartel cases and developing policy; the readopted Leniency Notice of 2006; the revised Fining Guidelines of 2006 and the introduction of the settlement system in 2008. Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, *OJ C 210;* Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases, *OJ L 171*.

[11] Discovering cartels is very costly; cartel participants often use code names to conceal their undertaking's names and encrypt software to protect e-mails and telephone conversations or even hire a consultancy firm to oversee and conceal their illicit arrangements. See *Organ Peroxides* Commission Decision 2005/349/EC [2005] OJ L 110, Case COMP/E-2/37.857; *Gas Insulated Switchgear* Commission Decision 2008/C 5/07 [2008] OJ C 5/7, Case COMP/38.899; *Heat Stabilizers* Commission Decision C(2009)8682 [2009], Case COMP/38589; R. WHISH and D. BAILEY, *Competition Law,* Oxford, Oxford University Press, 2012, 513. For a complete overview of the different enforcement methods, see F. ARBAULT and E. SAKKERS, "Cartels", in J. FAULL and A. NIKPAY (eds.), *The EC Law of Competition*, Oxford, Oxford University Press, 2007, 786; Y. BOTTEMAN and P. HUGHES, "Access to File: Striking the Balance Between Leniency and Private Enforcement Tools", *The European Antitrust Review* 2013, 3; W. WILS, "Leniency in Antitrust Enforcement: Theory and Practice", *World Competition* 2007, 25-45.

[12] The Commission enacted therefore the Leniency Notice, *infra*; F. ARBAULT and E. SAKKERS, "Cartels" in J. FAULL and A. NIKPAY (eds.), *The EC Law of Competition*, Oxford, Oxford University Press, 2007, 799-800; G. MONTI, *EC Competition Law,* Cambridge, Cambridge University Press, 2007, 334; W. WILS, "Leniency in Antitrust Enforcement: Theory and Practice", *World Competition* 2007, 25-37. See also *National Panasonic* Commission Decision [1982] OJ L354/28, para. 497, after which the Commission started to take account of the existence or absence of a cooperative attitude of the undertakings.

[13] M. BLOOM, "Despite Its Great Success, the EC Leniency Program Faces Great Challenges" in C.-D. EHLERMANN and I. ATANASIU (eds.), *European Competition Law Annual 2006: Enforcement of Prohibition of Cartels*, Oregon, Hart Publishing, 2006, 543-553; R. WHISH and D. BAILEY, *Competition Law,* Oxford, Oxford University Press, 2012, 60-82; O. GUERSENT, "The Fight Against Secret Horizontal Agreements in the EC Competition Policy" in B. HAWK (ed.), *International Antitrust Law and Policy*, New York Fordham Corporate Law. Juris

BLOWING THE WHISTLE – As aforementioned, leniency is a method of cartel enforcement by which the Commission rewards an undertaking that voluntarily reveals its participation in a secret cartel in exchange for immunity or a reduced fine.[14] Consequently, the leniency system offers benefits to both the undertaking that receives immunity from a fine as well as to the Commission, who is able *"to pierce the cloak of secrecy of cartels and obtain insider evidence of the cartel infringement."*[15]

2.2. IMMUNITY OR REDUCTION OF FINE

FULL IMMUNITY – In order to achieve immunity from fine, an undertaking should provide the Commission information and evidence that enables it to carry out a targeted inspection in connection with the alleged cartel[16] or to identify an infringement of Article 101 TFEU.[17] To that end, the undertaking must make a so-called "corporate statement", which contains detailed information of the cartel arrangements, such as *"its aims, activities and functioning; the product or service concerned, the geographic scope, (...)."*[18] It is important to note that only the undertaking that is the first to fulfill these criteria can obtain full immunity from fine.[19]

PARTIAL IMMUNITY – If full immunity is no longer possible, the Commission leaves the option to diminish the fine on the condition that the applicant provides convincing information, which must be of "significant added value".[20] The Leniency Notice clarifies that the latter concept refers to *"the extent to which the evidence provided strengthens, by its very nature and/or its level of detail, the Commission's ability to prove the alleged cartel."*[21] The level of the reduction of the fine depends on the exact order in which the

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Publishing, 2003, 43-54; G.J. KLEIN, Discussion Paper No. 10-107. "Cartel Destabilization and Leniency Programs – Empirical Evidence", *Centre for European Economic Research* 2010, 2-3 and 13-16, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1854426 [Accessed on 30 April 2013]; F. LEVEQUE, "L'Efficacité multiforme des programmes de clémènce", *Concurrences* 2004, 36; A. RILEY, "The Modernization of EU Anti-Cartel Enforcement: Will the Commission Grasp the Opportunity?", *ECLR* 2010, 191- 192; W. WILS, "Leniency in Antitrust Enforcement: Theory and Practice", *World Competition* 2007, 51-55.

[14] Preliminary remark: the term leniency in this paper refers both to the immunity from fine as well as a reduction of a fine. According to Recital 1 of the Leniency Notice, leniency is only available for "secret cartels". See *infra*.

[15] European Commission, "About the Leniency Policy", published on the DG COMP Website, http://ec.europa.eu/competition/cartels/leniency/leniency.html [Accessed on 30 April 2013]; OECD, Policy Brief, "Using Leniency to Fight Hard Core Cartels", 2001, http://www.oecd.org/daf/ca/1890449.pdf [Accessed on 30 April 2013].

[16] Recital 8 (a) of the Leniency Notice.

[17] Recital 8 (b) of the Leniency Notice.

[18] Recital 9 of the Leniency Notice. See also *infra* about the requirements of Recital 31.

[19] Recital 8 and 11 of the Leniency Notice.

[20] Recital 24 of the Leniency Notice. An undertaking which applies for a reduction of fine is not obliged to produce a corporate statement to the Commission, but only has to make a formal application to the Commission: Recital 27 of the Leniency Notice.

[21] Recital 25 of the Leniency Notice.

leniency applicants have provided the Commission information that is of significant added value.[22] This order is determined on the basis of the time when the conditions of significant added value were fulfilled and the extent to which the evidence presented by the undertaking is of an added value.[23]

OTHER CONDITIONS – Next, in order to obtain full immunity or a reduction of fine, a number of additional conditions must be met. First, the undertaking needs to cooperate with the Commission *"genuinely, fully, on a continuous basis and expeditiously."*[24] In addition, the undertaking must end its involvement in the cartel immediately and must not have destroyed or concealed the evidence of the alleged cartel.[25]

MARKER SYSTEM – In order to meet practical challenges, the Commission has introduced a marker system. This system guarantees an undertaking's place in the queue for a restricted period after their leniency application, allowing them to gather the necessary evidence and information.[26] The primary underlying rationale to this end was that the other cartel members could be anxious to approach the Commission once the cartel has started to break up, since only the first whistleblower can benefit from full immunity.[27] The marker system introduces thus an additional incentive to blow the whistle. If the applicant learns that he is the first, he shall be willing to continue his application. However, if he is no longer the first, the marker system creates an incentive to secure the next available benefit.[28]

PRISONER'S DILEMMA – The prospect of achieving a reward in exchange for a confession leads to tension and mistrust amongst the undertakings that belong to the cartel.[29] In addition, due to the fact that the leniency system only grants full immunity to the first undertaking that blows the whistle, it instigates the

[22] Recital 26 of the Leniency Notice.
[23] Recital 26 of the Leniency Notice.
[24] Recital 12 (a) of the Leniency Notice.
[25] Recital 12 (b and c) of the Leniency Notice.
[26] Recital 15 of the Leniency Notice. According to this Recital, the marker protection is however only available for immunity applicants. A. HOWARD, V. ROSE and P. ROTH QC, "The Enforcement of the Competition Rules in the Member States" in P. ROTH and V. ROSE (eds.), *Bellamy & Child. European Community Law of Competition*, Oxford, Oxford University Press, 2013, 1150.
[27] A. HOWARD, V. ROSE and P. ROTH QC, "The Enforcement of the Competition Rules in the Member States" in P. ROTH and V. ROSE (eds.), *Bellamy & Child. European Community Law of Competition*, Oxford, Oxford University Press, 2013, 1156.
[28] J.S. SANDHU, "The European Commission's Leniency Policy: A Success?", *ECLR* 2007, 149-152; P. VERMA and P. BILLIET, "Why Would Cartel Participants Still Refuse to Blow the Whistle under the Current EC Leniency Policy?", *Global Antitrust Review* 2009, 2-6.
[29] S.D. HAMMOND, "When Calculating the Costs and Benefits of Applying for Corporate Amnesty, How do You Put a Price Tag on an Individual's Freedom?", Speech, 8 March 2001, 1-2, available at http://www.justice.gov/atr/public/speeches/7647.htm [Accessed on 30 April 2013]; N. ZINGALES, "European and American Leniency Programs: Two Models Towards Convergence?", *Comp. L. Rev.* 2008, 4-6.

so-called prisoner's dilemma.[30] In this scenario, each prisoner is confronted with two choices, whose pay-off is subject to a corresponding choice of the other prisoner.[31] Theory proves that each prisoner will always act in his own interest, even if both prisoners could enjoy a more beneficial outcome if they chose to join forces collaboratively.[32] Thus, the leniency system incentivizes undertakings to blow the whistle as the first, thereby uncovering the cartel that otherwise likely would have remained undetected. This 'winner takes all' approach incites a race, in which time is of the essence.

2.3. THE LENIENCY SYSTEM INSTITUTIONALIZED

AMERICAN INSPIRATION & UPDATES – As mentioned above, the Commission has installed its leniency policy in 1996 by the Leniency Notice. While it certainly has its own particularities, the EU leniency system finds its roots in the United States.[33] In order to be successful, a leniency system must provide

[30] R. ALLENDESALAZAR and P. MARTINEZ-LAGE, "Evidence Gathered through Leniency: from the Prisoner's Dilemma to a Race to the Bottom", in C.-D. EHJERMANN and M. MARQUIS (eds.) *European Competition Law Annual 2009. The Evaluation of Evidence and its Judicial Review in Competition Cases*, Oxford, Oxford and Portland Hart Publishing 2009, 565-566; A. JONES and B. SUFRIN, *EC Competition Law. Text, Cases and Materials*, Oxford, Oxford University Press, 2011, 860-861.

[31] They are however not able to deliberate first together on their options. F. ARBAULT and E. SAKKERS, "Cartels" in J. FAULL and C. NIKPAY (eds.), *The EC Law of Competition,* Oxford, Oxford University Press, 2007, 800.

[32] G. MONTI, *EC Competition Law,* Cambridge, Cambridge University Press, 2007, 333-334; F. LEVEQUE, "L'Efficacité multiforme des programmes de clémence", *Concurrences* 2006, 31-34; J.F. NASH, "Equilibrium Points in n-Person Games", *Proceedings of the National Academics of Science* 1950, 48-49; N. ZINGALES, "European and American Leniency Programs: Two Models Towards Convergence?", *Comp. L. Rev.* 2008, 4-6.

[33] In 1978, the US Department of Justice adopted its first Corporate Leniency program. This (discretionary) program has been replaced by its current Corporate Leniency Policy, dating back from 1993: US Department of Justice, Corporate Leniency Policy, 10 August 1993, available at www.usdoj.gov/atr/public/guidelines/0091.pdf [Accessed on 30 April 2013]; C. HARDING and J. JOSHUA, *Regulating Cartels in Europe. A Study of Legal Control of Corporate Delinquency*, Oxford, Oxford University Press, 2003, 39-50; A. JONES and B. SUFRIN, *EC Competition Law. Text, Cases and Materials*, Oxford, 2011, 1240; A. HOWARD, V. ROSE and P. ROTH, "The Enforcement of the Competition Rules in the Member States" in P. ROTH and V. ROSE (eds.), *Bellamy & Child. European Community Law of Competition*, Oxford, Oxford University Press, 2013, 1153-1154; N.K. KATYAL, "Conspiracy Theory", *Yale Law Journal* 2003, 101-106. Especially with regard to the following updates of the Leniency Notice in 2002 and 2006, the EU leniency program has become more and more inspired by the US leniency system. See *e.g.* the Draft Notice published by the Commission as part of the consultation procedure preceding the adoption of the 1996 Leniency Notice [1995] *OJ C341/13*; F. ARBAULT and E. SAKKERS, "Cartels" in J. FAULL and C. NIKPAY (eds.), *The EC Law of Competition,* Oxford, Oxford University Press, 2007, 800-801; M. BLOOM, "Despite its Great Success, the EC Leniency Program Faces Great Challenges" in C.-D. EHLERMANN and I. ATANASIU (eds.), *European Competition Law Annual 2006: Enforcement of Prohibition of Cartels*, Oregon, Hart Publishing, 2006, 543-571; W. WILS, "The Commission Notice on the Non-Imposition or Reduction of Fines in Cartel Cases: a Legal and Economic Analysis", *Eur. Law Rev.* 1997, 125-140; W. WILS, "Leniency in Antitrust Enforcement: Theory and Practice", *World Competition* 2007, 26-33.

sufficient incentives for undertakings to blow the whistle.[34] Indeed, any rational cartelist will weigh the advantages and disadvantages of blowing the whistle. Therefore, in an attempt to enhance the predictability and transparency of the leniency system, the Commission has reformed its Leniency Notice multiple times, the most recent version dating from 2006, now already several years ago.[35]

LEGAL BASIS RECOGNIZED BY CASE LAW – Even though the leniency system has no express legal basis in the EU treaties, the Commission's competence to introduce leniency is generally accepted.[36] It can be argued that this competence is derived from Article 23 of Regulation 1/2003, which stipulates that *" (...) the Commission may by decision impose on undertakings and associations of undertakings fines not exceeding 1% of the total turnover in the preceding business year (...)."*[37] Emphasis must lie on the word "may", which implies that the Commission is free to adopt a decision to impose a fine or not.[38] This is in line with the vested case law of the CJEU, which states that the

[34] OECD, Report, "Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programs", 2002, 8-9, available at http://www.oecd.org/competition/cartels/1841891.pdf [Accessed on 30 April 2013]. For a more complete overview of the current existing disincentives to blow the whistle: T. CARMELIET, "How Lenient is the European Leniency System? An Overview of Current (Dis)incentives to Blow the Whistle", *Jura Falc.* 2011-2012, 463-512.

[35] Commission Notice on the non-imposition or reduction of fines in cartel cases [1996] *OJ C 207*, 4-6; Commission Notice on immunity from fines and reduction of fines in cartel cases [2002] *OJ C 45,* 3-5. L.O. BLANCO, *EC Competition Procedure,* Oxford, Oxford University Press, 2006, 219; L. RITTER and W.D. BRAUN, *European Competition Law: A Practitioner's Guide,* The Hague, Kluwer Law International, 2004, 1137-1138; I. VAN BAEL and J.-F. BELLIS, *Competition Law of the European Community,* The Hague, Kluwer Law International, 2010, 1125-1126; N. LEVY and R. O'DONOGHUE, "The EU Leniency Program Comes of Age", *World Competition* 2004, 75-83; A. RILEY, "Cartel Whistleblowing: Toward an American Model?", *CMLR* 2002, 1-5; A. RILEY, "The Modernization of EU Anti-Cartel Enforcement: Will the Commission Grasp the Opportunity?", *ECLR* 2010, 191-195; J.S. SANDHU, "The European Commission's Leniency Policy: A Success?", *ECLR* 2007, 148-149; S. SUURNAKKI and M.L. TIERNO CENTELLA, "European Commission Adopts Revised Leniency Notice to Reward Companies that Report Hard-Core Cartels", *Competition Policy Newsletter* 2007, 7.

[36] W. WILS, "Leniency in Antitrust Enforcement: Theory and Practice", *World Competition* 2007, 53. See also *infra*.

[37] Article 23 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] *OJ 4/1/2003* [emphasis added].

[38] D. ARTS, "Iedereen gelijk voor de wet? Beschouwingen over de rechtmatigheid van het verlenen van clementie in kartelzaken", *TBM* 2012, 5. It could possibly be argued that the legal basis of the leniency system not only relies on Article 23 of Regulation 1/2003, but also on the TFEU. Indeed, Article 103 (2) (b) TFEU gives the Council the power to adopt a regulation or a decision, taking into account the need to ensure effective supervision and simplified administration to the greatest possible extent. The Council has therefore enacted Council Regulation 1/2003. The Commission on the other hand could on the basis of Article 105 (3) TFEU adopt a regulation aimed at an effective supervision and a simplified administration, which arguably amounts to the leniency system. The leniency system is therefore based on Regulation 1/2003, however in execution of Article 105(3), in combination with Article 103 (2) (b) TFEU.

leniency system is an externalization of the Commission's discretionary competences in designing its fining policy.[39]

SOFT LAW INSTRUMENT – While the Leniency Notice is technically a soft law instrument, only consisting of rules of conduct, it is generally accepted that these rules are designed to produce external effects.[40] Undertakings can consequently reasonably rely on their 'legitimate expectations' when applying for leniency.[41] Questions nevertheless arise, especially after the entry into force of the Lisbon Treaty, whether this soft law instrument is still compatible with the reformed EU primary law, since essential elements of a certain policy cannot be delegated to the executive powers.[42] Due to the fact that the Leniency Notice has become indispensable for the effective prosecution of cartel infringements and is thus also essential for the realization of the core targets of competition law, it can be argued that at least some essential aspects

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[39] Article 23 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] *OJ 4/1/2003* [emphasis added]. See also Recital 29 of the Fining Guidelines. ECJ, Case C-298/98 *Metsa-Serla (Finnboard) v Commission* [2000] *ECR* I-10171, para. 56-57; ECJ, Joined Cases C-65/02 and C-73/02 *ThyssenKrupp Stainless v Commission* [2005] *ECR* I-7663, para 50; ECJ, Case C-397/03 *Archer Daniels Midland Co. and Archer Daniels Midland Ingredients Ltd v Commission* [2006] *ECR* I-4429, para. 409; CFI, Case T-150/89 *Martinelli v Commission* [1995] *ECR* II-1165, para. 59; CFI, Case T-49/95 *Van Megen Sports Group v Commission* [1996] *ECR* II-1799, para. 53; CFI, Case T-220/00 *Cheil Jedang Corp. v Commission* [2003] *ECR* II-2473, para. 60; CFI, Case T-279/02 *Degussa v Commission* [2006] *ECR* II-897, para. 78; CFI, Case T-322/01 *Roquette Frères v Commission* [2006] *ECR* II-3137, para. 223. This is also advocated by the Commission: *Sorbaten* Commission Decision 462/EC [2001] OJ L 162, Case COMP/E-1/37.370, para. 421: *"leniency is clearly a matter of the Commission's discretion"*; A. HOWARD, V. ROSE and P. ROTH QC, "The Enforcement of the Competition Rules in the Member States" in P. ROTH and V. ROSE (eds.), *Bellamy & Child. European Community Law of Competition*, Oxford, Oxford University Press, 2013, 1153-1154; D. ARTS, "Iedereen gelijk voor de wet? Beschouwingen over de rechtmatigheid van het verlenen van clementie in kartelzaken", *TBM* 2012, 5; W. WILS, "Self-Incrimination in EC Antitrust Enforcement: A Legal and Economic Analysis", *World Competition* 2003, 578-581; W. WILS, "Leniency in Antitrust Enforcement: Theory and Practice", *World Competition* 2007, 54.

[40] ECJ, Case C-397/03 *Archer Daniels Midland Co. and Archer Daniels Midland Ingredients Ltd v Commission* [2006] *ECR* I-4429, para. 91; F. RIJNSBERGEN, "De clementieregeling: boetevermindering door samen te werken met de Commissie", *SEW* 1998, 202-205; W. WEISS, "After Lisbon, Can the European Commission Continue to Rely on 'Soft Legislation' in its Enforcement Practice?", *Journal of European Competition Law and Practice* 2011, 443-445.

[41] Recital 38 of the Leniency Notice. CFI, Case 148/73 *Louwage v Commission* [1974] *ECR* 81, para. 12; CFI, Joined Cases T-259/02 to T-264/02 and T-271/02, *Raiffeisen Zentralbank Osterreich and others v Commission* [2006] *ECR* II-5169, para. 221; CFI, Case T-26/02 *Daiichi Pharmaceutical v Commission* [2006] *ECR* II-713, para. 181; CFI, Case T-15/02 *BASF AG* [2006] *ECR* II-497, para. 504; K. LENAERTS and P. VAN NUFFEL, *European Union law*, London, Sweet and Maxwell, 2011, 855; A. HOWARD, V. ROSE and P. ROTH QC, "The Enforcement of the Competition Rules in the Member States" in P. ROTH and V. ROSE (eds.), *Bellamy & Child. European Community Law of Competition*, Oxford, Oxford University Press, 2008, 1322.

[42] Article 290 TFEU. W. WILS, "Leniency: Theory and Practice", in W. WILS (ed.), *Efficiency and Justice in European Antitrust Enforcement*, Oxford, Oxford Hart Publishing, 2008, 113-116; H. HOFMANN, "Legislation, Delegation and Implementation under the Treaty of Lisbon: Typology Meets Reality", *ELJ* 2009, 482-485; W. WEISS, "After Lisbon, Can the European Commission Continue to Rely on 'Soft Legislation' in its Enforcement Practice?", *Journal of European Competition Law and Practice* 2011, 447-451.

of the leniency program should be regulated in a legislative act in order to comply with the Lisbon Treaty.[43]

2.4. ADVANTAGES AND DISADVANTAGES OF THE LENIENCY SYSTEM

ADVANTAGES – The use of leniency clearly has major advantages, the most considerable one being the rather easy collection of evidence through goal-oriented inspections in undertakings' premises.[44] Besides, a well-designed leniency system makes it very difficult for undertakings to develop an organizational structure in which they can create and maintain cartels.[45] Leniency also increases uncertainty and makes it more difficult for cartel participants to reach an agreement. Lastly, leniency systems tend to lower the costs of adjudicating, since whistle blowers recognize the violation and accept the penalty.[46]

DISADVANTAGES – However, as will be clarified below, leniency has also some major pitfalls and drawbacks. In short, leniency is a very intrusive system that has a considerable impact on the undertakings' legal position.[47] Besides, it is crucial that the Commission does not exclusively rely on the leniency system in its cartel enforcement. To date, leniency is still considered to be the best of all available options, but it only has a chance to succeed if undertakings expect to be better off by cooperating with these authorities than by avoiding interactions.[48] This decision largely depends in first instance on weighing off the penalty, determined by the lack of cooperation *versus* the probability of being caught.[49] It is therefore quintessential that the Commission has the necessary level of credibility to detect and punish anti-trust violations *ex officio*.[50] Finally, the leniency system has negative moral effects, since it introduces an incentive to infringe rather than being punished.[51]

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[43] J. SCHWARZE, "Soft law im Recht der Europäischen Union", *Zeitschrift Europarecht* 2011, 3-16; W. WEISS, "After Lisbon, Can the European Commission Continue to Rely on 'Soft Legislation' in its Enforcement Practice?", *Journal of European Competition Law and Practice* 2011, 447-451.
[44] W. WILS, "Leniency in Antitrust Enforcement: Theory and Practice", *World Competition* 2007, 38-41.
[45] W. WILS, "Leniency in Antitrust Enforcement: Theory and Practice", *World Competition* 2007, 42-43.
[46] *Infra*.
[47] *Infra*.
[48] W. WILS, "Self-Incrimination in EC Antitrust Enforcement: A Legal and Economic Analysis", *Word Competition* 2003, 586-588; W. WILS, "Leniency in Antitrust Enforcement: Theory and Practice", *World Competition* 2007, 25-45.
[49] It will also depend on the size of the sanctions and other costs which the undertaking or person will have to bear as a consequence of its violation becoming established; G.S. BECKER, "Crime and Punishment: an Economic Approach", *Journal of Political Economy* 1968, 169-170; P. VERMA and P. BILLIET, "Why Would Cartel Participants Still Refuse to Blow the Whistle under the Current EC Leniency Policy?", *Global antitrust Review* 2009, 1 and 14-16.
[50] N. KROES, Speech, "Reinforcing the Fight Against Cartels and Developing the Private Enforcement Damages Actions; Two Tools for a More Competitive Europe", SPEECH/07/128 of 8 March 2007, 4, available at http://europa.eu/rapid/press-release_SPEECH-07-128_en.htm

3. THE LENIENCY SYSTEM: A PARAGON OF UNFAIRNESS?

3.1. PROCEDURAL FAIRNESS AS BENCHMARK IN ASSESSING THE LENIENCY SYSTEM

OVERVIEW – In the next section, it will be thoroughly assessed whether the leniency system fulfills the requirements of procedural fairness. First, an overview is provided of the Leniency Notice, after which the (negative) consequences of a leniency application are discussed. Finally, attention is paid to the enforcement practice of the Commission, in which it is examined whether the procedural rights of the undertakings are respected. The concept of procedural fairness is in this respect the benchmark, against which the different aspects of the leniency system are tested.

"PROCEDURAL" – For the purpose of this paper, procedural fairness relates to the procedural aspects of a certain action or system. The procedural aspects of the leniency system are thus weighed up against the requirements of a fair procedure.[52] In order to use this concept of procedural fairness as a benchmark, it is important to first define the different criteria to judge a system as being "fair".[53]

[Accessed on 30 April 2013]. See also F. WIJCKMANS and F. TUYTSCHAEVER, "Tot zover het Belgisch kartelparadijs", *RW* 2008, 1188; W. WILS, "Leniency in Antitrust Enforcement: Theory and Practice", *World Competition* 2007, 47; N. ZINGALES, "European and American Leniency Programs: Two Models Towards Convergence?", *Comp. L. Rev.* 2008, 40-45.

[51] G. AMATO and C.-D. EHLERMANN, *EC Competition Law. A Critical Assessment*, Oregon, Hart Publishing, 2007, 685; C. HARDING and J. JOSHUA, *Regulating Cartels in Europe. A Study of Legal Control of Corporate Delinquency*, Oxford, Oxford University Press, 2003, 227; W. WILS, "Leniency in Antitrust Enforcement: Theory and Practice", *World Competition* 2007, 49-50. The idea that the Commission negotiates with infringers is ethically controversial. Anticipating on potential criticism, the Commission justified its pragmatic attitude in the Leniency Notice, see Recital 3: *" (...) The Commission considers that it is in the Community interest to reward undertakings involved in this type of illegal practices which are willing to put an end to their participation and co-operate in the Commission's investigation, independently of the rest of the undertakings involved in the cartel. The interests of consumers and citizens in ensuring that secret cartels are detected and punished outweigh the interest in fining those undertakings that enable the Commission to detect and prohibit such practices."*

[52] The concept of fairness is of course much broader than procedural fairness. Questions can rightly be asked whether leniency *e.g.* also complies with a more "substantive" interpretation of fairness. It can indeed be argued that the leniency system is "unfair", since it grants immunity from fine to infringers. However, due to the scope of our inquiry, we will not address this more classical discussion on the ethical fairness of the leniency system, *supra*.

[53] These criteria find their source in administrative principles, general principles of EU law, fundamental rights, principles of good administration etc. While they may have a distinct source, they all ensure the fairness of a certain procedure and as such each act as a rule of law. J. JOWELL, "The Rule of Law and its Underlying Values", in J. JOWELL and D. OLIVER (eds.), *The Changing Constitution,* Oxford, Oxford University Press, 2007, 5-13; J. SCHWARZE, *European Administrative Law,* London, Sweet & Maxwell, 2006, 677 and 867; T. TRIDIMAS, "The General Principles of EU Law", Oxford, Oxford University Press, 2006, 15 and 31; F. EHM and the European Commission for Democracy Through Law (Venice Commission), "Unidem

LEGAL CERTAINTY – First and foremost, a fair procedure implies that those subject to a certain legal system can rely on detailed, transparent and predictable rules and legal provisions.[54] As such, they must be able to predict precisely which rights they can expect to derive from a legal regulation and the extent of the obligations that are imposed upon them.[55] This legal certainty is posed firmly by the CJEU as a requirement for all legal rules in the EU.[56] Thus, legal rules should be clear and precise, ensuring that situations and legal relationships governed by EU law are foreseeable.[57] The requirement of legal certainty also denotes that the legitimate expectations that the individuals derive from the legal rules are honored.[58] The public authorities are

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Campus Trieste Seminar. "Administrative Discretion and the Rule of Law." Report The Rule of Law: Concept, Guiding principle and Framework", Strasbourg 2010, 10-11, available at http://www.venice.coe.int/webforms/documents/?pdf=CDL-UDT%282010%29022-e [Accessed on 30 April 2013].

[54] P. CRAIG, *EU Administrative Law,* Oxford, Oxford University Press, 2012, 549; X. GROUSSOT, *General Principles of Community Law,* Groningen, Europa Law Publishing, 2006, 23 and 189; J. JOWELL, "The Rule of Law and its Underlying Values", in J. JOWELL and D. OLIVER (eds.), *The Changing Constitution,* Oxford, Oxford University Press, 2007, 5-13; T. TRIDIMAS, "The General Principles of EU Law", Oxford, Oxford University Press, 2006, 242-243; D. WYATT and A. DASHWOOD, *European Union Law*, London, Sweet & Maxwell, 2006, 244.

[55] ECJ, Case C-233/96 *Kingdom of Denmark v Commission* [1998] *ECR* I-5759 para. 38; ECJ, Case 169/80 [1981] *ECR* 1931; ECJ, Case C-143/93 *Gebroeders van Es Douane Agenten BV v Inspecteur der invoerrechten en Accijnzen* [1996] *ECR* I-431, para. 27; ECJ, Case C-177/96 *Belgian State v Banque indosuez and European Community* [1997] *ECR* I-5659, para. 27; ECJ, Joined Cases C-9/97 and C-118/97 [1998] *ECR* I-6267 para. 48: *"the principle of legal certainty requires that legal rules be clear and precise, and aims to ensure that situations and legal relationships governed by Community law remain foreseeable"*; ECJ, Joined Cases C-487/01 and C-7/02 *Gemeente Leusden* [2004] *ECR* I-5337, para. 57; X. GROUSSOT, *General Principles of Community Law,* Groningen, Europa Law Publishing, 2006, 189; J.T. LANG, "Legal Certainty and Legitimate Expectations as General Principles of law", in *General Principles of European Community Law*, The Hague, Kluwer Law International, 2000, 165. D. WYATT and A. DASHWOOD, *European Union Law*, London, Sweet & Maxwell, 2006, 244-247.

[56] ECJ, Case 43/75 *Defrenne* [1976] *ECR* 455, paras. 71-77; ECJ, Case 169/80 *Administration des Douanes v Gondrand Frères* [1981] *ECR* 1931, paras. 17-18; ECJ, Case C-325/91 *France v Commission Mülder* [1993] *ECR* I-3283, para. 26; ECJ, Case C-143/93 *Van Es Douane Agenten* [1996] *ECR* I-431, paras. 27-33; ECJ, Case C-177/96 *Banque Indosuez and Others* [1997] *ECR* I-5659, paras. 26-31.

[57] ECJ, Case C-63/93 *Duff and Others v Minister for Agriculture and Food, Ireland, and the Attorney General* [1996] *ECR* I-569, para. 20; X. GROUSSOT, *General Principles of Community Law,* Groningen, Europa Law Publishing, 2006, 190; K. LENAERTS and P. VAN NUFFEL, *European Union Law*, London, Sweet & Maxwell, 2011, 854; T. TRIDIMAS, "The General Principles of EU Law", Oxford, Oxford University Press, 2006, 244.

[58] ECJ, Case 112/77 *Töpfer v Commission* [1978] *ECR* 1019, paras. 18-20; ECJ, Case 120/86 *Mülder* [1988] *ECR* 2321; ECJ, Case 170/86 *Von Deetzen* [1988] *ECR* 2355; ECJ, Case C-63/93 *Duff v Minister for Agriculture and Food, Ireland, and the Attorney General* [1996] *ECR* I-569, para. 20; CFI, Case T-73/95 *Estabelecimentos Isidoro M. Oliveira SA v Commission* [1997] *ECR* II-381, para. 29; CFI, Case T-203/96 *Embassy Limousines & Services European Parliament* [1999] *ECR* II-4239, paras. 73-88; K. LENAERTS and P. VAN NUFFEL, *European Union Law*, London, Sweet & Maxwell, 2011, 855; D. WYATT and A. DASHWOOD, *European Union Law*, London, Sweet & Maxwell, 2006, 244; J.T. LANG, "Legal Certainty and Legitimate Expectations as General Principles of law", in *General Principles of European Community Law*, The Hague, Kluwer Law International, 2000, 170.

consequently obliged to behave diligently and to execute these legal rules in a consistent manner.[59] A predictable procedure likewise implies that the consequences of an infringement to these legal rules are reasonably predictable.[60]

EQUAL TREATMENT – Next, a fair procedure requires that everyone who is subject to the same legal rules is treated equally.[61] It is vested case law of the CJEU that comparable situations cannot be treated differently, and different situations cannot be treated in the same way, unless such treatment is objectively justified.[62] Thus, in order to be considered fair, a procedure ensures that there is no inequality or arbitrary distinction between the different entities subject to the legal rules.

