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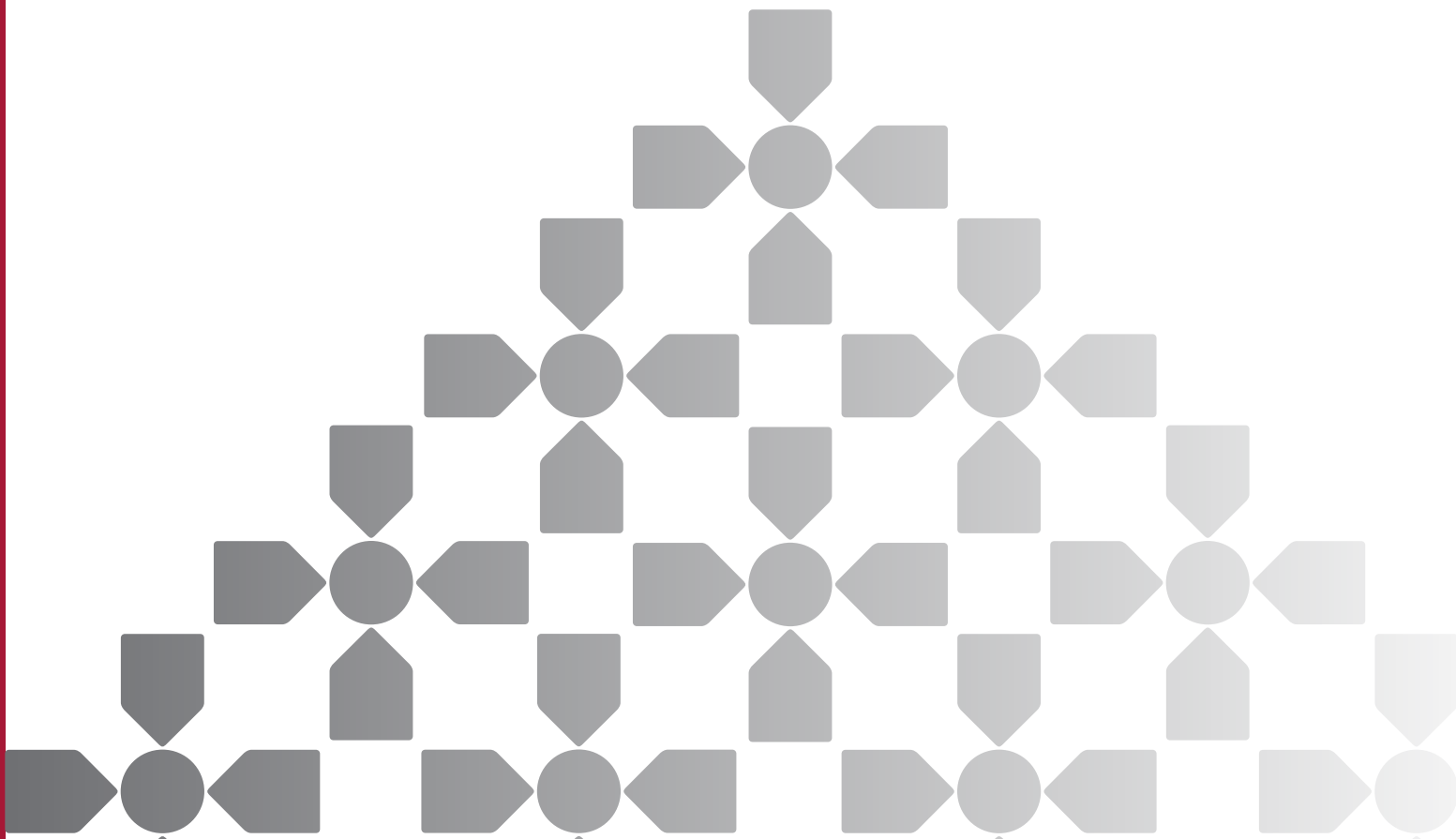
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# Access to Leniency Evidence and the Liability of an Immunity Recipient under EU Competition Law

Ingrid Margrethe Halvorsen Barlund.

*Prosjektet har mottatt midler fra det alminnelige prisreguleringsfondet.*

*Artikkelen er basert på deler av bok av Barlund IMH "Leniency in Competition Law, Wolters Kluwer [2020]"*



# **Access to Leniency Evidence and the Liability of an Immunity Recipient under EU Competition Law\***

- By Ingrid Margrethe Halvorsen Barlund\*\*

## **1. Shortcomings and Suggested Improvements**

In the following I examine whether, taken together, the rules on disclosure and liability of the Damages Directive allow a leniency applicant to self-report with confidence, at the same time as the right to compensation is assured.<sup>1</sup> The aim of the analysis is to highlight possible shortcomings and suggest improvements to the rules, thereby bringing us closer to answering the question of what the scope of leniency should be without undermining the right to compensation, while at the same time safeguarding the public interest in undistorted competition. The suggested improvements mainly consist of evidential aid, whereby immunity recipients provide assistance to claimants in filing suits in return for relief from liability for damages, and, to ensure the right to compensation, monetary aid taken from the public fines imposed. I will elaborate further on this below.

Pursuant to Article 11 (4) of the Damages Directive, it has been found necessary to initially limit the liability of an immunity recipient to its direct and indirect purchasers. Together with the prohibition on the disclosure of leniency statements in Articles 6 and 7, these rules are intended to safeguard the public interest in the effectiveness of leniency and its contribution to effective application of the Cartel Prohibition in Article 101 TFEU. In my view, however, the rules on the liability of an immunity recipient could be used to moderate the protection of leniency evidence that is necessary to safeguard the public interest in the effectiveness of leniency.<sup>2</sup> Therefore, even though the Damages Directive seeks to place the leniency applicant

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\* This article is based on parts of the book by Barlund IMH, “Leniency in EU Competition Law”, Wolters Kluwer, [2020].

