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ON

COMPETITION LAW

THE LENIENCY POLICY

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By my signature below, I pledge and certify that this master thesis is entirely my own work. I have faithfully and exactly cited all the sources I have used.

IN PRAGUE, 4th JULY2012 _____

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ABSTRACT:

KEY WORDS: *leniency, hard-core cartel, whistleblowing, competition*

The EU/US Leniency policy is a thesis collecting and classifying huge amount of information and data from several legislations in relation to a relatively new phenomenon of leniency policy. Its additional value are not only commentaries on the de lege lata (currently existing) legislation, but mainly de lege ferandae presumptions emphasizing the trends which could be anticipated in the leniency policies in the future. Processing world data would not be in my capacities and therefore I decided to work with the most representative legislations – those of the European Union and of the United States, a minor insight is also given in case of Great Britain, Germany and France. The thesis helps the reader get familiar with the basic leniency concepts (terminology, principles, history) and subsequently starts explaining the core of the laws from the substantial as well as procedural point of view. Chapters enabling comparison of European and American law firstly set both legislative frameworks and then provide a comparative chapter at the end dealing with weaknesses and strengths of each program. The historical part deals with the circumstances which led to passing of the legislative predecessors of the current laws but also carefully mentions their content and point out the changes they brought about and comment on whether these changes were of benefit in practise or not. Last but not least, the conclusionary chapters are added rather from my personal interest but are undoubtely related to the topic of leniency policy – the chapter about leniency policy in case of natural persons, de lege ferendae ideas, legislation and considerations and top ten of cartel cases where leniency was applied in some form and which were subject to unprecedented publicity. The branch of competition law in respect of leniency policies belongs to one of the newest concepts which sometimes lacks not only procedural but also substantial background for solution of certain occuring situations and the authorities in charge are forced to solve such problems by setting precedents. And just the flexibility, originality and unpredictability are those factors which have fascinated me and inspired me to write such a thesis.

ABSTRAKT:

KLÍČOVÁ SLOVA: *shovívavost, tvrdý kartel, udavačství, tržní soutěž*

Diplomová práce na téma politiky shovívavosti Evropské Unie (EU) a Spojených států amerických (USA) shromažďuje a třídí značné množství informací a dat pocházejících z rozmanitých legislativ a týkajících se relativně nového fenoménu politiky shovívavosti. Přidanou hodnotou této diplomové práce nejsou pouze komentáře de lege lata (aktuálně platné) legislativy, ale především teze de lege ferendae zdůrazňující trendy, které lze v budoucnu očekávat v oblasti politiky shovívavosti. Zpracování celosvětových dat by bylo mimo mé osobní kapacity,a proto jsem se rozhodl pracovat s nejreprezentativnějšími legislativami EU a USA; menší náhled poskytuji i v případech Velké Británie, Francie a Německa. Tato diplomová práce pomáhá čtenáři proniknout do základních konceptů politiky shovívavosti (prostřednictvím základní terminologie, zásad a historie) a teprve následně počíná vysvětlovat jádro hmotněprávních a procesněprávních úprav. Kapitoly, jež umožňují srovnání legislativních úprav EU a USA, nejdříve nastíní aktuální legislativní rámec a následně poskytnou komparativní kapitolu, která odhaluje silné i slabé stránky obou právních úprav. Historická část se zabývá okolnostmi, které vedly ke schválení legislativních předchůdců současných právních úprav, a také pečlivě rozebírá jejich obsah, zdůrazňuje změny, které přinesly, a podává komentář týkající se prospěšnosti těchto změn v praxi. V neposlední řadě je nutné zmínit i závěrečné kapitoly, které jsem doplnil spíše z osobního zájmu o téma politiky shovívavosti a které jsou s tímto tématem neodmyslitelně spojeny – kapitola o shovívavosti ve vztahu k fyzickým osobám, úvahy, legislativní změny a teze de lege ferendae a deset nejvýznamnějších případů, v nichž figurovaly kartely, a kde byla určitým způsobem aplikována politika shovívavosti a které byly zdrojem značného veřejného zájmu. Odvětví soutěžní politiky ve vztahu k politice shovívavosti patří k jedněm z nejmladších konceptů a často postrádá nejen procesněprávní, ale i hmotněprávní zázemí pro řešení určitých situací, a příslušné úřady jsou nuceny tuto problematiku řešit stanovováním precedentů. A právě tato flexibilita, novost a nepředvídatelnost jsou faktory, jež mne fascinují a inspirovaly mne k napsání této diplomové práce.

ZUSAMMENFASSUNG:

STICHWORTE: *Kronzeugenregelung,Hard-Core-Kartell,Whistleblowing und Wettbewerb*

Die These beschreibt das Thema von dem EU/ USA Kronzeugenregelung, sie sammelt und klassifiziert riesige Menge vonInformationen und Daten kommenden aus verschiedenen Gesetzgebungen in Bezug aufein relativ neues Phänomen der Kronzeugenregelung. Sein zusätzlicher Wert besteht nicht nur in den Kommentaren über die de lege lata (derzeit bestehendes) Recht, sondernvor allem in de lege ferandae Vermutungen, die die Trends betonnen, die man in derKronzeugenregelung in in der Zukunft erwarten werden konnte. Die Verarbeitungvon Weltdaten würde nicht in meine Fähigkeiten sein, und deshalb habe ich michentchlossen, mit den maßgebenden Rechtsvorschriften zu arbeiten - jene derEuropäischen Union und der Vereinigten Staaten von Amerika, ein kleinerEinblick gibt es auch im Fall von Großbritannien, Deutschland und Frankreich.Die Arbeit hilft dem Leser, sich mit den grundlegenden Konzepten derKronzeugenregelung (Terminologie, Prinzipien, Geschichte) bekannt zu machen undanschließend beginnt zu erklären den Kern der Gesetze von der materiellen sowieverfahrensrechtlicher Sicht. Die Kapitel ermöglichen den Vergleich von dem europäischen und amerikanischen Recht, erstens setzt beide Rechtsrahmen und dann gibt ein vergleichendes Kapitel, dasdie Schwächen und Stärken jedes Programms entdeckt. Der historische Teilbefasst sich mit den Umständen, die zur Übergabe von der gesetzgebendenVorgänger der aktuellen Gesetze führten, sondern auch sorgfältig erwähnt ihreInhalt und weist auf die Veränderungen hin, die sie herbeigeführt haben undkommentiert daran, ob diese Veränderungen einen Nutzen in der Praxis hattenoder nicht. Die Endkapitel habe ich aus meinem persönlichen Interesseaufgenommen, sie sind aber mit dem Thema der Kronzeugenregelung eng imZusammenhang – es handelt um das Kapitel über die Kronzeugenregelung beim naturalen Personen, delege Spruchstrafe Ideen, Gesetze und Überlegungen und Top-Ten der Kartellfälle,in denen die Kronzeugenregelung in irgendeiner Form angewandt wurde und die beispiellose Publizität unterlagen haben. DerZweig des Wettbewerbsrechts im Hinblick auf die Kronzeugenregelung gehört zueines der neuesten Konzepte, die manchmal fehlt es nicht nur an prozedurale,sondern auch an wesentliche Regelhintergrund für die Lösung bestimmter vorkommendenSituationen und dieverantwortlichen Behörden sind gezwungen, solche problematischeSituationen durch Präzedenzfälle zu lösen. Und genau die Flexibilität, Neuigkeitund Unberechenbarkeit sind die Faktoren, die mich faszinierthaben und michdazu inspiriert haben, eine solche Arbeit and das Thema der Kronzeugenregelung zuschreiben.

Р Е З Ю М Е

Ключевые слова: *снисхождение, донос, картель,рыночная конкуренция*

Дипломная работа на тему: Политика снисходительности /смягчения/ стран Европейского Союза /ЕС/ и Соединённых Штатов Америки /США/.На эту темунакоплено и классифицировано огромное количество информиции и данных, поступающих с разных законодательств, касающихся относительно нового феномена в политике снисхождения. Положительное преимущество этой дипломной работы является не только комментарии к деЛЕГЕ лата /в настоящее время действующие/ законодательства, но в основном де Леге ферандае/предположения подчёркивая тенденции, которые можно ожидать в будущем снисхождения в политике. У меня не хватило бы возможности обработать данные всего мира, а посему я решил поработать с наиболее представительными законодастельствами – стран Европейского Союза и Соединённих Штатов Америки, небольшой обзор могу предоставить и о таких странах, как: Великобритания, Франция и Германия . Эта дипломная работа помогает читателям проникнуть в основу концепции полтики ,,снисхождения,, /посредством основной терминологии, принцип и история/ и только сейчас начинается разьяснение основных законов материального правового и процессуального права.Статьи, которые позволяют сравнить европейские и американские законы, как законодательные базы, а затем представить главы в которых чётко просматриваются слабые и сильные сторонykаждой из программ.Историческая часть посвящается обстоятельствам, которые привели законодательных предшествинников к действующим законам, а также тщательно рассматривают их содержание и подчеркивают о перемене и пользе, которую принесли и предлагают комментарии , которые касаются положительных изменений на практике. Не на последнем месте стоит и заключительная глава работы, которую я добавил по личному усмотрению , тема политики о снисходительности и которые с этой темой неразрывно связаны – это глава о снисходительности по отношению к физическим лицам, рассуждениям, законодательным изменениям и тезисы деЛЕГЕферендае а топв тех случаях, в которых фигурировали картели и где была при определённых обстоятельствахприменилась политика снисходительности и явилась значительным источникомобщественного интереса. Одветвлённая конкурсная политика по отношению к политике снисходительности относится к одной из самых молодых концепций и часто нуждается не только в процессульно-правовомно и матерально-правовому праву, необходим и тыл для решения определённых сутуаций а соответствующие учреждения вынуждены эту проблематику решить уставным приоритетом.Именно гибкость, непредсказуемость – это те факторы меня очаровали и вдохновили на написания этой работы.

TABLE OF CONTENTS:

1 INTRODUCTION:

An unmerciful, logical and unthinkable aspect of legal systems all over the world has become a famous connotation: **crime – punishment**. Punishment is an inherent and desired part of each crime. No one could imagine a world being driven contrary to this basic principle. However, one law branch confirmed not only that this equation is not bulletproofbut even that it could be completely reversed: **crime – leniency.** The previously mentioned law branch is business law – competition law in particular. Let us have a deeper look into one of the most modern law disciplines that is still in the process of evolution, braver ones would not certainly dare to say "in its diapers."

One of the greatest threats to fair competition in the market has come from cartels. Several forms of cooperation between individual competitors have an enormous impact on the development of **business to business (b2b) relations** as well as **business to customer (b2c) relations.** An undue increase in prices, artificial barriers of entry for other prospective competitors, limited amount of supply, loss of pressure on further research and development, and lack of motivation for the improvement of company products – all these bring about damage to competitors, who are not willing to participate in the cartels, but mainly towards the end customers – towards us, normal people.

A wide range of methods aimed at suppression of such cartels have been developed but all of them have always relied upon the effectiveness and activity of public institutions or institutions appointed by the state. Unfortunately, none of these methods have proved to be extraordinarily effective due to the fact that formal procedures make the investigations longer and consequently less effective, giving the potential criminals the two most important elements – **time and information**. To get into the business premises, you need a warrant. To interrogate twenty members of the Board of Directors multiplied by three, four, five…ten companies, you need an unimaginable amount of time. To maintain confidentiality of all information obtained during an investigation, you need reliable, loyal and mainly diligent employees of public institutions investigating the illegal conduct. All of these aspects have doomed the vast majority of cartel investigations to oblivion. But, as well as

relying upon the "invisible hand" (as coined by Adam Smith) and the uncompromising decisions about the division of our welfare, in accordance with the famous proverb 'Money goes all over the world', people have been neglecting the reliance on the **instinct of self-preservation** – a selfish feature of our character inherent to all people, all across the world.

The magical and cost effective strategy is called **The Leniency Policy/The Leniency Program(me)**. It is based on the legal implementation of a specific programme which transfers the burden of liability for obtaining evidence onto the companies themselves. But why would they do that? Simply put, because this method relies on the psychological aspect of uncertainty. Companies which decide to cooperate in any way and join to form, as a result, an illegal cartel, are subjected to an extremely financially demanding uncertainty of **whistleblowing**.