PROCEDURAL DUE PROCESS – Procedural fairness moreover entails that fundamental rights can be enforced against the public authorities.[63] This requirement predominantly boils down to the respect for the rights of defense formulated in Article 6 ECHR and its corollaries.[64] Those rights of defense are

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[59] J. JOWELL, "The Rule of Law and its Underlying Values", in J. JOWELL and D. OLIVER (eds.), *The Changing Constitution,* Oxford, Oxford University Press, 2007, 11; J. USHER, *General Principles of EC Law,* London, Longman, 1998, 103.

[60] This requirement is generally referred to as the principle of legality. ECJ, Case C-266/06 *Evonik Degussa v Commission* [2008] *ECR* I-81, paras. 38-40; ECJ, Joined Cases C-7495 and C129/05 *Criminal Proceedings against X* [1996] *ECR* I-6609, para. 25; K. LENAERTS and P. VAN NUFFEL, *European Union Law*, London, Sweet & Maxwell, 2011, 846.

[61] X. GROUSSOT, *General Principles of Community Law,* Groningen, Europa Law Publishing, 2006, 160; K.
LENAERTS and P. VAN NUFFEL, *European Union Law*, London, Sweet & Maxwell, 2011, 156; J. JOWELL, "The Rule of Law and its Underlying Values", in J. JOWELL and D. OLIVER (eds.), *The Changing Constitution,* Oxford, Oxford University Press, 2007, 5-13.

[62] ECJ, Joined Cases 117/76 and 16/77 *Ruckdeschel* [1977] *ECR* 1753, para. 7: *"The prohibition of discrimination laid down in the aforesaid provision is merely a specific enunciation of the general principle of equality which is one of the fundamental principles of Union law and requires that similar situations shall not be treated differently unless differentiation is objectively justified."*; ECJ, Case 106/83 *Sermide* [1984] *ECR* 4209, para. 28; ECJ, Case C-354/95 *R v Minister For Agriculture, Fisheries and Food, ex parte National farmers' Union* [1997] *ECR* I-4559, para. 61; X. GROUSSOT, *General Principles of Community Law,* Groningen, Europa Law Publishing, 2006, 161; K. LENAERTS and P. VAN NUFFEL, *European Union Law*, London, Sweet & Maxwell, 2011, 141; D. WYATT and A. DASHWOOD, *European Union Law*, London, Sweet & Maxwell, 2006, 250; T. TRIDIMAS, "The General Principles of EU Law", Oxford, Oxford University Press, 2006, 59-64; K. LENAERTS, "L'Egalité de traitement en droit communautaire: un principe unique aux apparences multiples", *CDE* 1991, 4-8.

[63] P. CRAIG, *EU Administrative Law,* Oxford, Oxford University Press, 2012, 320-356; X. GROUSSOT, *General Principles of Community Law,* Groningen, Europa Law Publishing, 2006, 215; T. TRIDIMAS, "The General Principles of EU Law", Oxford, Oxford University Press, 2006, 244.

[64] ECJ, Case 98/79 *Pecastaing* [1980] *ECR* 691, paras. 21-22; ECJ, Joined Cases C-174/98 P and C-189/89 P *Netherlands and Van der Wal v Commission* [2000] *ECR* I-1, paras. 17-18; CFI, Case T-535/93 *F v Council* [1995] *ECR* II-163, paras. 32-35; CFI, Case T-83/96 *Van der Wal v Commission* [1998] *ECR* II-545, paras. 45-47; C.S. KERSE, "General Principles of Community Law: Procedural Guarantees – A Note", in *General Principles of European Community Law*, The Hague, Kluwer Law International, 2000, 208; K. LENAERTS and P. VAN NUFFEL, *European Union Law*, London, Sweet & Maxwell, 2011, 844.

generally said to include the right to a legal process within a reasonable time[65], the right to judicial review by an independent and impartial judicial body[66], the presumption of innocence[67], the respect for the principle of *ne bis in idem*[68], just to name only a few of the rights.[69]

PROPORTIONAL – Finally, a fair procedure requires that the system of the public authority is proportionate to the goal it wants to reach.[70] This has been exemplified by vested case law of the CJEU, which states that the principle of proportionality restricts the authorities in the exercise of their powers by requiring to strike a balance between the means used and the intended aim, and that no greater burden is imposed on individuals than is reasonably necessary to obtain the intended policy aim.[71]

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[65] ECJ, Case C-185/95 *Bausthalsgewebe v Commission* [1998] *ECR* I-8417, paras. 20-22 and 26-48; ECJ, Joined Cases C-238/99, C-244/99, C-245/99, C-247/99, C-250-252/99 and C-254/99 *Limburgse Vinyl Maatschappij NV, DSM NV and DSM Kunststoffen BV, Montedison SpA, Elf Atochem SA, Degussa AG, Enichem SpA, Wacker-Chemie GmbH and Hoechst AG and Imperial Chemical Industries plc v Commission* [2002] *ECR* I-8375, paras. 164-235; ECJ, Joined Cases C-341/06 and C-342/06 *Chronopost* [2008] *ECR* I-4777, paras. 44-60; ECJ, Case C-385/07 *Der Grüne Punkt – Duales System Deutschland v Commission* [2009] *ECR* I-06155, paras. 177-188; CFI, Joined Cases T-213/95 and T-18/96 *SCK and FNK v Commission* [1997] *ECR* II-1739, paras. 53-64.

[66] ECJ, Case C-506/04 *Wilson* [2006] *ECR* I-8613, paras. 43-61*;* ECJ, Case C-308/07 *Gorostiagoa Atxalandabaso* [2009] *ECR* I-1059, paras. 41-46.

[67] ECJ, Case C-199/92 *Hüls v Commission* [1999] *ECR* I-4287, paras. 149-150; ECJ, Case C-235/92 *Montecatini v Commission* [1999] *ECR* I-4539, paras. 175-176; ECJ, Joined Cases C-189/02, C-202/02, C-205/02 to C-208/02 and C-213/02 *Dansk Rorindustri and Others v Commission* [2005] *ECR* I-5425, paras. 69-76; ECJ, Case C-344/08 *Rubach* [2009] *ECR* I-7033, paras. 30-31.

[68] ECJ, Joined Cases C-238/99, C-244/99, C-245/99, C-247/99, C-250-252/99 and C-254/99 *Limburgse Vinyl Maatschappij NV, DSM NV and DSM Kunststoffen BV, Montedison SpA, Elf Atochem SA, Degussa AG, Enichem SpA, Wacker-Chemie GmbH and Hoechst AG and Imperial Chemical Industries plc v Commission* [2002] *ECR* I-8375, paras. 59-63; K. LENAERTS and P. VAN NUFFEL, *European Union Law*, London, Sweet & Maxwell, 2011, 846.

[69] For a complete overview, see K. LENAERTS and P. VAN NUFFEL, *European Union Law*, London, Sweet & Maxwell, 2011, 844-845.

[70] The standard formula of the Court reads in this respect as *"in order to establish whether a provision of EU law is consonant with the principle of proportionality, it is necessary to establish whether the means it employs to achieve the aim correspond to the importance of the aim and whether they are necessary for its achievement*." See *e.g.* ECJ, Case 66/82 *Fromançais v Forma* [1983] *ECR* 395, para. 8; ECJ, Case 15/83 *Denkavit Nederland v Hoofdproduktschap voor Akkerbouwprodukten* [1984] *ECR* 2171, para. 25; ECJ, Case 47/86 *Roquette Frères v ONIC* [1987] *ECR* 2889, para. 19; ECJ, Case 56/86 *Société pour l'exportation des sucres* [1987] *ECR* 1423, para. 28; ECJ, Case 281/84 *Zuckerfabrik Bedburg v Council* [1987] *ECR* 49, para. 36; ECJ, Case C-358/88 *Oberhausener Kraftfutterwerk Wilhelm Hopermann GmbH v Bundesanstalt für Landwirtschaftlichte Marktordnung* [1990] *ECR* I-1687, para. 13; T. TRIDIMAS, "The General Principles of EU Law", Oxford, Oxford University Press, 2006, 139; G. DE BURCA, "Proportionality and Subsidiarity as General Principles of Law", in *General Principles of European Community Law*, The Hague, Kluwer Law International, 2000, 97-98.

[71] ECJ, Case 9/73 *Schlüter* [1973] *ECR* 1135, para. 22; N. EMILIOU, *The Principle of Proportionality in European Law - A Comparative Study,* The Hague, Kluwer, 1996, 288; K. LENAERTS and P. VAN NUFFEL, *European Union Law*, London, Sweet & Maxwell, 2011, 141; T. TRIDIMAS, "The General Principles of EU Law", Oxford, Oxford University Press, 2006, 136-143.

EVALUATION – From the aforementioned elements, it has become clear that the question whether (a sufficient level of) procedural fairness is reached, depends on different criteria.[72] As such, a fair procedure entails that the addressee of the legal rules can rely on predictable, consistent legal rules, which honor the legitimate expectations that can be derived from them. These rules moreover ensure that the executor of the system applies these rules in a consistent and equal manner for the different addressees. Besides, the latter should be able to rely on their fundamental rights in order to defend themselves against accusations or to enforce certain guarantees. Whether the procedure is fair thus depends on several criteria, which need to be assessed on a case-by-case basis.[73] These criteria will function as a benchmark throughout the rest of Part II in assessing the leniency system.

3.2. THE LENIENCY NOTICE IN LIGHT OF THE REQUIREMENTS OF PROCEDURAL FAIRNESS

OVERVIEW – As mentioned above, the Leniency Notice is a soft law instrument, consisting of rules of conduct, however creating legitimate expectations for undertakings. Due to the major financial interests at stake, it is of utmost importance that these undertakings fully grasp the content of the conditions laid down in those rules of conduct *before* filing a leniency application. By pointing at several Recitals of the Leniency Notice that constitute the bottleneck, it is questioned in the next paragraphs whether the Leniency Notice complies with the requirements of procedural fairness.

3.2.1. An imprecise scope of application

a. Scope of application *ratione materiae*

ISSUE – The Leniency Notices' restrictive scope of application is ill-considered and generates paradoxical consequences. Besides, daily practice indicates that there is a lack of legal certainty as regards the applicability of the Notice to certain anti-competitive behavior.

HORIZONTAL SECRET CARTELS – In order to define which anti-competitive practice falls within the scope of application of the leniency system, regard should be given first to the Leniency Notice itself. According to the latter, an undertaking can ask leniency for an anti-competitive behavior that qualifies as

[72] X. GROUSSOT, *General Principles of Community Law,* Groningen, Europa Law Publishing, 2006, 215; H.G. SCHEMERS, "Human Rights as General Principles of Law", in U. BERNITZ and J. NERGELIUS (eds.), *General Principles of European Community Law*, The Hague, Kluwer Law International, 2000, 62-63.

[73] J.T. LANG, "Legal Certainty and Legitimate Expectations as General Principles of law", in U. BERNITZ and J. NERGELIUS (eds.), *General Principles of European Community Law*, The Hague, Kluwer Law International, 2000, 163.

a "secret cartel". [74] While the Notice does not explain what must be understood by "secret", one can safely assume that it consists of those issues that the participants of the cartel do not want to reveal publically to third persons.[75] Recital 1 of the Notice further explains a cartel as *"an agreement and/or concerted practice between two or more competitors aimed at coordinating their competitive behavior on the market and/or influencing the relevant parameters of competition through practices such as the fixing of purchase or selling prices or other trading conditions, the allocation of production or sales quotas, the sharing of markets including bid-rigging, restrictions of imports or exports and/or anti-competitive actions against other competitors."*

VERTICAL AGREEMENTS? – From this definition, it is inferred that vertical agreements and infringements of Article 102 TFEU are, in contrast to horizontal ones, excluded from the Notice's scope of application.[76] The emphasis on the fact that the anti-competitive behavior takes place between two or more competitors, which is a typical feature for horizontal cartels, combined with the fact that especially these cartels are difficult to detect, seems to indicate that the Commission intends to capture only horizontal cartels under the leniency system.[77] However, in light of the requirement of equal treatment, this reasoning is not entirely convincing. First, in some instances, vertical cartels have similar features as horizontal cartels. As such, they are sometimes also difficult to detect and can also be constructed between competitors.[78] Second, this restricted scope of application results in the paradoxical consequence that an undertaking can file a leniency application for price-fixing agreements, considered to be the worst cartel infringements, while

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[74] Recital 1 of the Leniency Notice.

[75] D. ARTS, "Iedereen gelijk voor de wet? Beschouwingen over de rechtmatigheid van het verlenen van clementie in kartelzaken", *TBM* 2012, 8.

[76] EGC, Case T-13/03 *Nintendo v Commission* [2009] *ECR* II-975, para. 157: "*In the first place, the application to the present case of the Leniency Notice must be rejected. It is apparent from that notice, the aim of which is to encourage undertakings to disclose the existence of restrictive agreements that are particularly difficult to detect, that it is applicable only in cases where infringements of a horizontal nature are involved, such as cartels. That notice refers at Section A(1), first subparagraph, to the case of 'secret cartels ... aimed at fixing prices, production or sales quotas, sharing markets or banning imports or exports."*; *Omega-Nintendo* Commission Decision 2003/675/EC [2003] OJ L 255, Case COMP/36.321, para. 453: *"As the present infringement is vertical in nature, the parties cannot benefit from the application of the Leniency Notice".*

[77] R. ALLENDESALAZAR and P. MARTINEZ-LAGE, "Evidence Gathered Through Leniency: From the Prisoner's Dilemma to a Race to the Bottom", in C.-D. EHJERMANN and M. MARQUIS (eds.) *European Competition Law Annual 2009. The Evaluation of Evidence and its Judicial Review in Competition Cases*, Portland, Hart Publishing, 2009, 567; D. ARTS, "Iedereen gelijk voor de wet? Beschouwingen over de rechtmatigheid van het verlenen van clementie in kartelzaken", *TBM* 2012, 8. Other infringements are consequently arguably not as difficult to detect, see Recitals 1 and 3 of the Leniency Notice; F. ARBAULT and E. SAKKERS, "Cartels" in J. FAUL and A. NIKPAY (eds.), *The EC Law of Competition*, Oxford, Oxford University Press, 2006, 801; T. WECK, "Antitrust Infringements in the Distribution Chain- When is Leniency Available to Suppliers?", *ECLR* 2010, 399.

[78] Thus, while they have similar features, they should not be treated differently from horizontal cartels, *supra*.

it cannot request for leniency for less unfavorable anti-competitive conduct such as vertical agreements.[79] Even though the Commission solves this paradox by reducing the fine if an undertaking has cooperated outside the Leniency Notice,[80] such an approach is in no way comparable, since there are no guarantees for a lenient treatment.[81]

INFORMATION EXCHANGE – Next, for certain anti-competitive practice, it is today still unclear whether an undertaking can file a leniency application.[82] As regards the horizontal participation in information exchange, it is vested case law of the CJEU that such behavior can constitute an infringement of Article 101 TFEU, even when it takes place in complete isolation and in absence of additional restrictive arrangements.[83] The CJEU and the Commission have

[79] F. ARBAULT and E. SAKKERS, "Cartels" in J. FAUL and A. NIKPAY (eds.), *The EC Law of Competition*, Oxford, Oxford University Press, 2006, 801; D. ARTS, "Iedereen gelijk voor de wet? Beschouwingen over de rechtmatigheid van het verlenen van clementie in kartelzaken", *TBM* 2012, 8.

[80] EGC, Case T-132/07 *Fuji v Commission* [2011] *nyr,* para 255.

[81] Case law moreover reveals that the principle of equal treatment is not always respected: CFI, Case T-347/94 *Mayr-Melnhof Kartongesellschaft v Commission* [1998] *ECR* II-1751, para. 368; CFI, Case T-23/99, *LR AF1998 v Commission* [2002] *ECR II*-1705, para. 337; EGC, Case T-13/03 *Nintendo v Commission* [2009] *ECR* II-975, paras. 157-159; *Omega-Nintendo* Commission Decision 2003/675/EC [2003] OJ L 255, Case COMP/36.321, para. 453; D. ARTS, "Iedereen gelijk voor de wet? Beschouwingen over de rechtmatigheid van het verlenen van clementie in kartelzaken", *TBM* 2012, 8-9; T. WECK, "Antitrust Infringements in the Distribution Chain-When is Leniency Available to Suppliers?", *ECLR* 2010, 399.

[82] *Inter alia* for a participation in horizontal information sharing, for bilateral contacts or hub and spoke cartels, no guidance in the Notice can be found. Since a hub-and-spoke coordination can, according to the EGC, form a part both of a horizontal and vertical scheme, leniency should however be available for the participants of the scheme that are horizontally integrated: CFI, Case T-36/05 *Coats Holding and J&P Coats v Commission* [2007] *ECR* II-110, para. 38; J. FAULL and A. NIKPAY, *The EC Law of Competition.* Oxford, Oxford University Press, 2007, 822; T. WECK, "Antitrust Infringements in the Distribution Chain-When is Leniency Available to Suppliers?", *ECLR* 2010, 399.

[83] The most recent development on information exchange in this respect can be found in: ECJ, Case C-8/08 *T-Mobile Netherlands And Others* [2009] *ECR* I-04529, in which the ECJ stated that information exchange which reduces the normal uncertainties as regards confidential information such as future market conduct must be regarded as having an anti-competitive object and consequently infringing Article 101(1) TFEU. This was however already advocated in previous cases: ECJ, Case C-176/99 *Arbed v Commission* [2003] *ECR* I-10687; ECJ, Case C-238/05 *Asnef v Equifax* [2006] *ECR* I-11125; *UK Agricultural Tractor Registration Exchange* Commission Decision 92/157/EEC [1992] OJ L 068, Case COMP IV/31.370 and 31.446; *Seamless Steel Tubes* Commission Decision 2003/382/EC [2003] OJ L140/1, Case COMPIV/E-1/35.860-B; *Belgian Beer Market* Commission Decision 2003/569/EC [2003] 0J L200/1, Case COMPIV/37.614/F3, para. 265; *Zinc Phosphate* Commission Decision 2003/437/EC [2003] OJ L153/1, Case COMP/E-1/37.027, para. 215; *Methionine* Commission Decision 2003/674/EC [2003] OJ L255/1, Case C.37.519, para. 214; *Cartonboard* Commission Decision 94/601/EC [2004] OJ L243/1, Case IV/C/33.833, paras. 61-64; OECD, *Policy Roundtables. Information Exchanges Between Competitors under Competition Law,* 2010, available at http://www.oecd.org/competition/cartels/48379006.pdf [Accessed on 30 April 2013]; F. ARBAULT and E. SAKKERS, "Cartels", in J. FAULL and A. NIKPAY (eds.), *The EC Law of Competition.* Oxford, Oxford University Press, 2007, 772; A. HOWARD, V. ROSE and P. ROTH QC, "The Enforcement of the Competition Rules in the Member States" in P. ROTH and V. ROSE (eds.), *Bellamy & Child. European Community Law of Competition*, Oxford, Oxford University

however not (yet) clarified whether this behavior also falls within the scope of application of the Leniency Notice.[84] Similar as for the exclusion of vertical agreements, it would be illogical to exclude a behavior that is certainly not the worst cartel infringement, from the scope of application. On top of all this, the exchange of information occurs comparably as horizontal cartels, and is likewise very difficult to discover. An exclusion of the scope of application would therefore violate the principle of equal treatment.

EVALUATION – The restricted scope of application of the Leniency Notice poses serious questions as to the respect for the principle of equal treatment and principle of legal certainty.

While vertical agreements sometimes have characteristics that are very comparable with horizontal cartels, the exclusion from the scope of application poses concerns of whether it can withstand the test of equality.[85] Secondly, for other competitive behavior, undertakings are today still in doubt whether they can file leniency. Such paucity of clarity leads to a lack of legal certainty on the part of the undertaking, which voluntarily reveals an anti-competitive behavior to the Commission, without being sure that it even *can* apply for leniency.

b. Scope of application ratione personae

PROCEDURAL UNCERTAINTY – Next to the fact that it is uncertain for which behavior an undertaking can ask leniency, it is unclear who can or should file a leniency application. While not every undertaking or entity has the (equal) right and opportunity to file a leniency application, the principle of equal treatment is moreover not respected.

DEFINITION OF UNDERTAKING – According to the CJEU, an undertaking is "*an economic unit which consist of a unitary organization of personal, tangible and intangible elements which pursues a specific economic aim on a long-term basis and can contribute to the commission of an infringement (...)*".[86]

Press, 2013, 327-328; A. CAPOBIANCO, "Information Exchange Under EC Competition Law", *CMLR* 2004, 1249; M. BENNETT and P. COLLINS, "The Law and Economics of Information Sharing: the Good, the Bad and the Ugly", *European Competition Journal* 2010, 311-313.

[84] R. ALLENDESALAZAR and P. MARTINEZ-LAGE, "Evidence Gathered Through Leniency: From the Prisoner's Dilemma to a Race to the Bottom", in C.-D. EHJERMANN and M. MARQUIS (eds.) *European Competition Law Annual 2009. The Evaluation of Evidence and its Judicial Review in Competition Cases*, Oxford, Oxford and Portland Hart Publishing, 2009, 567-577; M. HALL, "UK Office of Fair Trading Looks at Information Exchanges", *Hot topics in International Antitrust Law* 2011, 1-3, available at http://www.mcguirewoods.com/news-resources/publications/international/uk-office-fair-trading.pdf [Accessed on 30 April 2013].

[85] See *infra* for some suggestions to remedy this problem.

[86] ECJ, Case C-41/90 *Höfner & Elser v Macroton* [1991] *ECR* I-1979, para. 20-21; ECJ, Case C-41/90 *Wouters* [2002] *ECR* I-1577; ECJ, Case C-189/02 *Dansk Rorindustri v Commission* [2005] *ECR* I-5425, para. 112; CFI, Case T-11/89 *Shell v. Commission* [1992] *ECR* II-757, para. 311;

Consequently, while only "undertakings" can violate Article 101 TFEU, they are also the only entities that can apply for leniency. This is confirmed by the Leniency Notice, which specifies that leniency is applied by and granted to "an undertaking".[87] Even though this definition seems quite evident at first sight, the requirement that leniency is filed by "an undertaking" can cause certain unforeseen issues.

UNDERTAKINGS *VERSUS* LEGAL PERSONS – First, while the infringement of Article 101 TFEU is committed by the undertaking as a whole, the fine is imposed on and collected from the (often multiple) *legal persons* part of the single undertaking, which have however often not committed the infringement themselves.[88] It is consequently unclear whether a leniency application filed by one legal person also covers also all the other legal persons who are part of one undertaking, or whether the granted leniency is only to the advantage of those legal persons who were mentioned in the leniency application.[89] Some argue that the leniency application only counts for all legal persons if the legal person who is the "highest in rank" in the undertaking files the application.[90] Indeed, given that a subsidiary or a sister company cannot control its parent company, the Commission cannot be reassured that the parent company fulfills its duty of cooperation.[91] Even though some decisions of the Commission seem to suggest that the immunity or the reduction of fine resulting from the leniency application are granted to all the entities of the undertaking,[92] the

CFI, Case T-352/94 *Mo Och Domsjö AB t Commission* [1998] *ECR* II-1989, paras. 87-96; CFI, Case T-155/04 *SELEX Sistemi Integrati v Commission* [2006] *ECR* II-4797, para. 50.

[87] Recitals 8, 12, 20 and 24 of the Leniency Notice.

[88] The infringements of Article 101 TFEU are committed by "undertakings", a concept which is conceived economically and not legally. I. VAN BAEL and J.-F. BELLIS, *Competition Law of the European Community*, Alphen aan den Rijn, Alphen aan den Rijn: Kluwer Law International, 2010, 1139.

[89] I. VAN BAEL and J.-F. BELLIS, *Competition Law of the European Community*, Alphen aan den Rijn, Alphen aan den Rijn: Kluwer Law International, 2010, 1139; D. ARTS, "Iedereen gelijk voor de wet? Beschouwingen over de rechtmatigheid van het verlenen van clementie in kartelzaken", *TBM* 2012, 9-10; B. VAN BARLINGEN and M. BARENNES, "The European Commission's 2002 Leniency Notice In Practice", *Competition Policy Newsletter* 2005, 7-8.

[90] F. ARBAULT and E. SAKKERS, "Cartels" in J. FAULL and C. NIKPAY (eds.), *The EC Law of Competition,* Oxford, Oxford University Press, 2007, 824; I. VAN BAEL and J.-F. BELLIS, *Competition Law of the European Community*, Alphen aan den Rijn, Alphen aan den Rijn: Kluwer Law International, 2010, 1139; B. VAN BARLINGEN and M. BARENNES, "The European Commission's 2002 Leniency Notice In Practice", *Competition Policy Newsletter* 2005, 7-8.

[91] *Supra*; *Raw Tobacco Spain* Commission Decision 2001/462/EC [2001] OJ L 102, Case COMP/C.38.238/B3, para. 456; D. ARTS, "Iedereen gelijk voor de wet? Beschouwingen over de rechtmatigheid van het verlenen van clementie in kartelzaken", *TBM* 2012, 9-10; B. VAN BARLINGEN and M. BARENNES, "The European Commission's 2002 Leniency Notice In Practice", *Competition Policy Newsletter* 2005, 7-8.

[92] EGC, Case T-161/05 *Hoechst v Commission* [2009] *ECR* II-3555, para.75; *Organ Peroxides* Commission Decision 2005/349/EC [2005] OJ L 110, Case COMP/E-2/37.857, para. 513: *"where a company submits evidence in order to benefit from a reduction of fines, any reduction granted will benefit the undertaking of which the company that submitted the evidence forms part"*; *MCAA* Commission Decision C(2004)4876 [2004] OJ C 282, case COMP/E-1/37.773, paras. 326 and 332; *Candle Waxes* Commission Decision [2008] OJ C 295, Case COMP/39181, para. 768: "*when assessing leniency, it is the undertaking, as it exists at the time of application for immunity and*

precise conditions and circumstances for such application remain today still very unclear.[93]

JOINT VENTURES – The same indistinctness holds true for joint ventures. When considering that only one undertaking can file a leniency application, it can be questioned whether the leniency application of a joint venture also applies for its parent companies.[94] The problem seems to be that if both parent companies belonged to the cartel on their own account and the Commission grants (partial) immunity to the joint venture that also extends to the parent companies, the leniency application covers more than one cartel participant.[95] It can be argued that if the parent companies have exercised a decisive influence on the joint venture, that they can be considered together with the joint venture as a single economic entity, as a consequence of which the parent companies could benefit from the leniency application of the joint venture.[96] However, it is clear that a more detailed elaboration on this matter from the Commission is needed in order to enhance the legal certainty of the undertakings.

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which meets the requirements under the 2002 Leniency Notice, that can benefit from immunity."; *International Removal Services* Commission Decision [2009] *OJ C 188*, Case COMP 38.543 para. 612; A. HOWARD, V. ROSE and P. ROTH QC, "The Enforcement of the Competition Rules in the Member States" in P. ROTH and V. ROSE (eds.), *Bellamy & Child. European Community Law of Competition*, Oxford, Oxford University Press, 2013, 1157.

[93] This uncertainty concerns not only the duty to cooperate, but also the requirement of confidentiality that is imposed on the undertaking that has applied for leniency according to Recital 12 (a) of the Leniency Notice. *Raw Tobacco Spain* Commission Decision 20 October 2004, Case COMP/C.38.238/B3, para. 456; B. VAN BARLINGEN and M. BARENNES, "The European Commission's 2002 Leniency Notice in practice", *Competition Policy Newsletter* 2005, 7-8.

[94] D. ARTS, "Iedereen gelijk voor de wet? Beschouwingen over de rechtmatigheid van het verlenen van clementie in kartelzaken", *TBM* 2012, 10-11; B. VAN BARLINGEN and M. BARENNES, "The European Commission's 2002 Leniency Notice in practice", *Competition Policy Newsletter* 2005, 7-8.

[95] F. ARBAULT and E. SAKKERS, "Cartels" in J. FAULL and C. NIKPAY (eds.), *The EC Law of Competition,* Oxford, Oxford University Press, 2007, 824; I. VAN BAEL and J.-F. BELLIS, *Competition Law of the European Community*, Alphen aan den Rijn, Alphen aan den Rijn: Kluwer Law International, 2010, 1139; D. ARTS, "Iedereen gelijk voor de wet? Beschouwingen over de rechtmatigheid van het verlenen van clementie in kartelzaken", *TBM* 2012, 10-11; B. VAN BARLINGEN and M. BARENNES, "The European Commission's 2002 Leniency Notice in practice", *Competition Policy Newsletter* 2005, 7-8. It moreover poses problems as to their duty of confidentiality: are they allowed to discuss the preparation of the leniency application with the parent companies, or do they breach their obligation not to discuss their application with third parties?; I. VAN BAEL and J.-F. BELLIS, *Competition Law of the European Community*, Alphen aan den Rijn, Alphen aan den Rijn: Kluwer Law International, 2010, 1140.

[96] *Rubber Chemicals* Commission Decision [2005] OJ L 153, Case COMP/F/38.443, para. 263; *Chloroprene Rubber* Commission Decision C(2007) 5910 [2007] OJ C 251, Case COMP/38629, para 748; F. ARBAULT and E. SAKKERS, "Cartels" in J. FAULL and C. NIKPAY (eds.), *The EC Law of Competition,* Oxford, Oxford University Press, 2007, 824; I. VAN BAEL and J.-F. BELLIS, *Competition Law of the European Community*, Alphen aan den Rijn, Alphen aan den Rijn: Kluwer Law International, 2010, 1140.

TRADE ASSOCIATIONS – Finally, due to the fact that only undertakings can apply for leniency, it can be inferred that trade associations are excluded from leniency's scope of application.[97] The Commission's decision practice nevertheless reveals that it has held trade associations multiple times directly responsible for cartel infringements alongside its members.[98] This does not square with the principle of equality, which requires similar situations to be treated similarly. Thus, every entity that could be fined due to its participation to an anti-competitive practice should have the equal right and opportunity to apply for leniency. Trade associations, even when they are a part of the cartel, are however excluded from filing leniency and are thus 'destined' to be fined. Rather than using the legal structure of an entity in determining whether it can apply for leniency, [99] it would be much better to use the benchmark of whether such legal entity can be fined for its participation in anti-competitive conduct.[100]

EVALUATION – The issues stated above indicate that the requirement that only one undertaking can apply for leniency gives rise to difficult scenarios. Some legal entities are uncertain whether they can enjoy the lenient treatment of their

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[97] D. ARTS, "Iedereen gelijk voor de wet? Beschouwingen over de rechtmatigheid van het verlenen van clementie in kartelzaken", *TBM* 2012, 11. It can however be argued that the definition of an undertaking of the CJEU is flexible enough to encompass also trade associations in the Leniency Notice. Indeed, the notion of undertaking is a broad notion that goes beyond companies and could enclose every entity engaged in an economic activity regardless of its legal status and the way in which it is financed. While case law has clarified that as concerns the economic activity, the pursuit of profit is not essential, undertakings that offer a service on the market, fall under the definition of undertaking. See: ECJ, Case 7/82 *GVL v Commission* [1983] *ECR* 483; ECJ, Case C-244/94 *Fédération Française des Sociétés d'Assurances and Others v Ministère de l'Agriculture et de la Pêche* [1995] *ECR* I-4013, para. 17; *Film Purchases by German television stations* Commission Decision 89/536/EEC [1989] OJ L284/3, Case COMP IV/31734; F. ARBAULT and E. SAKKERS, "Cartels" in J. FAULL and C. NIKPAY (eds.), *The EC Law of Competition,* Oxford, Oxford University Press, 2007, 188.