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<sup>1</sup> Directive 2014/104/EU of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014], OJ L 349, 5.12.2014, p. 1-19 (the Damages Directive, OJ L 349/1).

<sup>2</sup> See also *Opinion of Advocate General Szpunar in C-162/15 P Evonik Degussa GmbH v Commission*, EU:C:2016:587 2017, para. 208. Marvão CMP, Spagnolo G and Buccicrossi P, ‘Leniency, Damages and EU Competition Policy’, [2015].

in the same position as its co-infringers in terms of the risk of damages claims, I believe that there may be better ways to regulate this interaction.

Guidance on which option strikes the best balance between leniency and the right to compensation can be found in the extent to which the rules provide legal certainty, for both the leniency applicant and the claimant. The less able a legal subject is to predict the outcome of the rules, the more legal uncertainty is created.<sup>3</sup> Many opinions have been expressed on how the rules on leniency and damages actions should interact. As regards the rules on liability for damages actions, some have argued against providing protection of the leniency system, arguing that the effectiveness of leniency and its contribution to the effective application of the Cartel Prohibition should be assured exclusively through the public channel.<sup>4</sup> Others have argued in favour of the opposite, arguing, for example, in favour of relieving an immunity recipient of liability in damages actions.<sup>5</sup> From a retributive and corrective justice perspective, this could undermine the restoration of losses caused by the cartel to an even greater extent. The immunity recipient would not only escape fines in the public channel, but also joint and several liability. In my opinion, such a proposal could nonetheless still work if it is combined with appropriate rules on disclosure. I will elaborate on this below. Note that ‘protection’ is used both in relation to situations where the rules seek to place the immunity recipient in an equal position as its co-infringers and situations where the rules seek to place the immunity recipient in an advantageous position at the expense of its co-infringers.

## **2. Removal of the Liability of an Immunity Recipient**

The Damages Directive has made sure that immunity recipients will ultimately be held fully liable. This reflects the view that granting an immunity recipient further protection from liability would undermine the right to compensation and the contribution of damages actions to effective application of the Cartel Prohibition in Article 101 TFEU. At the same time, the Damages Directive’s rules on the liability of an immunity recipient also reflect the view that treating an

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<sup>3</sup> Hammond SD, ‘The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades’ [2010] available at <https://www.justice.gov/atr/file/518241/download> [last accessed 11/3-2020], pp. 3-4. Note, however, that, to ensure effective enforcement, some have argued in favour of less predictable rules on, for example, the calculation of fines. This topic is touched on in, for example, Stephan A and Nikpay A, ‘Leniency Decision-Making from a Corporate Perspective: Complex Realities’, in Beaton-Wells E and Tran C (editors), *Anti-Cartel Enforcement in a Contemporary Age: Leniency Religion* Hart Publishing [2015], Chapter 8, pp. 143-144 with further references.

<sup>4</sup> Wils WPJ, ‘The Relationship between Public Antitrust Enforcement and Private Actions for Damages’, 32 *World Competition: Law and Economics Review* No.1 [2009], pp. 3-26, available at <https://ssrn.com/abstract=1296458> [last accessed 11/3-2020], p. 31.

<sup>5</sup> Marvão CMP, Spagnolo G and Buccirosi P, ‘Leniency and Damages’, [2015].

immunity recipient as jointly and severally liable on a par with co-infringers would be insufficient to protect the effectiveness of leniency. This would leave the immunity recipient as a primary target for damages claims, promoting the right to compensation, but undermining the public interest in assuring the effectiveness of leniency and, hence, effective application of the Cartel Prohibition.<sup>6</sup>

Given how the Damages Directive is practised and that the rules on liability only provide for de facto and not legal protection of the immunity recipient, I question whether the risk of damages claims can still be deemed likely to have a negative impact on leniency, thereby stabilising cartels and preventing cartel participants from stepping out of a cartel.<sup>7</sup> This line of reasoning is based on the assumption that the Damages Directive's rules on liability do not sufficiently ensure incentives to file for leniency. If further protection of the immunity recipient were provided, this would arguably ensure stronger incentives for a leniency applicant as a rational operator.<sup>8</sup> However, it would also be in conflict with the equality considerations behind the rules of the Damages Directive as regards the treatment of the immunity recipient and its co-infringers. The justification for these rules has been to avoid the immunity recipient becoming a primary target for damages claims. An undertaking should not be punished for seeking leniency, but rather be placed in the same position as its co-infringers in the private enforcement channel.<sup>9</sup> Further protection could entail greater liability for co-infringers since they are jointly and severally liable for the losses caused, but not for the immunity recipient, against whom it will not be possible to file claims during the recourse stage. As I will return to below, however, an arrangement whereby damages actions are included in the leniency programme could still allow for complete protection of an immunity recipient from liability in damages.

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<sup>6</sup> See, for example, Guttuso L, 'Leniency and the two Faces of Janus' in Beaton-Wells E and Tran C (editors), [2015], pp. 273-301, pp. 279-280.

<sup>7</sup> See, for example, Celli R and Riis-Madsen C, 'Strengthened Cartel Enforcement in the European Union: Balancing an Effective Leniency Programme with the Desire for Private Enforcement Action', 2 Competition Law International [2006], pp. 23-27, p. 23.