The simplicity and convenience of Leniency dwells within the fact that state or European **authorities initially perform a passive role**. The incentive towards the investigation comes from the cartel member who is also obliged to obtain all necessary evidence and documentation to defend their opinions and announcements. Providing the cartel member meets all the conditions of the so called "Leniency Programme", they go unpunished in the subsequent penalties granting.

What is more, the Leniency policy also reflects the efforts of cartel members during an already commenced cartel investigation. The cartel members still have a chance to restrict the amount of penalty. **Additional effective collaboration** within the investigation which helps to disclose facts, which would otherwise remain undiscovered or which would be extremely difficult for discovery, is considered beneficial and is awarded by the decrease of penalties.

From a historical point of view, quite a short practise of the Leniency Programmes/Policies brought about very visible results in various market branches ranging from the toy industry, raw materials industry, widely represented chemical industry through to the auction industry. Due to its recent adoption, the programme itself has not been thoroughly regulated, legally within European and United States law, and nowadays it develops either on the

basis of practical experience or based on logical assumptions. This could be regarded as an advantage thanks to the flexibility of development but, on the other hand, **uncertainty and unpredictability** of the investigated subjects who are not familiar with the exact course and, mainly, with the outcome/result of the investigation. Many states have adopted the basic principles and core of the Leniency Programme/Policy, but still the majority of them tend to **adhere to its legal domestic regulation** which guarantees a procedural course by their respective domestic legal regulation thereby increasing uncertainty among multinational companies and in certain cases, denial of particular aspects of Leniency itself.

Shall we consider the Leniency Policy as the exquisite and infallible policy helping to reveal cartels more effectively than public investigations? Can we at last say that the current leniency programmes do not include errors or inefficiencies or are there any aspects that could, potentially, be improved? Should the leniency be complete, partial or should we even distribute part of the penalties to whistleblowers? And how can we guarantee that the competitors will not make up a strategy which sponges on the leniency itself? The list of questions is endless, let me therefore point out the most important ones, let me theorise on them and draw subjective but hopefully logical conclusions about the beneficial, and on the contrary, negative impact of the Leniency Programme/Policy.

The application of the Leniency Policy has it roots in American legislation as it proved to be an extremely effective tool for fighting against the hard-core cartels, it soon spread all over the world. Currently, this strategy is in some form applied by almost all states in the world including, for example, the United States of America, Brazil, Pakistan, the Korean Republic etc. Official acceptance on European ground was realised in 1996. During this year, the European Commission passed a new notice which legally anchored the existence of the Leniency Programme. The period of the validity of the Leniency Policy could be dividend into two parts. Firstly, before being documented in 2002, and secondly, the period after. Within the first period, the Commission had to solve 16 matters coming from private companies. Some announcements remained unpunished as the European Commission had no

prior awareness of the existence of the cartels in that area. On the other hand, some were punished, but by a reduced amount of money in comparison with other members of that particular cartel – the most remarkable examples are: Fujisawa (gluconate sodium, 80% reduction), Cerestar (citronizum acid, 80% reduction). The rate of reduction is derived from the moment when the companies start to co-operate. The above stated ones brought their evidence soon after the commencement of the investigation of the European Commission. The amount of the penalties which were incurred by the Commission exceeded 220 million Euro. The reason for the documenting of the Policy in 2002 was an effort to increase the certainty among the competitors concerning the exactness of the rules and the procedure of the Leniency Policy. The new and detailed rules proved to be a very good incentive for those companies who had been doubtful before. Following the introduction of the documented policy, the Commission received ten new matters for investigation. The system itself turned out to be highly effective and the Leniency Policy was also applied in such famous cases as for example Sotheby's, Hasbro or Merck.

The United States might have been considered an inspiratory source for the European Union for several decades. However, the pace of knowledge adoption has been considerably higher in the European Union in the recent years. The United States in parallel with Europe had firstly faced unsuccess concerning the cartel disclosure. The breaking point came with the famous Lysine case which probably gave the Antitrust Division of Department of Justice a demonstration that Leniency as a tool really can work. From then on, the number of revealed cases grew, the number of fines grew and DOJ´s self-respect grew. Some problems in relation to unprecedented application of law occurred but they will soon prove to be just another lesson towards an ultimately reliable American Leniency Program.

2 TERMINOLOGY

2.1 Leniency

The term leniency describes any protection granted in cases where sanctions or penalties would otherwise be applied to individuals or companies. For the purpose of this thesis, a subject shall be considered undertakings (a term used for legal entities in the current European legislation) or corporations (a term used for legal entities preferred by the United States legislation and in court rulings) and intermittently individuals (natural persons) related to them – i.e. executives and other employee. Leniency, as understood within competition law framework, is a:

(a) set of **rules** applicable to particular **undertakings or individuals**
(b) which committed an **infringement** of particular competition laws
(c) with the aim of providing them with some kind of **benefit**
(d) in case they are willing to **co-operate** with the authorities in charge of investigation of this infringement.

The rules applicable in such situations are commonly called the **Leniency Programs/Policies** and can provide **full leniency or limited leniency**. The basic equilibrium characterizing the leniency ratio is as follows:

I (the undertaking/individual) will provide you (the authority in charge) with information and documentation and you will grant me some kind of benefit so as to diminish the normal punishment for my competition law infringement.

If the information and evidence provided subsequently leads to disclosure of cartel-related matters and help the authority in charge decrease the costs otherwise incurred for a demanding and long-term investigatory proceedings. On the other hand, the leniency policy considerably increases the costs of the cartel survival. (Usually) the cartel ringleader(s) have to set up a complex system of monitoring and enforcement towards cartel members so as to ensure any leak of information which could be then used for applications for leniency.

2.2 Definition of 'undertaking' and 'corporation'

2.2.1 The undertaking (European Union)

The branch of competition law in the European Union uses the term "undertaking". The problem is that the European treaties work with this term but do not provide an exact interpretation of it. The definition was interpreted by the European Court of Justice. *´As such can be described any entity engaged in an economic activity that is an activity in offering goods or services on a given market, regardless of its legal status and the way in which it is financed.´*[1]The definition does not require the activity of profit earning, even the public or state bodies are not excluded. *´This definition must work independently of national conceptions of undertaking'*[2].

However there are still theoretical disputes over two basic interpretations provided by the authors – **institutional and functional**. In this respect, one of the best definitions depicting the difference was summarised by Advocate General Jacobs[3]: *´The Court's general approach to whether a given entity is an undertaking within the meaning of the Community competition rules can be described as functional, in that it focuses on the type of activity performed rather than on the characteristics of the actors which perform it**....** Provided that an activity is of an economic character, those engaged in it will be subject to Community competition law.´*[4]

It is important to realise that taking into consideration only institutions would, in certain cases, be a too narrow and unfair interpretation, the emphasis must therefore focus on the kind of activities they perform. In other words, former Article 81(1) EC (currently Article 101(1) TFEU) is not addressed to

[1] Case C-41/1990 *Klaus Hbfner and Fritz Elser* ***v*** *Macrotron GrnbH* [1991] ECR 1-1979, para 21. Also Case 170/83 *Hydrotherm* [1984] ECR **2999,** at para 11.

[2]**OKEOGHENE, O:***The meaning of undertaking within 81 EC. Available from* http://www.law.cam.ac.uk%2Ffaculty-resources%2F10007305.pdf&ei=DE_zT9bSCuXk4QSasp3bCQ&usg=AFQjCNHmGSIHdqRR4bj3zVOSCTO6ufdFcw&sig2=_Hr3tMENd8EyXP8KtfHPzA [accessed May 15, 2012]

[3]**Sir Francis Geoffrey Jacobs, KCMG, QC** (born 1939), is a Britishjurist who served as Advocate General at the Court of Justice of the European Communities from October 1988 to January 2006.

[4]**GREAVES R. (2005):** A Commentary on Selected Opinions ofAdvocate General Jacobs in Fordham International Law Journal, Volume 29, Issue 4 2005 Article 6

entities; it addresses activities they perform. Providing they are of economic nature, they fall within the understanding of Article 81(1) (currently Article 101(1) TFEU).

2.2.2 The corporation (United States)

When trying to derive the defining characteristics of the **'**corporation**', one must take into account the lack of specific supranational legal environment as in case of the European Union. The United States as a whole simply include into the definition the forms of corporations as provided by the current U.S. law.**

A corporation is basically any organization formed with state governmental approval to act as an artificial person to carry on business (or other activities). As well as the natural persons, it can sue or be sued. So as to ensure **fund-raising**[5], it can issue shares of stock with which to start a business or increase its capital. The main benefit is the corporation's liability for damages or debts is limited to its assets. Therefore, the shareholders and officers are protected from personal claims, unless they commit fraud (subject to criminal law enforcement).

The main governing document is the **Articles of Incorporation**[6] filed with the Secretary of State. Corporation shareholders elect a Board of directors. The Board of directors adopts**Bylaws**[7] and selects the officers and top management. The shareholders and the Board of Directors must hold**AGMs / Annual General Meetings** and in exceptional cases **EGMs / Extraordinary General Meetings.**

There are many forms of corporations in the United States ranging from those of private to those of publich character. These include statutory corporations, limited liability companies, joint-stock companies and cooperatives, public limited companies, charities, clubs etc.

[5]unless it is some form of non-profit organization

[6]The Articles of Incorporation must include certain information: the name of the responsible party or parties (incorporators and agent for acceptance of service), the amount of stock it will be authorized to issue, and its purpose.

[7]Bylaws are the rules that govern the internal management of an organization. They must cover topics such as how directors are elected, how meetings of directors are conducted, and what officers the organization will have and their duties. The other content is voluntary.

2.3 Hard-Core Cartels

Firstly, let me state a **positive definition** of hard-core cartels and secondly, let me cite a **negative definition**. Firstly, a hard-core cartel could be considered any agreement among competitors aimed at abnormal allocation of resources which would have never happened providing that the competitors would have competed within the legally set boundaries. Secondly: *´The hard core cartel category does not include agreements, concerted practices, or arrangements that (i) are reasonably related to the lawful realisation of cost-reducing or output-enhancing efficiencies, (ii) are excluded directly or indirectly from the coverage of a Member country's own laws, or (iii) are authorised in accordance with those laws.´*[8]

The basic objective of hard-core cartels is to ensure higher costs for all participating companies. A successful cartel raises prices above the competitive level and reduces output. The cartel shelters its members from full exposure to market forces and they reduce their activity as for the innovation and controlling costs. The second adverse aftermath is that the companies gather much higher profit, encroaching on the consumer welfare. This makes the cartels per se illegal and challenges the public institutions to detect and break them, and consequently deter other competitors from forming them.

[8]**International Chamber of Commerce (2002):***Hard Core Cartels,* Document n° 225/577, Available from http://www.iccwbo.org/404.aspx?aspath=/id536/index.html[accessed May 11, 2012]

2.3.1 The most common types of hard-core cartels

Generally speaking, there are an unlimited number of possibilities on how to eliminate competition. The most egregious violations of competition law are:

- Imposition of barriers of entry for other prospective competitors
- Fixing Prices
- Territorial, Time or Consumer Division of markets
- Restriction of the output
- Rigging bids/Submitting collusive tenders
- Product bundling and tying
- Refusal to deal
    - Group boycott
    - Essential facilities
- Exclusive dealing
- Conscious parallelism
- Predatory pricing
- Misuse of patents and copyrights

The formation of a hard-core cartel does not follow any particular formula. The easiest way is a secret meeting of top management in some informal place or even using intermediaries or encrypted codes for communication. The individuals involved carefully cover all the tracks and the heavy burden of proof lying upon the public investigators usually makes it impossible to prove anything. The estimated effectiveness of revealing cartels without regard to the leniency policy was estimated to fluctuate somewhere between 12% to 17%.[9] There are no limits as to what business area is involved in cartel formation. History shows cases involving the food industry (powdered milk, strawberries), pharmaceutical industry (medicaments), electronics industry (graphite electrodes), producers of toys and even auction houses.