[98] See Article 101(1) TFEU: associations of undertakings are explicitly mentioned. *Belgian Wallpaper* Commission Decision [1974] OJ L237/3; *GB-Inno-BM/Fedetab+ IV/29.127 - Mestdagh- Huyghebaert/Fedetab* Commission Decision 78/670/EEC [1978] OJ L 224, Case COMP IV/29.149; *Italian Flat Glass* Commission Decision 89/93/EEC [1988] OJ L 033, Case IV/31. 906; *Cement* Commission Decision 94/815/EC [1994] OJ L *343,* Cases IV/33.126 and 33.322; *Amino Acids* Commission Decision 2001/418/EC [2000] OJ L 152/24, Case COMP/36.545/F3; *Citric Acid* Commission Decision 2002/742/EC [2001] OJ L 239, Case COMP/E-1/36 604; *Carbonless Paper* Commission Decision [2004] OJ L115/1, Case COMP 36121; *Association of Belgian Architects* Commission Decision 2005/8/EC [2004] OJ L 4/10, Case COMP/38.549; *PO/Elevators and Escalators* Commission Decision C (2007) 512 [2007] OJ 75/19, Case COMP/E-1/38.823; *Steel Beams* Commission Decision 2008/C 235/04 [2008] OJ C 235/4, Case C(2006) 5342 final. F. ARBAULT and E. SAKKERS, "Cartels" in J. FAULL and C. NIKPAY (eds.), *The EC Law of Competition,* Oxford, Oxford University Press, 2007, 781-783. For a pending Commission investigation about the role of the trade association *Fédération Professionnelle des Entreprises de l'Eau* in anti-competitive practices, see Press Release, "The Commission opens proceedings against companies in French water sector", 18 January 2012, available at http://europa.eu/rapid/press-release_IP-12-26_en.htm [Accessed on 30 April 2013].

[99] D. ARTS, "Iedereen gelijk voor de wet? Beschouwingen over de rechtmatigheid van het verlenen van clementie in kartelzaken", *TBM* 2012, 11.

[100] *Infra.*

subsidiary or joint venture, while others are even excluded to apply for leniency. This does not stroke with the requirements of legal certainty, which demands that the leniency applicant can predict precisely which rights it can derive from the Leniency Notice. Moreover, the Notice does not guarantee an equal treatment between the different legal entities, which are however facing a similar situation.

3.2.2. Ambiguous conditions for immunity from fine or reduction of fine

a. The obligation to cooperate

a.1. Recital 12 of the leniency notice

REQUEST FOR INFORMATION – An undertaking requesting immunity or a reduction in fine has an obligation to cooperate with the Commission.[101] This obligation is however framed in very broad and unclear terms, which makes it difficult for the undertakings to comply.[102] Besides, case law indicates that this duty to cooperate often intermingles with the duty to respond to requests for information and thereby violates the principle of equal treatment.[103]

a.2. Recital 31 of the leniency notice

QUALIFICATION OF THE INFRINGEMENT – Secondly, in order to qualify for full immunity, the undertaking's corporate statement should satisfy certain requirements. Recital 31 of the Leniency Notice requires the leniency applicant to state its *"knowledge of a cartel and its role therein prepared specially to be submitted under this Notice."*[104] It is unclear whether this means that the undertaking needs to determine the infringement for which it has filed a leniency application or that it only has to cooperate with "the investigation" of the Commission.[105] The latter reasoning seems to be confirmed by the Leniency Notice itself.[106] While the legal characterization provided by the

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[101] *Supra*; A. HOWARD, V. ROSE and P. ROTH QC, "The Enforcement of the Competition Rules in the Member States" in P. ROTH and V. ROSE (eds.), *Bellamy & Child. European Community Law of Competition*, Oxford, Oxford University Press, 2008, 1155.

[102] ECJ, Joined Cases C-189/02, C-202/02, C-205/02, C-208/02 and C-213/02 *Dansk Rorindustri A/S v* Commission [2005] *ECR* I-05425, paras. 395-399; ECJ, Case C-301/04 *Commission v SGL Carbon AG,* [2006] *ECR* I-05915, paras. 66-80; A. HOWARD, V. ROSE and P. ROTH QC, "The Enforcement of the Competition Rules in the Member States" in P. ROTH and V. ROSE (eds.), *Bellamy & Child. European Community Law of Competition*, Oxford, Oxford University Press, 2008, 1155.

[103] We will address this issue in the following chapter, *infra*.

[104] Recital 31 of the Leniency Notice.

[105] D. ARTS, "Iedereen gelijk voor de wet? Beschouwingen over de rechtmatigheid van het verlenen van clementie in kartelzaken", *TBM* 2012, 17.

[106] Recital 1 of the Leniency Notice: *"(...)rewarding cooperation in the Commission investigation";* Recital 3 of the Leniency Notice: *"(...)cooperate in the Commission's investigation"*; Recital 8 of the Leniency Notice: "*If it is the first to submit evidence which in the*

undertaking is not binding for the Commission[107], it seems contradictory that the success of the leniency application would have to rely on the qualifications made by the undertaking. Besides, as D. ARTS rightly points out, it is nearly impossible to determine the exact and final qualification of the infringement at the time of the filing the leniency application, since otherwise an investigation conducted by the Commission would become redundant.[108]

IMPACT ON SUCCESS APPLICATION – The case BASF AND UCB V COMMISSION nevertheless proves otherwise. In this case, the EGC reduced the initially granted fine reduction of the undertaking BASF because its competitor UCB successfully managed to convince the EGC that the infringement was different from the infringement defined by the Commission when granting the initial reduction in fine to BASF.[109] Thus, as this case makes clear, even though the undertaking's legal characterization of the facts is not binding for the Commission, it can have a (negative) influence on the success of their leniency application. It is however not correct to treat the contributions of the undertakings differently only because of the fact that the legal qualification was changed after the investigation was carried out. [110] The Commission cannot expect the undertaking to do the impossible. It is still undecided whether this case is the beginning of a tendency, or instead a *lapsus* of the Commission. In any event, in order to reduce the legal uncertainty, more clarity about this condition is mandated.

Commission's view may enable it to find an infringement of Article 101 in connection with the alleged cartel."

[107] *Amino Acids* Commission Decision 2001/418/EC [2000] OJ L 152/24, Case COMP/36.545/F3, para. 416.

[108] D. ARTS, "Iedereen gelijk voor de wet? Beschouwingen over de rechtmatigheid van het verlenen van clementie in kartelzaken", *TBM* 2012, 17-18. See also *infra*.

[109] CFI, Joined Cases T-101/05 and T-111/05 *BASF and others v Commission* [2007] *ECR* II-4949, paras. 132 *et. seq.* An interesting sequel on this topic can be found in a case before the French Competition Authority: Press Release, "L'Autorité de la concurrence sanctionne un cartel entre les 4 principaux fabricants de lessives à hauteur de 367,9 millions d'euros", 8 December 2011, available at http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=388&id_article=1734 [Accessed on 30 April 2013]. See also: *Consumer Detergents* Commission Decision C(2011) 2528 [2011] OJ C138, Case COMP/39579; N. CUNINGHAME and M. HOGNSSON, "Leniency Race in French Laundry Detergent Sector: First Come in Europe is Not First Served in France", *Competition Newsletter* 2012, available at http://www.ashurst.com/publication-item.aspx?id_Content=6515 [Accessed on 30 April 2013].

[110] D. ARTS, "Iedereen gelijk voor de wet? Beschouwingen over de rechtmatigheid van het verlenen van clementie in kartelzaken", *TBM* 2012, 17-18. A very lenient solution seems to exist in the United Kingdom, where the leniency rules stipulate that if an undertaking applies for leniency, and the infringement is later on in the procedure is re-characterized as a consequence of which the infringement falls outside scope of application, the undertaking still retains the advantage of leniency: OFT, "Leniency and no-action. OFT's Guidance Note on the handling of applications", December 2008, available at http://www.oft.gov.uk/shared_oft/reports/comp_policy/oft803.pdf [Accessed on 30 April 2013].

b. The concept of significant added value

NOT TRANSPARENT – As mentioned in paragraph 14, a leniency applicant can receive a fine reduction if they provide the Commission information that is of a significant added value.[111] While the Commission has done some effort to further clarify the notion of added value by adopting the latest Leniency Notice, substantial uncertainty and unpredictability remains.[112] The reasons for this are twofold.

CASE-BY-CASE BASIS – First, it is impossible to define uniform standards for this concept, since the question whether certain information is of a significant added value, largely depends on the precise circumstances of each case. The assessment of the information should thus inevitably be carried out on a case-by-case basis.[113] This leaves little guidance and guarantee for undertakings to know on beforehand whether their information has a considerable surplus value. Undertakings must make their own assessment which information could still be of added value, however being themselves ignorant of which information other undertakings might have provided to the Commission. As such, an undertaking has no detailed idea of the precise state of the knowledge of the Commission, and consequently can hardly be sure that the information it is providing is sufficiently novel for the Commission.[114]

DISCRETION – Secondly, the EGC has granted the Commission a broad discretion in assessing whether the information supplied with by the undertaking is of a significant added value.[115] This allows the Commission to

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[111] Recital 8 a) and b) and 24 of the Leniency Notice; S. SUURNAKKI and M.L. TIERNO CENTELLA, "European Commission Adopts Revised Leniency Notice to Reward Companies that Report Hard-Core Cartels", *Competition Policy Newsletter* 2007, 11-12; J.S. SANDHU, "The European Commission's Leniency Policy: A Success?", *ECLR* 2007, 152-154; P. VERMA and P. BILLIET, "Why Would Cartel Participants Still Refuse to Blow the Whistle under the Current EC Leniency Policy?", *Global Antitrust Review* 2009, 6-9.

[112] European Commission, Press Release, "Competition: revised Leniency Notice: Frequently Asked Questions", 2006, 1, available at http://europa.eu/rapid/press-release_IP-06-1705_en.htm?locale=en [Accessed on 30 April 2013].

[113] See *e.g.* ECJ, Cases C-65/02 and C-73/02 *ThyssenKrupp Stainless v Commission* [2005] *ECR* I-7663, para. 599; EGC, Case T-132/07 *Fuji v Commission (Gas Insulated Switchgear)* [2011], *nyr,* para. 239; F. ARBAULT and E. SAKKERS, "Cartels" in J. FAULL and C. NIKPAY (eds.), *The EC Law of Competition,* Oxford, Oxford University Press, 2007, 809.

[114] A. HOWARD, V. ROSE and P. ROTH QC, "The Enforcement of the Competition Rules in the Member States" in P. ROTH and V. ROSE (eds.), *Bellamy & Child. European Community Law of Competition*, Oxford, Oxford University Press, 2013, 1158-59; P. VERMA and P. BILLIET, "Why Would Cartel Participants Still Refuse to Blow the Whistle under the Current EC leniency policy?", *Global Antitrust Review* 2009, 2-4. The possibility moreover exists for another undertaking to leapfrog over an earlier leniency applicant if they provide information that is of more added value. J.S. SANDHU, "The European Commission's Leniency Policy: A Success?", *ECLR* 2007, 152-154157; P. BILLIET, "How Lenient is the EC Leniency Policy? A Matter of Certainty and Predictability", *ECLR* 2009, 16.

[115] EGC, Case T-343/08 *Arkema France v Commission* [2011] *ECR* II-02287, para. 135; A. HOWARD, V. ROSE and P. ROTH QC, "The Enforcement of the Competition Rules in the

make opposing or even arbitrary decisions, and to withhold specific aspects of a case, overall reducing the certainty of the outcome for the undertakings.

EVALUATION – It is disputable whether this case-by-case basis assessment violates the requirements of legal certainty. Undertakings are ignorant of how the Commission applies these very broadly formulated rules to their specific case. As such, they are to a certain extent unable to oversee their rights resulting from the leniency application, which leaves them in the very uncomfortable situation of confessing a cartel, without having any guarantee to achieve a fine reduction.[116] As is explained elsewhere, legal rules should be clear and precise, ensuring that all legal relationships are foreseeable.[117] It seems that this concept of significant added value does not measure up with these requirements.

3.2.3. The discretionary marker system

DISCRETION – Finally, the marker system, which was introduced in order to enhance the predictability and transparency of the leniency process,[118] leaves much discretion to the Commission in deciding whether or not to grant the marker and does not ensure an equal treatment.

LEGAL UNCERTAINTY AND INEQUALITY – First, Recital 15 of the Leniency Notice states that *"the Commission may grant a marker (...), the applicant should (...) justify its request for a marker".* These words seem to indicate that the Commission maintains a significant discretion in deciding whether or not the justification is sufficient, making it in practice often impossible for the undertakings to obtain one.[119] The Commission has indicated that a marker

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Member States" in P. ROTH and V. ROSE (eds.), *Bellamy & Child. European Community Law of Competition*, Oxford, Oxford University Press, 2013, 1158.

[116] On the other hand, introducing more uniformity in the process may also be not advisable, since a case-by-case basis analysis of the leniency applications is necessary, and rigorous standards could consequently lead to an unfair application of the conditions. D. GALLIGAN, "The Nature and Functions of Policies within Discretionary Power", *Public Law* 1976, 332. See *supra*; C. ACOCELLA,"Droit Punitif et Valeur de la certitude. Le cas de la clémence dans le cadre du droit de la concurrence", *Revue de Droit international et de Droit Comparé* 2013, 29-30.

[117] *Supra*.

[118] Recital 14 of the Leniency Notice; J.S. SANDHU, "The European Commission's Leniency Policy: A Success?", *ECLR* 2007, 149-151; S. SUURNAKKI and M.L. TIERNO CENTELLA, "European Commission adopts Revised Leniency Notice to Reward Companies that Report Hard-Core Cartels", *Competition Policy Newsletter* 2007, 9-10; P. VERMA and P. BILLIET, "Why Would Cartel Participants Still Refuse to Blow the Whistle Under the Current EC Leniency Policy?", *Global Antitrust Review* 2009, 2-4.

[119] According to the Commission, this justification is necessary to prevent competing companies from abusing the leniency policy, since obtaining leniency gives an undertaking a market advantage compared to his direct competitor who is severely punished: P. BILLIET, "How Lenient is the EC Leniency Policy? A Matter of Certainty and Predictability", *ECLR* 2009, 15. See also F. ARBAULT and E. SAKKERS, "Cartels" in J. FAULL and C. NIKPAY (eds.), *The EC Law of Competition,* Oxford, Oxford University Press, 2007, 817; S. SUURNAKKI and M.L.

may moreover only be granted for *inter alia "undertakings that inherited a cartel via a merger or acquisition."* [120] This disparate and incomplete recital makes it unclear in which precise circumstances a marker can be given. When requesting a marker, undertakings consequently experience no legal certainty as to the outcome of their request.[121] Moreover, the current restrictive scope moreover installs an unequal situation between the different cartel members. Those undertakings that inherited a cartel via a merger can apply for a marker, which obviously gives an enormous advantage in order to achieve immunity, while the others cannot.[122]

EVALUATION – By reserving a significant amount of discretion in deciding whether or not to grant the marker, the Commission arguably introduced more uncertainty and unpredictability rather than succeeding in its diminishment. In order to remedy this uncertainty, it is advisable that the Commission further elaborates upon the precise circumstances in which a marker can be granted. Next to this uncertainty, the restricted scope of circumstances in which such a marker can be granted, does not coincide with the principle of equality.

3.2.4. Evaluation

NO PROCEDURAL FAIRNESS – In the previous parts, the Leniency Notice has been analyzed in light of the requirements of procedural fairness. In holding the criticisms of the undertakings against these requirements, it seems that the Leniency Notice in general does not succeed in guaranteeing a fair procedure.

TIERNO CENTELLA, "European Commission Adopts Revised Leniency Notice to Reward Companies that Report Hard-Core Cartels", *Competition Policy Newsletter* 2007, 8.

[120] Commission Memorandum, "Competition: Commission proposes changes to the Leniency Notice" [2006] (MEMO/06/357), available at http://europa.eu/rapid/press-release_MEMO-06-357_en.htm, [Accessed on 30 April 2013]; P. BILLIET, "How Lenient is the EC Leniency Policy? A Matter of Certainty and Predictability", *ECLR* 2009, 15; R. BULL, "Klusmann Calls for Review of EU Marker System", *Global Competition Review* 2010, 1-2; J.S. SANDHU, "The European Commission's Leniency Policy: A Success?", *ECLR* 2007, 150-152.

[121] F. ARBAULT and E. SAKKERS, "Cartels" in J. FAULL and A NIKPAY (eds.), *The EC Law of Competition*, Oxford, Oxford University Press, 2007, 746; I. VAN BAEL and J.-F. BELLIS, *Competition Law of the European Community,* The Hague, Kluwer Law International, 2010, 1134-1135; P. BILLIET, "How lenient is the EC Leniency Policy? A matter of certainty and predictability", *ECLR* 2009, 15; M.J. REYNOLDS and D.G. ANDERSON, "Immunity and Leniency in EU Cartel cases: Current Issues", *ECLR* 2006, 85; J.S. SANDHU, "The European Commission's Leniency Policy: A Success?", *ECLR* 2007, 150-152; S. SUURNAKKI and M.L. TIERNO CENTELLA, "European Commission Adopts Revised Leniency Notice to Reward Companies that Report Hard-Core Cartels", *Competition Policy Newsletter* 2007, 9-10; P. VERMA and P. BILLIET, "Why Would Cartel Participants Still Refuse to Blow the Whistle Under the Current EC Leniency Policy?", *Global Antitrust Review* 2009, 2-4.

[122] This distinguishing criteria seems not to be well considerate and therefore cannot justify the installed unequal treatment. A. HOWARD, V. ROSE and P. ROTH QC, "The Enforcement of the Competition Rules in the Member States" in P. ROTH and V. ROSE (eds.), *Bellamy & Child. European Community Law of Competition*, Oxford, Oxford University Press, 2013, 1156; P. BILLIET, "How Lenient is the EC Leniency Policy? A Matter of Certainty and Predictability", *ECLR* 2009, 15-16; J.S. SANDHU, "The European Commission's Leniency Policy: A Success?", *ECLR* 2007, 151-154.

The biggest issue in this context is the lack of legal certainty. The Recitals of the Notice are frequently formulated in a very vague and broad way, are inconsistent or incomplete and consequently leave much to the absolute discretion of the Commission when assessing a leniency application.[123] Just to name one example, today, almost twenty years after the introduction of the first Leniency Notice, undertakings are still uncertain about particular essential conditions when applying for leniency. This is not conform with the requirements of detailed, transparent and predictable rules and legal provisions. In addition, the Notice's provisions are often insufficiently elaborated upon or ill-considered, often leading in daily practice to a situation in which inequality amongst the undertakings is created. For example, the chances and opportunities of legal entities to apply for leniency seem to be based on ill-considered distinguishing criteria. The latter inequality likewise is not conform with the requirement of a fair procedure.

TRANSPARENCY *VERSUS* EFFICIENCY – It is of course correct that it is challenging to elaborate on certain rules and conditions in such specific way as to encompass all possible scenarios. This incompleteness and indistinctness of the Leniency Notice perhaps also strengthens its efficiency. The more undertakings can predict the exact consequences of their actions, the less they will be induced to apply for leniency. This seems also to be the argumentation of the Commission. For example, in justifying its discretionary marker system, it clearly stated that: *"the interest is not in the race to simply get a place in the queue. One should keep in mind that the overall purpose of the Leniency Notice is to enhance actual cartel reporting and destabilizing."*[124]

INTERESTS AT STAKE – However, with regard to the vigorous fining policy of the Commission, it makes a difference between day and night for undertakings whether or not they are granted leniency. In this respect, it is not correct to create incentives to blow the whistle in order to achieve leniency through a

[123] L.O. BLANCO, *EC Competition Procedure*, Oxford, Oxford University Press, 2006, 219; I. VAN BAEL and J.-F. BELLIS, *Competition Law of the European Community,* The Hague, Kluwer Law International, 2010, 1125-1126; M. BLOOM, "Despite Its Great Success, the EC Leniency Program Faces Great Challenges" in C.-D. EHLERMANN and I. ATANASIU (eds.), *European Competition Law Annual 2006: Enforcement of Prohibition of Cartels*, Oregon, Hart Publishing, 2006, 558-565; P. BILLIET, "How Lenient is the EC Leniency Policy? A Matter of Certainty and Predictability", *ECLR* 2009, 14; N. LEVY and R. O'DONOGHUE, "The EU Leniency Program Comes of Age", *World Competition* 2004, 82-83; A. RILEY, "The Modernization of EU Anti-Cartel Enforcement: Will the European Commission Grasp the Opportunity?", *ECLR* 2010, 194-196; J.S. SANDHU, "The European Commission's Leniency Policy: A Success?", *ECLR* 2007, 148-157; P. VERMA and P. BILLIET, "Why Would Cartel Participants Still Refuse to Blow the Whistle under the Current EC Leniency Policy?", *Global Antitrust Review* 2009, 4 and 20.
[124] S. SUURNAKKI and M.L. TIERNO CENTELLA, "European Commission Adopts Revised Leniency Notice to Reward Companies that Report Hard-Core Cartels", *Competition Policy Newsletter* 2007, 9-10.

procedure that clearly cannot ensure a sufficient level of procedural fairness.[125] Such considerable financial consequences may not be connected to soft law rules, which resemble even clause-like provisions, and require further clarification and interpretation by the Commission. As pointed out during the analysis, it is strongly advised to further elaborate on certain aspects of the Notice in order to reduce a part of the aforementioned opaqueness and consequently to make the instrument much more in compliance with the requirements of procedural fairness.[126]

3.3. LEGAL UNCERTAINTY RESULTING FROM A LENIENCY APPLICATION

OVERVIEW – The necessity of a more elaborate and consistent framework moreover becomes clear from two recent societal evolutions, which cast doubt on the possible consequences of a leniency application. First, due to the existence of parallel existing leniency programs in the EU member states, there is a risk that undertakings will be exposed to investigations of other competition authorities when blowing the whistle. Secondly, while consumers increasingly claim damages from those undertakings, there is a growing confusion around the protection of the undertaking's corporate statement. In the next chapter, it is questioned whether and to what extent these evolutions amount to a lack of procedural fairness from the part of the undertakings.

3.3.1. The lack of a one-stop leniency shop[127]

NO UNIFORM SYSTEM – Since the conception of Regulation 1/2003, almost all member states of the EU have introduced a leniency program in their cartel

[125] It is vested case law of the CJEU that EU laws must be certain and their application foreseeable, in particular if they have financial consequences: ECJ, Case 169/80 *Gondrand* [1981] *ECR* 1931; ECJ, Case 70/83 *Kloppenberg* [1984] *ECR* 1075; ECJ, Case 325/85, *Ireland v Commission* [1987] *ECR* 5041; ECJ, Case 143/93, *Van Es Douane Agenten* [1986] *ECR* I-431, para. 27; ECJ, Case 92/87, *Commission v France* [1989] *ECR* 405, para. 22; ECJ, Case C-236/95, *Commission v Greece* [1996] 1996 *ECR* I-4459, para. 13; ECJ, Case C-177/96, *Banque Indo Suez* [1997] *ECR* I-5659, para. 27; J.T. LANG, "Legal Certainty and Legitimate Expectations as General Principles of law", in *General Principles of European Community Law*, The Hague, Kluwer Law International, 2000, 165.

[126] See also *infra* for some suggestions how to improve the level of procedural fairness.

[127] In the literature, a number of solutions have been proposed in order to overcome the problematic consequences of the lack of a one-stop shop, ranging from a system of mutual recognition to a system that is fully centralized or to simply improve the "European solution" by introducing a one-stop leniency shop. See *inter alia*: N. KROES, Speech, "The First Hundred Days, 40th Anniversary of the Studienvereinigung Kartellrecht 1965-2005", [2005] Speech/05/295, April 7 2005, available at http://ec.europa.eu/competition/speeches/index_theme_1.html [Accessed on 30 April 2013]; M. MEROLA and D. WAELBROECK, *Towards an Optimal Enforcement of Competition Rules in Europe*, Brussels, Bruylant, 2010, 40; D. ARTS and K. BOURGEOIS, "Samenwerking tussen mededingingsautoriteiten en rechtsbescherming: enkele bedenkingen", *TBM* 2006, 23-26; C. GAUER and M. JASPERS, "Designing a European Solution for a "One-Stop Leniency Shop", *ECLR* 2006, 690-692; A. NOURRY and M. JEPHCOTT, "The Interaction of EC and National Leniency Systems. Closing the Gap Between the Two Regimes is Critical", *Competition Law Insight* 2005, 7-8.

enforcement system.[128] However, while a uniform "European" system is (still) lacking, the programs differ considerably in substantive and procedural terms.[129] The existence of these different leniency programs also implies that filing a leniency application before one competition authority does not count for another. This lack of a so-called one-stop leniency shop creates numerous difficulties for the undertakings.[130] While the key problem is the unpredictable interaction between these leniency programs,[131] the filing of multiple procedures is moreover cumbersome, costly and difficult to organize in a short period of time.[132]

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[128] *Supra* for a list of the competition authorities which operate a leniency system.

[129] For an exemplary list of the main differences between the different leniency programs, see: S. BRAMMER, *Cooperation Between National Competition Agencies in the Enforcement of EC Competition Law*, Oxford, Hart Publishing, 2009, 189-190; D. SCHROEDER and S. HEIND, "Requests for Leniency in the EU: Experience and Legal Puzzles" in K. CSERES, M. SCHINKER and F. VOGELAAR (eds.), *Criminalization of Competition Law Enforcement*, Cheltenham, Elgar, 2006, 161-165; M. BLOOM, "Despite its Great Success, the EC Leniency Program Faces Great Challenges" in C.-D. EHLERMANN and I. ATANASIU (eds.), *European Competition Law Annual 2006: Enforcement of Prohibition of Cartels*, Oregon, Hart Publishing, 2006, 563-569; J. JOSHUA and P. CAMESASCA, "The Commission's 2002 Leniency Notice: High Noon for Reform", *Global Competition Review* 2007, 1-4; M. REYNOLDS and D. ANDERSON, "Immunity and Leniency in EU Cartel Cases: Current Issues", *ECLR* 2006, 86-89; A. SCHWAB and C. STEINLE, "Pitfalls of the European Competition Network – Why Better Protection of Leniency Applicants and Legal Regulation of Case Allocation is Needed", *ECRL* 2008, 523-524.

[130] L.O. BLANCO, *EC Competition Procedure,* Oxford, Oxford University Press, 2006, 240; M. BLOOM, "Despite Its Great Success, the EC Leniency Program Faces Great Challenges" in C.-D. EHLERMANN and I. ATANASIU (eds.), *European Competition Law Annual 2006: Enforcement of Prohibition of Cartels*, Oregon, Hart Publishing, 2006, 545; L. BROKX, "A Patchwork of Leniency Programs", *ECLR* 2001, 43-44; M.J. REYNOLDS and D.G. ANDERSON, "Immunity and Leniency in EU Cartel Cases: Current Issues", *ECLR* 2006, 82-90; J.S. SANDHU, "The European Commission's Leniency Policy: A Success?", *ECLR* 2007, 154; W. WILS, "Leniency in Antitrust Enforcement: Theory and Practice", *World Competition* 2007, 33-34.

[131] S. BRAMMER, *Cooperation Between National Competition Agencies in the Enforcement of EC Competition Law*, Oxford, Hart Publishing, 2009, 187-189; D.G. GOYDER, *The Future of European Competition Law*, Oxford, Oxford University Press, 2009, 645-650; A. HOWARD, V. ROSE and P. ROTH QC, "The Enforcement of the Competition Rules in the Member States" in P. ROTH and V. ROSE (eds.), *Bellamy & Child. European Community Law of Competition*, Oxford, Oxford University Press, 2013, 1159; A. JONES and B. SUFFRIN, *EU Competition law,* Oxford, Oxford University Press, 2011, 1159-1160; M. MEROLA and D. WAELBROECK, *Towards an Optimal Enforcement of Competition Rules in Europe*. *Time for a Review of Regulation 1/2003?*, Brussels, Bruylant, 2010, 39-40; P. BILLIET, "How Lenient is the EC Leniency Policy? A Matter of Certainty and Predictability", *ECLR* 2009, 16-17; C. GAUER and M. JASPERS, "Designing a European Solution For a "One-Stop Leniency Shop", *ECLR* 2006, 685-686; C. GAUER and M. JASPERS, "The European Competition Network, Achievements and Challenges - A Case in Point: Leniency", *Competition Policy Newsletter* 2006, 8-11; M.J. REYNOLDS and D.G. ANDERSON, "Immunity and Leniency in EU Cartel Cases: Current Issues", *ECLR* 2006, 84-90; J.S. SANDHU, "The European Commission's Leniency Policy: A Success?", *ECLR* 2007, 154; P. VERMA and P. BILLIET, "Why Would Cartel Participants Still Refuse to Blow the Whistle Under The Current EC Leniency Policy?", *Global Antitrust Review* 2009, 16-18; W. WILS, "Leniency in Antitrust Enforcement: Theory and Practice", *World Competition* 2007, 33-34; N. ZINGALES, "European and American Leniency Programs: two models towards convergence?", *Comp. L. Rev.* 2008, 22-23.

[132] M. MEROLA and D. WAELBROECK, *Towards an Optimal Enforcement of Competition Rules in Europe*, Brussels, Bruylant, 2010, 170-171; C. GAUER and M. JASPERS, "Designing a European Solution for a "One-Stop Leniency Shop", *ECLR* 2006, 686-687; M.J. REYNOLDS and

a. Risk of exposure of the leniency applicant to other NCA investigations

PARALLEL INVESTIGATION – Due to the lack of a one-stop shop, an undertaking has to file a leniency application before all NCAs where a potential cartel problem could arise. It is not unrealistic that upon a leniency application before a particular authority, another NCA starts an investigation against the undertaking, while this NCA has a particular leniency program, under which the undertaking does not qualify for a lenient treatment, or does not even have one at all.[133] The filing for leniency can moreover have calamitous consequences for the leniency applicant if the member states' enforcement policy contains criminal sanctions and the leniency system does not cover criminal liability.[134] Thus, while there is no uniform leniency system, leniency applicants should be cautious not to be prosecuted by other NCAs.

INFORMATION CIRCULATING IN THE LENIENCY NETWORK – This risk of exposure to other investigations is inevitably connected to the obligation of the members of the European Competition Network ("ECN") to exchange information on cartels.[135] While a member of the ECN is conform Article 11(3) of Regulation 1/2003 obliged to inform the other members of the ECN of cartel proceedings, another NCA can use this information in order to start an investigation *ex officio*, thereby preventing the leniency applicant to use their leniency application.[136] Recital 39 of the so-called Network Notice ensures

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D.G. ANDERSON, "Immunity and Leniency in EU Cartel Cases: Current Issues", *ECLR* 2006, 85-90.

[133] S. BRAMMER, *Cooperation Between National Competition Agencies in the Enforcement of EC Competition Law*, Oxford, Hart Publishing, 2009, 206-208.

[134] While the Commission has not the possibility to impose criminal sanctions on undertakings, more and more member states are introducing this procedure in their cartel enforcement system, since each member state can according to Article 5 of Regulation 1/2003 choose to provide criminal sanctions or not. I. VAN BAEL and J.-F. BELLIS, *Competition Law of the European Community,* The Hague, Kluwer Law International, 2010, 560-590; A. BURNSIDE and H. CROSSLEY, "Co-operation in Competition: A New Era?" *Eur. Law Rev.* 2005, 238-240; N. LEVY and R. O'DONOGHUE, "The EU Leniency Program Comes of Age", *World Competition* 2004, 95-98; M.J. REYNOLDS and D.G. ANDERSON, "Immunity and Leniency in EU Cartel Cases: Current Issues", *ECLR* 2006, 82; W. WILS, "Is criminalization of EU Competition law the answer?", *World Competition* 2005, 133.