<sup>8</sup> For more literature on this topic, see the literature review in Marvão CMP, Spagnolo G and Buccirosi P, 'Leniency and Damages', CEPR Discussion Paper No DP10682 [2015], pp. 5-7. Kersting C, 'Removing the Tension between Public and Private Enforcement: Disclosure and Privileges for Successful Leniency Applicants', 5 (1) Journal of European Competition Law & Practice [2014], pp. 2-5.

<sup>9</sup> The Damages Directive, OJ L 349/1, recital 38. See also Wils WPJ, 'Private Enforcement of EU Antitrust Law and its Relationship with Public Enforcement: Past, Present and Future', 40 World Competition: Law and Economics Review No 1 [2017], pp. 3-45, available at <http://ssrn.com/author=456087> [last accessed 11/3-2020], pp. 27-28.

More protection for an immunity recipient by shifting liability even more onto its co-infringers could be achieved in various ways. Firstly, the protection could be limited to the same solution as set out in the Directive, where ultimate full liability only applies if the co-infringers are without assets. This would entail the complete removal of several and joint liability, although the immunity recipient would still be liable to its direct and indirect purchasers, both initially and in the recourse stage. Or, like the US model, though not as punitive, the entire recourse stage could be left out, meaning that an immunity recipient would only be held liable to its direct and indirect purchasers if approached in the initial stage. The Hungarian Competition Act Article 88 D is interesting in this context. It previously stated that:

‘Any person to whom immunity from the fine was granted pursuant to Article 78/A may refuse to pay compensation for any damage caused by his/her conduct infringing Article 11 of this Act or Article 101 of the TFEU as long as such claim may be recovered from any other person causing the damage who is responsible for the same infringement [...]’<sup>10</sup>

To increase the attractiveness of Hungary’s leniency policy, a leniency applicant granted immunity from fines would, before the adoption of the Damages Directive, not be held liable for damages to third parties as long as these could be collected from other cartel members.<sup>11</sup> This solution thereby went further than the Damages Directive, where an immunity recipient will in any case be held liable to its direct and indirect purchasers, and for the whole loss caused by the cartel if its co-infringers have no assets left. Bear in mind that, for claimants, as long as there are sufficient assets, these solutions would only affect to whom they could turn for compensation.

Lastly, the liability of an immunity recipient could be completely removed, both initially and in the recourse stage. This would mean that claimants are not allowed to approach the immunity recipient in the initial stage, and nor are the co-infringers allowed to turn to the immunity recipient in the recourse stage. This would mean that, when a cartel member considers applying

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<sup>10</sup> The Hungarian Competition Act, [1996], available at [https://www.gvh.hu/pfile/file?path=/en/legal\\_background/rules\\_for\\_the\\_hungarian\\_market/competition\\_act/competition-act-documents/jogihatter\\_tpvt\\_hataly\\_20190101\\_a&inline=true](https://www.gvh.hu/pfile/file?path=/en/legal_background/rules_for_the_hungarian_market/competition_act/competition-act-documents/jogihatter_tpvt_hataly_20190101_a&inline=true) [last accessed 11/3-2020]. *About the Implementation of the Damages Directive into Hungarian Competition Law*, [2017] available at <http://www.internationallawoffice.com/Newsletters/Competition-Antitrust/Hungary/Schoenherr-Attorneys-at-Law/Implementation-of-EU-Antitrust-Damages-Directive> [last accessed 11/3-2020]. See also Komninos AP, ‘The relationship between Public and Private Enforcement: quod Dei Deo, quod Caesaris Caesari’ in in Lowe P and Marquis M (editors), *European Competition Law Annual - Integrating Public and Private Enforcement of Competition Law - Implications for Courts and Agencies*, [2011], pp. 141-157, p. 152.

<sup>11</sup> Komninos AP, ‘The relationship between Public and Private Enforcement: quod Dei Deo, quod Caesaris Caesari’ in *ibid*, pp. 141-157, p. 152.

for leniency, not only is there a chance of escaping fines, but also a chance of escaping private claims. This would mean including both fines and damages actions in the leniency programme. It is this latter suggestion I find most interesting.

If more liability is shifted onto the co-infringers, there is a risk of undermining the objective of undistorted competition that underlies the Cartel Prohibition in Article 101 TFEU. There may be a higher risk of other cartel members being pushed out of the market because of the size of the claims, which come in addition to severe fines.<sup>12</sup> It has been shown that in 46% of cartel cases, the Commission has granted immunity to the cartel participant with the highest turnover.<sup>13</sup> If the co-infringers are smaller undertakings and a ‘big fish/small fish scenario’ arises, the objective of undistorted competition may be undermined. It is important to be aware, however, that, of the 46% of cases where the immunity recipient has had the largest turnover, several of the co-infringers have also been large undertakings and difficult to push out of the market.<sup>14</sup> In addition, in terms of damages claims, if the solution in Article 11 of the Damages Directive is retained, such a scenario is even less likely. Article 11 states that:

‘[...] Member States shall ensure that, without prejudice to the right of full compensation as laid down in Article 3, where the infringer is a small or medium-sized enterprise (SME) as defined in Commission Recommendation 2003/361/EC, the infringer is liable only to its own direct and indirect purchasers where:

its market share in the relevant market was below 5% at any time during the infringement of competition law; and

the application of the normal rules of joint and several liability would irretrievably jeopardise its economic viability and cause its assets to lose all their value.’