[9]**BRYANT, P.G.; WOODROW E. E. (1991):***Price Fixing: The Probability of Getting Caught, The Review of Economics and Statistics*, Vol. 73, No. 3, pp. 531-536, Published by: The MIT Press, Available from: http://www.jstor.org/stable/2109581[accessed May 15, 2012]

2.3.2 Cartel formation and cartel behaviour / conduct

A very important question partly discussed above, is what triggers cartel formation and what guarantees its stability, aside from the Adam Smith's temptation for the highest profitability possible. *´The literature of the studies of prosecuted cartels identify a number of factors that are correlated with cartel formation and success and others that are inimical to cartel conduct.'*[10] A very famous analysis concerning this problem was carried out by Valerie Suslow and Margaret Levenstein[11] and published in 1975 and it is based on studies reported on prosecuted cartels (between 1910 - 1972) in the USA as shown below.

Table 1: Collusion and industry characteristics

Number of firms	No relation
Profit rate	-
Rate of demand growth	-
Company size	+
Producer goods	+
Profit variability	+
Market share	+
Advertising intensity	-
Entry barriers	+
Concentration	+
Patents	-
International market	-
Indivisibility of orders	-

Source: Valerie Suslow and Margaret Levenstein – Studies of cartel Stability. The results are taken from studies by Asch, Peter and Joseph. Seneca (1975) Journal of Industrial Economics p.223-237 and from Fraas, Arthur G. and Douglas Greer(see op,cit in footnote 1) of 606 DoJ price fixing convictions and 51 convicted price-fixers compared with 2 control samples of 1569 and 50, respectively, randomly selected 'non-colluders'.

[10]**MEHTA, K. (2009):***Formation of Effective System of Anti-Cartel Activity in the Fast Growing Economies: National and International Experience - Anti-cartel Enforcement in the EU,* Available from www.bric-competition.com/file/282.doc[accessed May 15, 2012]
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2.4 Whistleblower/Whistleblowing

A **whistleblower** is the entity who / which tells the antitrust authority about alleged cartel existence occurring in a particular location. The alleged misconduct is a type of hard-core cartel activity. The term was firstly interpreted in False Claims Act[12] in the United States in 1863 in a completely different connotation but basically sharing the same characteristics as cartel whistleblowers[13]. Whistleblowers are willing to blow the whistle under the condition of some kind of leniency. In the case of cartel conduct, the leniency can be full immunity from fines or, in an extended understanding of the term leniency, also reductions in fines.

The term whistleblowing describes an activity where one of the cartel participants decides to reveal the whole cartel with the usage of persuasive evidence and as a reward receives no or limited penalty for this illegal market conduct / behaviour. The other cartel participants are subsequently punished by entire penalties with no chance of "leniency" and can be granted only certain reductions in fines (which could be also understood as some form of leniency). None of the cartel members can ever be sure when, how or which cartel member breaks the illegal agreement with the view of complete leniency and of a cause of harm to other competitors by authorities sentencing them to high penalties. Facing such a threat, the competitors carefully evaluate their further steps within the agreed cartel and are externally, judicially and financially forced to be the first who abandon the atmosphere of uncertainty and fear from penalties.

[12]The False Claims Act (31 U.S.C.§§ 3729–3733) is United Statesfederal law that imposes liability on entities whoconduct illegal activities harming the governmental programs. The act is colloquially reffered to as ´Lincoln Law´.

[13]The act tried to fight increasing number of frauds commited by suppliers of the United States government during the U.S.Civil War. The act encouraged whistleblowers by granting them a financial reward and protected them from dismissal.

2.5 Cartel ringleaders

The viability of cartels depends to a great extent on their ability to set up control and their retaliation mechanisms that dissuade cheating by cartel members.[14] The complex co-operation between all the cartel members and a strong pressure on cartel secrecy requires perfect coordination of cartel activities and supervision over the cartel members. None of these could be performed without so called ringleaders. Ringleader or ringleaders is/are company/ies which play(s) a crucial role in the cartel system. Their role is very extensive - ringleaders organise initial and subsequent meetings of cartel members, collect necessary data for decision-making, ensure safe and repeated communication between cartel members and make calculations of price strategies.

Deriving a general description of a cartel ringleader may be difficult. There is no general rule for their size, their number or their market position. In general, every cartel usually has more than one ringleader and understandably, they are typically the largest cartel members. Not only inherent characteristics may serve as criteria for ringleader division. A very important factor is their position in the antitrust law. In the United States they are ipso facto excluded from any chance of application for the leniency, whereas the European Union legislation basically does not discriminate against them and therefore they are eligible a reduction in fine. The scientific works on this topic coined these legal systems as **discriminatory leniency programmes** and **non-discriminatory leniency programmes[15].**

Originally, the cartel ringleader position was understood as entirely negative by both legislative systems (US and EU). The 1993 U.S. Guidelines on corporate leniency excluded the ringleader company by the following wording: *´The firm is eligible for amnesty only if it did not coerce another party to participate in the illegal activity and clearly was not the leader in, or*

[14]**DE ARAUJO, ET AL. (2003):***European Union and Brazil: Leniency in Cartel Cases - Achievements and shortcomings*. European Competition Law Review, No. 9, 2003, pp. 463-475.

[15] The arteficially created division was firstlyused by Ivan Bos and Frederick Wandschneider

originator of, the activity.'[16] The European Commission followed this practise in 1996 Leniency Notice: *"Only the firm that has not compelled another enterprise to take part in the cartel and has not acted as an instigator or played a determining role in the illegal activity."*[17]This discriminatory attitude towards cartel ringleaders soon turned into a full immunity and the same conditions as for the other cartel members.

2.5.1 Cartel instigator and cartel leader

The distinction between the **cartel instigator** and **cartel leader** was later defined by the European Court of Justice, where the former initiates the establishment or the enlargement of a cartel and the latter describes the cartel operation[18]. *"An instigator is an undertaking that has persuaded or encouraged other firms to establish or join a cartel by taking the initiative to suggest collusion. A firm is classified as a leader if it was a significant driving force for the cartel."*[19]In practise, cartel ringleaders are usually the companies which adopt the prepared cartel price and cartel policy arrangements and later take over the full responsibility for the coordination and communication within the cartel.

There are certain points of psychological background which should be explained here. The cartel ringleader is usually the engine of the cartel that assembles all the necessary information and coordinates all its activities. Such a company or such companies are the biggest threat for other cartel members in the leniency program as they can provide the antitrust authorities with the most reliable and diverse information.

[16] United States Department of Justice (1993), Corporate Leniency Policy, para A6.
[17] 1996 ´Notice on the imposition or non-reduction of fines in cartel cases´ OJ [2004] C 207/04
[18] See Case T.15/02 BASF AG v. Commission, Summary of the Ludgment, March 15, 2006, side numbers 14-18
[19]**BOS, I., WANDSCHNEIDER, F. (2011):***Cartel ringleaders and the Corporate Leniency Program*, Maastrich and Norwich, Available from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1910000[accessed June 17, 2012]

2.5.2 Non-discriminatory systems

Only the EU system guarantees a non-discriminatory attitude towards them. Hypothetically, such legal systems should be more prone to blowing the whistle of cartel ringleaders because they would be treated in the investigatory proceedings almost the same way as any other cartel member blowing the whistleafterwards. What is more, in such a situation they are a much bigger danger for other cartel members who are aware of their importance and the fact that they have the most to offer to antitrust authorities. To make the situation more complex, there is one more factor influencing the ringleader's decision to whistleblow: the effectiveness of cartel detection and the effectiveness of the subsequent punishment. Supposing that the cartel ringleader is sure that the probability of being caught is low, their motivation to blow the whistle is low in comparison with other cartel members. Providing that the cartel ringleader is aware of the possibility of detection, then their position is more likely to blow the whistle in comparison with other cartel members.

2.5.3 Discriminatory system

On the contrary, the U.S. system refuses equitable position for the cartel ringleaders as well as other cartel members. Their position and their future potential for blowing the whistle and leniency could be described as hopeless. In such a situation, their basic motivation is usually rather cartel survival than blowing the whistle which guarantees them obtaining 'only' a reduction in fines. Needless to say, they are subject to blowing the whistle of other cartel members and therefore they usually put all their effort into providing incentives to other members to stay in the cartel and not to reveal it; and in case of cartel disclosure, into the effort to damage all the convicting evidence or data. What is more, it can hypothetically weaken their position within the cartel as they can be subject to blackmail by other cartel members which are aware of the unpleasant position of the cartel ringleader – such a case however has not been noticed yet.

In many works, you can meet several attempts at analysis of these two systems and I would like to generalise on their outcome. The non-discriminatory system proves to be much more convenient in many respects. The fact that the cartel ringleader can provide the majority of information makes them very precious and a simple refusal to give them the chance of full immunity does not seem (in my opinion) reasonable. However, many authors also emphasize the counterarguments. Is it morally correct if the cartel ringleader, which arranged, ran and boosted cartel existence, blows the whistle on the other cartel members and receives an immunity from fines? Some authors even go further and predict potential future abuse of the ringleader's position. Their warning aims towards the situation where the ringleaders with a considerable proportion of the market decides to arrange a cartel for the purposes of subsequent blowing the whistle, which would lead to financial penalties of all cartel members but him, and would undeniably weaken their position to the benefit of the cartel ringleader who is exempt from any fine.

2.6 Follow-my-leader role

Follow-my-leader role describes a passive role of cartel members who cannot be considered as cartel instigators or its leaders and do not develop creative activity towards the cartel coordination, coherency and existence. From the Commission's previous practise, all companies which are not considered ringleaders are solely considered as in a follow-my-leader role. Not only that, such a position enables them to qualify for fine reductions, but also for full immunity.

Basically, such companies do not participate in the cartel set-up and do not make any effort to organize the cartel meetings. Their main incentive is to dwell within the cartel and to benefit from its existence financially – to be a passenger whose price would be only participation.

2.7 Dawn raids

´Pursuant to Chapter V as included in Regulation No. 1/2003[20] *the Commission has extensive powers to regulate competition law within the European Community´*.[21] One of these are so called "dawn raids". A dawn raid is understood to be a situation when the Commission arrives at an undertaking's premises unexpectedly and with the intent of carrying out an inspection. The above stated Chapter V. enables the Commission to enter business and private premises, copy and take written information, ask individuals **on-the-spot questions** and generally request information.

2.8 The marker system

A marker is granted to protect a position in case of a queue of applicants which have not managed yet to gather all the necessary information or evidence to be eligible for an immunity application. When the marker is granted, the undertaking is obliged to submit the necessary data within a specified time. The marker system helps to organise the leniency competition more effectively – only one marker can be granted and that is for immunity. Reduction of fines cannot be influenced by a marker as the marker only helps the Commission find the main co-operator. Granting of a marker is fully at the Commission's discretion and is made on a case-to-case basis, respecting specific circumstances presented by the applicant. The time period necessary for granting a perfect marker differs from case to case. However, its duration should not be too long to discourage other potential leniency applicants and to slow the investigation down. Marker applications must meet the following formal requirements: applicant's name and address, alleged parties to the alleged cartel, products and territories subject to the cartel and cartel specifications (duration, cartel conduct…) – this information helps to express the serious interest of the company.

[20] Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of rules on competition laid down in Article 101 TFEU (ex Article 82 TEC) and Article 102 TFEU (ex Article 82 TEC) of the Treaty, OJL 1 of 04.01.2003, p.1

[21] **ASLAM, I.; RAMSDEN, M**. (2008): *EC Dawn Raids: A Human Rights Violation*? In The Competition Law Review, ISSN 1745-638X

2.9 Hypothetical application (EU) / No-action Letters (UK, US)

Hypothetical application is a tool that helps the undertakings consider their position when having an intention to apply for immunity. They provide the Commission with a certain amount of information and evidence and the Commission evaluates whether the immunity threshold would be met. The most important advantage in this case is that the undertaking does not need to reveal neither its identity nor its infringement of competition law. Similarly, the United States and the United Kingdom use for this purpose so called No-action Letters.

2.10 Statement of objectives (abbreviated SO)

Statement of objectives is a written communication addressed to the person or undertakings submitted before the adoption of the final decision afflicting their rights and position. The Statement of objectives must contain all the allegations that are going to be used against the addressee in the final decision. Such a procedure guarantees the right of defence – the addressees have a right to give their opinion on all accusations and allegations.