[135] The ECN is a forum used by the Commission and the member states of the EU to exchange information and support each other in specific (cross-border) investigations. The main purpose of the ECN is to enhance the competition law enforcement. C.S. KERSE and N. KHAN, *EC Antitrust Procedure,* London, Sweet & Maxwell, 2005, 275-277; S. BLAKE and D. SCHNICHELS, "Leniency Following Modernization: Safeguarding Europe's Leniency Programs", *ECLR* 2004, 765-767; E. PAULIS, "Eighteen Months of Cooperation Within the ECN- Achievements and Challenges Illustrated the Work in the Leniency Field", in A.M. MATEUS and T. MOREIRA (eds.), *Competition Law and Economics. Advances in Competition Policy and Antitrust Enforcement*, Alphen aan den Rijn, Kluwer Law International, 2007, 61-63.

[136] The obligation to inform the Commission of new cartel cases also applies to leniency applications, since Article 11(3) of Regulation 1/2003 does not provide for an exception: C. BELLAMY and D. CHILD, *European Community Law of Competition*, Oxford, Oxford University Press, 2008, 1159-1160; S. BRAMMER, *Cooperation Between National Competition*

however a protection mechanism by stipulating that other NCAs are prohibited to use such information in order to start an investigation on their own.[137] Thus, members of the ECN who want to use the information submitted by the leniency applicant need to file a request under Article 12 of Regulation 1/2003. The latter request triggers the second protective mechanism of the Network Notice. Pursuant to these safeguards, information submitted by a leniency applicant may only be exchanged between competition authorities in limited circumstances.[138]

REMAINING PROBLEMS – While these safeguards provide in theory sufficient protection, the possibility still remains that the leniency applicant will be exposed to additional proceedings by disclosing information to a member of the ECN.[139] Indeed, according to the Network Notice, the NCA is not prohibited from using his power *"to open an investigation on the basis of information received from other sources."* [140] Given the probability that another leniency applicant informs the NCA about the cartel, it is doubtful whether Recital 39 of the Network Notice sufficiently screens the leniency applicant from other investigations.[141] Furthermore, it can be expected that when an NCA is familiar with a particular cartel investigation, it shall monitor and even target the relevant sector in its own jurisdiction.[142] The smallest piece of additional information will then suffice to open a new investigation.

Agencies in the Enforcement of EC Competition Law, Oxford, Hart Publishing, 2009, 186; P. BILLIET, "How Lenient is the EC Leniency Policy? A Matter of Certainty and Predictability", *ECLR* 2009, 14-21; W. WILS, "Powers of Investigation and Procedural Rights and Guarantees in EU Antitrust Enforcement", *World Competition* 2006, 14-19; W. WILS, "Leniency in Antitrust Enforcement: Theory and Practice", *World Competition* 2007, 25.

[137] Recital 39 of the Commission Notice on Cooperation Within the Network of Competition Authorities [2004] *OJ C 101/43*. Even though the Network Notice is a (non-binding) soft law instrument, all NCAs have, by signing a declaration, acknowledged the provisions of the Network Notice as being binding. For a list of authorities that have signed the statement, see: www.europa.eu.int/comm/competition, [Accessed on 30 April 2013]; E. PAULIS, "Eighteen Months of Cooperation Within the ECN- Achievements and Challenges Illustrated the Work in the Leniency Field", in A.M. MATEUS and T. MOREIRA (eds.), *Competition Law and Economics. Advances in Competition Policy and* Antitrust Enforcement, Alphen aan den Rijn, 2007, 118-120.

[138] Recitals 39-42 of the Network Notice.

[139] S. BRAMMER, *Cooperation Between National Competition Agencies in the Enforcement of EC Competition Law*, Oxford, Hart Publishing, 2009, 187-188. *Contra*: S. BLAKE and D. SCHNICHELS, "Leniency Following Modernization: Safeguarding Europe's Leniency Programs", *ECLR* 2004, 765-767.

[140] Recital 39 of the Network Notice.

[141] S. BRAMMER, *Cooperation Between National Competition Agencies in the Enforcement of EC Competition Law*, Oxford, Hart Publishing, 2009, 187; E. PAULIS, "Eighteen Months of Cooperation Within the ECN- Achievements and Challenges Illustrated the Work in the Leniency Field", in A.M. MATEUS and T. MOREIRA (eds.), *Competition Law and Economics. Advances in Competition Policy and Antitrust Enforcement*, Alphen aan den Rijn, 2008, 118-121; K. DEKEYSER and M. JASPERS, "A New Era of ECN Cooperation. Achievements and Challenges with Special Focus on Work in the Leniency Field", *World Competition* 2007, 14-15; C. GAUER and M. JASPERS, "Designing a European Solution for a "One-Stop Leniency Shop", *ECLR* 2006, 685-687.

[142] S. BRAMMER, *Cooperation Between National Competition Agencies in the Enforcement of EC Competition Law*, Oxford, Hart Publishing, 2009, 188.

Ultimately, it is very delicate to prove that an NCA has in fact disregarded Recital 39 of the Network Notice.[143]

EVALUATION – In blowing the whistle to an NCA, an undertaking runs the risk that another member of the ECN opens parallel proceedings, against which the undertaking's previous leniency application will not be able to protect him. The Leniency Notice and the Network Notice seem consequently not able to ensure that the undertaking can oversee on behorehand the consequences of its leniency application.

b. Risk of (re)allocation of the leniency application within the ECN

CASE ALLOCATION – Secondly, the case allocation mechanism within the ECN is an unpredictable system that threatens the principle of legality and the rights of defense of undertakings.[144] This mechanism essentially comes down to allocating a cartel case, often initiated by a leniency application, to the best-placed competition authority, regardless of whether it is the Commission or an NCA.[145]

PRINCIPLE OF LEGALITY – While this mechanism of case allocation seems to function well in daily practice because of the competition authorities' flexible and pragmatic approach,[146] it does not measure up with the requirements of the principle of legality.[147] In fact, the outcome of this process, which also defines the applicable sanctions, can hardly be predicted in advance.[148] First, the case

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[143] S. BRAMMER, *Cooperation Between National Competition Agencies in the Enforcement of EC Competition Law*, Oxford, Hart Publishing, 2009, 195.

[144] I. VAN BAEL and J.-F. BELLIS, *Competition Law of the European Community,* The Hague, Kluwer Law International, 2010, 1144; W. WILS, "Powers of Investigation and Procedural Rights and Guarantees in EU Antitrust Enforcement", *World Competition* 2006, 16-17. See however the Joint Statement of the Council and the Commission on the functioning of the network of competition Authorities, in which they indicate that "*All members of the network will endeavour to make allocation a predictable process with business and other interested parties receiving guidance as to where to direct complaints",* available at http://ec.europa.eu/competition/ecn/joint_statement_en.pdf, [Accessed on 30 April 2013].

[145] The case allocation mechanism is set up by Article 11(3) of Regulation 1/2003 and Recital 16 of the Network Notice. S. BLAKE and D. SCHNICHELS, "Leniency Following Modernization: Safeguarding Europe's Leniency Programs", *ECLR* 2004, 765-767; A. BURNSIDE and H. CROSSLEY, "Co-operation in Competition: A New Era?", *Eur. Law Rev.* 2005, 238-240.

[146] C. GAUER and M. JASPERS, "The European Competition Network, Achievements and Challenges- A Case In Point: Leniency", *Competition Policy Newsletter* 2006, 8-11.

[147] As indicated *Supra*, the principle of legality forms part of the procedural fairness criterion.

[148] S. BRAMMER, *Cooperation Between National Competition Agencies in the Enforcement of EC Competition Law*, Oxford, Hart Publishing, 2009, 197-198 and 210; J. SCHWARZE and A. WEITBRECHT, *Grundzuge des Europaïschen Kartellverfahrensrechts*, Baden-Baden, Nomos, 2004, 183. Due to the existing divergences, case allocation can have a considerable impact on the sanctions imposed for the infringement. S. BLAKE and D. SCHNICHELS, "Leniency Following Modernization: Safeguarding Europe's Leniency Programs", *ECLR* 2004, 765-767; P. BILLIET, "How Lenient is the EC Leniency Policy? A Matter of Certainty and Predictability", *ECLR* 2009, 19-20; C. GAUER and M. JASPERS, "Designing a European solution for a "One-Stop Leniency Shop", *ECLR* 2006, 685-692; K. DEKEYSER and M. JASPERS, "A New Era of ECN

allocation principles do not lead to clear and unequivocal results.[149] Secondly, while the examples stated in the Network Notice assume that the factors of the case allocation process are known, it is impossible to realize in advance all relevant facts in order to determine the outcome of the process. In particular with cartels, it is imaginable that it becomes clear at a later point in time that additional undertakings were involved or more member states were affected. It is thus hardly foreseeable to which extent such changes of the facts can lead to a reallocation of the case.[150] Finally, the case allocation process depends on factors of which the impact is difficult to forecast in advance, such as the enforcement priorities of the competition authorities, their available resources etc.[151] Consequently, due to the unclear and uncertain factors that determine the case allocation, this system does not respect the principle of legality.[152]

VIOLATION RIGHTS DEFENSE – The case allocation mechanism also does not respect the rights of defense of the undertakings. Both before the first formal investigative measures are taken, as well as at a later point in time of the procedure, it is impossible for the undertaking, that filed a leniency application, to comment on the allocation of its case. Recital 34 of the Network Notice requires the Commission only to inform the undertaking if the case is reallocated, which obviously is an *ex post* information duty.[153] According to Recital 5 of the Network Notice, the allocation process is predominantly an internal consultation round within the network and consequently does not give

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Cooperation. Achievements and Challenges with Special Focus on Work in the Leniency Field", *World Competition* 2007, 3-4; A.P. KOMNINOS, "Public and Private Antitrust Enforcement in Europe: Complement? Overlap?", December 2006, 20-23, available at http://www.clasf.org/CompLRev/Issues/Vol3Issue1Art1Komninos.pdf, [Accessed on 30 April 2013].

[149] S. BRAMMER, *Cooperation Between National Competition Agencies in the Enforcement of EC Competition Law*, Oxford, Hart Publishing, 2009, 206. This uncertainty is supplemented by the fact that the notion of the "effect on trade between member states" is extremely wide interpreted: A. NOURRY and M. JEPHCOTT, "The Interaction of EC and National Leniency Systems. Closing the Gap Between the Two Regimes is Critical", *Competition Law Insight* 2005, 7-8.

[150] S. BRAMMER, *Cooperation Between National Competition Agencies in the Enforcement of EC Competition Law*, Oxford, Hart Publishing, 2009, 206-209.

[151] S. BRAMMER, *Cooperation Between National Competition Agencies in the Enforcement of EC Competition Law*, Oxford, Hart Publishing, 2009, 209-210.

[152] While the ECtHR has stated that this legal uncertainty does not amount to a breach of the principle of legality since the possibility of *e.g.* a criminal punishment 'could reasonably be foreseen', S. BRAMMER rightly points out, that "*it would overstretch the meaning of the criteria "foreseeability" and "defined by law" if we would accept that the mere existence in some member states of e.g. domestic criminal laws is sufficient to satisfy the conditions of Article 7 ECHR, even though the risk of being held criminally liable is nothing more than an abstract possibility as it is highly uncertain whether the relevant national provisions would be applies at all in a specific case.*"; *CR v United Kingdom* no. 335-C, para. 34, ECHR, 1995-II; S. BRAMMER, *Cooperation Between National Competition Agencies in the Enforcement of EC Competition Law*, Oxford, Hart Publishing, 2009, 212.

[153] S. BRAMMER, *Cooperation Between National Competition Agencies in the Enforcement of EC Competition Law*, Oxford, Hart Publishing, 2009, 213.

rise to a formal allocation decision.[154] This indicates that, even though the allocation of a case can have significant consequences for the success of a leniency application, the designers of the allocation process never had the intent to create a legal procedure in which undertakings could contest the allocation decisions before a judge.[155] As such, the lack of an inscribed remedy in this process to dispute the allocation decision amounts to a disrespect of the rights of defense.

c. Evaluation

DIFFERENCES IN LENIENCY SYSTEMS – An assessment of the consequences of the different leniency programs demonstrates that the requirements of procedural fairness are not respected. First, due to the information flow within the ECN, a leniency applicant runs the risk of becoming involved in additional prosecutions when filing a leniency application. As such, the undertaking is unable to oversee the consequences of blowing the whistle, which contradicts with the principle of legal certainty. The Leniency Notice and the Network Notice should be able to guarantee that the undertaking can predict precisely which situations and legal relationships derive from a leniency application. Secondly, the case allocation process hampers the principle of legality and the procedural rights of defense. While it is in practice impossible to predict the outcome of a case allocation, the undertaking cannot reasonably foresee which fines could be imposed and consequently what the outcome of the leniency application might be. The Network Notice moreover installs no possibility for the undertaking to challenge the allocation decision, thereby jeopardizing the procedural rights of defense.

3.3.2. Access to the leniency applicant's corporate statement

OVERVIEW – To date, leniency applicants have no assurance that both the Commission as well as the NCAs treat their corporate statement confidentially *vis-à-vis* third parties.[156] This uncertainty does not coincide with the

[154] According to Recital 5 of the Network Notice, neither the Commission nor the ECN has the power to formally assign a particular case to a jurisdiction: *"each network member retains full discretion in deciding whether or not to investigate a case."* This reasoning is also reflected in Article 27(2) of Regulation 1/2003 that excludes correspondence between members of the networks and documents drawn up pursuant to Article 11 of Regulation 1/2003 from the right of access to the file.

[155] Recital 31 of the Network Notice: "*allocation of cases does not create individual rights for the companies involved*. A. ANDREANGELI, *EU Competition Enforcement and Human Rights,* Cheltenham, Edward Elgar, 2009, 214-215; S. BRAMMER, *Cooperation Between National Competition Agencies in the Enforcement of EC Competition Law*, Oxford, Hart Publishing, 2009, 213-215; W. WILS, "The Reform of Competition Law Enforcement – Will It Work?", Community Report for the FIDE XXI Congress, Dublin, 2-5 June 2004" in D. CAHELL (ed.), *The Modernization of EU competition law enforcement in the EU – FIDE 2004 National Reports,* Cambridge, Cambridge University Press, 2004, 661.

[156] A.E. BEUMER and A. KARPETAS, "The Disclosure of Files and Documents in EU Cartel Cases: Fairytale or Reality?, *European Competition Journal* 2012, 123-125; Y BOTTEMAN and

requirements of procedural fairness, since the undertakings cannot predict the consequences of their leniency application.

a. Conflict of interest between leniency applicants and third parties

FACILITATION DAMAGES CLAIM – From the moment it has become possible for consumers to claim damages for their losses caused by Article 101 TFEU infringements,[157] third parties have tried to get access to their corporate statement. As mentioned in paragraph 13, the corporate statement of a leniency application contains, amongst others, the admission of illegality and the proof of an infringement of Article 101 TFEU,[158] and in this respect clearly increases the third parties' chances to obtain damages. Consequently, the leniency applicant who blows the whistle first, also risks of being the first to stand in

P. HUGHES, "Access To File: Striking the Balance Between Leniency and Private Enforcement Tools", *The European Antitrust Review* 2013, 3-5; C. CANENBLEY and T. STEINVORTH, "Effective Enforcement of Competition Law: Is There a Solution to the Conflict Between Leniency Programs and Private Damages Actions?", *Journal of European Competition law & Practice* 2011, 315-316; G. DE STEFANO, "Access of Damage Claimants to Evidence Arising Out of EU Cartel Investigations: a Fast-Evolving Scenario", *GCLR* 2012, 95; G. GODDIN, "The Pfleiderer Judgment on Transparency: the National Sequel of the Access to Document Saga", *Journal of European Competition law & Practice* 2012, 40-42.

[157] Even though the Leniency Notice does not contain any condition of restitution, the CJEU has for many years accepted that consumers can claim damages for their economic losses: ECJ, Case C-453/99, *Courage and Crehan* [2011] *ECR* I-6297; ECJ, Joined Cases C-295-298/04 *Manfredi* [2006] *ECR* I-6619; A. JONES and B. SUFFRIN, *EU Competition Law*, Oxford, Oxford University Press, 2011, 801-803; I. VAN BAEL and J.-F. BELLIS, *Competition Law of the European* Community, The Hague, Kluwer Law International, 2010, 1136-1137; R. WHISH, *Competition Law*, Oxford, Oxford University Press, 2012, 660; N. KROES recognized this tension between the leniency system and private enforcement: European Commission, "Damages Actions for Breach of the EC Antitrust Rules" COM [2005], available at http://ec.europa.eu/competition/speeches/index_theme_35.html, [Accessed on 30 April 2013]; M. BLOOM, "Despite Its Great Success, the EC Leniency Program Faces Great Challenges" in C.-D. EHLERMANN and I. ATANASIU (eds.), *European Competition Law Annual 2006: Enforcement of Prohibition of Cartels*, Oregon, Hart Publishing, 2006, 556-558; C. CANENBLEY and T. STEINVORTH, "Effective Enforcement of Competition Law: Is There a Solution to the Conflict between Leniency Programs and Private Damages Actions?", *Journal of European Competition Law & Practice* 2011, 315; G. DE STEFANO, "Access of Damage Claimants to Evidence Arising out of EU Cartel Investigations: A Fast-Evolving Scenario", *GCLR* 2012, 95; C.A. JONES, "Private Antitrust Enforcement in Europe: A Policy Analysis and Reality Check" *World Competition* 2004, 13; A.P. KOMNINOS, "Public and Private Antitrust Enforcement in Europe: Complement? Overlap?", December 2006, 23-26, available at http://www.clasf.org/CompLRev/Issues/Vol3Issue1Art1Komninos.pdf, [Accessed on 30 April 2013]; W. VAN GERVEN, "Substantive Remedies for the Private Enforcement of EC Antitrust Rules Before National Courts", *European Competition Law Annual* 2001, 3; D. J. WALSH, "Carrots and Sticks – Leniency and Fines in EC Cartel Cases", *ECLR* 2009, 31.

[158] The corporate statement in fact assembles all the incriminating evidence of the infringement of Article 101 TFEU and consequently is one of the centrepieces of the Leniency Notice. See Recital 31 of the Leniency Notice: *"(...) voluntary presentation by or on behalf of an undertaking to the Commission of the undertaking's knowledge of a cartel and its role therein prepared specially to be submitted under this Notice";* P.W. FORT, "Access to Evidence – The Conflict Between Leniency and Private Antitrust Legislation", *GCLR* 2008, 25-26.

front of a civil damages judge.[159] On top of this, unlike fines that cannot exceed 10 per cent of the annual turnover, civil damages are not capped, but are rather subject to an unrestricted assessment by the civil law judge.[160] It is thus of vital importance for the undertakings to know on beforehand whether their corporate statement will or will not be treated confidentially. However, nowadays, leniency applicants have no assurance that their corporate statement will not be given free, both before the Commission as well as before the NCAs.

b. Confidentiality and right of access at EU level

TRANSPARENCY REGULATION – While the grant of leniency itself cannot protect the undertaking from the civil law consequences of the infringement of the competition rules,[161] the Leniency Notice contains several measures to protect the confidentiality of the corporate statement.[162] Case law of the CJEU nevertheless reveals that these guarantees should not always be followed. Indeed, by relying on the Transparency Regulation, third parties have in some instances obtained access to the corporate statement, stored in the files of the Commission.[163] While the Commission has, by relying on the exceptions laid

[159] P.W. FORT, "Access to Evidence – The Conflict Between Leniency and Private Antitrust Legislation", *GCLR* 2008, 25-26; A.P. KOMNINOS, "Public and Private Antitrust Enforcement in Europe: Complement? Overlap?", December 2006, 1-3, available at http://www.clasf.org/CompLRev/Issues/Vol3Issue1Art1Komninos.pdf, [Accessed on 30 April 2013]; T. SCHOORS, T. BAEYENS and W. DEVROE, "Schadevergoedingsacties na kartelinbreuken", *NjW* 2011, 198-203.

[160] C. CANENBLEY and T. STEINVORTH, "Effective Enforcement of Competition Law: Is There a Solution to the Conflict Between Leniency Programs and Private Damages Actions?", *Journal of European Competition Law & Practice* 2011, 315-318.

[161] The immunity from administrative fines is institutionally independent from the civil law consequences of an infringement on Article 101 TFEU. J. BOOT, "Privaatrecht & Boete. Over double damages bij privaatrechtelijke handhaving van mededinging", *Ars Aequi* 2008, 200-208; A.P. KOMNINOS, "Public and Private Antitrust Enforcement in Europe: Complement? Overlap?", December 2006, 10-11, available at http://www.clasf.org/CompLRev/Issues/Vol3Issue1Art1Komninos.pdf, [Accessed on 30 April 2013]; W. WILS, "Leniency in Antitrust Enforcement: Theory and Practice", *World Competition* 2007, 57-58; D. WILSHER, "The Public Aspects of Private Enforcement in EC Law: Some Constitutional and Administrative Challenges of a Damages Culture", *Comp. L. Rev.* 2006, 27-29. It must moreover be stated that the Commission has a dual position in this matter, since it also encourages those private damages. The Commission sees these private damages actions as part of the enforcement of competition law in the EU. This is especially so since the imposition of fines does not (directly) benefit consumers; Commission White Paper – Damages actions for breach of the EC antitrust rules, COM [2008], 165, available at http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/whitepaper_en.pdf [Accessed on 30 April 2013].

[162] Recitals 30-35 of the Leniency Notice. It is clear that the Commission tries to ensure the confidentiality of the corporate statement, *e.g.* by introducing the possibility of giving oral corporate statements, by disclosing the statements only in secure circumstances and only to the addressees of a statement of objections etc.

[163] Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and European Commission documents [2001] *OJ L 145/43* ("Regulation 1049/2001"). This regulation regulates the access to documents

down in the Regulation, almost always rejected such requests for access to the leniency-evidence, the CJEU does not seem to unequivocally accept this line of reasoning.[164]

JUDGMENTS CJEU – First, in the case CDC HYDROGENE PEROXIDE, the EGC annulled a decision of the Commission refusing to grant third parties access to the un-edited version of the index of the file of a cartel case.[165] Secondly, in AUSTRIAN BANKS, the Austrian consumer organization obtained access to evidence from the file.[166] In both cases, the CJEU thus reversed the judgment of the Commission and ordered the disclosure of certain cartel evidence to a third party. Finally, in ENBW, the EGC annulled the Commission's refusal of access, because it had not carried out a concrete individual examination of the content of the requested documents as required by the applicable case law.[167] According to some, it can be deduced from these judgments that the CJEU does not accept a complete bar on disclosure of a leniency application, which consequently should be interpreted as opening the door for extended access to the Commission's file in cartel cases through the application of the Transparency Regulation. [168] Others argue that the CJEU's statements in these

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of the Commission. G. DE STEFANO, "Access of Damage Claimants to Evidence arising out of EU Cartel Investigations: A Fast-Evolving Scenario", *GCLR* 2012, 97-99.

[164] The Commission invokes either the exception for the protection of the commercial interests of third parties or the exception for the protection of the purpose of investigations: EGC, Case T-237/05 *Editions Odile Jacob v Commission* [2010] *ECR* II-2245; EGC, Case T-111/07 *Agrofert v Commission* [2010] *ECR* II-128, paras. 68-72; G. DE STEFANO, "Access of Damage Claimants to Evidence Arising out of EU Cartel Investigations: A Fast-Evolving Scenario", *GCLR* 2012, 98; P.W. FORT, "Access to Evidence – The Conflict between Leniency and Private Antitrust Legislation", *GCLR* 2008, 26-27. A third party will moreover not be given access to the Commission's files by invoking the Commission Notice on Access to Files, since it grants only access to the addressees of the statement of objections.

[165] EGC, Case T-437/08 *CDC* [2011] *nyr*, paras. 35 and 62. By relying on the exceptions of Article 4(2) of Regulation 1049/2001, the Commission denied access because disclosure would undermine the commercial interests of the undertakings as well as the purpose of the cartel investigations. According to the EGC, these exceptions needed to be interpreted strictly and narrowly. A. EZRACHI, *EU Competition Law. An Analytical Guide to the Leading Cases*, Oxford, Hart Publishing, 2012, 490; Y BOTTEMAN and P. HUGHES, "Access to File: Striking the Balance Between Leniency and Private Enforcement Tools", *The European Antitrust Review* 2013, 6; G. DE STEFANO, "Access of Damage Claimants to Evidence Arising out of EU Cartel Investigations: A Fast-Evolving Scenario", *GCLR* 2012, 98.

[166] CFI, Case T-2/03 *Verein für Konsumenteninformation* [2005] *ECR* II-1121.

[167] EGC, Case T-344/08 *EnBW Energie Baden-Württemberg v Commission* [2012] *nyr*. There are moreover some cases pending before the CJEU. EGC, Case T-534/11, *Schenker v Commission*, *nyr;* EGC, Case T-380/08 *Netherlands v Commission*, pending; EGC, Case T-185/12 *Huk-Coburg v Commission*, pending; EGC, Case T-341/12 *Evonik Degussa v Commission*, pending; R. HEMPEL, "Access to DG Competition's Files: An Analysis of Recent EU Court Case Law", *ECLR* 2012, 195-212.

[168] EGC, Case T-437/08 *CDC* [2011] *nyr*, para. 70; EGC, Case T-344/08 *EnBW Energie Baden-Württemberg v Commission* [2012] *nyr,* para. 125; A.E. BEUMER and A. KARPETAS, "The Disclosure of Files and Documents in EU Cartel Cases: Fairytale or Reality?, *European Competition Journal* 2012, 140-143; Y. BOTTEMAN and P. HUGHES, "Access to File: Striking the Balance between Leniency and Private Enforcement Tools", *The European Antitrust Review* 2013, 5-7; C. CAUFMANN, "Access to Leniency-Related Documents after Pfleiderer", *World Competition* 2011, 611-613.

cases were based on the specific circumstances of the case that did not precisely relate to leniency documents.[169] In any event, it is clear that, as a result of these rulings, it is uncertain to which extent documents with references to leniency materials and leniency materials themselves shall be disclosed to third parties in the future.[170]

c. Uncertainty of confidential treatment before the national courts

CASE PFLEIDERER – This dubious attitude of the CJEU is also noticeable in its PFLEIDERER judgment, as a consequence of which the protection against disclosure of leniency confessions is today not uniform nor predictable at national level.[171] In this case, the ECJ stated that the provisions of EU cartel law *"must be interpreted as not precluding a person who has been adversely affected by an infringement of EU competition law and is seeking to obtain damages from being granted access to documents relating to a leniency procedure involving the perpetrator of that infringement*".[172] As such, the national court must weigh the respective interests in favor of disclosure and those in favor of protection of that same information.[173] Thus, in the absence of EU rules and according to the principle of procedural autonomy, the member states must take the initiative to establish and apply national rules regarding the access to leniency documents. This doubtful judgment seems to indicate that the CJEU does not directly exclude the possibility of granting access to third parties.

DIFFERENT JUDGMENTS IN MEMBER STATES – In the aftermath of this judgment, member states throughout the EU have ruled differently on the access to the corporate statement. First, following the ruling of the ECJ, the District Court of Bonn refused to grant the claimant access to the leniency confessions after

[169] G. DE STEFANO, "Access of Damage Claimants to Evidence Arising out of EU Cartel Investigations: a Fast-Evolving Scenario", *GCLR* 2012, 95 and 97-98.

[170] Y. BOTTEMAN and P. HUGHES, "Access to File: Striking the Balance between Leniency and Private Enforcement Tools", *The European Antitrust Review* 2013, 4-5; R. HEMPEL, "Access to DG Competition's Files: An Analysis of Recent EU Court Case Law", *ECLR* 2012, 195-212.

[171] EGC, Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] *nyr.* See also the pending case which probably will further elaborate on this point: ECJ, Case 536/11 *Donau Chemie and Others,* pending and the A-G's opinion: Opinion of A-G JÄASKINEN, ECJ, Case C-536/11 [2013], pending; G. DE STEFANO, "Access of Damage Claimants to Evidence Arising out of EU Cartel Investigations: a Fast-Evolving Scenario", *GCLR* 2012, 101-110.

[172] ECJ, Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] *nyr*, para. 2. The ECJ thereby neglected the point of view of several member states and A-G MAZÁK: Opinion of A-G MAZÁK, ECJ, Case C-360/09 *Pfleiderer AG v Bundeskartellamt*, *nyr*, paras. 44-47; C. CANENBLEY and T. STEINVORTH, "Effective Enforcement of Competition Law: Is There a Solution to the Conflict Between Leniency Programs and Private Damages Actions?", *Journal of European Competition law & practice* 2011, 321.

[173] EGC, Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] *nyr*, para. 31; G. GODDIN, "The Pfleiderer Judgment on Transparency: the National Sequel of the Access to Document Saga", *Journal of European Competition law & Practice* 2012, 40-42; I. VANDENBORRE and S.B. THOMAS, "European Court of Justice Provides Limited Guidance on the Disclosure of Leniency Documents", *ECLR* 2011, 488-489.

having considered the various factors and carrying out the balancing test proposed by the ECJ.[174] Maintaining the attractiveness of the leniency program was the prime argument to refuse disclosure.[175] In a second case, the Higher Regional Court in Düsseldorf decided that the denial of third-party access to the leniency applications of cartel participants was valid in court proceedings.[176] Thus, according to the latter, leniency applicants can rely on the confidentiality of their applications, not only before the *Bundeskartellamt* but also in court proceedings. In the United Kingdom, a much more nuanced approach is followed. In the saga of the GAS INSULATED SWITCHGEAR cartel, the English High Court decided that in the specific circumstances of the case, disclosure had to be ordered, as the Court phrased it *"of, a number, but by no means all, of the redacted passages of the Commission's decision."*[177] This suggests that the English Courts will not deny disclosure as such, but that they will assess the circumstances of the case and the relevant documents before making decisions about the (non)-disclosure.[178]

EVALUATION – At the national level, the implementation of the recent PFLEIDERER judgment ensures a different outcome of the request of disclosure throughout the member states. This lack of uniformity increases uncertainty about the protection of leniency applications in Europe. Indeed, depending on the exact member state, disclosure of the leniency application is granted. It is

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[174] *Ambtsgericht* Bonn (District Court of Bonn,) Case no. 51 GS 53/09, Decision of January 18, 2012; Press Office of the *Bundeskartellam*t, Press release, "Decision of Local Court of Bonn strengthens leniency program", 30 January 2012, available at http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2012/2012_01_30.php [Accessed on 30 April 2013].

[175] Press Office of the *Bundeskartellamt*, Press release, "Decision of Local Court of Bonn strengthens leniency program", 30 January 2012, available at http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2012/2012_01_30.php [Accessed on 30 April 2013], in which A. MUNDT, President of the *Bundeskartellamt*, stated that: "*attractive leniency programs are of the utmost importance for effective cartel prosecution".*

[176] Press Office of the *Bundeskartellamt*, Press release, "Decision of Düsseldorf Higher Regional Court safeguards *Bundeskartellamt*'s leniency program", 27 August 2012, available at http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2012/2012_08_27.php, [Accessed on 30 April 2013].

[177] High Court of Justice Chancery Division, 4 April 2012, (2012) EWHC 869 (Ch), *National Grid Electricity Transmission Plc v ABB & ors*, available at http://ec.europa.eu/competition/antitrust/national_courts/1368894.pdf. It must be said that the English High Court initially ruled otherwise. Indeed, the Court reversed its ruling after the PFLEIDERER judgment and after having received observations from the Commission on this case: Observations of the Commission pursuant to Article 15(3) of Regulation 1/2003 provided in respect of case HC08C03243, November 3, [2011], available at http://ec.europa.eu/competition/court/amicus_curiae_2011_national_grid_en.pdf [Accessed on 30 April 2013]; *Gas Insulated Switchgear* Commission Decision 2008/C 5/07 [2008] OJ C 5/7, Case COMP/38.899; M.T. TIERNO CENTELLA, M. PINO and J. KLOUB, "Cartel Fined in the Gas Insulated Switchgear Sector", *Competition Policy Newsletter* 2007, 43-44.