SMEs therefore have limited liability like the immunity recipient under the Directive. Under a follow-on damages action, the Commission may have already capped the fines to avoid a scenario where undertakings are at risk of going out of business. In addition, though not in order

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<sup>12</sup> Wils WPJ, ‘Optimal Antitrust Fines: Theory and Practice’, 29 *World Competition: Law and Economics Review* No. 2, February [2006], available at <https://ssrn.com/abstract=883102> [last accessed 11/3-2020], p. 19.

<sup>13</sup> Wils WPJ, [2017], p. 29 with further references. See also Summary of Commission Decision of 21 February 2007 relating to a proceeding under Article 81 of the Treaty establishing the European Community (Case COMP/E-1/38.823 — *Elevators and Escalators*), [2008] OJ C 75/19, paras. 10 (see the Netherlands market). Commission Decision of 8 December 2010 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the Agreement on the European Economic Area (Case COMP/39.309 — *LCD*), [2011], OJ C 295/8.

<sup>14</sup> Wils WPJ, [2017].

to avoid bankruptcy, these undertakings may still be eligible for reduced fines under the Leniency Notice, easing the burden of monetary remedies.

One way of further limiting an immunity recipient's liability would be to adjust the fines to the damages paid.<sup>15</sup> Note that this would be relevant for the co-infringers, which are less likely to be bankrupt, but that it is not relevant to the incentives of the immunity recipient, who does not pay fines. Article 18 (3) of the Damages Directive states that '*A competition authority may consider compensation paid as a result of a consensual settlement and prior to its decision imposing a fine to be a mitigating factor.*' Such mitigation could go beyond cases where consensual settlements are agreed, and also be applied to the quantification of fines in standard infringement procedures, to enable further limitation of an immunity recipient's liability at the expense of its co-infringers. In previous decisions, the Commission has given consideration to damages claims paid when quantifying fines, but, in the General Court's view, there is no obligation to take this into account, and nor is it stipulated in the fining guidelines.<sup>16</sup>

Some would argue that consideration should not be given to damages paid when calculating fines, since, as a matter of principle, they should be set separately and reflect the seriousness of the infringement, the principle of proportionality and the separation of duties between competition authorities and national courts.<sup>17</sup>

There is also the issue of whether the authorities should take possible future claims into account, but an infringer could postpone the fines, for example by filing for interim relief.<sup>18</sup> Note,

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<sup>15</sup> Commission Decision of 21 October 1998 relating to a proceeding under Article 85 of the EC Treaty (Case No IV/35.691/E-4: - *Pre-Insulated Pipe Cartel*), [1999], OJ L 24/1, para. 172. Commission decision of 30 October 2002 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/35.587 *PO Video Games*, COMP/35.706 *PO Nintendo Distribution* and COMP/36.321 *Omega — Nintendo*), [2003] OJ L 255/33, paras. 440-441. See also Judgment of 30 April 2009, *Nintendo and Nintendo of Europe v Commission*, T-13/03, EU:T:2009:131, para. 215. Spagnolo G, 'Divide et Impera: Optimal Leniency Programs', CEPR Discussion Paper No 4840 [2005], available at <ftp://ftp.zew.de/pub/zew-docs/veranstaltungen/rnic/papers/GiancarloSpagnolo.pdf> [last accessed 11/3-2020], p. 29.

<sup>16</sup> Commission Decision of 21 October 1998 relating to a proceeding under Article 85 of the EC Treaty (Case No IV/35.691/E-4: - *Pre-Insulated Pipe Cartel*), [1999], OJ L 24/1, para. 172. Commission decision of 30 October 2002 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (COMP/35.587 *PO Video Games*, COMP/35.706 *PO Nintendo Distribution* and COMP/36.321 *Omega — Nintendo*), [2003], OJ L 255/33, para. 440. See also Judgment of 27 September 2006, *Archer Daniels Midland v Commission*, T-59/02, EU:T:2006:272, para. 354. Judgment of 30 April 2009, *Nintendo and Nintendo of Europe v Commission*, T-13/03, EU:T:2009:131, para 215. The Fining Guidelines [2006] OJ C 210/2.

<sup>17</sup> Lasserre B, 'Integrating Public and Private Enforcement of Competition Law: Implications for Courts and Agencies', in Lowe P and Marquis M (editors), [2011], pp. 315-325, pp. 323-324.

<sup>18</sup> Wils WPJ, 'The Relationship between Public Antitrust Enforcement and Private Actions for Damages', 32 *World Competition: Law and Economics Review*, No 1, [2009], pp. 3-26 (p. 5 with further references), available at <https://ssrn.com/abstract=1296458> (last accessed 11/3-2020), p. 5.

however, that access to such interim measures may be difficult, as the powers of NCAs to order interim measures pursuant to Article 5 of Regulation 1/2003 seem to largely be limited to making sure that infringements are brought to an end, and have nothing to do with ensuring compensation.<sup>19</sup> In addition, if it was possible to file for such interim relief, this could complicate claimants' access to evidence as it would lead to postponement of the publication of decisions. This may not become a problem, however, if immunity recipients are required to assist in the private enforcement, which I will elaborate on below.

Another option could be to take a more stringent approach, limiting the discretion of the authorities to quantify fines by deducting a set percentage or amount in cartel cases where leniency has been applied for, in order to increase the liability of the co-infringers of the immunity recipient and ensure the right to compensation.<sup>20</sup> Establishing that damages take precedence over fines would help to justify giving an immunity recipient more protection, since there would be a smaller risk of its co-infringers being pushed out of the market. Such a set deduction does not have to be limited to cases where leniency has been granted. The increasing level of fines, together with damages claims, is allegedly not just a problem in cases where leniency is sought and players are pushed out of markets due to added liability resulting from the protection provided to immunity recipients. Article 20 (2) a) of the Damages Directive stipulates that, in the Commission's review report on the Directive, which is to be submitted to the European Parliament and the Council by 27 December 2020, it will explain

‘the possible impact of financial constraints flowing from the payment of fines imposed by a competition authority for an infringement of competition law on the possibility for injured parties to obtain full compensation for the harm caused by that infringement of competition law’.