2.11 Contemporaneous and incriminating evidence

This term describes the quality of evidence that must be provided in case that the applicant would like to qualify for full immunity under point 8(b) of the 2006 Leniency Notice. The quality of such evidence should enable the Commission to find evidence of a violation of former Article 81 of the EC Treaty (currently Article 101 TFEU) in connection with the alleged cartel. It must be information/evidence of better/higher quality than in case when the Commission does not have any evidence on the alleged cartel at all. The evidence must prove not only the existence of the cartel but it must also originate from the time of the infringement. This type of "additional" evidence helps to provide a deeper look into the cartel activities and mainly increases the

probability of good evidence helping the Commission convict the other cartel members without any additional complications.

2.12 Significant added value

Companies that cannot qualify for immunity from fines can still benefit from the reduction of fines. To be eligible for this, they are obliged to provide evidence of "significant added value". Such evidence must reinforce the probability of cartel provability and must be suitable enough to help to reveal the infringement. The first company meeting these conditions is granted 30% to 50%, the second one 20% to 30% and the subsequent ones less than 20%. The particular amount is dependent on the Commission's discretion; the leniency notice sets only the boundaries and conditions for the qualification for them.

3 PRINCIPLES GOVERNING THE LENIENCY POLICIES

All the below stated principles represent an intersection of general principles governing European Union, United States and other states legislations. Despite different terms used for them, their purpose is basically the same and any deviations from the standard interpretation of the terms used are described. The principles govern substantial as well as procedural law matters and it turned out to be more beneficial not to separate them.

3.1 The principle of co-operation

For the purpose of a successful disclosure of cartels, two basic elements are irreplaceable. Firstly, speed and secondly, information. Not only supranational institutions (European Commission, European Competition Network[22] etc.) participate in the fight against the cartels but an important part is played by national institutions (national antirust authorities). This complex system requires perfect information exchange which does not enable information leaks and puts a strong emphasis on speed. Therefore, all institutions are obliged to cooperate, request the provision of certain information and exchange information.

A general rule in the case of interstate co-operation is that on condition that one authority takes over the investigation and leniency was offered to the applicant, the ceding authority shall provide all necessary documentation and information, but also inform on the granted leniency provision and its extent.

The exchange of information between the antitrust authorities is subject to strict rules protecting, primarily, the position of the applicant. The work and processing of information should generally guarantee that its confidentiality will be ensured. A leak of information generally means a considerable threat to the upcoming Commission's cartel investigation. On the other hand, it also

[22]ECN lacks legal subjectivity and works on the basis of formal meetings of its members. Despite having no powers, it passed non-binding ECN Model Leniency Program coping with several intricacies of the current system of leniency applications – unfortunately of a non-binding character.

weakens the applicant's position in relation to private anti-cartel enforcement proceedings.

3.2 The principle of proportionality

All decisions imposed by the antitrust institutions should be coherent and corresponding with the damage or threat of damage incurred. Providing that any one cartel member receives a fine as a penalty, having no opportunity of any leniency, then all the other companies should anticipate a proportionate penalty. By incurring different criteria when judging case from case, the overall system would certainly be understood as not clear, unreliable and would deter all potential whistleblowers. Not to mention that such incoherent decisions could be ground for filing of a dispute at the European Court of Justice.

Another example is even legally incorporated. The faster and the more beneficial evidence the undertakings/individuals brings to the investigation of the cartel case, the lower the penalty the undertakings/individuals receive from the antitrust authority. Current European and U.S. legislation provides full leniency exclusively to the first applicant (100%) and proportionate limited leniency to subsequent applicants for leniency in compliance with the effectiveness of the already initiated cartel investigation.

3.3 First-in-door policy (US terminology)

The U.S. Department of Justice's Antitrust Division's leniency policy grants leniency only to the first applicant. Its unique and exclusive position is described as ´first-in-door policy´ and such a limited space for application celebrates success in the U.S. constitution. ´The success of this program is substantially driven by the DOJ's Leniency Policy, a "winner-takes-all" game designed to pressure cartel members to self-report. *´Under this policy, "first-in-the-door" amnesty applicants have the opportunity to avert criminal prosecution and fines,leaving their co-conspirators to race to the DOJ to enter*

plea agreements allowing for reduced penalties, provided that they can assist in the criminal investigation.´[23]

´As a general rule, the maximum benefit of the leniency programme will be given to the first applicant for leniency who meets all of the relevant requirements of the programme.´[24]The proof of the value of the information and evidence provided by the first applicant usually does not need to be of detail. Its benefit should be that the antitrust authorities can initiate proceedings on its basis. Further information which thoroughly describes the interaction between cartel members, the establishment of the cartel or its sessions are the kind of evidence required for only a reduction in fines and are requested under the circumstances when the antitrust authority has already started the cartel investigation.

3.4 The principle of conditional full leniency/reduction in fine

As soon as the antitrust authority receives an application requesting leniency in exchange for the provision of information, the authority will confirm its acceptance, but the real leniency shall be granted on condition that that the applicant continues to meet all the necessary conditions. All these conditions generally follow one aim and this is to avoid any preliminary leak about the initiation of the cartel investigation by the anti-trust authority. Such conditions generally are to provide a possibility to interview executives and other employees of the applicant; the prohibition of publication of the content of the application; the prohibition of damage, deformation, modification or hiding of evidence; some programmes also require ceasing of cartel activities and some even require the complete ending of participation of the applicant in the cartel – visibly all these frequent conditions anticipate full co-operation of the applicant with the anti-trust authority. Any digression or abuse of the

[23] **LIBOW, D.A. - D'Allaird, L.K. (2006):***Recent Developments and Key Issues in U.S. Cartel Enforcement.* Available from http://apps.americanbar.org/intlaw/fall09/materials/O'Farrell_Alfredo_Recent%20Developments.pdf[accessed May 15, 2012]

[24] **Director´s General of European Competition Authorities (2001):***Principles for Leniency Programmes*, Available from http://www.tca.ie/images/uploaded/documents/2001-09-04%20eca%20leniency%20principles.pdf[accessed May 14, 2012]

conditions generally disqualifies the applicant from benefiting from any of the advantages which would have otherwise granted to it in the case it had not breached the conditions.

3.5 Confidentiality of information

The applicant provides the antitrust authority with some information and evidence. Its leak would be disastrous for the cartel investigation. In the context of interstate multijurisdictional investigations, the adequate treatment of the information must be subject to a strict set of rules consistent with the future plans of the anti-trust authorities for effective enforcement of cartel laws in question.

Current European legislation works with the applicant's approval in cases where the Commission intends to transfer the information to other member states with certain exceptions[25]. To strengthen the applicant's position, the receiving jurisdiction should not receive or use information that would be considered privileged under the recipient's own laws. Nor should loss of privilege occur as a result of the sharing of confidential information between antitrust authorities in different jurisdictions.'[26]

3.6 The rule of non-withdrawal

Once the potential cartel member submits an application for leniency, it will be considered a final consent to its consideration. In such a case, the applicant is not entitled to withdraw it in any circumstances. In practise, every applicant must carefully consider the burden of application and its consequences, and then when aware of all the circumstances, they can apply.

[25]This certainly cannot be applied in cases when the same applicant submitted application in both state competition authorities. Furthermore, the applicants approval is not necessary in cases where the states guarantees in a written form that exchanged information or information gathered soon after the information exchange will not be used for the purpose of fine imposition on any undertaking, any individual or any employees for which the applicant shall request leniency.

[26]**International Chamber of Commerce (2002):***Hard Core Cartels,* Document n° 225/577, Available from http://www.iccwbo.org/404.aspx?aspath=/id536/index.html[accessed May 11, 2012]

3.7 One leniency application – effects for one jurisdiction (EU)

Providing that the undertaking applies for leniency in one jurisdiction, it cannot be considered an application for leniency under other jurisdiction(s) unless the applicant meets the local conditions of that state. In practise, this means getting familiar with that states procedural aspects of applying for leniency, meeting local conditions for leniency which usually incurs high costs and mainly wastes the applicant's precious time guaranteeing it the first position.

The ECN Model Leniency Program anticipates a simple system of one application submitted to only one anti-trust authority where the applicant marks the states where the alleged cartel might have deformed the market or had any other impact. The rest of the proceedings will be within the responsibility of this authority – informing the anti-cartel authorities in the states in question, submitting this application to the Commission in cases where the market of three states is affected.

Current rules provide only a limited help from antitrust authorities in this respect. The antitrust authority is obliged to make the applicant aware of the possibility to apply at other jurisdictions as well. The authorities can provide information about locality, procedural aspects and further information when being asked to do so.

3.8 The principle of Joint and Several Liability of cartel members (EU/US) and ´No-contribution´ rule (US)

This principle allows a plaintiff to recover the ultimate amount of the damages arising from the caused injury from combination of the defendants who contributed to the injury. All cartel members (cartel ringleaders, follow-my-leader companies) are jointly and severally liable for the damage caused by their illegal anticompetitive practices under the general principles of tort law across Europe and in the United States too. Therefore, each cartel member may be held liable for the entire cartel-related damage that occurred to the victim

concerned and each cartel member may be sued for this purpose for full incurred damage with no regards to the proportionate damages of the other cartel members.

Unfortunately, there is a problem that it is almost impossible to estimate the amount of damage caused by each cartel member individually. This problem raises when the business that actually paid the damages to the plaintiff starts obtaining contributions from the cartel co-infringers. The EU law relies basically on the ability of cartel infringers to agree on it and provides no legal or precedential solution. The United States came further and has successfully solved this problem by so called **'no-contribution rule'** for the last one hundred years. In practise, this means that there is basically a right to contribution in cases of joint and several liability. Its exceptional occurence in antitrust law justifies the need of effective deterrence and full compensation.

3.9 Principle of allocation / Principle of parallel jurisdictions

The European Competition Network system of cooperation is based on a system of parallel competences in which all NCAs and the Commission have the power to apply Articles 101 and 102 TFEU and are in charge of an efficient division of work where each NCA and Commission retain full discretion in deciding whether or not to investigate a case. The system of parallel competences solves the situation whether the competitioncases will be dealt with by a single NCA (supported by NCAs of other Member States), several NCAs acting in parallel or the Commission.

3.10 Due process

Provision of legally incorporated safeguards to applicants as well as non-applicants and other subjects participating in the cartel investigations should be available to ensure procedural fairness for all, and legal certainty for future potential applicants. Such guarantees must be ensured at the time of the investigation – thus before issuing any adverse decision by the anti-trust

authority.

The parties have the right to stay informed upon all legal concerns forming the decision related to their case; they should also have access to certain evidence and information which are the background for the alleged legal concerns. The passive role must be reinforced positively by a legally guaranteed chance of addressing all these legal concerns in the course of, and at any stage of, the investigation. The onus of proof should not be placed on the applicant but preferably on the authorities in charge of the investigation of the anticompetitive conduct. And finally, the possibility to have a decision reviewed by an independent judicial body.

3.11 Non-discrimination

This principle is closely related to the principle of proportionality. Competition laws and regulation provisions applicable to cartels should not make any difference between cartelists unless it is expressly stated – e.g. in cases of gradual reductions in fines. Discrimination on any other but legally permissible basis (nationality, market location, market branch, individuality of some executives) is strictly prohibited.

3.12 Transparency, clarity, certainty, consistency, predictability

Substantial and procedural law should not suffer from too general provisions. Certainty of mainly procedural aspects helps the applicants anticipate the future events and such legal certainty promotes its reliability among other potential applicants. Clarity should protect the law´s adressees from ambivalent interpretation of any leniency program provisions. The cartel investigation process should be transparent with respect to the policies and procedures, the identity of the decision-makers, the decision-making process and the available remedies. Transparency should foster predictability and consistency of the outcomes of cartel investigations.

3.13 The principle of deterrence

All the above stated principles in combination with the law provisions must guarantee an effective deterrent effect from the formation of cartels. Only an effective leniency policy can create a deterrent threat for any undertakings / corporations intending cartel establishment. What is more, the costs of monitoring cartel members, ensuring the confidentiality of cartel data and safe distribution of information among cartel members has considerably increased.

3.14 The principle of attractiveness

All leniency programmes must include an extremely stimulating aspect which motivates the undertakings/individuals to blow the whistle with a low level of hesitation to do so. The financial background is heavily reinforced by guaranteeing a certain level of legitimate expectations and legal certainty. The most remarkable example is the fact that the first applicant should be granted full leniency providing that it meets all the legal conditions.