[178] High Court of Justice Chancery Division, 4 April 2012, (2012) EWHC 869 (Ch), *National Grid Electricity Transmission Plc v ABB & ors*, para. 58 available at http://ec.europa.eu/competition/antitrust/national_courts/1368894.pdf, [Accessed on 30 April 2013].

therefore advisable to create more clear and uniform guidelines as concerns the disclosure of the corporate statement.[179]

d. Evaluation

LEGAL UNCERTAINTY – The above review indicates that, due to the CJEU dubious case law, both in cases before the Commission as before the NCAs, undertakings have no guarantee that their corporate statement will not be disclosed to third parties. While the Leniency Notice contains certain protection measures against such disclosure, case law of the CJEU reveals that third parties, in relying on the Transparency Regulation, arguably could get (more) access (in the future). This lack of clarity does not coincide with the requirement of legal certainty. The leniency applicant should be able to survey all the consequences of a certain regulation, especially if financial aspects are attached to it.[180] As such, the undertaking should be able to know in advance whether, as a consequence of its leniency application, it will expose itself to possible damages claims. This disrespect of legal certainty amounts to an absence of procedural fairness.

3.4. DISRESPECT OF THE UNDERTAKING'S PROCEDURAL RIGHTS IN LENIENCY APPLICATIONS

3.4.1. Enforcement of competition law with due regard to fundamental rights

APPLICABILITY HUMAN RIGHTS – As mentioned above, Regulation 1/2003 endows the Commission with far-reaching investigative, prosecutorial and decision-making power in the detection and suppression of cartels. This model of administrative enforcement has traditionally given the Commission a large margin of discretion. It should therefore not cause any surprise that many claims have been formulated over the years that the EU competition law enforcement does not stroke with sufficient respect for the undertaking's fundamental rights.[181] While these challenges were initially dismissed,[182] some

[179] It remains to be seen whether the pending case C-536/11 shall bring more guidance in this matter. In any event, a legislative interference would be the best option: G. DE STEFANO, "Access of Damage Claimants to Evidence Arising out of EU Cartel Investigations: a Fast-Evolving Scenario", *GCLR* 2012, 106-110. See also *infra*.

[180] See *supra*.

[181] A. ANDREANGELI, *EU Competition Enforcement and Human Rights,* Cheltenham, Edward Elgar, 2009, 1-23; C.S. KERSE and N. KHAN, *EC Antitrust Procedure,* London, Sweet & Maxwell, 2005, 126-127; H. SCHWEITZER, "Judicial Review in EU Competition Law", Chapter in D. GERADIN and I. LIANOS (eds.), *Research Handbook on EU Antitrust Law*, Edward Elgar Publishing, 2012, 1-4, forthcoming, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2129147l, [Accessed on 30 April 2013]; E.M. AMEYE, "The Interplay Between Human Rights and Competition Law in the EU", *ECLR* 2004, 332-333; M. BRONCKERS and A. VALLERY, "Fair and Effective Competition Policy in the EU: Which Role for Authorities and Which Role for the Courts after *Menarini*?", *European Competition Journal* 2012, 283-284; I. FORRESTER, "Due Process in EC Competition Cases: a Distinguished Institution with Flawed Procedures", *Eur. Law Rev.* 2009, 817-818; R. KNOX,

aspects of the ECHR have been receptive in the CJEU's case law over time, often instigated by the ECtHR. The CJEU has indeed stated multiple times during recent years that in the execution of its competition policy, the Commission should not only comply with procedural prescriptions, but should also respect the fundamental rights and general principles of EU law.[183] Undertakings consequently enjoy the protection of (some) fundamental rights and general principles in the procedure before the Commission.

RECENT ATTENTION – With the entry into force of the Charter[184] and the EU's commitment to become a party to the ECHR[185], the question whether the EU competition procedure is compatible with the ECHR and the general principles

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"ICN - The Due Process Debate Continues", *Global Competition Review* 2012, 21-23; A. RILEY, "The Modernization of EU Anti-Cartel Enforcement: Will the Commission Grasp the Opportunity?" *ECLR* 2010, 191; D. SLATER, S. THOMAS and D. WAELBROECK, "Competition Law Proceedings before the European Commission and the Right to a Fair Trial: No Need for Reform?", *Global Competition Law Centre Working* Paper 2008, 2-4, available at http://www.coleurope.eu/content/gclc/documents/GCLC%20WP%2004-08.pdf [Accessed on 30 April 2013]; W. WEISS, "Human Rights and EU Antitrust Enforcement: News from Lisbon", *ECLR* 2011, 186.

[182] For example, the ECJ stated in an early case that the Commission was not a tribunal within the meaning of Article 6 ECHR and that the standards of Article 6 ECHR were consequently not applicable: ECJ, Joined Cases C-215/78 to C-218/78 *Fedetab* [1980] *ECR* 3125, paras. 79-81; F. MONTAG, "The Case for a Radical Reform of the Infringement Procedure under Regulation 17", *ECLR* 1996, 428; M. MESSINA, "The Protection of the Right to Private Life, Home and Correspondence v the Efficient Enforcement of Competition Law: Is a New EC Competition Court the Right Way Forward? *European Competition Journal* 2007, 185-187.

[183] Article 6 TEU. ECJ, Case C-189/02 P *Dansk Rorindustri and others v Commission* [2005] *ECR* I-05425; EGC, Case T-299/08 *Elf Aquitaine/Commission* [2011] *ECR* 2011, para. 173; EGC, Case T-138/07 *Schindler v Commission* [2011] *nyr*, para. 163. It seems that nowadays also the Charter is more and more invoked: EGC, Case T-127/04 *KME v Commission* [2009] *ECR* II-1167; Opinion A-G RUIZ-JARABO, ECJ, Joined Cases C-204 and C-205, C-211 to C-219/00 P *Aalborg A/S and Others v Commission* 2004 *ECR* I-123, para. 26: "*the Commission has wide powers of investigation and inquiry but, precisely because of that nature and because one and the same body is invested with the power to conduct investigations and the power to take decision, the rights of defense of those subject to the procedure must be recognized without reservation and respected*"; P. VAN NUFFEL, "De handhaving van het Europees mededingingsrecht in het licht van de mensenrechten" in *Recht in Beweging. 19e VRG-Alumnidag 2012,* Antwerp, Maklu, 2012, 351-363. Charter of Fundamental Rights of the European Union, *OJ C 326.*

[184] Article 6(1) TEU. The Charter however corresponds to the ECHR, see Article 52 (3) of the Charter: *"In so far as this Charter contains rights which correspond to rights guaranteed by the Convention, the meaning and scope of those Charter rights shall be the same"*. M. BRONCKERS and A. VALLERY, "Fair and Effective Competition Policy in the EU: Which Role for Authorities and Which Role for the Courts after *Menarini*?", *European Competition Journal* 2012, 284; L. ORTEGA, "Fundamental rights in the European Constitution. European Public Law", *Kluwer Law International* 2005, 363-364; W. WEISS, "Human Rights and EU Antitrust Enforcement: News From Lisbon", *ECLR* 2011, 186-187.

[185] Article 6(2) TEU. For a recent update about the accession, see Council of Europe, "Final Report to the CDDH, Fifth Negotiation Meeting between the CDDH *AD HOC* Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights", 5 April 2013, available at http://www.coe.int/t/dghl/standardsetting/hrpolicy/accession/Meeting_reports/47_1%282013%29008_final_report_EN.pdf [Accessed on 30 April 2013].

of EU law has acquired renewed attention and importance.[186] This new interest is also prompted by the Commission's vigorous fining policy and steady record of uncovered cartels, which leads undertakings to frame more criticisms in human rights terms.[187]

LENIENCY AND FUNDAMENTAL RIGHTS – Recently, the leniency instrument, obviously a part of the Commission's competition law enforcement, has also been criticized for its disrespect for the ECHR and the general principles of EU law.[188] The increasing number of fines and, consequently, the growing difference between the undertakings that are rewarded or fined for the same anti-competitive behavior, has instigated ever louder criticisms on the compatibility of the leniency system with the requirements of procedural fairness. In the next section it is explored, by examining the procedural rights and safeguards of the undertakings in the leniency procedure, whether these

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[186] J. CALLEWAERT, "The European Convention on Human Rights and European Union Law: A Long Way to Harmony", *EHRLR* 2009, 770-773; S. DOUGLAS-SCOTT, "A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis", *CMLR* 2006, 661-662; C. LESKINEN, "An Evaluation of the Rights of Defense During Antitrust Inspections in the Light of the Case Law of the ECtHR: Would the Accession of the European Union to the ECHR Bring About a Significant Change?", *Working paper IE Law School* 2010, 2-6, available at http://globalcampus.ie.edu/webes/servicios/descarga_sgd_intranet/envia_doc.asp?id=9697&nombre=AccesoDatosDocumentIE.Documento.pdf&clave=WPLS10-04 [Accessed on 30 April 2013]; W. WEISS, "Human Rights and EU Antitrust Enforcement: News From Lisbon", *ECLR* 2011, 186-187; W. WEISS, "Human rights in the EU: Rethinking the Role of the European Convention on Human Rights after Lisbon", *European Constitutional Law Review* 2011, 64-65. *Contra:* A.S. GRAELLS, "The EU's Accession to the ECHR and Due Process Rights in EU Competition Law Matters: Nothing New Under the Sun?", *Working Paper Series* 2012, 1-5, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2156904&download=yes [Accessed on 30 April 2013].

[187] A. ANDREANGELI, *EU Competition Enforcement and Human Rights,* Cheltenham, Edward Elgar, 2009, 8; E. M. AMEYE, "The Interplay between Human Rights and Competition Law in the EU", *ECLR* 2004, 336; V.O. BENJAMIN, "The Application of EC Competition law and the European Convention on Human Rights", *ECLR* 2006, 693-695; I. FORRESTER, "Due Process in EC Competition Cases: A Distinguished Institution with Flawed Procedures", *Eur. Law Rev.* 2009, 817; W. WEISS, "Human Rights in the EU: Rethinking the Role of the European Convention on Human Rights after Lisbon", *European Constitutional Law Review* 2011, 64-66; W. WEISS, "Human Rights and EU antitrust Enforcement: News from Lisbon", *ECLR* 2011, 186.

[188] R. ALLENDESALAZAR and P. MARTINEZ-LAGE, "Evidence Gathered Through Leniency: From the Prisoner's Dilemma to A Race to the Bottom", in C.-D. EHJERMANN and M. MARQUIS (eds.) *European Competition Law Annual 2009. The Evaluation of Evidence and its Judicial Review in Competition Cases*, Oxford, Oxford and Portland Hart Publishing 2009, 567; D. ARTS, "Iedereen gelijk voor de wet? Beschouwingen over de rechtmatigheid van het verlenen van clementie in kartelzaken", *TBM* 2012, 3; P. BILLIET, "How Lenient is the EC Leniency Policy? A Matter of Certainty and Predictability", *ECLR* 2009, 14; J. SCHWARZE, R. BECHTOLD and W. BOSCH, "Deficiencies in European Community Competition Law. Critical Analysis of the Current Practice and Proposals for Change", *Gleiss Lutz Rechtsanwälte* 2008, 30-35. The ECJ however rejected the argument that the use of the leniency instrument would be contrary to fundamental rights. ECJ, Case C-298/98 *Metsä-Serla (Finnboard) v. Commission* [2000] *ECR* I-10171, paras. 56-57: *"Nor (...) can the complaint of infringement of the rights of defence be upheld. An undertaking which, when challenging the Commission's stance, limits its cooperation to that which is required under Regulation 17 (now 1/2003), will not, on that ground, have an increased fine imposed on it"*.

concerns are warranted. The inquiry obviously shall remain restricted to those procedural rights that are problematic in leniency applications in particular, and not in the cartel enforcement procedure in general.[189]

3.4.2. Disrespect of the right to a fair trial

a. No independent and impartial judge assessing the leniency application

CENTRALIZATION OF FUNCTIONS – The Commission's current institutional structure in enforcing its leniency system does not measure up with the requirements of an independent and impartial judge, given that its centralization of different functions inevitably bears the risk of a prosecutorial bias.[190] Indeed, according to this prosecutorial bias, a case handler of the Commission is more likely to identify a violation of competition law once the proceedings have commenced.[191]

FULL JUDICIAL REVIEW – Today, in spite of the past intense debate, it is generally accepted that the requirements of Article 6 (1) ECHR are applicable in competition law procedures before the Commission.[192] According to some, the case law of the ECtHR and the CJEU indicates however that, in spite of the

[189] The inquiry is moreover limited to those procedural rights that have already been invoked by the undertakings before the Commission or the CJEU or that have caused controversy.

[190] The requirement of an independent and impartial judge is laid down in Article 6(1) ECHR. M. BRONCKERS and A. VALLERY, "Fair and Effective Competition Policy in the EU: Which Role for Authorities and Which Role for the Courts After *Menarini*?", *European Competition Journal* 2012, 283-284; D. SLATER, S. THOMAS and D. WAELBROECK, "Competition Law Proceedings before the European Commission and the Right to a Fair Trial: No Need for Reform?", *Global Competition Law Centre Working* Paper 2008, 1-2, available at http://www.coleurope.eu/content/gclc/documents/GCLC%20WP%2004-08.pdf [Accessed on 30 April 2013].

[191] M. BRONCKERS and A. VALLERY, "Fair and Effective Competition Policy in the EU: Which Role for Authorities and Which Role for the Courts After *Menarini*?", *European Competition Journal* 2012, 296-297; J. JOWELL, "Administrative Justice and Standards of Substantive Judicial Review", in *Continuity and Change in EU Law, Essays in Honour of Sir Francis Jacobs*, Oxford, Oxford University Press, 2008, 172-186; W. WILS, "The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis", *World Competition* 2004, 212-219.

[192] In short, two non-cumulative conditions need to be fulfilled. Vested case law has clarified that the fines imposed by the Commission are to be regarded as being criminal in nature, as a result of which the second condition is fulfilled. *Engels And Others v The Netherlands* no. 5100/71, 5101/71, 5102/71, 5354/72; 5370/72, ECHR, 1976-II; *Jussila v Finland* no. 73053/01, para. 43, ECHR, 2006-II. W. WILS, "La comptabilité des procedures communautaires en matière de concurrence avec la convention Européenne des droits de l'homme", *Cahiers de Droit Européen* 1996, 329-331; W. WILS, "The Increased Level of EU Antitrust Fines, Judicial Review and the ECHR", *World Competition* 2010, 10-16; R. WESSELING and M.H. VAN DER WOUDE, "Over de rechtmatigheid en aanvaardbaarheid van de handhaving van het Europese kartelrecht", *SEW* 2012, 175-178. Even before the proclamation of the Charter of Fundamental Rights, the ECJ recognized the right to judicial review by an independent and impartial judicial body: ECJ, C-506/04 *Wilson* [2006] *ECR* I-8613, paras. 43-61; ECJ, Case C-208/07 P *Gorostiaga Atxalandabaso* [2009] *ECR* I-1059, paras 41-46.

criticisms formulated in the legal literature,[193] the Commission's institutional structure does not violate Article 6 (1) as long as the decisions of the Commission can be subject to judicial review by a court with full jurisdiction.[194] Thus, the Commission's institutional structure respects Article 6 (1) on the condition that the CJEU can carry out an in-depth judicial review of its decisions.[195]

MARGIN OF DISCRETION – It is however debatable whether this review by the CJEU fulfills the requirements of a "full judicial review".[196] While the TFEU grants the CJEU clearly defined powers of judicial review,[197] it is well known

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[193] According to some, the CJEU and the ECtHR have still not yet *explicitly* acknowledged the current Commission's institutional architecture: M. BRONCKERS and A. VALLERY, "Fair and Effective Competition Policy in the EU: Which Role for Authorities and Which Role for the Courts after *Menarini*?", *European Competition Journal* 2012, 296-297; D. WAELBROECK and D. FOSSELARD, "Should the Decision-Making Power in EC Antitrust Procedures Be Left to an Independent Judge? The Impact of the European Convention of Human Rights on EC Antitrust Procedures", *Yearbook of European Law* 1994, 111.

[194] The main argument for this reasoning lies in the MENARINI case of the ECtHR, which is afterwards also confirmed in the POSTEN NORGE judgment of the EFTA court. *Menarini Diagnostics v Italy*, no. 43509/08, para. 59, ECHR, 2011-II; EFTA COURT, Case E-15/10 *Action brought on 14 September 2010 by Posten Norge AS against the EFTA Surveillance Authority* 2010/C 320/12. In this case, the ECtHR decided that the Italian Competition Authority did not violate Article 6(1) ECHR, since the Italian court fully reviewed the decision of the Italian Competition Authority. While the Italian Competition Authority concentrates the same powers as the Commission, its enforcement structure is a mirror of the Commission's. The outcome of this case was consequently of utmost relevance for the compatibility of the Commission's institutional structure with Article 6 ECHR. M. BRONCKERS and A. VALLERY, "Fair and Effective Competition Policy in the EU: Which Role for Authorities and Which Role for the Courts After *Menarini*?", *European Competition Journal* 2012, 285-288; P. OLIVER, "'Diagnostics' – A Judgment Applying the Convention of Human Rights to the Field of Competition", *Journal of European Competition Law & Practice* 2012, 163-165; R. WESSELING and M.H. VAN DER WOUDE, "Over de rechtmatigheid en aanvaardbaarheid van de handhaving van het Europese kartelrecht", *SEW* 2012, 175-177; W. WILS, "La comptabilité des procedures communautaires en matière de concurrence avec la Convention Européenne des droits de l'homme", *Cahiers de Droit Européen* 1996, 341-343. From MENARINI, it is inferred that competition law fines belong to the periphery of criminal law, a distinction which was made in the earlier judgement JUSSILA. Consequently, procedural guarantees do not need to be complied with the same strength as in a hard-core criminal procedure. *Jussila v Finland* no. 73053/01, para. 43, ECHR, 2006-II.

[195] P. LEMMENS, "Enkele beschouwingen bij de zogenaamde "volle rechtsmacht" van de rechter bij de toetsing van administratieve sancties", in *Liber Amicorum Marc Boes*, Brugge, die Keure, 2011, 402-405; D. WAELBROECK and C. SMITS, "Le droit de la concurrence et les droits fondamentaux" In *Les droits de l'homme dans les politiques de l'Union européenne*, plaats, Larcier, 2006, 137-145.

[196] J. JOWELL, "Administrative Justice and Standards of Substantial Review", in A. ARNULL, P. EECKHOUT and T. TRIDIMAS (eds.), *Continuity and Change in EU Law, Essays in Honour of Sir Francis Jacobs,* Oxford, Oxford University Press, 2008, 172; M. BRONCKERS and A. VALLERY, "Fair and Effective Competition Policy in the EU: Which Role for Authorities and Which Role for the Courts after *Menarini*?", *European Competition Journal* 2012, 286-295; EDITORIAL COMMENTS, "Towards a More Judicial Approach? EU Antitrust Fines Under the Scrutiny of Fundamental Rights", *CMLR* 2011, 1413-1416; R. WESSELING and M.H. VAN DER WOUDE, "Over de rechtmatigheid en aanvaardbaarheid van de handhaving van het Europese kartelrecht", *SEW* 2012, 174-186.

[197] Pursuant to Article 261 TFEU and Article 31 of Regulation 1/2003, the CJEU is endowed with an unlimited jurisdiction to assess the appropriateness of the amount of the fine imposed by the

that the CJEU allows the Commission a considerable margin of discretion with respect to complex economic or technical assessments of a certain cartel.[198] In these instances, the CJEU limits its review to *"checking whether the relevant rules on procedure and on stating reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers"*.[199] Consequently, it is very disputable whether the latter review squares with a full judicial review.

SUBSEQUENT CASE LAW – In the KME[200] and CHALKOR[201] judgments, the ECJ provided for the first time recommendations, though still in very vague phrases, about the level of judicial review that the EGC must carry out when reviewing the Commission's decisions.[202] The Court held that *"the Courts cannot use the Commission's margin of discretion ... as a basis for dispensing with the conduct of an in-depth review of the law and the facts."*[203] In this case, the ECJ has been sensitive for the criticisms about the margin of appreciation

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Commission. The review rules of the finding of an infringement are laid down in paras. 1 and 2 of Article 263 TFEU. This legality review can stretch both legal interpretations as well as factual assessments, the latter however only before the EGC. ECJ, Case C-7/95 *John Deere v Commission* [1998] *ECR* I-3111, paras. 34-36; ECJ, Case C-194/99 *Thyssen Stahl* [2003] *ECR* I-10821, para. 78; EGC, Case T-28/09 *Holcim v Commission* [2005] *ECR* II-1357, para. 95.

[198] *E.g.* ECJ, Case 42/84 *Remia v Commission* [1985] *ECR* I-2545, para. 34; ECJ, Case C-269/90 *Technische Universität München v Hauptzollamt München-Mitt*e [1991] *ECR* I-5469; EGC, Case T-201/04 *Microsoft v Commission*, [2007] *ECR* II- 03601; H. SCHWEITZER, "Judicial review in EU Competition law", Chapter in D. GERADIN and I. LIANOS (eds.), *Research Handbook on EU Antitrust Law*, Edward Elgar Publishing, 2012, 8-14, forthcoming, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2129147, [Accessed on 30 April 2013]; M. BRONCKERS and A. VALLERY, "Business as Usual After Menarini?", *mLex Magazine* 2012, 44-47.

[199] CFI, Case T-28/03 *Holcim v Commission* [2005] *ECR* II-1357, para. 95. See also ECJ, Case 42/48 *Remia v Commission* [1985] *ECR* 2585, para. 26; ECJ, Case C-7/95 *John Deere v Commission* [1998] *ECR* I-3111, paras. 34-36; ECJ, Case C-194/99 *Thyssen Stahl* [2003] *ECR* I-10821, para. 78.

[200] ECJ, Case C-389/10P *KME v Commission* and ECJ, C-272/09 P *KME v Commission* [2011] *nyr.*

[201] ECJ, Case C-386/10 P *Chalkor v Commission* [2011] *nyr.*

[202] In MENARINI, the ECtHR was however not crystal clear on the issue of a margin of appreciation. The ECtHR stated that even though some limitations to the full judicial review are acceptable, the court should nevertheless assess whether the competition authority "*made an appropriate use of its powers"*, from which it can be deduced that the powers of review go beyond a mere control of legality: *Menarini Diagnostics v Italy*, no. 43509/08, para. 61 and 64, ECHR, 2011-II; L. PARRET, "Effectieve rechtsbescherming: eindeloos potentieel, ongeleid projectiel?" *NtER* 2012, 159-161; I. FORRESTER, "Due Process After Menarini and Chalkor: Is There Any More To Say?", 8-9, http://www.expertguides.com/default.asp?Page=9&GuideID=310&Ed=175 [Accessed on 30 April 2013]; R. WESSELING and M.H. VAN DER WOUDE, "Over de rechtmatigheid en aanvaardbaarheid van de handhaving van het Europese kartelrecht", *SEW* 2012, 175-178.

[203] ECJ, Case C-389/10 *KME Germany And Others v Commission* [2011] *nyr,* paras. 102-103; M. BRONCKERS and A. VALLERY, "Fair and Effective Competition Policy in the EU: Which Role for Authorities and Which Role for the Courts After *Menarini*?", *European Competition Journal* 2012, 291-292; P. OLIVER, "'Diagnostics' – A Judgment Applying the Convention of Human Rights to the Field of Competition", *Journal of European Competition Law & Practice* 2012, 163-165.

review and 'condemned' the previous cases of the EGC in which a deferential standard of review was used. [204] This more strict approach was later confirmed by POSTON NORGE, a judgment issued by the EFTA court.[205] These cases could be interpreted as an invitation for the EGC to engage in a more thorough judicial review.[206]

EVALUATION – Today, in spite of the mission of the aforementioned Courts to denounce the margin of discretion, there still is no thorough judicial review of the Commission's decisions in every case.[207] While the aforementioned

[204] P. OLIVER, "'Diagnostics' – A Judgment Applying the Convention of Human Rights to the Field of Competition", *Journal of European Competition Law & Practice* 2012, 163-165; R. WESSELING and M.H. VAN DER WOUDE, "Over de rechtmatigheid en aanvaardbaarheid van de handhaving van het Europese kartelrecht", *SEW* 2012, 175-179. However, it must be stressed that although the EGC had referred a number of times to the Commission's discretion as being "wide" or "substantial", according to the ECJ, *"this had not prevented the EGC from engaging in "the fill and unrestricted review, in law and in fact, required of it",* para. 102. Thus, while the ECJ clearly stated how the EGC must guarantee full judicial review and emphasized that the court must restrict its limited review to the bare minimum, *in casu* they refused to criticize the obviously less than full review of the EGC. ECJ, Case C-389/10 *KME Germany And Others v Commission* [2011] *nyr,* paras. 102-103; M. BRONCKERS and A. VALLERY, "Fair and Effective Competition Policy in the EU: Which Role for Authorities and Which Role for the Courts After *Menarini*?", *European Competition Journal* 2012, 291-292; I. FORRESTER, "Due Process After Menarini and Chalkor: Is There Any More To Say?", 8-9, http://www.expertguides.com/default.asp?Page=9&GuideID=310&Ed=175 [Accessed on 30 April 2013].

[205] Since EEA-law mirrors EU law, this judgment constitutes a significant source of inspiration for EU law. The EFTA court comes here to a rather blunt conclusion, which the ECJ never expressed so clearly, as it concludes that *"the submission that the court may intervene only if it considers a complex economic assessment to be manifestly wrong must be rejected".* EFTA COURT, Case E-15/10 *Action brought on 14 September 2010 by Posten Norge AS against the EFTA Surveillance Authority* 2010/C 320/12, para. 102. See also para. 100 of the judgment with regard to the complex economic assessments.

[206] P. VAN CLEYNENBREUGEL, "Case law. Case note. Constitutionalizing Comprehensively Tailored Judicial Review in EU Competition Law. Judgments of the Court (second chamber) in Case C-272/09, KME Germany, KME France SAS and KME Italy spa v European Commission, Case C-386/10, Chalkor ae Epexergasias Metallon v European Commission and Case C-389/10, KME Germany, KME France SAS and KME Italy spa v European Commission of 8 December 2011, nyr", *Columbia Journal of European Law* 2012, 539-544.

[207] *Inter alia,* CFI, Case T-43/92 *Dunlop Slazengr v Commission* [1994] *ECR* II-441, paras. 178-179; CFI, Case T-338/94 *Finnboard v Commission* [1998] *ECR* II-1617, para. 342; CFI, Joined Cases T-191/98, T-21/98 to T-214/98 *Atlantic Container Line and Others v Commission* [2003] *ECR* II-3275; EGC, Case T-33/05 *Cetarsa v Commission* [2011] *ECR* II-00012, para. 271; EGC, Case T-37/05 *World Wide Tobacco Espana v Commission* [2011] *ECR* II-00041, para. 197; E. BARBIER DE LA SERRE, "A Lesson on Judicial Review from the Other European Court in Luxembourg", 2012, available at http://kluwercompetitionlawblog.com/2012/04/27/a-lesson-on-judicial-review-from-the-other-european-court-in-luxembourg/ [Accessed on 30 April 2013]; M. BRONCKERS and A. VALLERY, "Fair and Effective Competition Policy in the EU: Which Role for Authorities and Which Role for the Courts After *Menarini*?", *European Competition Journal* 2012, 290 and 294-296; EDITORIAL COMMENTS, "Towards a More Judicial Approach? EU Antitrust Fines under the Scrutiny of Fundamental Rights", *CMLR* 2011, 1413-1416; B. VESTERDORF, "The Court of Justice and Unlimited Jurisdiction: What Does it Mean In Practice?" *Global Competition Policy* 2009, 1603-1634, available at www.globalcompetitionpolicy.org; [Accessed on 30 April 2013]. *Contra:* M. JAEGER, "The Standard of Review in Competition Cases Involving Complex Economic Assessments: Towards

judgments indicate that the requirement for a full judicial review imposes stringent obligations, in daily practice, it seems that the attention and emphasis on a full judicial review are more theoretical phrases and hollow words than practical guidelines for decisions of particular cases. Thus, while the Commission centralizes today different functions (as such not compatible with the requirements of an independent and impartial judge) on one hand, the CJEU does not engage in a thorough review on the other hand and consequently does not counter the possible prosecutorial bias of the Commission. [208] As such, a leniency applicant cannot rely on the procedural guarantee of having an independent and impartial judge assessing their leniency application.

b. Lack of assessment of the leniency application within a reasonable time

OVERLOAD OF APPLICATIONS – The CJEU has recognized that undertakings enjoy the right of an assessment of their leniency application within a reasonable time, both during the administrative proceedings before the Commission[209] as well as afterwards before the EGC and the ECJ when reviewing the Commission's decision.[210] The case NEDERLANDSE BIERMARKT proves that the Commission does however not always respect this procedural

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the Marginalization of the Marginal Review?", *Journal of European Competition Law & Practice* 2011, 295-310.

[208] See *e.g.* the inconsistent and contradictory application of the former Leniency Notice in the cases *Seamless Steel Tubes* Commission Decision 2003/382/EC [2003] OJ L140/1, Case IV/E-1/35.860-B and *Greek Ferries* Commission Decision C(1998) 3792 [*1998*] OJ L 109/24, Case COMP/V/34466 *versus Zinc Phosphates* Commission Decision 2003/437/EC [2001] OJ L 153/1, Case COMP/E-1/37.027. There has however not yet been a thorough review of the Commission's decision practice indicating that this prosecutorial bias leads to a *systemic* failure of the Commission to ensure a fair outcome without arbitrary results. For an overview on the review on the Commission's fining decisions, see: D. GERADIN and D. HENRY, "The EC Fining Policy for Violations of Competition Law: An Empirical Review of the Commission Decisional Practice and the Community Courts' Judgments", *The Global Competition Law Centre Working Papers Series* 2005, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=671794 [Accessed on 30 April 2013]; F. MONTAG, "The Case for a radical reform of the infringement procedure under regulation 17", *ECLR* 1996, 428-467; W. WILS, "The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis", *World Competition* 2004, 212-217.

[209] ECJ, Case C-185/95 *Baustahlegewebe GmbH v Commission* [1998] *ECR* I-8417, paras. 20-22; ECJ, Case C-105/04 *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission* [2006] *ECR* I-00003, paras. 35-62; ECJ, Case C-113/04 *Technische Unie v Commission* [2006] *ECR* I-08831, paras. 40-72; CFI, Case T-213/00 *CMA CGM SA v Commission* [2003] *ECR* II-913; A. RILEY, "The Modernization of EU Anti-Cartel Enforcement: Will the Commission Grasp the Opportunity?" *ECLR* 2010, 191 and 194.

[210] ECJ, Case C-185/95 *Baustahlegewebe GmbH v Commission* [1998] *ECR* I-8417, paras. 20-22; ECJ, Joined Cases C-238/99, C-244/99, C-245/99, C-247/99, C-250-252/99 and C-254/99 *Limburgse Vinyl Maatschappij NV, DSM NV and DSM Kunststoffen BV, Montedison SpA, Elf Atochem SA, Degussa AG, Enichem SpA, Wacker-Chemie GmbH and Hoechst AG and Imperial Chemical Industries plc v Commission* [2002] *ECR* I-8375, paras. 164-235; ECJ, Joined Cases C-341/06 and C-342/06 *Chronopost and La Poste v UFEX and Others* [2008] *ECR* I-04777, paras. 44-60; ECJ, Case C-385/07 *Der Grüne Punkt – Duales System Deutschland v Commission* [2009], *ECR* I-06155, paras. 177-188.

guarantee laid down in Article 6 (1) ECHR. In this case, the Commission recognized that the procedure assessing a leniency application took (too) long and stated that this exceptionally justified an additional reduction of the fine.[211] This signifies that, due to the enormous amount of leniency applications, the Commission is nowadays becoming a victim of its own success. While the initial goal was to accelerate the procedure through leniency applications, the Commission struggles today with a considerable backlog, which could hinder the undertaking's right for a trial within a reasonable time.[212] An analysis of the Commission's decisions nevertheless clarifies that a recognition of the violation of this guarantee has not (yet) frequently appeared in the Commission's decision practice or the case law of the CJEU, arguably indicating that it is either not of great concern for the undertakings or that a violation of the requirement is not easily accepted by the CJEU.

c. Disregard of the presumption of innocence in leniency proceedings

OVERVIEW – From a procedural fairness point of view, the leniency system raises serious questions whether the requirements of the presumption of innocence of Article 6 (2) ECHR are complied with. While the presumption of innocence is applicable in cartel proceedings of the Commission,[213] three (closely related) aspects of the leniency system do not correspond with this requirement.

c.1. The reverse burden of proof

GENERAL RULE – First, since a leniency application requires a shift of the burden of proof from the Commission to an undertaking, it is questionable whether the presumption of innocence of the *accused* undertaking is respected.[214] This presumption, which signifies that every accused person is

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[211] *Nederlandse Biermarkt* Commission Decision C(2007)1697 [2007] OJ L 200, Case COMP/B-2/37.766, paras. 497-498: *"De Commissie erkent dat de procedure in deze zaak, die in maart 2000 is begonnen en meer dan zeven jaar heeft geduurd, ongepast lang was. Zoals in punt 5.2 is uiteengezet, zijn er geen aanwijzingen dat door de duur van de procedure de rechten van verdediging van de partijen zijn geschonden. Voor zover de duur van de procedure aan de Commissie toe te schrijven is en als onredelijk dient te worden aangemerkt, meent de Commissie dat dit een uitzonderlijke vermindering van geldboeten rechtvaardigt. Om die reden verlaagt de Commissie de boetebedragen met 100.000 EUR"* [Only available in Dutch].