The fact that there is no established supremacy could arguably be criticised from a general deterrence perspective.<sup>21</sup> In EU competition law, fines have been assigned chief responsibility for ensuring deterrence, and they have increased dramatically in recent decades.<sup>22</sup> But models

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<sup>19</sup> Lasserre B, ‘Integrating Public and Private Enforcement of Competition Law: Implications for Courts and Agencies’, in Lowe P and Marquis M (editors), [2011], pp. 315-325, pp. 323-324.

<sup>20</sup> See similar suggestion by Ratliff J, ‘Integrating Public and Private Enforcement of Competition Law: Implications for Courts and Agencies’, in Lowe P and Marquis M (editors), [2011], pp. 271-293, pp. 293.

<sup>21</sup> See Van Nuffel P, the Institutional Report, Bándi G et al., *Private Enforcement and Collective Redress in European Competition Law*, Wolters Kluwer Law & Business [2016], p. 257 and footnote 397.

<sup>22</sup> Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market [2019] OJ L 11, 14.1.2019, p. 3-33 (hereafter, The ECN+ Directive, OJ L 11/3), recital 49. See also Ezrachi A and Ioannidou M, ‘Access to Justice in European Competition Law - Public Enforcement as a Supplementary Channel for “Corrective Compensation”’, 19 *Asia Pacific Law Review* [2011], pp. 195-216, p. 199



for calculating fines have not taken into consideration the financial burden of paying damages.<sup>23</sup> The calculation of fines appears to have been based on the assumption that compensation is rarely paid.<sup>24</sup> With the adoption of the Damages Directive, which harmonises certain rules on damages actions to ensure that claims are filed, this assumption may be misleading.<sup>25</sup> There is a risk of fines being set too high and not achieving the right level of deterrence, leading to scenarios such as the one highlighted between an immunity recipient and its co-infringers.<sup>26</sup> This also raises the question of whether non-monetary sanctions are needed, as I argue in favour of.<sup>27</sup> To allow for a solution where an immunity recipient escapes liability for damages actions, and where more liability is shifted onto its co-infringers, fines could be adjusted more to the exposure to damages claims.<sup>28</sup>

Based on the figures set out above, there is nonetheless little risk that a situation will arise where an immunity recipient must step in. The slim chance of this happening can be used as an argument in favour of providing complete protection of leniency applicants, as the right to compensation will most likely be ensured by pursuing the co-infringers. Alternatively, instead of providing complete protection, a solution such as Hungary's prior to the Directive could be chosen. It entailed no initial liability, but last-resort liability, since the small chance of last-resort claims against the immunity recipient will not notably affect the incentives to file for leniency. This latter position could be backed by the argument that, if a potential leniency applicant were offered immunity from both fines and damages, the undertaking would be tempted to exaggerate the scope and extent of the cartel in order to harm its co-infringers and competitors.<sup>29</sup>

If a situation should nonetheless arise where the cartel participants are pushed out of a market, thereby leaving claimants uncompensated since there is nothing to collect from the co-infringers of the immunity recipient, the question arises of whether primary law allows for claimants

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with further references. Stephan A and Nikpay A, 'Leniency Decision-Making from a Corporate Perspective: Complex Realities', in Beaton-Wells C and Tran C (editors), [2015], Chapter 8, pp. 147-148.

<sup>23</sup> The Fining Guidelines [2006] OJ C 210/2.

<sup>24</sup> Hodges C, *Law and Corporate Behaviour: Integrating Theories of Regulation, Enforcement, Compliance and Ethics*, Hart Publishing [2015], p. 120.

<sup>25</sup> Peyer S, 'Private Antitrust Litigation in Germany from 2005 to 2007: Empirical Evidence', 8 *Journal of Competition Law & Economics* No. 2 [2012], pp. 331-359.

<sup>26</sup> Hodges C, [2015], p. 120.

<sup>27</sup> See, for instance, Wils WPJ, [2017], p. 41.

<sup>28</sup> Hodges C, [2015], p. 124.

<sup>29</sup> See, for example, Wils WPJ, [2017], p. 45.

having to carry their losses uncompensated if the immunity recipient has assets left.<sup>30</sup> Complete protection of an immunity recipient from liability for damages could conflict with the obligation to ensure the right to compensation. In the following, I will examine whether deeper integration of damages actions and leniency could help in such a scenario.

### **3. Assistance to Claimants**

It is difficult for claimants to build their cases. The regulatory framework has an untapped potential that could assist claimants in building their cases, while at the same time possibly allowing for a stronger leniency regime. I therefore suggest here that, if immunity from damages claims is also allowed for, this could be incorporated into the leniency programme of the Commission in a similar way as fines.<sup>31</sup> As I will return to below, there is a difference here given that a damages action is, in principle, a matter between private parties and not between the authorities and infringers.

I nonetheless suggest that certain specific requirements be set that the immunity recipient must fulfil in order to qualify for protection from liability for damages actions as well as from fines. These requirements entail providing assistance and evidence to the claimants to enable them to build their cases.<sup>32</sup> Such assistance could be provided in different ways. A solution whereby the leniency applicant is required to provide information to claimants could be similar to the US model. Note that the US antitrust enforcement model is not a compensatory model that seeks to restore the situation to how it was *ex-ante*.