4 PSYCHOLOGICAL LENIENCY-RELATED ASPECTS

4.1 Prisoner's dilemma

You are a prosperous company and a cartel member. On the one hand, you know that on condition that the activity of the cartel continues as until now, your prices, expenses, turnover…is guaranteed for a long time. On the other hand, once one of the other cartel members decides to blow the whistle, your dreams about a guaranteed future not only fades away, but you can also anticipate paying a considerable fine to the antitrust/anticartel authorities but also to plaintiffs in civil litigations. An uneasy psychological situation described as the**Prisoner's dilemma.**

4.2 Game theory

The so called prisoner's dilemma belongs to games which are theoretical concepts analyzed in **Game theory**[27]**.** The leniency policy relies in this respect to one factor – profit orientation of cartel members. Once they decide to become cartel members, their position becomes threatened by potential cartel disclosure. The cartel provides them with an extra gain they would not have got providing that Adam Smith's Invisible Hand functioned unconditionally. The cartel basically deforms normal economic conditions on a particular market and aims at artificially increasing the profit of cartel members. The co-operation guarantees the cartels success and its success guarantees intermittently extra gains. A promising situation in which one would expect to receive constant reassurance on the necessity of co-operation.

[27]Game theory is the study of strategic decision making. It is a general term for all mathematical models where the subjects are subjected to solving situations of conflict and cooperation. It is applicable mainly in economics, but also in political sciences, biological concepts, psychology, social sciences and logic. The term has been generalized for all situations where the person has to opt for a certain strategy which helps him to maximize his personal benefit. The origins date back to John Von Neuman´s minimax theorem in 1928. In 1944, the game theory proved itself as a real scientifical area by the publication of Theory of games and Economic behaviour by Oskar Morgenstern which considered cooperative games of more than two players.

However, the situation is modified by two very important facts. Firstly, the cartels conduct is illegal and per se punishable. The most threatening for the company are fines influencing the company's economic performance. Secondly, due to the leniency programme, there is a guarantee that not all the companies will be punished and those blowing the whistle or co-operating will be granted leniency.

4.3 Deterring and motivating the cartelists

The crucial role in the decision on whether to submit an application for leniency or not, is the **deterrence effect** and **motivating effect**. Sanctions are a powerful means of deterring any potential undertakings from cartel collusion or deterring them from further or repeated cartel infringements. The sanctions, which are inevitable and properly conducted, guarantee future deterrence. A vague attitude towards sanctioning signals an ineffective law and makes the cartelists believe that they could somehow avoid the sanction. Unfortunately, sanctions play a completely different role in the case of existing cartels. All the cartel members are aware that they can count on sanctions being imposed if the cartel is discovered and the deterrence effect forces them to keep the cartel running and hide its existence as long as possible.

For such cases, one must opt for a completely different attitude – persuade the undertakings about the benefit arising from co-operation. And here comes the element of leniency. Only a trustworthy promise of leniency in the case of co-operation with the authorities in charge can change the cartel member(s) mind.

4.4 Extra gains v. Fines

Surprisingly, there is another threshold determining the undertaking's decision to co-operate or not – the gain/loss mathematics. Each undertaking involved in cartel collusion profits from that in some way. Let us add up all its extra gains which the company would not have gained if it had not participated in the cartel. And now, compare them with the amount of fines (or other

sanctions) imposed on it. If the extra gains predominate over the potential fine considerably, the collaboration of the undertaking in the case of leniency does not need to be necessarily provided, as the undertaking may prefer the threat of being disclosed to co-operation, which would not bring about an extra benefit for it.

4.5 Morality v. Money

Moral aspects are also questionable. The treatment of all the cartelists should be equal and none should be treated in any preferential way. Only proving to the public that for the same crime follows the same punishment will getyouthe respect of the subordinated subjects. Despite this, the leniency program relies heavily on a hierarchy of gradual fine sanctions and thus making a visible difference between all the cartelists. And the question remains – is this fair? Contrary to this argument, one must consider another counter aspect. High costs and low effectiveness of cartel investigations, in an environment without the leniency policy (before the introduction of this program), simply made the cartel fight tremendously difficult and with very limited success. Philosophically, the implementation of the leniency policy raised, raises and will raise two questions: Should we rely on our own sources of costs and information during investigations and treat all cartelists equally? Or, should we climb back from the moral aspect and rely on the psychological effect of prisoner's dilemma? The results undoubtedly support the second question and hence the implementation of leniency programmes in a majority of states all over the world.

4.6 Current risks of being granted leniency

Once the company decides to apply for leniency, it should realise and consider several threats which usually accompany such an important step. The psychological factor positioning the lenient company under increasing pressure is the disclosure of the cartel. Not only that, other adversely affected companies are entitled to restitution of damages incurred by the company's

anticompetitive behaviour / conduct under both (EU and US) legislations, but the fact that the company was involved in a cartel implies its involvement in many other countries all over the world (providing it operates in these markets), therefore other investigations generally mean other potential threats of administrative penalties and exposure to an unlimited number of private plaintiffs. To cap it all, U.S. antitrust laws count on so called treble damages and despite the not well-developed practise of the European Union, courts usually count on double damages (which are also implemented in the ECN Model Leniency Program). There is also another phenomenon threatening the budgetary capability of cartel members - **derivative actions**. These actions are filed by directors or shareholders by the adversely affected companies and simply require a restitution of damages caused by cartels illegal conduct.

However, there are not only financially-related threats of the leniency application and benefiting from it. The company can lose its market position due to reputational harm.[28] Some companies even changed their names[29], despite a long tradition of its firms and respective logos.[30] Another threat might be related to the revocation of leniency. Similarly, as in the famous Stolt-Nielsen case[31], the company must meet certain conditions to preserve a once granted leniency (mainly co-operation with the antitrust authority and ceasing its cartel involvement).

The last threat is thoroughly explained below and it concerns only the legislative situation in the European Union.To put it simply, applying for leniency at the Commission does not necessarily mean that it will be granted.

[28]Reputational risk is the risk of losses of the credit organization due to decrease in the number of customers (counterparties) as a result of negative public image about financial stability of the credit organization, quality of provided services or the nature of business in general. In this case, purchasers/clients will be aware of the company´s anticompetitive conduct.

[29] An example could be GrafTech International Ltd. which changed its name as well as logo after the ending of Graphite cartel. It started as UCAR and adopted new business policies. For more information see the chapter about top-ten leniency-related cases.

[30] Quite interestingly but being exposed to some cartel-related scandal, the companies change not only their logos but sometimes even their names. The benefit from getting rid of the old reputation predominates the risk of losing customers due to a change of logo they are used to.

[31]The core of the problem was that there has been a considerable period between the granting of full leniency by the Department of Justice and the cease of the participation of the Stolt-Nielsen company in the cartel. Despite immoral conduct of the company, there has been no experience in solving such a case and the Department´s Antitrust Division´s Attorney signalled law infringement and revoked the granted leniency. Such an unprecedented step evoked extreme controversy over DOJ´s powers and to make the defamation even stronger, the federal District Court decided that Department of Justice is obliged to keep the terms as granted in the leniency agreement. For more information see the chapter about top-ten leniency-related cases.

There is a considerable lapse of time between the leniency application and the Commission's decision on it. Providing that the Commission rejects the application and delegates the applicant to national courts, the already mentioned lapse of time can mean that another company can apply for leniency faster with an appropriate national competition authority, and the original applicant could consequently lose a chance to benefit from leniency despite being the first to take action. Similarly, the companies must submit applications to national competition authorities of states where the cartel adversely affected the local economy. But this is quite difficult to predict and it might happen that the first leniency applicant neglects one of these states and thus will not benefit from leniency as well. To combat this vicious circle, the ECN Model Leniency Program introduced an effective legal construction.[32]

[32]ECN Model leniency program is supposed to harmonize all the leniency programs of all member states by setting general standards of applicant treatment and standards of procedure for effective and fast cooperation among members states when investigating cartel-related matters.

5 HISTORICAL ASPECTS

5.1 European Continent

Long-lasting problems with cartel disclosure made the Commission think about innovatory attitudes which would boost it. Between 1969 and 1996, the Commission ruled on the infringement of cartel provisions in only 37 cases and the amount of imposed fines was, in certain cases, negligible. A general increase of revealed cartel cases is visible in the data below:

Table 2: EU cartel cases by decades

Type by geographic scope	1960-1969	1970-1979	1980-1989	1990-1999
EU/EEA	2	2	15	15
national	0	1	2	3
international	0	0	0	5
total	2	3	17	21

Source : M**EHTA, K. (2009):***Formation of Effective System of Anti-Cartel Activity in the Fast Growing Economies: National and International Experience - Anti-cartel Enforcement in the EU*, Available from www.bric-competition.com/file/282.doc[accessed May 15, 2012]

The publication of American Leniency Programme of 1993 and subsequent effort to cope with low effectivity of cartel investigations was one of the main grounds for the publication of the 1993 White Paper on Growth, Competitiveness and Employment where the basis for further development of leniency policy was set.

5.1.1 The 1996 Leniency Notice[33] - historical connotation

In an effort to meet the objectives as set out in the 1993 White Paper on Growth, Competitiveness and Employment, the European Commission decided to adopt a leniency programme aimed at cartel combat within the European Community borders. The Introduction of the Notice emphasized the

[33] Notice on the imposition or non-reduction of fines in cartel cases´ (96/C 207/04)

importance of cartel fighting with respect to Community customers, European Industry as a whole, effective allocation of resources, increasing competitiveness, and increasing employment opportunities and product development.

The U.S Leniency Programme from 1993[34] served as the source of inspiration. Similarly, the European Commission took into consideration that the pressure on certain cartel members could be turned into the Commission's benefit, providing that leniency for such companies was provided. The underlying ratio behind the notice is that on the one hand, granting proportionate fines to cartel members corresponding with their level of cooperation within the cartel, is of high importance, but on the other hand, an increase in the probability of detection and prohibition of cartels by the introduction of a leniency policy outweighs the first interest. The introduction of the Notice also set a rule of a proportionate fine relative to the cartel member's level of co-operation with the European Commission, ranging from 0% to 100%.

However, there was a crucial factor that deterred all potential instigators from blowing the whistle. The notice's lack of certainty and clarity as far as the legal definitions, substantial provisions or procedural aspects were unacceptable. Andreas Stephen[35], in one of his works[36], pointed out three main legal deficiencies: *´Its lack of clarity was mainly due to the subjective wording of the notice…Secondly, there was an inherent lack of certainty as to how a firm would be treated once it had approached the Commission… and furthermore, Leniency applicants would only learn of the level of leniency granted when the Commission delivered its final decision, usually seven years later.´* Despite quite a bitter criticism on flaws and inefficiency of this notice, the Competitioner Mario Monti[37] highlighted the Notice as a starting point for

[34]U.S. Guidelines on Corporate Leniency (1993)

[35] Lecturer in Competition law, Norwich Law School and ESRC Centre for Competition Authority and Humanities Research Council , University of East Anglia

[36]**STEPHAN, A.:***An empirical assessment of the 1996 Leniency Notice, CCP* Working Paper 05-10, ESRC Centre for Competition Policy and The Norwich Law School, University of East Anglia, 2005

[37]Mario Monti was born in 1943, I tis a famous Italian economist and political leader. From 1995 to 2004 he served on the European Commission, first as internal markets, financial services, and taxation commissioner and then (from 1999) as competition commissioner; in the latter post he was involved in several prominent antitrust cases. In 2011, amid an Italian debt

future and a more detailed version of a leniency policy, which really appeared in 2002[38].

"*The Leniency Notice has played an instrumental role in uncovering and punishing secret cartels. Five years after its adoption it appears, however, that this fight can produce better results if companies are given a greater incentive to denounce this kind of collusion."*Monti also premised the future legal improvements needed for a more effective legal framework: "*Experience gathered to date shows that the effectiveness of the notice would be improved by an increase in the transparency and certainty of the conditions on which any reduction of fines is to be granted. It would also benefit from a closer alignment between the level of reduction of fines and the value of a company's contribution to establishing the infringement*."