[212] S*upra*. Former Commissioner Kroes, Answer to Parliamentary Question from Sharon Bowles MEP, written questions: E-0890/09, E-0891/09, E-0892/09, April 2, 2009; A. RILEY, "The Modernization of EU Anti-Cartel Enforcement: Will the Commission Grasp the Opportunity?", *ECLR* 2010, 191 and 194.

[213] ECJ, Case C-185/95 *Baustahlgewebe v Commission* [1998] *ECR* I-08417; ECJ, Case C-235/92 *Montecatini v Commission* [1999] *ECR* I-04539; ECJ Case C-199/92 *Hüls v Commission* [1999] *ECR* I-4287, paras. 149-150; CFI, Case T-62/98 *Volkswagen v Commission* [2000] *ECR* II-2707, para. 281; CFI, Case T-474/04 *Pergan Hilfsstoffe für industrielle Prozesse v Commision* [2007], *nyr,* paras. 76-81.

[214] R. ALLENDESALAZAR and P. MARTINEZ-LAGE, "Evidence Gathered Through Leniency: From the Prisoner's Dilemma to a Race to the Bottom", in C.-D. EHJERMANN and M. MARQUIS (eds.) *European Competition Law Annual 2009. The Evaluation of Evidence and Its*

presumed to be innocent until his guilt has been established according to the law,[215] requires that the burden of proof to establish an infringement of Article 101 TFEU rests with the Commission.[216] Article 2 of Regulation 1/2003 also explicitly confirms this. Taken together, the general rule is that the Commission bears the legal and evidentiary burden in proving all elements of an infringement of Article 101 TFEU.

LENIENCY NOTICE – However, the Leniency Notice requires that if an undertaking wants to be eligible for leniency, it must prove that it together with its competitors has infringed Article 101 TFEU.[217] A central feature of the leniency system is thus that the Commission does not gather the evidence on its own, but instead relies on the evidence supplied by the parties in order to issue a prohibition decision. The system moreover incentivizes the undertakings to make (too) extensive or general accusations on other undertakings, in order to qualify for leniency.[218] Consequently, instead of defending itself against the evidence supplied by the Commission, the accused undertaking has to exonerate itself from the accusations of the other undertakings.

SUPPLEMENTARY EVIDENCE – The CJEU has nevertheless defended the leniency system by stating that Article 2 of Regulation 1/2003 does not require the Commission to rely *solely* on the evidence gathered through its enforcement powers.[219] In its judgments, the CJEU has thus created a sort of

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Judicial Review in Competition Cases, Oxford, Oxford and Portland Hart Publishing 2009, 573; J. SCHWARZE, R. BECHTOLD and W. BOSCH, "Deficiencies in European Community Competition Law. Critical Analysis of the Current Practice and Proposals for Change", *Gleiss Lutz Rechtsanwälte* 2008, 30-35; D. ARTS, "Iedereen gelijk voor de wet? Beschouwingen over de rechtmatigheid van het verlenen van clementie in kartelzaken", *TBM* 2012, 6-7.

[215] *Supra*.

[216] ECJ, Case C-199/92 *Hüls v Commission* [1999] *ECR* I-4287, paras. 149-150; ECJ, Case C-235/92 *Montecatini v Commission* [1999] *ECR* I-4539, paras. 175 and 176; CFI, Case T-474/04 *Pergan Hilfsstoffe für industrielle Prozesse v Commision* [2007], *nyr,* paras. 76-81; CFI, Joined Cases T-67/00 *JFE Engineering Corp And Others v Commission* [2004] *ECR* II-2501, para. 178; CFI, Case T-44/04 *Dresdner Bank And Others v Commission* [2007] *nyr*, para. 61; F. ARBAULT and E. SAKKERS, "Cartels" in J. FAULL and C. NIKPAY (eds.), *The EC Law of Competition,* Oxford, Oxford University Press, 2007, 962.

[217] *E.g.* Recital 9 of the Leniency Notice. This requirement does moreover not seem to respect the privilege of self-incrimination, *infra*.

[218] J. SCHWARZE, R. BECHTOLD and W. BOSCH, "Deficiencies in European Community Competition Law. Critical Analysis of the Current practice and Proposals for Change", *Gleiss Lutz Rechtsanwälte* 2008, 32-33.

[219] ECJ, Joined Cases C-65/02 and C-73/02 *ThyssenKrupp Stainless GmbH v Commission* [2005] *ECR* I-6773, para. 51; EGC, Case T-138/07 *Schindler v Commission* [2011] *nyr,* paras. 159-163: *"The 2002 Leniency Notice does not alter the duty of the Commission, which has the burden of proving the infringements found by it, to adduce evidence capable of demonstrating to the requisite legal standard the existence of the circumstances constituting the infringement. Nevertheless, in proving the existence of an infringement, the Commission may rely upon any relevant information available to it. Thus, it may, without breaching the principle of the presumption of innocence, rely not only upon documents which it has obtained during the course of inspections carried out under Regulations No's 17 and 1/2003, or which it has received in*

"exceptional regime" for the leniency system, by mitigating the requirements of the presumption of innocence. From this, it can be deduced that a leniency application can serve as an additional piece of evidence for the Commission to prove the infringement of Article 101 TFEU. However, practice reveals that leniency is not just one part of the evidence next to the other proofs gathered by the *ex officio* enforcement, but that it is rather the ultimate basis of the whole investigation of the Commission. Without the leniency application, the Commission would in most cases not have been able to further investigate the alleged cartel, by *e.g.* executing dawn raids or sending requests for information. The latter reverse burden of proof also reverses the presumption of innocence to a presumption of guilt, since the accused undertakings are forced to gather evidence themselves in order to prove their innocence.[220]

c.2. The doubtful evidentiary value of a leniency application

CORRECTNESS EVIDENCE – In connection to the previous issue, it should be questioned in a second phase whether the Commission can *rely* on the leniency statement of an undertaking that incriminates other undertakings, without infringing the presumption of innocence.[221] The Commission indeed relies on incriminating evidence of another undertaking without having the guarantee and certainty that this evidence is correct.[222] As mentioned in paragraph 84, while undertakings, even if they have been previous partners in the cartel, remain competitors, it is not unlikely that the leniency applicant exaggerates

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response to requests for information made under those regulations, but also upon evidence which an undertaking has voluntarily submitted to it under the 2002 Leniency Notice".

[220] R. ALLENDESALAZAR and P. MARTINEZ-LAGE, "Evidence Gathered Through Leniency: From the Prisoner's Dilemma to a Race to the Bottom", in C.-D. EHJERMANN and M. MARQUIS (eds.) *European Competition Law Annual 2009. The Evaluation of Evidence and Its Judicial Review in Competition Cases*, Oxford, Oxford and Portland Hart Publishing 2009, 575-576; J. SCHWARZE, R. BECHTOLD and W. BOSCH, "Deficiencies in European Community Competition Law. Critical Analysis of the Current Practice and Proposals for Change", *Gleiss Lutz Rechtsanwälte* 2008, 32-33.

[221] R. ALLENDESALAZAR and P. MARTINEZ-LAGE, "Evidence Gathered Through Leniency: From the Prisoner's Dilemma to a Race To the Bottom", in C.-D. EHJERMANN and M. MARQUIS (eds.) *European Competition Law Annual 2009. The Evaluation of Evidence and its Judicial Review in Competition Cases*, Oxford, Oxford and Portland Hart Publishing 2009, 575-576; D. ARTS, "Iedereen gelijk voor de wet? Beschouwingen over de rechtmatigheid van het verlenen van clementie in kartelzaken", *TBM* 2012, 6; J. SCHWARZE, R. BECHTOLD and W. BOSCH, "Deficiencies in European Community Competition Law. Critical Analysis of the Current Practice and Proposals for Change", *Gleiss Lutz Rechtsanwälte* 2008, 30-35.

[222] In this context, it has also been argued that the leniency system infringes Article 6 (3) (d) ECHR, since the undertakings which are charged with a statement made by a leniency applicant have no possibility of examining the witnesses who made these potentially incriminating statements: CFI, Joined Cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02 *Bolloré v Commission* [2007] *ECR* II-965, paras. 24 and 49; J. SCHWARZE, R. BECHTOLD and W. BOSCH, "Deficiencies in European Community Competition Law. Critical Analysis of the Current Practice and Proposals for Change", *Gleiss Lutz Rechtsanwälte* 2008, 50-55; J. FLATTERY, "Balancing Efficiency and Justice in EU Competition Law: Elements of Procedural Fairness and Their Impact on the Right to a Fair Trial", *Comp. Law Rev.* 2010, 53-81.

the precise role of both parties of the cartel or describes the anti-competitive practices as restrictive as possible in order to qualify for leniency. [223]

CJEU – The CJEU has accepted that the Commission can rely on a leniency application under certain restrictive conditions.[224] First, the Commission needs to evaluate the evidence supplied by the undertaking.[225] Secondly, the leniency application of an undertaking must be supported by additional evidence.[226] However, it is doubtful whether the Commission conducts such an independent investigation in practice. The case NEXANS proves this concern.[227] Here, the EGC emphasized the fact that the Commission cannot solely rely on a leniency application in order to start a dawn raid at another undertaking's premises.[228]

[223] *E.g.* to fulfil the requirement of providing significant added value J. SCHWARZE, R. BECHTOLD and W. BOSCH, "Deficiencies in European Community Competition Law. Critical analysis of the current practice and proposals for change", *Gleiss Lutz Rechtsanwälte* 2008, 36-37; R. ALLENDESALAZAR and P. MARTINEZ-LAGE, "Evidence Gathered Through Leniency: From the Prisoner's Dilemma to a Race to the Bottom", in C.-D. EHJERMANN and M. MARQUIS (ed.) *European Competition Law Annual 2009. The Evaluation of Evidence and its Judicial Review in Competition Cases*, Oxford, Oxford and Portland Hart Publishing 2009, 575-576.

[224] CFI, Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering Corp. And Others v. Commission* [2004] *ECR* II-02501, para. 192: "*In that connection, no provision or any general principle of community law prohibits the Commission from relying, as against an undertaking, on statements made by other incriminated undertakings(...)"*; CFI, Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01, *Graphite Electrodes: Tokai Carbon Co. Ltd. and others v. Commission* [2004] *nyr*, para. 431; B. VAN BARLINGEN and M. BARENNES, "The European Commission's 2002 Leniency Notice in practice", *Competition Policy Newsletter* 2005, 1-16.

[225] CFI, Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering Corp. And Others v. Commission* [2004] *ECR* II-02501, para. 219; CFI, Joined cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02 *Bolloré v Commission* [2007] *ECR* II-965, para.166; EGC, Case T-208/06, *Quinn v Commission* [2011] *nyr*, para. 109; R. ALLENDESALAZAR and P. MARTINEZ-LAGE, "Evidence Gathered Through Leniency: From the Prisoner's Dilemma To a Race To the Bottom", in C.-D. EHJERMANN and M. MARQUIS (eds.) *European Competition Law Annual 2009. The Evaluation of Evidence and its Judicial Review in Competition Cases*, Oxford, Oxford and Portland Hart Publishing 2009, 574.

[226] CFI, Case T-337/94 *Enso-Gutzien Oy v Commission* [1998] *ECR* II-1571, para. 91; CFI, Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering Corp. And Others v. Commission* [2004] *ECR* II-02501, para. 219; CFI, Joined Cases T-25/95 to T-104/95 *Cimenteries CBR and Others v Commission* [2000] *ECR* II-491, para. 1838; R. ALLENDESALAZAR and P. MARTINEZ-LAGE, "Evidence Gathered Through Leniency: From the Prisoner's Dilemma To A Race To The Bottom", in C.-D. EHJERMANN and M. MARQUIS (eds.) *European Competition Law Annual 2009. The Evaluation of Evidence and Its Judicial Review in Competition Cases*, Oxford, Oxford and Portland Hart Publishing 2009, 575.

[227] EGC, Case T-135/09 *Nexans France SAS v Commission* [2012] *nyr*.

[228] EGC, Case T-135/09 *Nexans France SAS v Commission* [2012] *nyr,* paras. 64-67 and 91-92. More in particular, the EGC imposed restrictions on the Commission to start a dawn raid following a leniency application. The EGC stated that a rumor, stemming from an undertaking applying for leniency for another cartel, is not sufficient for the Commission to execute a dawn raid. Thus, the leniency applicant must be able to present effective evidence of another cartel, which also implies that the Commission must check this information. EGC, Case T-135/09, *Nexans France SAS v Commission* [2012] *nyr,* para. 84: *"However, the existence of the [confidential] and the [confidential], which are old, public agreements, notified to the competition authority of a Member State and, in principle, compatible with the EU competition rules, does not in itself*

The risk is thus realistic that, because of reasons of efficiency, the Commission pays more attention to prosecution and confinement than to a truthful investigation of the situation. Even though the Commission has no formal obligation to investigate the case *à charge* and *à décharge*, conform a general duty of carefulness, the Commission needs to investigate all relevant information of the case in an impartial and careful manner.[229] Thus, while the presumption of innocence is only respected if an independent investigation is executed by the enforcement authorities,[230] it is very disputable whether the Commission meets those requirements in practice.

c.3. The factual coercion violates the privilege of non-incrimination

APPLICABILITY – Finally, while the ECJ has indicated that undertakings enjoy the guarantee not to be incriminated against themselves during the procedure before the Commission, [231] the leniency system does not respect this privilege, since an undertaking is obliged to present self-incriminating information in its corporate statement.

LEGAL ANALYSIS – A strictly legal analysis does not support this view. Recital 12 of the Leniency Notice stipulates that an undertaking must be willing to cooperate *voluntarily* with the Commission. Thus, while there is no obligation to cooperate, the privilege of non-incrimination cannot be violated. This view is supported by the ECtHR and the CJEU. First, the ECtHR recognized that a

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constitute reasonable grounds for supposing that some of the signatories to those agreements later concluded secret agreements, contrary to those rules and concerning the same products, with other producers."

[229] ECJ, Case C-269/90 *Technische Universität München* [1991] *ECR* I-5469, para. 14. See also *infra*.

[230] H. BUREZ and F. WIJCKMANS, "Het onderzoek à décharge - food for thought", *TBM* 2012, 184-188; W. WILS, "The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: a Legal and Economic Analysis", *World Competition* 2004, 201-224. F. MONTAG, "The Case for a radical reform of the infringement procedure under regulation 17", *ECLR* 1996, 428.

[231] ECJ, Case 374/87 *Orkem v Commission* [1989] *ECR* 3283, para. 35; CFI, Case T-112/98 *Mannesmannröhren-Werke v Commission* [2001] *ECR* II-00729, paras. 59-79. However, according to the ECJ, the undertaking is obliged to supply the Commission with documents it has in its possession: ECJ Case C-301/04 *Commission v SGL Carbon* [2006] *ECR* I-05915, paras. 40-44. Note that the privilege against self-incrimination is to a lesser extent protected in the ECJ case law than the ECtHR case law: *Saunders v United Kingdom* no.19187/91, para. 68, ECHR, 1996-II; *Heaney and Mc Guinness v Ireland* no. 34720/97, para. 40, ECHR, 2000-II; *J.B. v Switzerland* no. 31827/96, para. 64, ECHR, 2001-II; *Abu Bakah Jalloh v Germany no.* 54810/00, para. 100, ECHR, 2007-II; A. ANDREANGELI, *EU Competition Enforcement and Human Rights,* Cheltenham, Edward Elgar, 2008, 124-128; M. EMBERLAND, *The Human Rights of Companies. Exploring the Structure of ECHR Protection*, Oxford, Oxford University Press, 2005, 42; A. MACCULLOCH, "The Privilege Against Self-Incrimination, in Competition Investigations: Theoretical Foundations and Practical Implications", *Legal Studies* 2006, 211-214; J. SCHWARZE, R. BECHTOLD and W. BOSCH, "Deficiencies in European Community Competition Law Criteria Analysis of current practice and proposals for change", *Gleiss Lutz Rechtsanwälte* 2008, 55-57; W. WILS, "Self-Incrimination in EC Antitrust Enforcement: A Legal and Economic Analysis", *World Competition* 2003, 580-581.

leniency application does not raise any objection to the privilege against self-incrimination: *"persons are always free to incriminate themselves if in doing so they are exercising their own will".*[232] Secondly, both the ECJ in the THYSSEN KRUPP STAINLESS case as well as the EGC in the SCHINDLER case underlined that a leniency program does not entail any coercion *vis-à-vis* undertakings to admit the suspected infringement.[233]

PRESSURE TO APPLY FOR LENIENCY – However, the prospect of receiving immunity from fine, reinforced by the vigorous fining policy of the Commission, *de facto* compels an undertaking to blow the whistle and consequently to incriminate itself.[234] The race to be the first through the door, set up by the leniency system, forces undertakings to reveal the cartel to the Commission, since leniency is only available if the undertaking proves an infringement of Article 101 TFEU.[235] Because the undertakings are not aware of other leniency applications, they moreover have no chance to consider the pros and cons of blowing the whistle.[236]

EVALUATION – Legally speaking, the Commission respects the privilege of non-incrimination by inviting leniency applicants to blow the whistle. Different Courts have advocated this statement, probably because they were motivated to protect the efficiency of the leniency program. In practice

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[232] See however the Concurring Opinion of Jude Walsh in *Saunders v United Kingdom* no. 19187/91, ECHR, 1996-II, available at www.althingi.is/pdf/umsogn_doc.php4?lt=133&umsogn=523, [Accessed on 30 April 2013]; W. WILS, "Self-Incrimination in EC Antitrust Enforcement: A Legal and Economic Analysis", *World Competition* 2003, 580-581.

[233] ECJ, Case T-24/07 *ThyssenKrupp Stainless* v *Commission* [2009] *ECR* II-2309, para. 52-53; EGC, Case T-138/07 *Schindler v Commission* [2011] *nyr*, para. 153: *"il doit être constaté que la coopération au titre de la communication sur la coopération de 2002 revêt un caractère purement volontaire de la part de l'entreprise concernée. Celle-ci n'est en effet en aucune manière contrainte de fournir des éléments de preuve concernant l'entente présumée. Le degré de coopération que l'entreprise souhaite offrir au cours de la procédure administrative relève donc exclusivement de son libre choix et n'est, en aucun cas, impose par la communication sur la coopération de 2002".* See also ECJ, Case C-298/98 *Metsa-Serla (Finnboard) v Commission* [2000] *ECR* I-10171, para. 58, in which the ECJ said that *"Nor ... can the complaint of infringement of the rights of defense be upheld. An undertaking which, when challenging the Commission's stance, limits its cooperation to that which is required under Regulation No. 17 will not, on that ground, have an increased fine imposed on it."*

[234] The only formal obligation that however seems to exist is to stop the participation in the cartel: D. ARTS, "Iedereen gelijk voor de wet? Beschouwingen over de rechtmatigheid van het verlenen van clementie in kartelzaken", *TBM* 2012, 4.

[235] Recital 8 of the Leniency Notice. J. SCHWARZE, R. BECHTOLD and W. BOSCH, "Deficiencies in European Community Competition Law Criteria Analysis of Current Practice and ¨Proposals For Change", *Gleiss Lutz Rechtsanwälte* 2008, 55-57.

[236] R. ALLENDESALAZAR and P. MARTINEZ-LAGE, "Evidence Gathered Through Leniency: From the Prisoner's Dilemma To a Race To the Bottom", in C.-D. EHJERMANN and M. MARQUIS (eds.) *European Competition Law Annual 2009. The Evaluation of Evidence and Its Judicial Review in Competition Cases*, Oxford, Oxford and Portland Hart Publishing, 2009, 571; J. SCHWARZE, R. BECHTOLD and W. BOSCH, "Deficiencies in European Community Competition Law Criteria Analysis of current practice and proposals for change", *Gleiss Lutz Rechtsanwälte* 2008, 55-57.

however, no undertaking can afford to run the risk not to file a leniency application. Due to the high fining policy of the Commission, every undertaking has to seize the chance of receiving a lenient treatment. Consequently, the right not to be coerced to incriminate oneself seems to have become meaningless in the context of a leniency application.

c.4. Evaluation and conclusion

DISRESPECT – The presumption of innocence, applicable in cartel enforcement proceedings, conflicts with the burden of proof of the undertakings, the prime essential aspect of the leniency system, on three accounts. As such, undertakings are *de facto* compelled to file a leniency application, thereby incriminating themselves and violating the principle of non-incrimination. At the same time, the leniency applicant also incriminates its competitor, who has to prove that the applicant's statement, which evidentiary value is moreover doubtful, is incorrect. In both instances, the evidence is not provided by the Commission, but by the undertakings themselves. This results in a system that is accusatorial instead of being inquisitorial. The latter procedure does not respect the presumption of innocence, and consequently also contains a disrespect of the undertaking's procedural rights.

3.4.3. Ignorance of the principle of ne bis in idem

APPLICABILITY – The Commission does not always respect the principle of *ne bis in idem* in its leniency proceedings. While undertakings enjoy the guarantee of not being punished twice for the same conduct, [237] case law indicates that the Commission as well as the CJEU are very reluctant to accept this argument in cartel proceedings in general.[238]

IN A LENIENCY CONTEXT – Even though there is only one single case reported to date, it can be argued that the same tendency of disrespect of this procedural guarantee exists in leniency applications. In the case LIFTEN, ASCENSEURS AND OTHERS, the ECJ stated that the principle of *ne bis in idem* is not violated if an

[237] This principle is laid down in Protocol No. 2 of the ECHR. Even though not all member states did ratify the Protocol, the principle is also laid down in the Charter and is recognized by the ECJ as a general principle of EU law: ECJ, Case 7/72 *Boehringer Mannheim GmbH. v Commission* [1972] *ECR* 1281; ECJ, Case C-254/99 *Limburgse Vinyl Maatschappij NV (LVM)* [2002] *ECR* I-8375. S. BRAMMER, *Cooperation Between National Competition Agencies in the Enforcement of EC Competition Law*, Oxford, Hart, 2009, 197-210; W. WILS, *Principles of European Antitrust Enforcement*, Oxford, Hart Publishing, 2005, 98-102; E.M. AMEYE, "The Interplay Between Human Rights and Competition Law in the EU", *ECLR* 2004, 332-341.

[238] ECJ, Case 14/68 *Walt Wilhelm* [1969] *ECR* I; ECJ, Case C-397/03 *Archer Daniels Midland Co. and Archer Daniels Midland Ingredients Ltd v Commission* [2006] *ECR* I-4429, para. 409; ECJ, Case C-17/10 *Toshiba Corporation and Others v Úřad pro ochranu hospodářské soutěže* [2010] *nyr;* Opinion A-G KOKOTT, ECJ, Case C-17/10 *Toshiba Corporation and Others v Úřad pro ochranu hospodářské soutěže* [2010], *nyr;* ECJ, Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* [2012] *nyr;* F. LOUIS and G. ACCARDO, "Ne bis in Idem, Part 'bis'", *World Competition* 2011, 97-112.

NCA grants only conditional immunity to a leniency applicant for a cartel, while the Commission has initiated its procedure for the same cartel.[239] According to this reasoning, the principle of *ne bis in idem* only applies if a competition authority has issued a final infringement decision, which means that the granted leniency must be *res judicata* or that no other ordinary judicial remedies are available. Conditional immunity is therefore not sufficient in order to prevent a second proceeding.[240]

CRITICISMS – This argumentation is prone to criticisms. The meaning of *ne bis in idem* has become worthless if only definitive immunity is accepted as a ground for prohibiting a second proceeding, since the conditions in order to apply the principle shall almost in no single case be fulfilled.[241] With regard to the often worldwide nature of cartels and the multiple recourse to the leniency instrument, one should moreover be careful not to create a disincentive for undertakings that are considering to blow the whistle. It is therefore advisable that the competition authorities revise their attitude in relation to the respect of the principle of *ne bis in idem*. Anyway, while the guarantees of *ne bis in idem* are in principle applicable to the procedure before the Commission, the *ne bis in idem* principle is far from being respected.

3.4.4. Violation of the principle of equal treatment

OVERVIEW – Next to the fundamental rights embedded in the ECHR, procedural fairness requires that the general principles of EU law are respected.[242] Daily practice indicates that the principle of equal treatment is at odds with several aspects of the leniency system. First, to fine one undertaking and to reward the other for the same behavior, discords with the requirements of equal treatment. Secondly, in the use of its investigative powers, the Commission negatively influences the chances of undertakings to apply for leniency and consequently breaches their right to equality.

[239] ECJ, Case C-516/11 P *Liften, Ascenseurs And Others v Commission* [2011], *nyr*, para. 158; EGC, Case T-150/07, *ThyssenKrupp v Commission* [2011], *nyr.*

[240] E. M. AMEYE, "The Interplay Between Human Rights and Competition Law in the EU", *ECLR* 2004, 339.

[241] Indeed, only if the outcome of a leniency application is definitive, another NCA cannot initiate a proceeding. With due regard to the nowadays lengthy proceedings (*infra*), it will occur very frequently that the competition authority has not yet reached a final decision at the moment that the other competition authority decides to initiate a proceeding. The existence of parallel investigations is also caused due to the information obligations of the members of the ECN (*supra*). This does moreover not yet takes account of the fact that it is often argued that the protection of free competition in Europe is another protected right than the protection of free competition in a member state.

[242] *Supra*.

a. Cooperation and chance as the distinguishing criterion

NO COOPERATION *VERSUS* COOPERATION – As mentioned before, the principle of equal treatment requires that comparable situations are treated similarly, and different situations are not treated in the same way, unless objectively justified.[243] Due to the fact that the leniency system makes an arbitrary distinction between two undertakings that were both part of the cartel, equal treatment is not guaranteed. According to the CJEU, this arbitrary distinction can however be justified if the behavior of the undertakings differs.[244] Thus, when one undertaking files a leniency application (and consequently helps the Commission in establishing the infringement), while the other undertakings that were also part of the cartel, are fined, the requirements of equal treatment are respected.[245] The behavior of the undertakings is different, which constitutes a legitimate distinguishing criterion.[246] The Commission is therefore perfectly entitled to grant leniency applicants different reductions in their punishment corresponding to the differences in the value and timing of their co-operation.[247]

COOPERATION BY ALL UNDERTAKINGS – Would the argumentation be different if both undertakings applied for leniency, and their behavior is not 'different' anymore? In order to guarantee the efficiency of the system, the difference of treatment could arguably still be accepted when immunity is granted to the

[243] *Supra*.
[244] The CJEU states that there is no breach of the principle of equality since a reduction in the fine is justified if the conduct of the undertaking concerned enabled the Commission to establish the infringement more easily: ECJ, Case C-297/98 *SCA Holding v Commission* [2000] *ECR* I-10101, para. 36; CFI, Case T-13/89 *ICI v Commission* [1992] *ECR* II-1021, para. 393; CFI, Case T-310/94 *Gruber and Weber v Commission* [1998] *ECR* II-1043, para. 271; CFI, *BPB De Eendracht v Commission* [1998] *ECR* II-1129, para. 325; CFI, Case T-21/99 *Dansk Rorindustri v Commission* [2002] *ECR* II-1681, para. 245; CFI, Case T-48/03 *Brouwerij Haacht v Commision* [2005] *ECR* II-5259, para. 104; CFI, Joined Cases T-109/02, T-188/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02, *Bolloré v Commission* [2007] *ECR* II-947, paras. 677-678; A. HOWARD, V. ROSE and P. ROTH QC, "The Enforcement of the Competition Rules in the Member States" in P. ROTH and V. ROSE (eds.), *Bellamy & Child. European Community Law of Competition*, Oxford, Oxford University Press, 2008, 1162. See also ECJ, Joined Cases C-65/02 and C-73/02 *ThyssenKrupp Stainless v Commission* [2005] *ECR* I-7663, para 60: *"an express admission of infringement may therefore give rise to a reduction in fine which is greater than that given to an undertaking which cooperated but did not make any such express admission."*
[245] D. ARTS, "Iedereen gelijk voor de wet? Beschouwingen over de rechtmatigheid van het verlenen van clementie in kartelzaken", *TBM* 2012, 11-12.
[246] ECJ, Joined Cases C-189/02, C-202/02, C-205/02 to C-208/02 and C-213/02, *Dansk Rorindustri v Commission* [2005] *ECR* I-5425, paras. 417-420; CFI, Joined cases T-109/02, T-188/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02, *Bolloré v Commission* [2007] *ECR* II-947; EGC, Case T-127/04 *KME v Commission* [2009] *ECR* II-1167, para. 143; EGC, Case T-13/03 *Nintendo v Commission* [2009] *ECR* II-975, para. 171.
[247] CFI, Case T-21/99 *Dansk Rorindustri v Commission* [2002] *ECR* II-1681, para 245.

first applicant.[248] Altogether, the leniency system would lose its attractiveness if all leniency applicants could be granted full immunity, since there would be no more race to be the first through the door.[249]

SAME SITUATION – This justification does not hold true for a *fine reduction*. First, in the KME case, the EGC explicitly acknowledged that *"such a situation [of full immunity] is distinct from that in which the Commission is already aware of evidence, but is seeking to complete it. In that latter case, the granting of a fine reduction to the offenders rather than immunity from fining to a single undertaking, is justified by the fact that the aim is no longer to reveal a fact likely to lead to an increase in the fine imposed, but to assemble as much evidence as possible in order to reinforce the Commission's ability to establish the facts in question."*[250] Thus, the undertakings that applied for leniency, received a fine reduction, not because they detected the cartel, but because they enabled the Commission to find as much evidence as possible. Every application for a fine reduction indeed reduces the burden of proof of the Commission. It is therefore very disputable to treat undertakings that are in the same situation differently, without being able to justify this distinction because of reasons of efficiency of the leniency system.[251]

CHANCE – Secondly, the dissimilar treatment of undertakings, exemplified by the variable fine reductions, is predominantly a matter of chance, which is however not a legitimate distinguishing criterion.[252] The EGC has stated multiple times that 'coincidence' or 'chance' cannot determine the level of a fine reduction.[253] However, daily practice indicates that the setting up of the order of the leniency applications is to a large extent determined by chance.[254]

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[248] EGC, Case T-127/04 *KME v Commission* [2009] *ECR* II-1167, para. 130: *"Moreover, it is inherent in the logic of immunity from fines that only one of the cartel members can have the benefit, given that the effect being sought is to create a climate of uncertainty within cartels by encouraging their denunciation to the Commission. That uncertainty results precisely from the fact that the cartel participants know that only one of them can benefit from immunity from being fined by denouncing the other participants in the infringement, thereby exposing them to the risk that they face more severe fines."*

[249] D. ARTS, "Iedereen gelijk voor de wet? Beschouwingen over de rechtmatigheid van het verlenen van clementie in kartelzaken", *TBM* 2012, 11; W. WILS, "Leniency: Theory and Practice", in *Efficiency and Justice in European Antitrust Enforcement*, Oxford, Oxford Hart Publishing, 2008, 118-121.

[250] EGC, Case T-127/04 *KME v Commission* [2009] *ECR* II-1167, para. 132 [Emphasis added].

[251] D. ARTS, "Iedereen gelijk voor de wet? Beschouwingen over de rechtmatigheid van het verlenen van clementie in kartelzaken", *TBM* 2012, 13-14.