Making restitution to injured parties where possible is part of the corporate leniency programme in the US.<sup>33</sup> This is often achieved through civil actions under the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA).<sup>34</sup> Section 213 of ACPERA ‘detrables’ damages for the immunity recipient, in addition to providing exemption from joint and several liability. This means that the immunity recipient is only liable for the actual damages attributable to its own conduct, and that, rather than being liable for three times the damages caused by the cartel, the

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<sup>30</sup> On rebates on damages for a leniency applicant, see Cauffman C, ‘The Interaction of Leniency Programmes and Actions for Damages’, 7 *The Competition Law Review* [2011], pp. 181-220, pp. 208-210.

<sup>31</sup> The Leniency Notice [2006] OJ C 298/17.

<sup>32</sup> This question is briefly commented on by Ratliff J, ‘Integrating Public and Private Enforcement of Competition Law: Implications for Courts and Agencies’, in Lowe P and Marquis M (editors), [2011], pp. 271-293, pp. 289-290.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programmes*, OECD Report [2002], available at <https://www.oecd.org/competition/cartels/1841891.pdf> [last accessed 11/3-2020], p. 21.

immunity recipient only risks single damages.<sup>35</sup> This could result in claimants refraining from approaching the immunity recipient, knowing that they will receive less compensation than from the co-infringers. To be eligible for single damages, the applicant must not only collaborate with the Antitrust Division, it must also assist the private parties. Pursuant to Section 213 of ACPERA

‘an antitrust leniency applicant or cooperating individual satisfies the requirements [for single damages] [...] if the court in which the civil action is brought determines, after considering any appropriate pleadings from the claimant, that the applicant or cooperating individual, as the case may be, has provided satisfactory cooperation to the claimant with respect to the civil action, which cooperation shall include--

(1) providing a full account to the claimant of all facts known to the applicant or cooperating individual, as the case may be, that are potentially relevant to the civil action;

(2) furnishing all documents or other items potentially relevant to the civil action that are in the possession, custody, or control of the applicant or cooperating individual, as the case may be, wherever they are located; and

(3)(A) in the case of a cooperating individual—

(i) making himself or herself available for such interviews, depositions, or testimony in connection with the civil action as the claimant may reasonably require; and

(ii) responding completely and truthfully, without making any attempt either falsely to protect or falsely to implicate any person or entity, and without intentionally withholding any potentially relevant information, to all questions asked by the claimant in interviews, depositions, trials, or any other court proceedings in connection with the civil action; or

(B) in the case of an antitrust leniency applicant, using its best efforts to secure and facilitate from cooperating individuals covered by the agreement the cooperation described in clauses (i) and (ii) and subparagraph (A).<sup>36</sup>

The collection of information is thus not only an objective pursued through the public enforcement channel, it also helps to ensure that claims for damages are filed under the opt-out class action system. Bear in mind that indirect purchasers are not included, which facilitates litigation, but that this could ‘*be criticized on the grounds that they may deny compensation to the real victims of the anticompetitive arrangements and allow direct purchasers to collect a*

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<sup>35</sup> The Antitrust Criminal Penalty Enhancement and Reform Act of 2004 Extension Act [2009] Pub.L. 111–30, 123 Stat. 1775, H.R. 2675. Rodger BJ and MacCulloch A, *Competition Law and Policy in the EU and UK*, Routledge [2014], pp. 75-76.

<sup>36</sup> The Antitrust Criminal Penalty Enhancement and Reform Act of 2004 Extension Act [2009] Pub.L. 111–30, 123 Stat. 1775, H.R. 2675.

*windfall, [still, the system does] concentrate antitrust claims in the hands of those most likely to sue [...]*.<sup>37</sup> As opposed to the de facto limited liability of the immunity recipient under the Damages Directive, which follows automatically from its immune status pursuant to the Leniency Notice of the Commission, under the corporate or individual leniency programme of the Antitrust Division, the immunity recipient must fulfil additional requirements to be eligible for single damages.

Further, to be eligible for single damages under the US model, an undertaking or individual must have applied for leniency under the leniency programmes of the DOJ. This is clear from the wording ‘*an antitrust leniency applicant or cooperating individual*’, meaning that both corporate entities and individuals may be eligible for single damages if they fulfil the requirements described above. This indicates stronger integration between leniency and damages actions than in EU competition law, since escaping treble damages incentivises cartel participants to self-report and participate in the DOJ leniency programmes.<sup>38</sup> That private enforcement in the US has played a much more dominant role in antitrust enforcement can also be taken as a sign that the US leniency system works.

The deterrent effect of the enactment of ACPERA has been questioned, however.<sup>39</sup> Empirical evidence shows that there has only been minimal change in the number of leniency applications since its enactment. A study showed, however, an increase in the number of successful applications relating to undetected cartels, where the Department of Justice did not know about their existence in advance. ACPERA’s enactment could thus have had an effect on the type, but not the number of applications, although this could also be explained by other factors.<sup>40</sup> The report concludes that the criminal sanctions, and not the civil ones, still provide a greater incentive for leniency applicants to come forward.<sup>41</sup> Of most interest here, the report demonstrated that the assistance and information provided by the leniency applicants had a positive effect on civil actions, and ‘*strengthened and streamlined*’ the cases.<sup>42</sup>

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<sup>37</sup> Jones A, ‘Private Enforcement of EU Competition Law: A Comparison with, and Lessons from, the US’, TLI Think! Paper 10 [2016], p. 7 with further references.

<sup>38</sup> Mobley SJ and Denton R (editors), *Global Cartels Handbook: Leniency: Policy and Procedure* Oxford University Press [2011], p. 637.