Indisputably, the 1996 leniency Notice could not be considered flawless. Notice's simplicity and unwillingness to go deeper into the problems and introduce changes thorough provisions, restricting the space for interpretation, predetermined its low applicability and deterred the cartel members from any activity. Its pitfalls sometimes reminded detractors of the U.S. leniency policy imperfectness in its beginnings. Therefore, it is quite surprising that the European Commission decided to serve a starter despite the fact that the main dish was perfectly finished. Even a simple implementation of the U.S. leniency policy, incorporating the wide experience of the Federal Trade Commission and Department of Justice into local European conditions would have certainly proved to be a good step ahead. However, the Commission opted for slow incorporation of new legislation and postponed the ´small´ leniency revolution until 2006. Some might argue that starting a leniency programme in the U.S. way could be too revolutionary and could cause an unpreparedness of EC Institutions for leniency applications and dealing with them. The others might point out the fact that such a new innovation would be too innovative and too scary for cartel members to apply for leniency. No matter where the truth is, time has shown that in the long-

crisis, he was named prime minister of a government of technocrats formed to restore confidence in Italy's finances; he also became finance minister.

[38]European Commission press release IP/01/1011, 18th July, 2001; Draft Commission Notice on immunity from fines and reduction of fines in cartel cases, OJ C 205/1. Clifford Chance

term, and thanks to the complexity of its Notice successors, it bore fruit. I would not like to scatter criticism over the Commission's work, therefore, let me praise the European Commission's attitude towards the search for an efficient, revised leniency policy (public notice relating to the revision of the 1996 Leniency Notice and self-criticism proving its awareness of 1996 Leniency Notice inefficiencies).

5.1.2 The 1996 Leniency Notice – legal connotation

The Introductory A part of the 1996 Leniency Notice included main incentives which led the European Commission to passing this Notice as described in the part with the historical background.

The core of the notice is the non-imposition of a fine or reduction in its amount and conditions under which these could be guaranteed. The basic rule could be characterized as follows: The more intensive and punctual and effective the cooperation with the European Commission is, the higher reduction during the fine imposition is.

5.1.2.1 Full exemption from fine/very substantial reduction in fine

Any enterprise potentially interested in leniency had to be the first to come up with evidence about the existence of a secret cartel. To be granted full leniency, the cartel member had to do so before the initiation of the investigation by the European Commission. The instigator could not be granted full leniency if the Commission had already obtained a sufficient amount of information to prove the existence of the cartel. The applicant was obliged to provide ´**decisive evidence**´[39] of the cartel existence. Additionally, the cartel member had to quit its illegal performance within the cartel immediately. The Notice included not only the requirement for the provision of all the relevant materials and evidence serving as a background for the Commission's

[39] One of the most arguable provisions in the Notice as it did not specify what would be considered as ´sufficient´ by the European Commission and what not. Consequently, the evaluation of the threshhold whereby the evidence was sufficient depended solely upon the European Commissioners´ subjective judgment with no boundaries stated.

investigation, but also a continuous and complete co-operation throughout the following investigation. The involvement of the applicant in any-related cartel as well as its role as the cartel's instigator or the cartel member with a determining role[40] disqualified the applicant from being granted leniency. Providing that all above stated conditions were met, the applicant was entitled to receive at least a 75% reduction of the fine, or even total exemption from the fine.

5.1.2.2 Substantial reduction in fine

In case that all the conditions (as set out above) were met, but the Commission would have already undertaken investigatory proceedings on the premises of cartel members, they would have been entitled to be granted leniency of 50% to 75% of the fine.

5.1.2.3 Significant reduction in fine

The cartel members belonging to this leniency group were guaranteed a fine reduction of 10% to 50%. Meeting all the required conditions was not necessary, but two major aspects were strictly required in this case – **co-operation** and **contribution.** The contribution could be divided into two groups – active and passive. Active contribution was required before the statement of objections – the cartel member had to provide the Commission with information/documents/other evidence and materials that contributed to establishing the existence of the infringement. Passive contribution concerned the situation where after receiving the statement of objections to qualify for the

[40] This provision has been also widely criticised as the ringleaders of the cartel generally dispose of the most reliable information and mainly of the widest scale of potentional evidence. What is more, there is almost no justification why to discriminate against them as they acted the same way as other cartel members. However, the most problematic counter-argument (in my opinion) is the fact that they can intentionally form a cartel and after whistleblowing benefit from the non-imposition of fines or granting of considerably reduced fine. The real practise has not proved such behaviour yet but the complexity of market strategies will certainly bring about such a case whereby the ringleader will abuse the leniency rules in order to harm other competitors willfully and intentionally with an intent to do so since the formation of the cartel.

significant reduction in price; the cartel member could not substantially contest the facts on which the Commission had based its allegations.

The procedural framework required the contact of the Commission's Directorate-General for Competition, but only by empowered company representatives. Applications from general employees were unacceptable. The provisions of the procedure fully left the consideration on whether to grant immunity and its amount upon the Commission[41]. As expressly emphasized in Section E of the notice, failure to meet any of the required conditions in B/C Sections at any stage of administrative procedures resulted in an ultimate loss of any leniency benefit. The uncertainty over the amount of granted leniency was multiplied by the fact that unlawful benefit from the leniency led to annulment before the Court of First Instance and the empowerment of the Commission to ask the Court for an increase of the imposed fine.

Any of the above stated did not guarantee any protection, neither from civil suits filed by competitors not participating in the cartel and theoretically, nor from consumer civil law suits.

5.1.3 The 2002 Leniency Notice[42] - historical connotation

Having self-judged from the previous mistakes, the Commission did not hesitate long and within six years after the release of 1996 Leniency Notice, its reformed version appeared. The Commission adopted the '2002 Leniency Notice' replacing the previous one. Later, it proved to be an open gate towards a higher efficiency of competition law mainly thanks to two major innovations. As a response to increasing criticism towards the uncertainty of fines (in the case where the penalty represents the basic incentive for leniency applicants' decisions), the Commission thoroughly specified the determinants of the amount of fines and considerably shortened the period for the decision about the amount of fines, to only a few weeks. To emphasize the modernised

[41] Applying for leniency on condition that your chances are not guaranteed could be considered as the main deterrent for the cartel participants. The uncertainty in this respect lawfully invoked untrustworthiness over the Commissions leeeway and demotivated the companies from application.

[42] OJC Commission notice on immunity from fines and reduction of fines in cartel cases (2002/C 45/03)

leniency notice, the first leniency applicant (providing that they met all the legally required conditions) became automatically qualified for granting full immunity from fines.

A gradually rising awareness about the convenience of leniency applications under the new Notice soon replaced the lack of interest accompanying the first leniency notice. Needless to say, the increase was partly caused by a long-term awareness of leniency possibilities, but the main incentive indisputably was the incomparably higher quality of the 2002 Leniency Notice. The Notice described the situation as follows: *´Whilst the validity of the principles governing the notice has been confirmed, experience has shown that its effectiveness would be improved by an increase in the transparency and certainty of the conditions on which any reduction of fines will be granted.´*[43]

However, despite a visible progress in the leniency policy improvement, certain points remained unanswered. The imposition of fines were given exact thresholds and conditions for each one set, but the competitors have not been given certainty as to the starting point for fines, whether recidivism shall have any impact on the amount of fine and whether the size of the company or its turnover are of any importance. In practise, all three aspects influenced the final Commission's verdict, but the written form of law was still missing.

5.1.4 The 2002 Leniency Notice – legal connotation

5.1.4.1 Immunity from fines

To qualify for obtaining immunity from fines, the company involved in a cartel shall either; provide the Commission with sufficient evidence enabling the Commission to take a decision to carry out an inspection on the company's premises and, as later added (May 2004), at executives homes (i.e. dawn raids) on condition that the Commission has not received such evidence yet; or it shall be the first company submitting evidence which shall be a background for

[43] OJC Commission notice on immunity from fines and reduction of fines in cartel cases (2002/C 45/03)

the Commission for finding an infringement of Article 81 EC, on condition that the Commission does not have such evidence and that no other company has been given immunity under the rules of dawn-raid obtained evidence.

However, the immunity is conditional and several further conditions must be met so as to qualify finally for the fine-immunity. Firstly, the undertaking shall co-operate fully, continuously and expeditiously during the investigation and other procedures. Secondly, the company is obliged to provide all the documentation and data relating to the cartel case at every stage ofthe investigation. The question remains how to solve cases where some evidence may be withheld and discovered after the release of Commission's decision on immunity. The aspect of co-operation is of high importance and must be considered from the particular behaviour of the company - whether it immediately responds or not, whether it cooperates effectively and does not cause any obstructions etc. The company must cease its participation in the cartel.[44] And finally, a new provision was added in comparison with the 1996 Leniency Notice concerning the prohibition of taking steps to coerce other companies to participate in the cartel infringement.

5.1.4.2 Significant added value

Significant added value is a new reformulated concept of limited leniency. The company can obtain certain reductions in fines providing that it provides the Commission with evidence of significant added value and ceases its involvement in the cartel at the latest when approaching Commission.

The evidence provided could be presented to the Commission in two forms: orally and in written form. The Legislator, the Commission and the Companies preferred the written form. The exact formulations do not usually enable any misinterpretations or misconceptions and when properly thoughtover can save the Company a considerable amount of money on fines.

[44]This is a very tricky provision. Neither further involvement of the company in the illegal cartel cannot be considered optimal solution but nor the immediate and unannounced or unexpected exclusion from cartel activities can be considered optimal. If nothing else, it certainly invokes curiosity among other cartel members. And providing that the crucial moment of surprise has been damaged by careless behaviour, it can lead to non-recoverable damages in the following Commission´s investigation.

Oral statements provided by Company executives would also be considered useful mainly to avoid written evidence in subsequent civil litigations.

One of the most remarkable changes implemented into the 2002 Notice was a hierarchy of fines which can be granted under the significant-added-value policy whereby the first whistleblowing company providing evidence with a significant added value can be granted reductions of between 50% and 30%, the second company 20%-30% and all subsequent companies are guaranteed a reduction of up to 20%. What is more, even further practise provided a further field for the Commission's discretion.[45]And to emphasize the innovation in this respect, the Commission is obliged to take into consideration all the evidence provided by the company relating to information on the cartel, which are particular but were previously unknown to Commission, which are to have a direct bearing on the gravity and duration of the infringement. As soon as the company approaches the Commission with their evidence, within a few weeks[46] (in comparison with no guarantee included in 1996 Leniency Notice) they will receive some kind of ´anticipated immunity/leniency position´ which predetermines their future immunity/leniency, providing they meet all the further legally required conditions. Despite being given this statement of anticipated immunity/leniency, it does not necessarily mean that the anticipated ranking is guaranteed. The actual amount granted will be adopted in the Commission's final decision.

5.1.4.3 Disclosure of co-operation

Quite an important point on the issue of evidence is who will be entitled to see and work with that. The first time the evidence was disclosed was in the decision. The necessity of this step is understandable as the Commission needs to explain the differences in the imposition of fines between different companies. Generally, any unexpected or earlier disclosure would certainly

[45]e.g. In Industrial Tubes Case (IP/03/1746, 16 December 2003) in addition to 50% for leniency cooperation, one cartel participant received an additional reduction of frther 20% for the disclosure of the cartel duration period.

[46] In practise, it takes approximately two working weeks, See van Berlingen

trigger panic among those cartel members who have not been investigated yet and belong to the alleged cartel and importantly, it would place the revealing company into the position where it might face civil law suits from the harmed competitors not participating in the cartel or even consumers. Therefore, any written evidence disclosure belongs to the evidence and it might not be disclosed for other purpose but the enforcement of Article 81 EC. This is highly important for the US Leniency Programme as the plaintiffs seeking treble damages usually request the provision of application statements from the companies involved in the cartel. Therefore, the main statements in the US leniency applications are made orally. On the other hand, this trend is completely different in Europe as the companies submit mainly written applications for leniency. The reason behind this different attitude is generally due to the behaviour of potential plaintiffs. In Europe, the custom of suing cartel members has not developed yet and the threat of document revelation is not such a threatening factor as it is in the United States.