[252] D. ARTS, "Iedereen gelijk voor de wet? Beschouwingen over de rechtmatigheid van het verlenen van clementie in kartelzaken", *TBM* 2012, 13-14.

[253] The EGC nevertheless still seems to ignore the consequences hereto for the Commission's practice. CFI, Case T-38/02, *Danone v Commission* [2005] *ECR* II-4407, para. 454; EGC, Joined Cases T-45/98 and T-47/98 *Thyssen Krupp Stainless and Acciai speciali Terni v Commission* [2009] *ECR* II-3757, para. 246; EGC, Case T-13/03 *Nintendo v Commission* [2009] *ECR* II-975, para. 171.

[254] As mentioned before, an undertaking's place in an order is determined on the basis of the point in time and the quality of its application. *Supra*.

First, both the discovery of the undertaking's participation in the cartel as well as the quality of the evidence they are able to gather is always subject to considerable chance and coincidence.[255] The determination of the undertaking's ranking position in the sequence of applications is moreover subordinate to chance, since it depends on the possible leniency applications of other undertakings that are part of the cartel.[256] Even though "chance" could be described as one of the goals of the leniency system, namely by introducing uncertainty and mandating preventive action of the undertakings, [257] it nevertheless poses a disproportional burden on the undertakings. Not every undertaking can *e.g.* bear (the costs of) an internal investigation in order to explore cartel involvement (more rapidly) or to set up a compliance program.[258]

CONCLUSION – A difference in treatment between the undertakings, part of the same cartel, can be justified if one undertaking applies for leniency (and thus cooperates), while the other does not. In addition, considering the goals of the leniency system, a divergent treatment of undertakings applying for immunity could also still be justified. However, undertakings that both apply for a fine reduction and cooperate with the Commission should not be treated differently. As such, they both enable the Commission to find evidence of the cartel, while the outcome of their application is mainly dependent on chance. The compatibility of the current Commission's decision practice with the principle of equal treatment is therefore disputable, especially in view of the EGC's case law.

b. An unfettered discretion in the use of its investigative powers

PRINCIPLE OF EQUAL TREATMENT – The discretionary enforcement by the Commission of its investigative powers does not correspond with the principle of equal treatment. As such, the issuance of a request for information impacts

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[255] D. ARTS refers to *inter alia* the situation in which a cartel is discovered when (a part of) the company is sold, the undertakings that have set up a compliance program, documents that were accidentally deleted or well stored etc.: D. ARTS, "Iedereen gelijk voor de wet? Beschouwingen over de rechtmatigheid van het verlenen van clementie in kartelzaken", *TBM* 2012, 12.

[256] EGC, Case T-186/06, *Solvay v Commission* [2011] *nyr,* paras. 356-382; *Hydrogen Peroxide and Perborate* Commission Decision C(2006) 1766 [2006] *OJ L 353*, Case COMP/F/38.620; R. ALLENDESALAZAR and P. MARTINEZ-LAGE, "Evidence Gathered Through Leniency: from the Prisoner's Dilemma to A Race to the Bottom", in C.-D. EHJERMANN and M. MARQUIS (eds.) *European Competition Law Annual 2009. The Evaluation of Evidence and its Judicial Review in Competition Cases*, Oxford, Oxford and Portland Hart Publishing, 2009, 565.

[257] CFI, Case T-279/02 *Degussa v Commission* [2006] *ECR* II-897, para. 350 *et seq.; Methacrylates* Commission Decision C(2006) 2098 [2006] OJ L 322, Case COMP/F/38.645, para. 386.

[258] D. ARTS, "Iedereen gelijk voor de wet? Beschouwingen over de rechtmatigheid van het verlenen van clementie in kartelzaken", *TBM* 2012, 12. ARTS argues that the extent of coincidence also does not square with the objectives of the fining decisions, since fines are imposed in order to achieve *ex-post* deterrence, and that it is impossible to create a deterrent effect for an action on which the undertaking has no control.

on the chances to receive leniency, both for the undertakings that received a request as well as those that did not.

REQUEST FOR INFORMATION – According to Article 18 (1) of Regulation 1/2003, the Commission has the power to send a request for information to an undertaking, thereby seeking information from the addressee about the alleged cartel.[259] By arbitrarily selecting particular undertakings to request additional information, the chances to achieve a fine reduction are significantly higher for undertakings that received such request.[260] These undertakings can assume earlier than other non-informed undertakings that the Commission has detected the cartel and are thus able to file a leniency application well before the other undertakings are even aware of the Commission's worries. The use of these investigative powers could thus breach the principles of diligence and equality, since every cartelist should have an equal opportunity to request leniency.[261] This seems to be confirmed by case law, stating that a differentiation between undertakings may not depend on arbitrary factors, such as the point in time, when undertakings are questioned by the Commission.[262]

ZINC PHOSPHATES – This different treatment of the undertakings nevertheless does not seem to be a concern for the Commission. In the case ZINC PHOSPHATES, some undertakings argued that they were not notified of the investigation of the Commission until they received the statement of objections and that they did not had a chance to file a leniency application.[263] The Commission stated however very clearly that *"the fact that certain addressees of this decision were subject to on-the-spot investigations or received requests for information from the Commission, did not confer on them any advantage, not did that hinder Britannia's or James Brown's right of defense. Inspections and request for information are investigatory steps which, as such, are not meant to be any specific vehicle of the exercise by an undertaking of its right of defense."*[264] This is also supported by the EGC.[265] Thus, even though such

[259] F. ARBAULT and E. SAKKERS, "Cartels", in J. FAULL and A. NIKPAY (eds.), *The EC Law of Competition*, Oxford, Oxford University Press, 2007, 882.
[260] D. ARTS, "Iedereen gelijk voor de wet? Beschouwingen over de rechtmatigheid van het verlenen van clementie in kartelzaken", *TBM* 2012, 16.
[261] D. ARTS, "Iedereen gelijk voor de wet? Beschouwingen over de rechtmatigheid van het verlenen van clementie in kartelzaken", *TBM* 2012, 16.
[262] CFI, Case T-48/98 *Acerinox* [2001] *ECR* II-3859, para. 140; CFI, Case T-47/98 *Krupp Thyssen Stainless and Acciai Speciali Terni v Commission* [2001] *ECR* II-3757, para 246; A. HOWARD, V. ROSE and P. ROTH QC, "The Enforcement of the Competition Rules in the Member States" in P. ROTH and V. ROSE (eds.), *Bellamy & Child. European Community Law of Competition*, Oxford, Oxford University Press, 2013, 1162.
[263] *Zinc Phosphates* Commission Decision 2003/437/EC [2001] OJ L 153/1, Case Case COMP/E-1/37.027.
[264] *Zinc Phosphates* Commission Decision 2003/437/EC [2001] OJ L 153/1, Case Case COMP/E-1/37.027, para. 347. See also: *Methacrylates* Commission Decision C(2006) 2098 [2006] OJ L 322, Case COMP/F/38.645, para. 421: *"The Commission is not under an obligation of any kind to inform participating undertakings in the cartel of its investigation"*.
[265] EGC, Case T-18/05 *Imi and others v Commission* [2010] *ECR* II-1769, paras. 120-130.

request in practice can make an enormous difference for the success of a leniency application, the Commission is completely free in using its investigative powers, without thereby taking into account the consequences for the undertakings' chances to apply for leniency.[266]

ADDED VALUE – At the same time however, undertakings that received a request for information have a reduced chance to obtain a fine reduction, since they must surpass a certain qualitative threshold of providing the Commission information that is of a significant added value on top of the information requested by the Commission.[267] The Commission has stated multiple times that *"what is required by law cannot be voluntarily, and by definition does not qualify as 'cooperation' which would refer to voluntary collaboration in the common interest"*.[268] It is not sufficient that the undertaking enlarges the scope of the request, but the provided evidence should really surpass the information that the Commission can demand by such a request for information.[269] The Commission seems to have a quite harsh and inflexible approach in these conditions, thus making it very challenging if not impossible for undertakings that received a request for information, to fully comply. [270]

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[266] See also *infra*.

[267] With regard to the requirements of "voluntarily" and "significant added value", undertakings must provide significantly more than the requested documents by the Commission. CFI, Case T-308/94 *Cascades v Commission* [1998] *ECR* II-925, para. 262; CFI, Case T-230/00 *Daesang en Sewon v Commission* [2003] *ECR* II-2733, para. 137; CFI, Case T-213/00 *CMA v Commission* [2003] *ECR* II-913, para. 303; CFI, Joined Cases T-236/02, T-239/01, T-244/01-T-246/01, T-251/01 and T-252/01 *Tokai v Commission* [2004] *ECR* II-1200, paras. 409-410; CFI, Case T-48/02 *Brouwerij Haacht v Commission* [2005] *ECR* II-5259, para. 107.

[268] ECJ, Case C-301/04 *Commission v SGL Carbon AG* [2006] *ECR* I-05915; CFI, Case T-213/00 *CMA v Commission* [2003] *ECR* II-913, para. 303; *Amino Acids* Commission Decision 2001/418/EC [2000] OJ L 152/24, Case COMP/36.545/F3, para. 403; *Vitamins* Commission Decision 2003/2/EC [2001], Case COMP/E-1/37.512, para. 755; *Graphite Electrodes* Commission Decision 2002/271/EC [2002], Case COMP/E-1/36.490, para. 174; *Speciality Graphite* Commission Decision COM C(2002)5083final [2002], Case COMP/E-2/37.667, para. 324; *PO/Interbrew en Alken Maes* Commission Decision 2003/569/EC [2003], Case COMP IV/37.614/F3, para. 324; *Austrian Banks – Lombard Club* Commission Decision 2004/138/EC [2004] OJ L 56/1, Case COMP/36.571/D-1, para. 546; *Industrial Bags* Commission Decision C(2005)4634 [2005], Case COMP/38354, para. 859.

[269] CFI, Case T-308/94 *Cascades v Commission* [1998] *ECR* II-925, para. 262; CFI, Case T-230/00 *Daesang and Sewon v Commission* [2003] *ECR* II-2733, para. 137; CFI, Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai and others v Commission* [2004] *ECR* II-1200, paras. 409-410:*"the undertaking might for example have drawn attention to important facts that were not known to the Commission beforehand, and for which the Commission had not asked; or it might have given a particularly exhaustive answer to the request for information, if it is precisely that exhaustiveness that made it easier for the Commission to understand the significance of facts or documents and to draw the necessary inferences so as to establish the existence of the infringement and bring it to an end";* CFI, Case T-48/02, *Brouwerij Haacht v Commission* [2005] *ECR* II-5259, para. 107.

[270] ECJ, Case C-301/04 *Commission v SGL Carbon AG* [2006] *ECR* I-05915, para. 243: "*It is up to each company to consider carefully the benefits resulting from any cooperation with the Commission and difficulties which could possibly arise in other proceedings, in particular in the US. As cooperation provided on a voluntarily basis, each company individual decision to choose the appropriate means and timing; The Commission can however only take into account real and*

EVALUATION – From the aforementioned cases, it can be deduced that undertakings have no "right" to know which investigatory actions the Commission is executing.[271] According to the Commission, the principle of equal treatment does not seem to be relevant when it exercises its investigatory powers. The attitude of the CJEU is dubious, since on the one hand it prohibits differentiation based arbitrary factors, but on the other hand supports the Commission's unfettered discretion in executing its powers. With regard to the fact that such investigative measures can have a considerable impact on the chances of an undertaking to obtain leniency, the lack of an undertaking's right to information is unacceptable. The liberty of the Commission to use its investigative powers at its own will in fact installs an inequality between different undertakings. While it seems reasonable that a certain level of secrecy of the investigation should be maintained, it is recommended that the undertakings are at least informed of the Commission's investigative measures in order to preserve mutual equality.[272]

3.4.5. A (Dis)proportional instrument?

DISPROPORTIONAL BURDEN? – To conclude, it is disputable whether the Commission, in having recourse to the leniency instrument, complies with the requirements of the principle of proportionality, and consequently does not pose a disproportional burden on the undertakings. One can rightly question whether the adverse effects of the leniency system, such as the considerable procedural unfairness of the system, the loss of pro-competitive contacts after a leniency application, as well as the suspension of valuable information exchange in confederations or even the bankruptcy of undertakings etc., are dominated by the ultimate goals of competition law. Until now, two claims on different aspects of the leniency system have been rejected by CJEU.

BURDEN OF PROOF – First of all, questions arise whether the leniency instrument is disproportional as regards the burden of proof, since the evidence of the cartel infringement is supplied by the leniency applicant instead of the Commission itself, as it is required by Article 2 of Regulation 1/2003[273]. In response to the argument of an undertaking that the Commission disposes of satisfactory instruments to detect cartels and consequently that the leniency instrument is disproportional, the EGC has stipulated that: *"(...) force est de constater que la communication sur la coopération de 2002 apparaît comme un instrument approprié et indispensable pour établir l'existence des ententes*

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effective contributions". R. KNOX, "ICN- The Due Process Debate Continues", *Global Comp. Rev.* 2012, 22.

[271] *Methacrylates* Commission Decision C(2006) 2098 [2006] OJ L 322, Case COMP/F/38.645, para. 421: *"The Commission is not under an obligation of any kind to inform participating undertakings in the cartel of its investigation"*; D. ARTS, "Iedereen gelijk voor de wet? Beschouwingen over de rechtmatigheid van het verlenen van clementie in kartelzaken", *TBM* 2012, 14-16.

[272] *Infra.*

[273] *Supra.*

horizontales secrètes et, partant, orienter le comportement des entreprises dans le sens du respect des règles de concurrence".[274] The main argument seems to be that it is extremely difficult to uncover secret cartels, as a consequence of which recourse to leniency is justified.[275] Thus, according to the EGC, this aspect of the system complies with the principle of proportionality, arguably inspired by the willingness to maintain the leniency system.

GRANT OF IMMUNITY – Secondly, it was argued that the grant of immunity or a reduced fine, which is the centerpiece of the leniency system, is contrary to the principle of proportionality.[276] The EGC has however justified the leniency system by pointing out that the detection and punishment of secret cartels is more important for consumers than not fining those undertakings that enabled the Commission to uncover (more) cartel infringements.[277]

CONCLUSION – While questions can be posed whether leniency is an instrument proportional in achieving its aims, it seems that the CJEU has taken a firm stand in the defense of the leniency instrument, by pointing at the importance for society as a whole. The next chapter elaborates further on this matter.

3.4.6. Evaluation of the undertaking's procedural rights

ENFORCEMENT INSTRUMENT – In the previous paragraphs, an analysis was made of the extent of the protection of the undertaking's procedural rights, which are of particular importance during leniency applications. An overview of the Commission's decision practice indicated that it does not always (sufficiently) respect these procedural rights. In addition, while undertakings have taken any opportunity to complain about this lack of procedural fairness, the CJEU seems to neglect and dismiss these complaints. The situation is therefore quite paradoxical. While the CJEU played in first instance a prominent role in legitimizing a strong enforcement of the Commission by extending the human rights to the undertakings, it does not seem to live up its own requirements afterwards in concrete situations.

EXCEPTIONAL REGIME – Rather than forcing the Commission to comply with the procedural rights, the CJEU creates in its case law often an exceptional regime for the leniency system, thereby reducing the protection of those procedural rights. Just to give two examples, the two essential features of the

[274] EGC, Case T-138/07, *Schindler v Commission* [2011] *nyr*, para.168.
[275] It is important to note that the scope of application is therefore restricted to only those infringements that are very difficult to uncover, *supra*.
[276] According to the undertaking, the principle of proportionality was violated since on the one hand infringements of competition law should be punished, and on the other hand because it puts undertakings at a disadvantage.
[277] EGC, Case T-138/07, *Schindler v Commission* [2011] *nyr*, para.168.

leniency system - the reverse burden of proof and the different fine reductions granted to the undertakings - are considered to be in compliance with the procedural rights. Indeed, the CJEU reduced the requirements of the presumption of innocence and the principle of equal treatment, however, as indicated, based on a reasoning that is not really convincing.[278]

EFFICIENCY – In refusing to recognize the (consequences of the) breach of procedural rights by the Commission, the CJEU is apparently driven by considerations to ensure the maximal efficiency of the Commission's leniency enforcement policy. Thus, while the CJEU sometimes clearly states that a certain practice of the Commission is inadmissible, it is nonetheless not willing to accept the consequences that the Commission should adapt its leniency instrument, or even completely dismantle it altogether.

DIFFERENT PROCEDURAL RIGHTS – Where does this leave us in terms of procedural fairness? The disrespect of the undertaking's procedural rights results in a considerable lack of procedural fairness. While the procedural due process rights are an inevitable part of the conception of procedural fairness, it can only be concluded that the latter concept is not lived up today. It is nonetheless important to make a distinction between the various procedural rights. Not all procedural guarantees are equally "important" in the leniency procedure, and not all of them are violated to the same extent. In any event, the anti-competitive behavior of an undertaking that is subject to quasi-criminal sanctions merits procedural guarantees that are comparable to those of the criminal standards of due process, rigor and thoroughness. A restriction of those procedural rights is therefore unacceptable in light of the requirements of procedural fairness.

4. REFLECTIONS ON (IMPROVING) THE LENIENCY SYSTEM'S LEGITIMACY

4.1. A PARAGON OF UNFAIRNESS

POPULAR BUT CONTROVERSIAL – The analysis of the previous sections has indicated that the leniency system is far from perfect and suffers several shortcomings. Indeed, different aspects of the leniency system do not meet the requirements of procedural fairness. First, the Leniency Notice, initially considered a (soft law) rule of conduct, falls substantially short when it relates to equal treatment and legal certainty.[279] Moreover, the fact that the system would benefit from a more elaborate framework has become evident from the legal uncertainty resulting from a leniency application.[280] Finally, a review of the Commission's assessment of the leniency applications demonstrates that

[278] *Infra.*
[279] *Supra.*
[280] *Supra.*

the undertakings' procedural rights are not fully respected.[281] Consequently, the current leniency system seems to be a 'paragon of unfairness.'[282]

EFFICIENCY *VERSUS* JUSTICE – With respect to the fact that the leniency system lacks procedural fairness, it can rightly be questioned whether it is a legitimate system today. While it is true that any system or institution can be perceived legitimate when it is legitimized by a policy that is based on certain values,[283] it is clear that if there are different (conflicting) values, the system is much more legitimate if it is based and relies on both values.[284] In the leniency system, two (internal conflicting) values, efficiency and justice, could play an important role in its legitimation. As such, leniency becomes part of the classic debate in competition law centered around "finding the right balance between efficiency and justice."[285] Given the lack of procedural fairness, the author

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[281] *Supra*.

[282] J. HETZEL, *Kronzeugenregelingen im Kartellrecht – Anwendung und Ausleging von Vorschiften über den Erlass von Geldbußen im lichte elementarer Rechtsgrundsätze*, Berlin, Nomos 2004, 34-40; J. SCHWARZE, R. BECHTOLD and W. BOSCH, "Deficiencies in European Community Competition Law. Critical Analysis of the Current Practice and Proposals For Change", *Gleiss Lutz Rechtsanwälte* 2008, 30-35; D. ARTS, "Iedereen gelijk voor de wet? Beschouwingen over de rechtmatigheid van het verlenen van clementie in kartelzaken", *TBM* 2012, 3 and 18.

[283] O. GUERSENT, "The EU Model of Administrative Enforcement Against Global Cartels: Evolving to Meet Challenges," in C.-D. EHLERMANN and I. ATANASIU (eds.), *European Competition Law Annual 2006: Enforcement of Prohibition of Cartels*, Oxford, Hart Publishing, 2006, 213-214; J.K. BLATTER, "Legitimacy", 518-521, available at www.unilu.ch/files/legitimacy.pdf [Accessed on 30 April 2013]; J. FLATTERY, "Balancing Efficiency and Justice in EU Competition Law: Elements of Procedural Fairness and Their Impact on the Right to A Fair Trial", *Comp. Law Rev.* 2010, 227; R. GRAFSTEIN, "The Legitimacy of Political Institutions", *Palgrave Macmillan Journals* 1981, 51-52; J. PONCE, "Good Administration and Administrative Procedures", *Indiana Journal of Global Legal Studies* 2005, 2-5; V.J. POWER, "The Relative Merits of Courts and Agencies in Competition Law – Institutional Design: Administrative Models; Judicial Models; and Mixed Models", *European Competition Journal* 2010, 116-117; P.G. STILLMAN, "The Concept of Legitimacy", *Palgrave Macmillan Journals* 1974, 32-36.

[284] N. CAMBIEN and K. LENAERTS, "The Democratic Legitimacy of The EU After the Treaty of Lisbon", in J. WOUTERS, L. VERHEY and P. KIIVER (eds.) *European Constitutionalism Beyond Lisbon,* Antwerp, Intersentia, 2009, 185; J. FLATTERY, "Balancing Efficiency and Justice in EU Competition Law: Elements of Procedural Fairness and Their Impact on the Right to A Fair Trial", *Comp. L. Rev.* 2010, 227; O. GUERSENT, "The EU Model of Administrative Enforcement Against Global Cartels: Evolving to Meet Challenges," in C.-D. EHLERMANN and I. ATANASIU (eds.), *European Competition Law Annual 2006: Enforcement of Prohibition of Cartels*, Oxford, Hart Publishing, 2006, 213-214; P.G. STILLMAN, "The Concept of Legitimacy", *Palgrave Macmillan Journals* 1974, 45-46.

[285] Opinion of A-G GEELHOED, ECJ, Case C-301/04 *Commission v SGL Carbon* [2006] *ECR* I-05915; Opinion of A-G GEELHOED, ECJ, C-411/04 *Salzgitter Mannesmann v Commission* [2007] *ECR* I-00959; W. WILS, *Efficiency and Justice in European Antitrust Enforcement*, Portland, Hart Publishing, 2008, Introduction; D. ANDERSON and R. CUFF, "Cartels in the European Union: Procedural Fairness for Defendants and Claimants", *Fordham International Law Journal* 2011, 398-392; A. ANDREANGELI, "Between Economic Freedom and Effective Competition Enforcement: the Impact of the Antitrust Remedies Provided by the Modernisation Regulation on Investigated Parties' Freedom to Contract and to Enjoy Property", *Comp. L. Rev.* 2010, 225 and 229; J. FLATTERY, "Balancing Efficiency and Justice in EU Competition Law: Elements of Procedural Fairness and Their Impact on the Right to A Fair Trial", *Comp. L. Rev.* 2010, 227-229;

questions therefore in a second phase whether and to what extent leniency is nowadays a legitimate system, and proposes how it could possibly become more legitimate in the future by striking a new balance between efficiency and justice.

4.2. EFFICIENCY AND JUSTICE AS LEGITIMIZING VALUES

UNDERLYING VALUES – In order to answer the question whether leniency is a legitimate system, it is necessary to elaborate further on what should be understood by its underlying values of efficiency and justice. No attempt will be made to define these concepts in detail, a short description is however necessary in order to clarify their meaning in this particular context.[286]

4.2.1. Justice

PROCEDURAL FAIRNESS – "Justice" is a very broad term, difficult to define, but often connected to a concept of "moral rightness".[287] In competition law, and more in particular in the leniency system, this term of justice is predominantly linked to the procedural fairness of the system.[288] What is thus important for the undertakings is that they have clear, predictable legal rules, which enables them to invoke their fundamental (procedural) rights against the competition authorities. Consequently, the concept of justice is narrowed to the procedural fairness of the system and should for the following analysis be perceived as was defined in Chapter 1 of Part II. It needs little clarification that procedural fairness is a value that can play a strong legitimizing role in the leniency system.[289] In particular, while the consequences of a leniency application have

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J. SCHWARZE, "Les sanctions imposes pour les infractions au droit Européen de la concurrence selon l'article 23 du règlement n°1/2003 CE à la lumière des principes généraux du droit", *RTD Eur*. 2007, 1-3; R. WESSELING and M.H. VAN DER WOUDE, "Over de rechtmatigheid en aanvaardbaarheid van de handhaving van het Europese kartelrecht", *SEW* 2012**,** 174-175.

[286] This clarification is especially necessary since the terms of efficiency and justice are often (wrongly) used in differing contexts, *infra*.

[287] D.W. HASLETT, *Moral Rightness*, The Hague, Nijnoff, 1974, 1-192; D.W. ROSS, *The Right and the Good,* Oxford, Clarendon, 2002, 1-183.

[288] W. WILS, *Efficiency and Justice in European Antitrust Enforcement*, Portland, Hart Publishing, 2008, Introduction; D. ANDERSON and R. CUFF, "Cartels in the European Union: Procedural Fairness for Defendants and Claimants", *Fordham International Law Journal* 2011, 392-398; J.M. JOSHUA, "The Powers of the Commission: Efficiency and Swiftness in Investigative Procedures" in X (ed.), *Rights of Defence and Rights of the European Commission in EC Competition Law,* Brussels, Bruylant, 1994, 9-23; M. A. KONOVSKU, "Understanding Procedural Justice and Its Impact on Business Organizations", *Journal of Management* 2000, 489-499. As mentioned above, the conception of justice could also be used as a benchmark in assessing the moral objections against the leniency system as such, *supra*.

[289] O. GUERSENT, "The EU Model of Administrative Enforcement Against Global Cartels: Evolving to Meet Challenges," in C.-D. EHLERMANN and I. ATANASIU (eds.), *European Competition Law Annual 2006: Enforcement of Prohibition of Cartels*, Oxford, Hart Publishing, 2006, 213-214; M. TARUFFO, *Abuse of Procedural Rights. Comparative Standards of Procedural Fairness,* The Hague, Kluwer Law International, 1999, 3-29; J. FLATTERY, "Balancing Efficiency and Justice in EU Competition Law: Elements of Procedural Fairness and Their Impact on the Right to A Fair Trial", *Comp. L. Rev*. 2010, 227-229. M. GRIMES,

an enormous financial impact, it is only appropriate that the system guarantees a sufficient level of procedural fairness.[290]

4.2.2. Efficiency

TAX PAYER'S MONEY – However, next to procedural fairness, efficiency is also a value that could "guide" the leniency system. Efficiency is an economic concept, which describes the extent to which a certain amount of time, effort or cost is well used for the intended purpose.[291] This concept contains therefore essentially a relationship between the "ends" and the "means", and should result in a positive ratio between output and input. Thus, a measure is efficient if nothing more can be achieved with the same resources. In the competition law context, efficiency refers to the fact that the competition authorities are able to achieve the various aims of competition law at the lowest societal cost. It thus aims at the methods and approaches how competition law is enforced (be it efficient or inefficient),[292] rather than to the objective of obtaining an efficient internal market by implementing those competition laws[293] or to the extent to which the goals of competition law are reached.[294] It is clear that in

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Democracy's Infrastructure: the Role of Procedural Fairness in Fostering Consent, Göteborg, Göteborg University. Department of Political Science, 2005, 11-12; C. LEBECK, "Procedural Fairness as Constitutional Justice: An Essay on Hans Kelsen's Theory of Liberal Constitutionalism", *Zeitschrift für öffentliches Recht* 2008, 577-580.

[290] As already mentioned, it is vested case law of the CJEU that EU law must be certain and their application foreseeable, in particular if they have financial consequences: ECJ, Case 169/80 *Gondrand* [1981] *ECR* 1931; ECJ, Case 70/83 *Kloppenberg* [1984] *ECR* 1075; ECJ, Case 325/85, *Ireland v Commission* [1987] *ECR* 5041; ECJ, Case 143/93, *Van Es Douane Agenten* [1986] *ECR* I-431, para. 27; ECJ, Case 92/87, *Commission v France* [1989] *ECR* 405, para. 22; ECJ, Case C-236/95, *Commission v Greece* [1996] 1996 *ECR* I-4459, para. 13; ECJ, Case C-177/96, *Banque Indo Suez* [1997] *ECR* I-5659, para. 27; J.T. LANG, "Legal Certainty and Legitimate Expectations as General Principles of law" in U. BERNITZ and J. NERGELIUS (eds.), *General Principles of European Community Law*, The Hague, Kluwer Law International, 2000, 165.

[291] L. BERLAGE and A. DECOSTER, *Inleiding tot de Economie,* Leuven, Universitaire Pers Leuven, 2011, 30-31; A. ANDERTON, *Economics,* Lancashire, Causeway Press, 2000, 281; A. SULLIVAN and S.M. SHEFFRIN, *Economics: Principles in Action,* New Jersey, Upper Saddle River, 2003, 15.

[292] W. WILS, *Efficiency and Justice in European Antitrust Enforcement*, Portland, Hart Publishing, 2008, Introduction; P. LOWE, "The Design of Competition Policy Institutions for the 21st Century – The Experience of the European Commission and DG Competition", *Competition Policy Newsletter* 2008, 2-3.

[293] The efficient enforcement of competition law should be distinguished with the goals competition law wants to achieve, one of which is efficiency in terms of allocation and production. A. JONES and B. SUFRIN, *EC Competition Law. Text, Cases and Materials*, Oxford, 2011, 3; L. PARRET, "Do We (Still) Know What We Are Protecting?", *TILEC Discussion Paper* 2009, 20-21, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1379342 [Accessed on 30 April 2013].

[294] It is important to make a distinction with effectiveness, which in essence comes down to the actual achievement of the goals. Efficiency on the other hand is more about the ratio of what is putted into the system and its outcome, thereby achieving the goals. As concerns the effectiveness, economic studies indicate that the leniency system succeeds in achieving both its aims, namely the *ex-post* and the *ex-ante* deterrence. M.-L. ALLAIN, M. BOYER, R. KOTCHONI and J.-P. PONSSARD, "The Determination of Optimal Fines in Cartel Cases. The Myth of Under-Deterrence", *Scientific Series* 2011, 1-34, available at www.cirano.qc.ca/pdf/publication/2011s-

competition law, efficiency is an important value, since it avoids the unfair situation that the consumer has to pay the price twice. Indeed, while the consumer already pays a higher price for products because of cartel formation, he will be obliged to provide substantial financial support for the competition authority to perform much more costly *ex-officio* investigations, if there is no efficient enforcement instrument available and operational.[295]

4.2.3. Evaluation

BALANCING? – An elaboration of these principles indicates that justice, referred to as procedural fairness, as well as efficiency, the achievement of goals by the smallest means, are values that on their own could legitimize leniency as a cartel enforcement system. However, these two values are (to a certain extent) opposing forces in the leniency context; the leniency system is precisely so efficient because it lacks a certain level of transparency and predictability.[296] Because of these opposite values, the leniency system is only as legitimate as it could be, if a fair balance is struck between those two values, rather than relying only on one particular value alone.[297]

34.pdf [Accessed on 30 April 2013]; D. ARTS, "Iedereen gelijk voor de wet? Beschouwingen over de rechtmatigheid van het verlenen van clementie in kartelzaken", *TBM* 2012, 3-18; S. BRENNER, "An Empirical Study of the European Corporate Leniency Program", *International Journal of Industrial Organization* 2009, 639-645; S.D. HUNT and D.F. DUHAN, "Competition in The Third Millennium. Efficiency or Effectiveness?, *Journal of Business Research* 2002, 97-98; G.J. KLEIN, "Cartel Destabilization and Leniency programs – Empirical Evidence. Discussion paper No. 10-107", *Centre for European Economic Research* 2010, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1854426 [Accessed on 30 April 2013]; W. WILS, "Leniency in Antitrust Enforcement: Theory and Practice", *World Competition* 2007, 25-64; S. SUURNAKKI and M.L. TIERNO CENTELLA, "European Commission Adopts Revised Leniency Notice to Reward Companies that Report Hard-Core Cartels", *Competition Policy Newsletter* 2007, 7; J. YSEWYN, "Immunity Programs in the EU", presentation, 2009, available at http://www.agcm.it/trasp-statistiche/doc_download/2421-ven-0423intervento-ysewyn.html.