<sup>39</sup> Report to Congressional Committees by the United States Government Accountability Office (GAO), CRIMINAL CARTEL ENFORCEMENT. Stakeholder Views on Impact of 2004 Antitrust Reform Are Mixed, but Support Whistleblower Protection, GAO-11-619.

<sup>40</sup> *Ibid.*, p. 19.

<sup>41</sup> See *inter alia* *ibid.*, p. 20

<sup>42</sup> *Ibid.*, p. 2.

Even though the number of applications has not increased overall, the increase in the detection rate can be said to give damages actions a deterrent aspect. Furthermore, private enforcement does not interfere with public enforcement since the number of applicants seem to be stable, and to have a positive effect on private actions. Bear in mind that the report is from 2004 and thus 16 years old. It is still relevant, however, as the US system is much the same today. After this report, it therefore seems that, through ACPERA, the US appears to have found a way to maintain the integrity of its leniency policy, while at the same time enabling damages claimants to strengthen their cases through the cooperation of the leniency applicant in exchange for de-trebled damages awards.<sup>43</sup>

As regards how to enforce such an integrated leniency and damages policy under EU competition law, the natural enforcer would be the national courts in all the Member States, as in the US where it is the courts that assess whether the defendant has fulfilled the requirements for ‘*satisfactory cooperation*’ and award either single or treble damages.<sup>44</sup> As under the corporate leniency programme in the US, an approach that requires an immunity recipient to assist claimants could be made explicit by the Commission. A good start would be to change the current wording of the Leniency Notice, which states that ‘*[t]he fact that immunity or reduction in respect of fines is granted cannot protect an undertaking from the civil law consequences of its participation in an infringement of Article 81 EC*’.<sup>45</sup>

In principle, granting immunity from fines and immunity from damages should be made mutually dependent. However, in a scenario where a cartel has already been exposed and a cartel participant wishes to assist claimants in order to escape liability for damages, I am sceptical about granting full immunity: the point of closer integration between leniency and damages actions is not just to ensure compensation, but to strengthen the incentives to file for leniency from fines as well. If granted immunity from damages alone, this could weaken the incentives to file for leniency from fines, with the result that the cartel is not detected in the first place. That would be to the detriment of everyone, including those that have suffered losses due to the cartel.

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<sup>43</sup> Moodaliyar K, ‘Access to Leniency Documents: Should Cartel Leniency Applicants Pay the Price for Damages?’, 7 Yearbook of Antitrust and Regulatory Studies [2014], pp. 159-189, p.185.

<sup>44</sup> See, for instance, Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programmes, OECD Report [2002], available at <https://www.oecd.org/competition/cartels/1841891.pdf> [last accessed 11/3-2020], p. 21.

<sup>45</sup> The Leniency Notice [2006] OJ C 298/17, point 39.

If a leniency system is introduced whereby immunity recipients are incentivised to assist claimants in filing their claims in return for escaping liability for such claims, this would strengthen the right to compensation rather than weakening it. But a scenario where there is nothing to collect from the co-infringers cannot be completely ruled out. That is why, in addition to greater integration between leniency and damages actions, I also suggest establishing a fund to avoid any conflicts of law. This would allow for a broader scope of leniency by including immunity from liability for damages actions.

#### **4. A Fund Financed by Fines**

To enable complete protection of an immunity recipient from damages actions, at the same time as ensuring that claimants are compensated, a solution could be to create a fund financed by part of the fines paid to the Commission, which could be earmarked for claimants.<sup>46</sup> Fines are assigned responsibility for collecting illegal gains, but none of the fines go to victims of cartels.<sup>47</sup> Rather, they are allocated to other purposes within the internal market and the EU budget.<sup>48</sup> This should not stand in the way, however, of reallocating part of the fines to those left uncompensated due to a scenario like the one set out above, where there is nothing to collect from the co-infringers of the immunity recipient.<sup>49</sup> A fund would enable more protection to be given to an immunity recipient at the expense of its co-infringers since the fund would ensure coverage of legitimate claims left uncovered.

Such a fund could be managed in several ways. The competition authority could, for example, set aside a certain percentage of the fines for those that have suffered losses, as was suggested above in relation to the moderation of fines.<sup>50</sup> Or compensation could be added to already calculated fines in order to increase deterrence.<sup>51</sup> Unlike the first option, this latter option

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<sup>46</sup> Ezrachi A and Ioannidou M, 'Access to Justice in European Competition Law - Public Enforcement as a Supplementary Channel for "Corrective Compensation"', 19 *Asia Pacific Law Review* [2011], pp. 195-216. Hodges C, [2015], pp. 120-121.

<sup>47</sup> European Commission, *European Union Public Finance*, 5<sup>th</sup> edition, Luxembourg: Publications Office of the European Union, [2014], Chapter 14.

<sup>48</sup> *Ibid.*, see for instance p. 246. See also the Commission 'Where does the money come from?' [2017], available at [http://ec.europa.eu/budget/explained/budg\\_system/financing/fin\\_en.cfm#compensation](http://ec.europa.eu/budget/explained/budg_system/financing/fin_en.cfm#compensation) [last accessed 11/3-2020].

<sup>49</sup> Komninos AP, 'The relationship between Public and Private Enforcement: quod Dei Deo, quod Caesaris Caesari' in Lowe P and Marquis M (editors), [2011], pp. 141-157, p. 142. Hodges C, [2015], p. 120.

<sup>50</sup> This question is briefly commented on by Ratliff J, 'Integrating Public and Private Enforcement of Competition Law: Implications for Courts and Agencies', in Lowe P and Marquis M (editors), [2011], pp. 271-293, pp. 291-293.