5.2 The United States of America

5.2.1 Sherman Antitrust Act (1890)[47]

As the basic regulation of competition law and the merit source of leniency programmes can be undeniably considered the Sherman Antitrust Act. The existence of regulation in the competition law proved to be necessary as a counter-movement against the increase of market power of monopolistic companies in the US market (mainly Standard Oil[48]). The U.S government claimed the power to pass this law by the fact that interstate commerce fell within its constitutional authority. Correspondingly, the Federal Courts were

[47] Act of July 2, 1890(Sherman Anti-Trust Act), July 2, 1890; Enrolled Acts and Resolutions of Congress, 1789-1992; General Records of the United States Government; Record Group 11; National Archives. Federal statute passed on July 2, 1890, ch. 647, 26 Stat. 209, 15 U.S.C. §§ 1–7. Its scan and transcript are available on http://www.ourdocuments.gov /doc.php?flash=true

[48] **Standard Oil** was a monopolistic American company specializing in oil producition, transportation, refining, and its marketing company founded, led and chaired by John D. Rockefeller. The company was incorporated in 1870 in Ohio and operated as a major company trust until 1911 when the U.S. Supreme Court ruled that antitrust law required Standard Oil to be divided into smaller, independent and legally separated companies.

empowered to judge the trust-related cases. The Act put the burden of investigation and pursuing suspected institutions in violation of law upon the federal authorities. Its author, Senator John Sherman, defended its passing by *´the necessity to outlaw and prevent anticompetitive practises which harmed customers´*[49]. A very important role in the interpretation, further development and animation of the Sherman Act provisions was played the **U.S. Supreme Court**[50]. The scope of protection was subsequently broadened by a famous ruling **Spectrum Sports Inc. V. McQuillan**, 506 U.S. 447 (1993) where the court added the importance of competition as a whole[51]. The invocation of the Sherman Act proved to be rather slow - one of the first Sherman Act applications was in 1894 against the **American Railway Union**[52] in the successful attempt to settle the **Pullman Strike**[53]. The second milestone came in the case of splitting the American Tobacco Company and the final remarkable case was the breaking up of Rockefeller's Standard Oil.

This brief, two-page hand-written Act signed into law by the American President Benjamin Harrison prohibited existence, formation and any ways of collaboration performed by American companies which could reduce American market competition. The crucial provisions were included in Section 1 and 2. Its application required three basic conditions:

i. the existence of contract, combination in the form oftrust or otherwise, or conspiracy (subject aspect)
ii. which shall be in restraint of trade or commerce (illegal aspect)
iii. among the several States, or with foreign nations (territorial aspect)

[49] "To protect the consumers by preventing arrangements designed, or which tend, to advance the cost of goods to the consumer".

[50]The **Supreme Court of the United States** is the highest court in the United States. It has ultimateand largely discretionary (for which is often put under a strong criticism)appellate jurisdiction over all federal courts and over state court cases where federal law is involved, and original jurisdictionin certain limited cases,

[51]506 U.S. 447 (1993): "The purpose of the Sherman Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself.This focus of U.S. competition law, on protection of competition rather than competitors, is not necessarily the only possible focus or purpose of competition law. For example, it has also been said that competition law in the European Union (EU) tends to protect the competitors in the marketplace, even at the expense of market efficiencies and consumers."

[52] One of the largest labour unions in the U.S.

[53]U.S. national conflict between railroads and labour unions which arose as a consequence of a wage reduction and subsequent increase of rents where the labourers worked. The Sherman Act was used indirectly as a part of labour union argumentation against the railroads.

The Act also deemed antitrust activities as a felony on condition that two legal requirements were met:

i. monopolization, or an attempt of monopolization, or combination or conspiring with any other person or persons (subject aspect)
ii. intended to monopolize any part of the trade or commerce (illegal aspect)
iii. among the several States, or with foreign nations (territorial aspect)

The violations of the Sherman Antitrust Act could be divided into two basic groups – i.e. **violations per se** and **violations of the rule of reason**. The first case includes strictly those cases which shall meet the legal conditions as set in the Sherman Act Section 1. The second case aims at not per se illegal violations of Sherman Act, whereby the intent and motive of the trusts must be taken into consideration. The rule of reason uses so called **quick-look test** which transfers the burden of proof on the defendant who is obliged to prove justification or harmlessness of its market behaviour.

5.2.2 Clayton Antitrust Act (1914)[54]

The Act emphasized, reformed and detailed certain concepts of the Sherman Act. It brought a thorough description of prohibited conducts, enforcement scheme, exemptions and remedial measures. Despite many changes before the final version, the original legislation was introduced by Henry de Lamar Clayton, Alabama Representative – that is where its name comes from.

The most beneficial aspect of the Clayton Act was its effort to specify too general provisions of Sherman Act. The main focus was on the thorough description of antitrust behaviour. As illegal were considered:

- Act Section 2: price discrimination lessening the competition or tending to create a monopoly in any line of commerce which shall be conducted between different purchasers

[54] The Clayton Antitrust Act of 1914 (Pub.L. 63-212, 38 Stat. 730, enacted October 15, 1914, codified at 15 U.S.C. §§12-27, 29 U.S.C. §§52-53

- Act Section 3: sales whereby the exclusive dealings or tying is conducted but only providing that these acts substantially lessen the competition
- Act Section 7, 7a: mergers and acquisitions where the effect may substantially lessen the competition or where the voting securities and assets threshold is met, this section also included a precise definition of a holding company
- Act Section 8: any person from being a director of two or more competing corporations providing that those corporations violate anti-trust criteria by merging

As for exemptions, labour unions, agricultural organizations and major league baseball were provided safe harbours. The activities such as strikes and collective bargaining became legal as they were exempted from the provisions of the Clayton Act.

Any injured party could use the Sections 4 or 16 entitling them to sue the cartel members for **treble damages**[55] or **injunctive relief**[56]. Civil suits could be initiated in the federal courts and interestingly, the injured parties could sue their opponents for three times higher damages than as had really been incurred. For the purpose of this Act´s enforcement, President Woodrow Wilson created a special Federal Trade Commission and Antitrust Division of the U.S. Department of Justice.

5.2.3 Leniency Programme (1978)

The 1978 Leniency Program became the threshold between previously un-unified legislation and modern brief legislation, providing effective protection for leniency applicants as well as applicants for reductions in fines, legislating on substantial and procedural aspects of the leniency program. From the current point of view, it lacked legislation for vertical cartels and fully

[55]**Treble damages** permit the court to triple the amount of damages awarded in cases where the defendant willfully acted in a prohibited way. Courts usually require substantial evidence proving that the defendant´s actions were willful in nature or done in a bad faith before treble damages are awarded. In the corporate world, treble damages often arise in regard to patent infringement, willful counterfeiting and antitrust lawsuits. Damages are calculated against the financial loss incurred by the plaintiff directly resulting from the actions of the defendant. (definition used from investopedia.com)

[56]**Injunctive relief** is a court-ordered act or prohibition against an act or condition which has been requested, and somtimes granted, in a petition to the court for an injunction. Such an act is used to handle a problemand is not a judgment for money.

focused on a limited number of horizontal anticompetitive conducts – i.e. price-fixing, bid-rigging, output restrictions and market allocation. In case of corporations, leniency meant avoiding fines and in parallel, in the case of natural persons, avoiding fines and jail. There were no guidelines as to what fines the Department of Justice could impose and the final decision lay ultimately, at its discretion. Similarly, as in the European Union case, the programme was a complete fiasco with only one application for leniency received. However, it became a milestone upon which the 1993 Leniency Programme built the most effective leniency policy in the world.

5.2.4 Leniency Programme (1993)

This programme brought about several changes and improvements to the 1978 Leniency Programme, but of rather minor character. The new version mainly helped to adapt to new market conditions and reflected previously occurring deficiencies. Most importantly, it became the inspiration for European legislation – particularly the 1996 Leniency Notice. However, additional aspects of Leniency or Amnesty Plus have not been included here yet and practise showed a need for provision specification or improvement of some procedures. The most radical change came in 2008 as a direct reaction to the **Stolt-Nielsen case**.

5.2.5 Stolt-Nielsen case and Model Conditional Leniency Letters

Having faced a strong criticism for its benevolence in the Stolt-Nielsen case[57], and in an effort to avoid similar unprecedented situations in the future, it took action towards the last innovation of the Leniency Programme of a large extent. Its aim was based entirely on the applicant's activity following the application's submission. The Antitrust Division (AD) of the Department of Justice finally implemented four major changes which were interrelated.

[57] *U.S. v. Stolt-Nielsen*, No. 06-cr-466, 2007 U.S. Dist. LEXIS 88011 (E.D. Pa. Nov. 29, 2007)

Firstly, the unconditional nature of the leniency was emphasized. The applicant cannot count on benefiting from full immunity from fines unless it proves the eligibility for leniency during the investigation following its application. By this legal rule, the AD simply sought confirmation of its otherwise unprecedented decision to revoke its leniency granted to Stolt-Nielsen when it did not provide full cooperation and continued its involvement in the cartel. Secondly, the applicant must provide *´complete disclosure, immediate discontinuance of the antitrust conspiracy, and the ability to prove eligibility.´*[58]Again, such a change of administrative practise tried to avoid future controversies similar to that ones in the Stolt-Nielsen case. *´These changes reflect the DOJ's contention that the specific facts of Stolt-Nielsen ultimately disqualified the company from leniency, and also, that its revocation of antitrust leniency was not an arbitrary act.´*[59] Thirdly, the AD gave itself discretion over the revocation or change of a previously granted leniency in those cases where "*there is a significant lapse in time between the date the applicant discovered the anticompetitive activity being reported and the date the applicant reported the activity to the Antitrust Division."*[60]Providing that the lapse is long, it should be taken as an aggravating circumstance and could be a reason for revocation of any granted immunity from fines. What is more, the applicant is obliged to acknowledge an understanding of the consequences of a potential revocation. The application letters should also include the first unmarked paragraph which assures the applicants that the Division is still committed to leniency. The recovery from the 2008 Stolt-Nielsen controversy required even such non-bonding and legally obsolete declarations.

[58]*U.S. v. Stolt-Nielsen*, No. 06-cr-466, 2007 U.S. Dist. LEXIS 88011 (E.D. Pa. Nov. 29, 2007)
[59]*See* Scott Hammond on *Stolt-Nielsen* (May 1 2008), *available at* http://www.usdoj.gov/atr/public/speeches/234840.htm. Copyright © 2009 Washington Legal Foundation ISBN 1056 3059
[60]U.S. Antitrust Division of the Department of Justice, Model Conditional Leniency Letters, 2008

6 INSTITUTIONAL ASPECTS OF LENIENCY

6.1 European Union Institutions

6.1.1 National Competition Authorities (NCAs)

This term is used by theCouncil Regulation 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 (currently 101 and 102 TFEU) and the Commission Notice on cooperation within the Network of Competition Authorities(2004/C 101/03) and it is an overal term for any Member State institution which is entrusted the anticartel policy. Commission cooperates with them and can even request them to act on behalf of the Commission. The most famous examples are Office of Fair Trading in case of Great Britain, Bundeskaterllamt in Germany or newly re-establishedAutorité de la concurrence in France. The Other authorities are as follows:

- Austria: Bundeswettbewerbsbehörde.
- Belgium: Ministère des Affaires économiques.
- Denmark: Konkurrencestyrelsen.
- Finland: Kilpailuvirasto.
- Hungary: Gazdasági Versenyhivatal
- Netherlands: Nederlandse Mededingingsautoriteit (NMa).
- Ireland: Competition Authority.
- Italy: Autorità Garante della Concorrenza e del Mercato.
- Latvia: Konkurences padome.
- Lithuania: Konkurencijos taryba.
- Poland: Urząd Ochrony Konkurencji i Konsumentów.
- Portugal: Autoridade da Concorrência.
- Slovenia: Urad Republike Slovenije za varstvo konkurence.
- Spain: Comision Nacional de la Competencia
- Sweden: Konkurrensverket.[61]

[61] http://en.wikipedia.org/wiki/European_competition_law

6.1.2 European Commission

Undeniably, the most important institution of the European Union consists of **Commissioners**, each representing one member state of the European Union and each in charge of their own assigned tasks. The European Commission, despite not being a directly elected body which represents Europe as a whole, drafts proposals for future European Union legislation, ensures smooth daily flow of administration and is in charge of the administration of European funds.