[295] L. PARRET, "Do We (Still) Know What We Are Protecting?", *TILEC Discussion Paper* 2009, 15-17, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1379342 [Accessed on 30 April 2013]. For a more complete overview of the different objectives competition law wants to achieve, see: S. BISHOP and M. WALKER, *The Economics of EC Competition Law,* London, Sweet & Maxwell, 1999, 3-5; A. JONES and B. SUFRIN, *EC Competition Law. Text, Cases and Materials*, Oxford, 2011, 1-11; M. KUNEVA, "Competition Policy and Consumer Protection in the EU", 25-27; V.J. POWER, "The Relative Merits of Courts and Agencies in Competition Law – Institutional Design: Administrative Models; Judicial Models; and Mixed Models", *European Competition Journal* 2010, 116-117; D. ZIMMER, "On Fairness and Welfare: The Objectives of Competition Policy", *European Competition Annual* 2007, 5-7.

[296] *Infra*.

[297] Framed in other terms, no only the input of the leniency system, namely justice (*input* legitimacy), but also the output of the system, efficiency (*output* legitimacy) should be legitimate. N. CAMBIEN and K. LENAERTS, "The Democratic Legitimacy of The EU After the Treaty of Lisbon", in J. WOUTERS, L. VERHEY and P. KIIVER (eds.) *European Constitutionalism Beyond Lisbon,* Antwerp, Intersentia, 2009, 185.

4.3. INTRODUCING MORE LEGITIMACY BY STRIKING A NEW BALANCE BETWEEN EFFICIENCY AND JUSTICE

4.3.1. Predominance of efficiency?

POLICY QUESTION – It is evident that striking a balance between efficiency and justice is a strategic policy-based agenda for those who define the system. Do they consider the efficient enforcement of greater importance than the procedural rights of the undertakings? The leniency policy of the Commission nowadays seems to be governed to a large extent by the first viewpoint. On the one hand, the analysis of the previous sections has indicated that the leniency system barely respects the requirements of procedural fairness. On the other hand, the current design of the system enables the Commission to detect and punish cartels without having to recourse other (more) costly and time-consuming methods of cartel enforcement.[298] The full cooperation of the leniency applicant saves the Commission valuable resources that would otherwise be needed to investigate the cartel and to gather sufficient evidence, much of which is now provided by the leniency applicant.[299]

PARETO EFFICIENT – In economic terms, one could interpret the current balance between efficiency and justice as being Pareto efficient. This economic model postulates that a certain allocation of two different goods or values is efficient, if there could be no further improvement of one of the goods, without reducing the value of the other.[300] When applied to the leniency system, As such, there could be no more improvement of the enforcement of cartels (= efficiency) without reducing (even further) the procedural fairness (= justice) of the undertakings. Conversely, it is arguably also true that it will be (to a certain extent) impossible to create more procedural guarantees for the undertakings, without jeopardizing the overall efficiency of the leniency system.

[298] J. FAULL and A. NIKPAY, *The EC Law of Competition*, Oxford, Oxford University Press, 2007, 800; W. WILS, "Leniency in Antitrust Enforcement: Theory and Practice", *World Competition* 2007, 38-41.
[299] C. CANENBLEY and T. STEINVORTH, "Effective enforcement of competition law: is there a solution to the conflict between leniency programs and private damages actions?", *Journal of European Competition law & practice* 2011, 315-320. W. WILS points however out that, due to the checks and balances in the administrative proceedings, the CJEU frequently has to acquire knowledge and insight in the case due to subsequent applications for judicial review, which in turn increases the administrative costs. While thus in general the administrative costs are reduced when having recourse to the leniency instrument, practice reveals that in many cases the total administrative cost is considerable because of the additional judicial review by the CJEU: W. WILS, "Leniency in Antitrust Enforcement: Theory and Practice", *World Competition* 2007, 44-45.
[300] L. BERLAGE and A. DECOSTER, *Inleiding tot de Economie,* Leuven, Universitaire Pers Leuven, 2011, 29; J. HUERTA DE SOTO, *The Theory of Dynamic Efficiency,* Abingdon, Routlegde, 2010, 14-18.

4.3.2. *Critical thoughts on the legitimacy of the leniency system*

LEGITIMATE? – Where does this current balance leave us in terms of legitimacy? While a Pareto efficient allocation of goods is commonly valued as a stated goal for society, [301] such allocation model does not have the same implications when considering legitimacy. Indeed, Pareto efficiency is a minimalistic notion of efficiency and does not necessarily result in a socially desirable distribution of goods. Thus, it does not elaborate upon the overall wellbeing of a society, but rather indicates how different goods should be allocated.[302]

BASED ON THE RULE OF LAW – With regard to the fact that the EU highly values the respect for the fundamental rights and for the rule of law, it is very disputable whether the current balance is able to grant the leniency system a sufficient level of legitimacy. Indeed, Article 2 TEU, which states that *"the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities"*, clarifies that the rule of law forms a constitutional core of the EU.[303] As such, the rule of law and the fundamental rights are of a foundational value to the EU, which consequently also partly legitimizes it.[304] This respect for the rule of law and for the fundamental rights must be honored by all EU institutions and organs.

[301] L. BERLAGE and A. DECOSTER, *Inleiding tot de Economie,* Leuven, Universitaire Pers Leuven, 2011, 29; J. HUERTA DE SOTO, *The Theory of Dynamic Efficiency,* Abingdon, Routlegde, 2010, 14-18.

[302] N. BARR, "The Relevance of efficiency to different theories of society", in N.A. BARR (ed.), *Economics of the Welfare State,* Oxford, Oxford University Press, 2012, 46; A. SEN, "Markets and Freedom: Achievements and Limitations of the Market Mechanism in Promoting Individual Freedoms", *Oxford Economic Papers* 2004, 519-541.

[303] The rule of law was for the first time in the famous Les Verts case in 1986 recognized, before any legislative recognition was present. ECJ, Case 294/83 *Parti écologiste 'Les Verts' v European Parliament* [1986] *ECR* 1339, para. 23: *"the European Community is a community based on the rule of law, inasmuch as neither its member states, nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the treaty"*: W.T. EIJSBOUTS, "In Defence of EC Law", in T.A.J.A. VAN DAMME and J.H. REESMAN (eds.), *Ambiguity in the Rule of Law*, Groningen, Europe Law Publishing, 2001, 35-50; W. VAN GERVEN, *The European Union. A Polity of States and Peoples*, Oregon, Hart Publishing, 2005, 127; N. WALKER, "The Rule of Law and the EU: Necessity's Mixed Virtue" 2009, available at www.law.ed.ac.uk/.../53_n%20walker-%20the%20eu%20and%20the%2. [Accessed on 30 April 2013].

[304] N. CAMBIEN and K. LENAERTS, "The Democratic Legitimacy of The EU After the Treaty of Lisbon", in J. WOUTERS, L. VERHEY and P. KIIVER (eds.) *European Constitutionalism Beyond Lisbon,* Antwerp, Intersentia, 2009, 204-205; W. VAN GERVEN, "Wanted: More Democratic Legitimacy for the European Union", in J. WOUTERS, L. VERHEY and P. KIIVER (eds.), *European Constitutionalism Beyond Lisbon,* Antwerp, Intersentia, 2009, 167; K.-O. LINDGREN and T. PERSSON, "Input and Output Legitimacy: Synergy or Trade-Off? Empirical Evidence from an EU Survey", *Journal of European Public Policy* 2010, 450-452; L. PECH, "The Rule of Law as a Constitutional Principle of the European Union", *Jean Monnet Working Paper 04/09* 2009, 6-10, available at http://ssrn.com/abstract=1463242 [Accessed on 30 April 2013]; M. ROSENFELD, "The Rule of Law and the Legitimacy of Constitutional Democracy", *Southern Californian Law Review* 2001, 1307-1309.

Consequently, in executing its powers, the Commission itself should also respect those values. However, while the respect for the rule of law and for the fundamental rights amounts to the conception of procedural fairness, it is very unlikely that a policy instrument such as the current leniency system can secure these requirements.[305] Such disrespect by the Commission bears the consequences that the legitimacy of competition law enforcement in general and of the whole EU is to a certain extent undermined. Disregarding certain key societal principles and values, on which the whole system is based, can indeed compromise its legitimacy.[306]

EVALUATION – With regard to the fact that the EU is an entity, which is governed by, based on and consequently also legitimized by the rule of law, it should be concluded that the leniency system today is not successful in being perceived as a sufficiently legitimized system. Undertakings are confronted with considerable procedural unfairness, which does not square with the prime foundational values of the EU. This discrepancy can have important implications for the EU, since it *de facto* undermines the legitimacy of the EU itself.

4.3.3. Suggestions for a more legitimate leniency system

NEED FOR IMPROVEMENT – The lack of procedural fairness mandates changes in the balance between efficiency and justice. In the sections below, two related but mutually exclusive recommendations are proposed to render the leniency system more legitimate. On the one hand, it is recommended, by thoroughly revising the leniency system, to introduce more procedural fairness. However, in case there is no willingness to accept such changes, a broader societal debate should be held on the exact meaning of the rule of law and respect for fundamental rights of the undertakings in order not to undermine the EU's legitimacy.

a. Recommendations for more procedural fairness in the leniency system

REASSESSMENT – With due regard to the norms and values that the EU respects today, it is mandated to reassess, in terms of procedural fairness, the leniency system. In this work, several problematic aspects of the leniency system have

[305] *Supra*.
[306] M. ROSENFELD, "The Rule of Law and the Legitimacy of Constitutional Democracy", *Southern Californian Law Review* 2001, 1307-1309; F. CENGIZ, "Judicial Review and the Rule of Law in the EU Competition Law Regime after *ALROSA"*, *European Competition Journal* 2011, 127-128. History and today's totalitarian regimes have taught us some harsh lessons as to the consequences of undermining society's values on which it is based. J. GLOVER, *Humanity, A Moral History of the Twentieth Century*, London, Pimlico, 2011, 6-12; F. LOVETT, *A General Theory of Domination and Justice,* Oxford, Oxford University Press, 2010, 132; M. BERNHARD and E. KARAKOC, "Civil Society and the Legacies of Dictatorship", *World Politics* 2007, 539-567; C.W. CASSINELLI, "Totalitarianism, Ideology and Propaganda", *The Journal Of Politics* 1960, 68-95.

been discussed. Below, some suggestions for change are given in order to enhance the system's procedural fairness. In proposing these suggestions, the necessity of a case-by-case assessment of leniency applications, together with the need to provide undertakings more uniform procedural rights, is taken into consideration.[307] It must be stressed that balancing these values remains a continuous challenge.[308] It is indeed not the purpose to sacrifice the entire efficiency and effectiveness of the system on an altar of pious principles of law, but rather to introduce more procedural fairness.

OVERVIEW – Introducing more procedural fairness obviously commences with a fundamental reassessment of the instrument that has developed the leniency system. In addition, proposals are made to oversee the diverging consequences of a leniency application. In the end, critical considerations will be provided onto how procedural rights can be better protected in the current institutional structure.

a.1. The leniency notice

LEGAL BASIS – It is generally accepted that the Leniency Notice, even though formally not a binding legislative act, creates legitimate expectations on which undertakings can rely.[309] However, with regard to the fact that the leniency system is nowadays such an important instrument to realize the core targets of the EU competition law, it is advisable to formalize this system, initially developed by the Commission and to further elaborate it into a legislative act, which would endow the system with much more democratic legitimacy.[310]

SCOPE OF APPLICATION *RATIONE MATERIAE* – Secondly, concerning the scope of application of the leniency system, more clarity should be introduced as to the possible applicability of the system to more recent anti-competitive practices, such as information exchange, hub-and-spoke cartels etc.[311] In making a decision on the scope of application, it is important to offer undertakings a clear distinguishing criterion. In particular, it is advisable that the criterion should not depend on a difference between horizontal and vertical cartels, but rather on the secret character of the anti-competitive practice. Consequently, in some circumstances, participation in both vertical cartels as well as in

[307] The proposed changes mandate sometimes an institutional change, but often only require that the Commission adapts its policy or attitude when assessing leniency applications.
[308] W. WILS, *Efficiency and Justice in European Antitrust Enforcement*, Portland, Hart Publishing, 2008, Introduction; J. FLATTERY, "Balancing Efficiency and Justice in EU Competition Law: Elements of Procedural Fairness and Their Impact on the Right to A Fair Trial", *Comp. Law Rev.* 2010, 227-229; R. WESSELING and M.H. VAN DER WOUDE, "Over de rechtmatigheid en aanvaardbaarheid van de handhaving van het Europese kartelrecht", *SEW* 2012**,** 174-175.
[309] *Supra*.
[310] W. WEISS, "After Lisbon, Can the European Commission Continue to Rely on 'Soft Legislation' in its Enforcement Practice?", *Journal of European Competition Law and Practice* 2011, 447-451.
[311] *Supra*.

information exchange are anti-competitive practices that are difficult to uncover, and thus resemble what occurs in horizontal cartels.[312] This not only leaves the possibility of a case-by-case assessment, but also offers the undertakings at the same time a clear criterion to determine on beforehand whether their conduct is eligible for the application. In addition, this criterion would deprive undertakings the incentive to frame their cartel in terms of horizontal relations, as already occurred previously in the decision practice of the NCAs.

SCOPE OP APPLICATION *RATIONE PERSONAE* – The same recommendation holds true to the distinguishing criterion for legal entities that can or cannot apply for leniency. To the author, what seems to be of greater importance, is to distinguish between those undertakings that can be fined and or cannot be fined, rather than to base the distinction on the concept of "undertaking", as described by the CJEU.[313] It is therefore advisable that the Commission attunes its fining practice with the scope of its leniency system. The general rule should thus be that everyone who can be fined for anti-competitive practices that fall within the scope of application *ratione materiae*, should be offered an equal opportunity to apply for leniency. This avoids unfair situations, whereby *e.g.* undertakings are fined even though they were not directly engaged in the cartel, and the leniency application of their sister company does not apply to them.[314]

CONDITIONS TO ACHIEVE LENIENCY – More in general, attention should also be paid to the question as to what can be expected from the undertakings. Leniency applications are meant to proceed in a short period, and it cannot be expected that the leniency applicant engages in an in-depth research effort to supply the Commission the precise legal qualification of the anti-competitive behavior. It must be taken into consideration that a leniency applicant is only aware of its own information, and that initiating a research effort can be viewed by other undertakings as suspicious. It is also advisable that the Commission uses reasonable criteria concerning the requirement that undertakings must provide information that is of a significant added value, since it is impossible to state general requirements. In order to reduce the inequality between the undertakings, this consideration should especially apply once the Commission has sent a request for information. This would also contribute to a greater respect for the principle of proportionality.

a.2. The consequences of a leniency application

LEGAL CERTAINTY – In second instance, the uncertainty about the consequences and side effects of a leniency application should be remedied. In

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[312] *Supra.*
[313] *Supra.*
[314] *Supra.*

order to resolve this issue, the Commission together with the other competition authorities of the EU should reflect on the question of how much they are prepared to protect the leniency applicant against possible side effects such as parallel investigations or damages claims.[315] While it is probable that this will become a major disincentive for undertakings that doubt to blow the whistle in the future, [316] a more final set of guidelines and criteria issued by these competition authorities is necessary. How much of the current leniency system are these authorities willing to give up in order to keep an effective and efficient leniency system? Are they prepared to further attune their systems[317], to dramatically change the nature of their fines, or even to introduce a compensatory aspect in their fining policy?[318] In any event, a legislative intervention, preferably at the EU level, is required to reduce at the very least the legal uncertainty especially concerning the damages claims.[319]

a.3. The procedural rights of undertakings

KEY ELEMENTS – It is of course impossible to change the key aspects of the leniency system, such as *e.g.* the fact that the leniency applicant should supply the Commission with (self)-incriminating evidence[320], or the fact that there is an inequality installed between different leniency applicants. However, some effort could be done in order to reduce the level of disrespect of the procedural rights, without having to change the essential characteristics of the leniency system.

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[315] *Supra*.

[316] It is very likely that there will become more and more private enforcement in Europe in the near future. In this respect, an evolution one cannot ignore is the rise of firms such as Cartel Damages Claims and Hausfeld LLP in Europe, which are likely to lead the way in increasing the number of civil plaintiff actions. D.J. WALSH, “Carrots and Sticks- Leniency and Fines in EC Cartel Cases”, *ECLR* 2009, 30-35; A. RILEY, “The Modernization of EU Anti-Cartel Enforcement”, *ECLR* 2010, 194-197.

[317] *E.g.* in order to come to a one-stop leniency shop, *supra*. N. KROES, Speech, “The First Hundred Days, 40th Anniversary of the Studienvereiniging Kartellrecht 1965-2005”, [2005] Speech/05/295, April 7 2005, available at http://ec.europa.eu/competition/speeches/index_theme_1.html [Accessed on 30 April 2013]; M. MEROLA and D. WAELBROECK, *Towards an Optimal Enforcement of Competition Rules in Europe*, Brussels, Bruylant, 2010, 40; D. ARTS and K. BOURGEOIS, “Samenwerking tussen mededingingsautoriteiten en rechtsbescherming: enkele bedenkingen”, *TBM* 2006, 23-26; C. GAUER and M. JASPERS, “Designing a European Solution for a “One-Stop Leniency Shop”, *ECLR* 2006, 690-692; A. NOURRY and M. JEPHCOTT, “The Interaction of EC and National Leniency Systems. Closing the Gap Between the Two Regimes is Critical”, *Competition Law Insight* 2005, 7-8.

[318] J. RUGGEBERG and M.P. SCHINKEL, “Consolidating Antitrust Damages in Europe: A Proposal for Standing in Line with Efficient Private Enforcement”, *Amsterdam Centre of Law & Economics* 2006, 2-3, available at http://ssrn.com/paper=903282 [Accessed on 30 April 2013].

[319] *Supra*.

[320] The only solution in this respect would be to reduce the amount of the fines, by which the undertakings would not notice such considerable amount of financial pressure anymore. However, while these enormous fines guarantee the effectiveness of leniency, it is unimaginable that the Commission shall be willing to change this.

IMPARTIALITY – First, while the evidence shall always be supplied by the undertakings, it is advisable to implement in a revised leniency system that the Commission is obliged to impartially assess the leniency applications, which would in turn improve the guarantees of an impartial procedure. Justice must not only be done, but must also be seen to be done.[321] Secondly, due to the current institutional structure,[322] the risk of a prosecutorial bias of the Commission will always remain.[323] However, a significant improvement in the thoroughness of the review of a leniency application by the CJEU could reduce the negative consequences of such institutional design.[324]

EQUALITY – Finally, in order to reduce the inequality between the undertakings, it is recommended that the Commission at least uses its investigative powers in a well-considerate manner. Thus, the Commission could *e.g.* inform other undertakings about a request for information. [325] This would probably also induce them to file a leniency application, and enlarges the amount of leniency applicants. In addition, as mentioned in paragraph 132, when evaluating whether the information is of a significant added value, the Commission should take into account of the fact whether the undertakings received a request for information or not.

a.4. Consequences of enhanced procedural fairness

REDUCED ATTRACTIVENESS? – Incorporating these changes would significantly improve the level of procedural fairness, without at the same time entirely compromising the efficiency and effectiveness of leniency. However, as mentioned before, this improved transparency and predictability could lead to a reduced attractiveness of the system.[326]

OPTIMAL LEVEL OF ENFORCEMENT – In this respect, the society must consider which precise level of cartel enforcement is ultimately desirable. Does society prefer a leniency system that efficiently uncovers cartels at any cost and price?

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[321] It is advisable that there is a further elaboration upon the specific sanctions if this duty is violated: H. BUREZ and F. WIJCKMANS, "Het onderzoek à décharge - food for thought", *TBM* 2012, 184-188.

[322] There have been many proposals to change the Commission's institutional structure. See *e.g.* A. ANDREANGELI, *EU Competition Enforcement and Human Rights*, Cheltenham, Edward Elgar, 2008, 230-256; A. RILEY, "The Modernization of EU Anti-Cartel Enforcement: Will the European Commission Grasp The Opportunity?", *ECLR* 2010, 191-207; W. WILS, "The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis", *World Competition* 2004, 201-224.

[323] W. WILS, "The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: a Legal and Economic Analysis", *World Competition* 2004, 212-217.

[324] *Supra*.

[325] *Supra*.

[326] *Supra*. It is nevertheless important to stress that it is uncertain which exact percentage of leniency applicants would be disincentivized to apply for leniency. The leniency system remains to a large extent unpredictable and will remain to attract leniency applicants.

Or does she favor a more moderate leniency system that is perhaps less efficient, but which offers undertakings more rights? Today, it seems that the Commission has copied and transplanted the American competition law tradition, which is characterized by severe cartel enforcement, without however engaging in a true debate of whether such policy is in fact desirable in the West-European culture at all.[327] Indeed, it is important not to forget that when outlining its cartel enforcement and leniency policy, the Commission has been clearly inspired by the North American antitrust culture.[328] Society thus seems to have accepted implicitly the introduction of the leniency instrument, at the expense of the rule of law for undertakings in society.[329] While such implicit consent would be allowable for exceptional rare policies, it is less advisable to execute an enforcement policy that is the prime enforcement instrument, if it is not supported by the broader society. It is therefore recommended to hold a debate about the optimal level of cartel enforcement, wherein leniency can play a vital role. The fixation of enforcement priorities, including the level of enforcement, can have a profound impact on the enforcement methods. [330] If the society agrees to employ a more flexible and less efficient level of enforcement, then a reduced attractiveness of such a milder leniency system would not necessarily pose a problem.

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[327] There is a considerable difference in culture between North America and Europe. In North America, cartel enforcement is part of the American way of life; the American objection to anti-competitive practice is as much political as economics. S. TIMBERG, "Report on the United States", in W. FRIEDMANN (ed.), *Anti-Trust Laws: A comparative Symposium*, Stevens, 1956, 404.

[328] Thus, North America considerably influenced Europe in adopting a cartel enforcement policy, since before the Second World War, cartels were in Europe a widespread and even a highly esteemed institution. C. HARDING and J. JOSHUA, *Regulating Cartels in Europe. A Study of Legal Control of Corporate Delinquency*, Oxford, Oxford University Press, 2003, 1-409; A. MONNET and G. MARENCO, "The Birth of Modern Competition Law in Europe", in A. VON BOGDANDY, PC MAVROIDIS and Y. MENY (eds.), *European Integration and International Co-ordination – Studies in Transnational Economic Law in Honour of Claus-Dieter Ehlermann*, New York, Kluwer Law International, 2002, 279; P.F. KUNZLIK, "Globalization and Hybridization in Antitrust Enforcement: European "Borrowings From the U.S. Approach", *The Antitrust Bulletin* 2003, 319; H.G. SCHROTER, "Cartelization and Decartelization in Europe, 1870-1995: Rise and Decline of an Economic Institution" *Journal of European Economic History* 1996, 129, 137; L. WARLOUZET and T. WITSCHKE, "The Difficult Path to an Economic Rule of Law: European Competition Policy 1950-91", *Contemporary European History* 2012, 437-455.

[329] W. WILS, "Is Criminalization of Antitrust Enforcement Desirable?" in W. WILS (ed.), *Efficiency and Justice in European Antitrust Enforcement*, Oxford and Portland, Hart Publishing, 2008, 191. Indeed, as JOHN COFFEE has pointed out, *"the limited empirical evidence on public attitudes toward white-collar crimes suggests that the public learns what is criminal from what is punished, not vice versa"*: J. COFFEE, "Paradigms Lost: The Blurring of the Criminal and Civil Law Models – And What Can Be Done About It", *The Yale Law Journal Company* 1992, 1889. See also H.V. BALL and L.M. FRIEDMAN, "The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View", *Stanford Law Review* 1965, 197.

[330] It is clear that the enforcement priorities affect the design and the enforcement of the competition rules. If society agrees on a lesser level of enforcement, a lesser efficient and effective instrument than the leniency system could be used. L. PARRET, "Do We (Still) Know What We Are Protecting?", *TILEC Discussion Paper* 2009, 42-43, available at, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1379342 [Accessed on 30 April 2013].

EVALUATION – It is clear that the balance between efficiency and justice is a compromise of both options. Full clarity and predictability are neither desirable nor necessary, since the system would otherwise not be able to function adequately, but on the other side, a sufficient level of procedural fairness should also be reached. It is therefore important as a society to first determine which level of cartel enforcement is appropriate, since the stipulation of priorities has also an impact on how cartels should be enforced. In the end, the question does not only appear to be whether or not, or to what extent, one considers cartel offences to be reprehensible, but also, and more importantly, to what extent one is willing to compromise the legitimacy of those systems and structures on which it is based.

b. Reconsidering the reach of procedural fairness

EXCLUSION OF UNDERTAKINGS? – In the other event, if fundamental changes to the leniency system are not deemed appropriate, it is advisable that the broader society reflects on what should be understood by concepts such as fundamental rights and the rule of law, in order not to undermine the legitimacy of the EU. For instance, does this also include fundamental rights for legal persons, and more in particular, for undertakings in a leniency context? The CJEU and the ECtHR have in recent years significantly broadened the scope of the human rights instruments to the business context. This has been severely criticized, since many share the opinion that this extension affects the legitimacy of the human rights of individuals.[331] This is also reflected by the dual attitude of those Courts, since they are very hesitant in guaranteeing the requirements of those rights in daily practice. In this respect, the leniency system could also foster a broader debate on the question to which extent it is desirable to

[331] M. EMBERLAND, *The Human Rights of Companies. Exploring the Structure of ECHR Protection*, Oxford, Oxford University Press, 2005, 2-17; P.H. VAN KEMPEN, "The Recognition of Legal Persons in International Human Rights Instruments: Protection Against and Through Criminal Justice", in M. PIETH and R. IVORY (eds.) *Corporate Criminal Liability. Emergence, Convergence and Risk. Ius Gentium: Comparative Perspectives on Law and Justice,* New York, Springer, 2011, 355-389; J.D. BISHOP, "The Limits of Corporate Rights and the Rights of For-Profit Organizations", *Business Ethics Quaterly* 2012, 119-144; S.R. RATNER, "Corporations and Human Rights: A Theory of Legal Responsibility", *The Yale Law Journal* 2001, 452-460; M.E. SALOMON, A. TOSTENSEN and W. VANDENHOLE, *Casting the Net Wider: Human Rights, Development and New Duty Bearers,* Antwerp, Intersentia, 2007, 27-76; P.H.P. VAN KEMPEN, "Human Rights and Criminal Justice Applied to Legal Persons. Protection and Liability of Private and Public Juristic Entities Under the ICCPR, ECHR, ACHR, AfChHPR", *European Journal of Comparative Law* 2010, 1-4. For an overview of the human rights of undertakings recognized by the ECtHR, see: ECtHR, Press Unit, Factsheet, "Companies: Victims or Culprits", March 2013, available at http://www.echr.coe.int/NR/rdonlyres/FFA38777-33CE-4A30-BF91-94E269F04FEB/0/FS_Companies_ENG.pdf [Accessed on 30 April 2013]; H. PAUL, "Companies are not Human, so Why Should They Have Human Rights?", 2011, available at http://www.econexus.info/publication/corporations-are-not-human-so-why-should-they-have-human-right. [Accessed on 30 April 2013]; R. TAMULYTE, "Can a Company Have Any Human Rights?", available at http://www.worldservicesgroup.com/publications.asp?action=article&artid=4575 [Accessed on 30 April 2013].

provide procedural rights to undertakings. Indeed, leniency is in fact a prime example of the scenario whereby fundamental rights are granted in a first instance, but are subsequently challenged and encounter substantial resistance.

CLARITY – It is however of utmost importance that there is clarity as to what this concept of fundamental rights and, by extension, of procedural fairness encompasses. Otherwise, there is a risk running into a situation where it is proclaimed to comply with the rule of law and the fundamental rights, but where in reality a quite substantial part of our policy makers completely ignores them, which undermines the legitimacy of the broader structure of the EU.

4.4. CONCLUSION

LEGITIMACY – This section has addressed the question what the consequences are for the legitimacy of the leniency system when it lacks a substantial amount of procedural fairness. In order to be perceived legitimate, the efficient enforcement and the adequate protection of the rights of the undertakings must be reconciled. Today, while the balance tips in favor of efficiency, such legitimation is lacking. Especially with respect to the values of the EU, it is unacceptable to not respect them, because it rankles the legitimacy of the other systems on which leniency is based.

SUGGESTIONS – In order to remedy this lack of legitimacy, two mutually exclusive suggestions were proposed. First, some concrete proposals were introduced to enhance the procedural fairness of the leniency system, which could result in a more equilibrated balance between efficiency and justice and consequently contributes to a greater legitimacy. Secondly, if those suggestions are not viable, it is recommended to reconsider what the notion of procedural fairness exactly includes, and more in particular, to explore who benefits of this situation. Only with such adaptations will it be possible that the Commission runs a legitimized policy, which is not only beneficial for the cartel policy, but also for the entire EU.

5. CONCLUDING OBSERVATIONS

SUCCESSFUL BUT CONTROVERSIAL – The advent of the leniency system has completely transformed the method of how competition authorities detect, investigate and punish cartels. Leniency, initially conceived as an exceptional regime in order to uncover hard-core cartels that otherwise would have remain undetected, is nowadays more rule than exception in the enforcement of cartels. Indeed, if success is measured in terms of the number of detected cartels, the leniency system is a very cost-efficient method in achieving the desired results. However, there is also another side on the coin in this case. The increasing criticisms voiced on the leniency system seem to indicate that

this instrument is not something that competition authorities ought to be proud of. The leniency system is characterized by very intrusive powers, having a profound impact on the undertakings. An investigation as to the legitimacy of such popular enforcement system was therefore imperative. In the analysis presented here, the author has drawn conclusions first on the level of procedural fairness of the leniency system, and thereafter on the legitimacy arising from this level of procedural fairness.

PROCEDURAL UNFAIRNESS – In order to answer the question whether procedural fairness is sufficiently respected in the leniency system, a 'neutral' benchmark of procedural fairness was developed, against which the different aspects of the leniency system were checked. While the criticisms of the lawyers of the undertakings have often been ridiculed as tricks to secure maximal benefit for their clients, a profound analysis of the Leniency Notice and of the enforcement practice of the Commission has indicated that several criticisms on the leniency system are well-founded. First, the Leniency Notice does not come up to the mark with regard to legal certainty and equality. Secondly, it has become clear that there is too much legal uncertainty as concerns the consequences of a leniency application. Finally, an overview of the Commission's decisions and of the case law of the CJEU indicates that the procedural rights that were granted to the undertakings by the same CJEU, are never enforced in practice. While the leniency system is represented by the Commission as an optional instrument for which undertakings can opt freely, daily practice demonstrates that undertakings today have no other choice than to apply for leniency because of its vigorous fining policy, thereby being submitted and subordinated to a system that lacks procedural fairness on several accounts.

INSUFFICIENT LEGITIMACY – Having concluded that there is a lack of procedural fairness, the author has questioned in second instance whether this assessment also leads to a reduced level of legitimacy. While Europe fiercely defends the respect for the rule of law and for human rights, it is highly disputable to accept the Commission's leniency policy as it almost totally denies the respect for the rule of law and for the fundamental rights. The rule of law is not a *à la carte* concept, which the Commission can respect when it suits its interests. The author is concerned that a disrespect of those foundational values could undermine the legitimacy of the cartel enforcement system as well as of the EU as a whole. Consequently, while the balance in the current system tips over today in favor of efficiency, it seems that the leniency system lacks (sufficient) legitimacy, which is nonetheless badly needed, given the frequent recourse to it in practice.

SUGGESTIONS FOR IMPROVEMENT – Therefore, in order to improve this legitimacy, two alternative suggestions were proposed. First, it is recommended to enhance the procedural fairness of the leniency system. As such, it is argued that both the setup of the Leniency Notice as well as the

enforcement policy of the Commission could be substantially improved, without however totally jeopardizing the efficiency and effectiveness of the leniency system. Alternatively, if changes to the system are not deemed appropriate, it is necessary to seriously reflect on the concept of procedural fairness, including of human rights and the rule of law. If the society wants to keep conducting her leniency policy in the same old way, there should be more clarity that these foundational values of the EU do not apply to legal persons and undertakings. Only then we will be able to save the legitimacy of the leniency system and more in general of the EU. These two suggestions are not only meant as a measure to improve the leniency's legitimacy, but also to instigate a broader debate on this crucial matter. Finding the right balance between efficiency and justice remains a difficult balancing exercise, but it is of utmost necessity to achieve this goal in every single case. In the end, in order to continue to attract undertakings to blow the whistle, it is important that the leniency system is perceived fair, not only by the broader public, but also by the undertakings.