<sup>51</sup> Ezrachi A and Ioannidou M, [2011], p. 212.

would be based on the assumption that the current fines are not sufficiently deterrent. I do not agree with this assumption, however.

Such a fund could be positive for the defendants, as it would allow them to redress the harm caused no matter what.<sup>52</sup> The fund would thus be a supplement where private enforcement alone does not ensure corrective justice and the right to compensation.<sup>53</sup>

The fund would not have to be limited to the scenario described above, where there is nothing to collect from the co-infringers of the immunity recipient. From a more overall perspective on antitrust enforcement that does not just deal with the second external conflict between leniency and claimants, the fund could also, for example, provide aid where litigation costs are high. The issue of expensive litigation as an obstacle to the proper development of private enforcement within EU competition law should have been given more attention by policymakers and legislators, but it is not addressed in either the Damages Directive or the ECN+ Directive. Such a fund could be used, for example, in cases typically suited to class actions, i.e. where there is a large group of more or less identical victims that are difficult to identify and are unlikely to file for damages alone because of the limited loss per victim.<sup>54</sup> The chances of every purchaser or end-consumer filing for compensation are very low in these instances, since they do not have an incentive to bring a private damages action. Yet, their collective losses can be very substantial.<sup>55</sup> These are the typical victims of cartels in retail markets, where consumers have suffered losses due to higher prices for products or services, but also poorer selection and quality. Money from the fund could be used, for example, to strengthen the incentives of, and provide aid and support to, consumer organisations lobbying for consumers' interests and rights. Of course, the fund could also function as a channel for repaying money to customers who have paid too much.<sup>56</sup> The Commission actually proposed allowing collective claims brought by qualified bodies (for instance consumer associations) on behalf of and for the benefit of consumers.<sup>57</sup> Both the White Paper and the withdrawn directive proposal from 2009

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<sup>52</sup> This question is briefly commented on by Ratliff J, 'Integrating Public and Private Enforcement of Competition Law: Implications for Courts and Agencies', in Lowe P and Marquis M (editors), [2011], pp. 271-293, p. 292.

<sup>53</sup> Ezrachi A and Ioannidou M, [2011], p. 214.

<sup>54</sup> Ibid., pp. 195-291, p. 212. Hondius E and Janssen A (editors), *Disgorgement of Profits: Gain-Based Remedies throughout the World*, Volume 8, Springer, [2015], p. 4.

<sup>55</sup> Gavil AI, 'Designing Private Rights of Action for Competition Policy Systems' in Lowe P and Marquis M (editors), [2011], part I, pp. 3-15, p. 9.

<sup>56</sup> Ezrachi A and Ioannidou M, [2011], p. 212.

<sup>57</sup> The Green Paper COM [2005] 672 final.

proposed allowing opt-in collective actions (group actions) and representative actions, but none of them were included in the Damages Directive.<sup>58</sup>

A fund could thus strengthen claimants' access to compensation in many ways and, most importantly in the present context, contribute to closer integration between leniency and damages actions by offering lenient treatment in relation to damages actions as well. I am sceptical about giving the same scope of lenient treatment in relation to damages actions as in relation to fines, and am perhaps inclined to only offer immunity from the former. This would mean that, whereas an undertaking would be eligible for both immunity from and a reduction of fines, it would only be eligible for immunity from damages actions. This could not only have a stronger destabilising effect since the incentives to blow the whistle on the cartel would be stronger, but, most importantly, it would ensure that claimants are compensated. If subsequent leniency applicants can also qualify for reduced damages claims, this could threaten the right to compensation to a greater extent than if only the initial immunity recipient is qualified.

## **5. Concluding Remarks**

The analyses show that there is a need to change the rules of the Damages Directive. My suggestion is to create a leniency system for damages actions as well. Offering leniency applicants immunity from damages actions in return for providing evidence to claimants could both strengthen claimants' possibilities to build solid damages suits and create stronger incentives for self-reporting to the Commission. I do not find the evidentiary sources promoted by the regulatory framework that a claimant can rely on in building a case satisfactory. In my opinion, including damages actions in the leniency programme of the Commission by requiring that leniency recipients give evidentiary aid to claimants in return for immunity from damages actions could greatly improve this situation.

Even if offering immunity from both fines and damages actions could entail stretching considerations of justice and equality even further, there is reason to believe that such integration would further both the public interest in ensuring the effectiveness of leniency and safeguard the right to compensation, as well as their contribution to effective application of the Cartel Prohibition in Article 101 TFEU. From an overall perspective, I have thus sought to

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<sup>58</sup> The White Paper COM [2008] 165 final. See also the Proposal for a Council Directive on rules governing damages actions for infringements of Articles 81 and 82 of the Treaty [2009], Commission Internal, Annex III in Lowe P and Marquis M (editors), [2011].



integrate the two enforcement channels to a greater degree than if no protection from damages actions was provided, since this could arguably increase the incentives to apply for leniency, leading to more cartels being detected and to more decisions that can form the basis for follow-on damages actions.

In terms of how the evidence should be provided, ACPERA could serve as an inspiration. It is important to note that, as opposed to immunity from fines, which does not affect the co-infringers, immunity from damages actions does. As jointly and severally liable parties, the co-infringers will be required to step in and ensure that the claimants are compensated. To avoid scenarios where undistorted competition is undermined, or where the right to compensation is not ensured, adjusting fines to subsequent claims could possibly be a solution. In particular, a fund financed by some of the revenues from monetary sanctions could help to ensure that claims are filed and compensated.