In 1951, the informally coined **"High Authority"** consisting of nine members was established. Its character was supranational and it served the administrative purposes of the newly established European Coal and Steel Community (ECSC). The term "Commissions" comes in 1958 when the Treaties of Rome established two new communities - the European Economic Community (EEC) and the European Atomic Energy Community (Euratom). Its importance grew since its debut at the General Agreement on Tariffs and Trade (GATT) negotiations. Since this moment, the Commission initiated a consolidation and later harmonization of European law. However, two major factors which led to its strong position must be highlighted – firstly, the support of the European Court of Justice emphasizing, conforming and strengthening its position in many famous decisions and secondly, extreme authority and the personal X-factor of the Commission's presidents which drove the Commission across the last five decades towards its strength in respect of its powers and towards authority it gained in the international field.

The head of the Commission is the president nominated by the European Council. Other Commissioners are also appointed by the European Council but importantly, in agreement with the nominated President. Finally, the appointment of all Commissioners, as well as their president, is subject to the approval of the European Parliament. Subsequently, the President assigns each Commissioner responsibility for a particular policy area. The power of the dismissal of the Commission is within the hands of the Parliament. The daily basic administration is supported by the administrative body of about 23,000

European civil servants who are split into departments called Directorates-General and Services. These include lawyers, economists, translators, interpreters, administrators etc.

The European Commission has extensive powers in four areas – legislation, finance, law enforcement and European Union representation. The commentary on each of the powers was used from the official web pages of the European Commission as it thoroughly characterizes the importance of each of these powers and does not need any additional commentary.

´Firstly, the Commission can propose new laws to protect the interests of the EU and its citizens. It does this only on issues that cannot be dealt with effectively at national, regional or local level (subsidiary principle). With the Council and Parliament, the Commission sets broad long-term spending priorities for the EU in the EU 'financial framework'. It also draws up an annual budget for approval by Parliament and the Council, and supervises how EU funds are spent – by agencies and national and regional authorities. Secondly, the Commission manages funding for EU policies (e.g. agriculture and rural development) and programmes such as 'Erasmus' (student exchanges). Thirdly, as 'guardian of the Treaties' the Commission checks that each member country is applying EU law properly. If it thinks a national government is failing to apply EU law, the Commission first sends an official letter asking it to correct the problem. As a last resort, the Commission refers the issue to the Court of Justice. The Court can impose penalties, and its decisions are binding on EU countries and institutions. And finally, the Commission speaks on behalf of all EU countries in international bodies like the World Trade Organisation. It also negotiates over the international agreements for the EU.´[62]

6.1.3 European Competition Network

The original purpose of the European Competition Network was just a creation of a simple discussion and co-operation forum for the European Commission and national competition authorities. The establishment of this

[62] http://europa.eu/about-eu/institutions-bodies/index_en.htm

institution reflected the need of consistent application of Article 101 TFEU (ex Article 82 TEC) and Article 102 TFEU (ex Article 82 TEC)in the member states. The emphasis is on the co-ordination of co-operation and help during investigations, exchange of information and evidence, and importantly, negotiations of problematic and interstate cartel cases.

Members of the ECN are European Member States Competition Authorities and the Commission. The ECN cannot be considered a legal person as it has no legal powers, no legal subjectivity and therefore is not accessible to either natural and juridical persons.

6.2 United States Institutions

6.2.1 United States Department of Justice (DOJ)

For the purposes of this thesis, we should focus solely on the Antitrust Division of the Justice Department. However, gaining a deeper insight into history helps us understand how the current DOJ developed in relation to its antitrust policy.

The United States Department of Justice is a federal executive department. Its main responsibility is the enforcement of antitrust laws of the United States (Sherman Act, Clayton Act, and Federal Trade Commission Act). In relation to civil antitrust cases, it partly shares jurisdiction with the Federal Trade Commission (FTC) [63] and in cooperation with the FTC, the DOJ prepares regulatory guidance to businesses. The most important department for our purposes is the Antitrust Division which has the power to file criminal antitrust cases against violators from one of the above stated Acts, and ipso facto, it must co-operate with other states or organisations (mainly the European Union) when an international element in the cartel case occurs.

[63] An independent federal agency whose main goals are to protect consumers and to ensure a strong competitive market by enforcing a variety of consumer protection and antitrust laws. These laws guard against harmful business practices and protect the market from anti-competitive practices such as large mergers and price-fixing conspiracies. For more information see Chapter 5.2.2.

6.2.1.1 Historical insight

The head of the DOJ is the Attorney General which originally was a single-person post. Established by the Judiciary Act of 1789, it soon began to grow in response to the workload involved. After some unsuccessful attempts to create an independent department with its own bureaucracy, the "Act to Establish the Department of Justice to call on different department solicitors, as well as changing the Attorney General's responsibilities, was finally passed in 1870, with the DOJ starting its existence in 1870. During the 20th century, the DOJ expanded its powers – namely in relation to the Interstate Commerce Act in 1887, and Acts related to the control of federal prisons.

6.2.1.2 Antitrust Division

The passage of the Sherman Antitrust Act dates back to 1890. The first sign of the separation of antitrust agenda came in 1903 by appointing a special assistant for this purpose. The enactment of the Clayton Act came in 1914. Formal establishment of the Antitrust Division came in 1933. Since that moment on, its task has not changed – promotion of economic competition. The tools used are antitrust enforcement and the provision of guidance on antitrust-related matters – mainly laws and principles. The prosecution of antitrust law violations is carried out by filing criminalsuits and the initiation of civil actions which are aimed at prohibiting further violations, issuing fines for the violators and in certain cases imprisonment of mainly the cartel member's executives or other employees. Co-operation and co-ordination with foreign antitrust authorities is necessary in interstate cartels.

Guidance is the second main purpose of the DOJ's existence. In co-operation with the FTC, it explains how far the U.S. businesses can go in cases of antitrust conduct and they also set thresholds for legal/illegal market conduct – e.g. in the case of company purchases, takeovers, mergers, restructuring and some other business operations of higher importance. The Antitrust Division's function as the advocate for competition means that it helps to ensure and

guarantee healthy competition in many economic sectors which are subject to government regulation.[64]

6.2.1.3 Attorney General and its bureaucratic apparatus

As it emerges from the previous text, the DOJ is headed by the Attorney General. His/her nomination comes from the U.S.President, furthermore, it requires Senate confirmation. The Attorney General is a member of the Cabinet. The five main assistants to the Attorney General areAssistant Attorney General, Deputy Assistant Attorneys General, Chief of Staff and Senior Advisors, Directors of Enforcement, and the Office of the General Counsel. The DOJ is divided into several offices – e.g. Office of Operations, Civil Sections offices, Criminal Section and Field Offices, National Criminal Enforcement Section, Economic Sections, Appellate Section, Executive Office, Foreign Commerce Section, etc.

6.2.2 Federal Trade Commission (FTC)

After the Court's ruling in *Standard Oil Co. v United States*[65], the matters of trust and antitrust policies even started dominating elections. In 1914, Woodrow Wilson signed the Federal Trade Commission Act and later the Clayton Act.

The newly established independent agency was a follower of the previous Commerce Department's Bureau of Corporations, effective since 1903[66]. The FTC received the same powers as its predecessor, i.e. carry out investigations, information collection and reporting on market matters. As an innovation came the entitlement to challenge administrative cases. But most importantly, the Commission was legally bound to deal with "unfair methods of competition" which opened the gate to investigations of such practices as

[64] Particularly communications, banking, agriculture, securities, transportation, energy, international trade, insurance, housing, health care, public utilities, professional and occupational licensing, certain aspects of banking, and real estate.

[65] The development of the "Rule of Reason" doctrine in *Standard Oil Co. v United States*, 221 U.S. 1911

[66] Theodore Roosevelt initiated the debate over the its creation and later signed the establishment of this institution

certain price discriminations, stock acquisitions, vertical arrangements, and interlocking directorships.

In the 1920's, the FTC adopted and soon extended the application of "trade practice conference"[67] procedure, then in the mid-1960's displaced it by simple rulemaking. The 1920's and 1930's were characterized by continuous disputes and position fighting between Commission members appointed by the Republican and Democratic Parties[68]. A key role in the powers of the Commission was played the U.S. Supreme Court which many times interfered within the granted powers of the Commission – most visibly in cases of ability to challenge mergers effectively[69]. In this case, the Court later stepped many times back and pulped its previous decision[70].

In the midst of the Depression, came two acts considerably extending the Commission's powers but rather towards more regulation – the National Industrial Recovery Act which created a new centre for industrial policy - the National Recovery Administration (NRA) whose Code was later proclaimed unconstitutional by the U.S.Supreme Court. The FTC was newly empowered with the enforcement of the Securities Act, later this new power was shifted to the Securities and Exchange Commission. There followed a rapid turnover of the Commissioners Board. After this string of departures, though, the turnover among Commissioners came to a halt from 1935 to 1945 which was partly caused by the necessity of solving World War II market-related matters.

A small revolution in the FTC Act came in 1938 when the **Wheeler-Lea Act** provided civil penalties for violations of Section 5 orders. In 1938 it amended Section 5 to proscribe unfair or deceptive acts or practices and unfair

[67]Trade conferences were called and presided over by a Commissioner. The process had two steps – firstly, the industry participants voted on rules, and secondly, the Commission approved, disapproved, or modified the recommended rule and the Commission announced whether violations of these rules would be deemed *per se* violations of Section 5. At first sight, it must be understandable that such rules invoked a lot of controversy. Most visibly, some provisions aimed to inhibit price competition considerably and the trusts were not allowed to deviate from those posted prices. The violations of these rules were summarized under one term of so called "clandestine violations" and the businesses had to agree to perform in accordance with them.

[68]What is more, the Commissioners chose their own Chairman. Under a resolution first passed in 1916, they elected to rotate the position annually and to deny the Chairman any special administrative responsibilities.

[69]FTC v. Eastman Kodak Co., 274 U.S. 619 (1927)

[70]FTC v. Western Meat Co., 272 U.S. 554 (1926) and Arrow-Hart & Hegeman Electric Co. v. FTC, 291 U.S. 587 (1934)

methods of competition. And the infinite intervention of the Supreme Court continued by holding that when challenging deception as an unfair method of competition, the FTC had to prove harm to competitors. The new language made such proof unnecessary. Further, the FTC Act used language that authorised pre-complaint injunctions. An important part of 1930's to 1950's was a noticeable amount of several acts regulating trade with particular products.[71]

The 1950's brought about the groundwork for the development and change into a modern Commission. The Celler-Kefauver Act amended the Clayton Act's merger provisions and amongst others closed the loophole for asset acquisitions. Additionally, in 1949, US President Truman changed the FTC's chairmanship – from this year on, the President has designated a Chairman from among the Commissioners, and more importantly, the Chairman became the FTC's executive and administrative head. Repeated criticism about the lack of the Commission's responsibility and activity culminated in several important laws amending the FTC and Clayton Acts – in 1973, the FTC's authority to seek preliminary injunctions was broadened, in 1975 a wide range of new remedies was included including civil penalties for violations of trade regulation rules and several laws extending the FTC's powers or addressing problems accompanying modern civilization and huge industrial and computer progress[72]. Currently, the organization tackles matters related to global competition and consumer protection, patent law, internet fraud and privacy. Its main benefit in the promotion of leniency policies is that it helps consumers deal with the legislative complexity of anti-cartel laws and helps with the organization of class actions. The FTC also provides regulatory guidance in co-operation with Department of Justice (Antitrust Division) to businesses.

[71]**The 1936 Robinson-Patman Act** (amended the Clayton Act's price discrimination provisions), 1939 Wool Products Labeling Act, 1951 Fur Products Labeling Act and the 1958 Textile Fiber Products Identification Act – all continuously expanded FTC´s powers which later led to criticism by American Bar Association which coined this process as the "misguiding enforcement policy".

[72]**Federal Trade Commission Improvement Act,** Hart-Scott-Rodino, Fair Credit Reporting Act, Fair Debt Collection Practices Act, Telemarketing and ConsumerFraud and Abuse Prevention Act etc.

7 ANTITRUST/ANTICARTEL ENFORCEMENT – GENERAL LEGAL INTERPRETATION FOR FURTHER LENIENCY-RELATED COMMENTARIES

7.1 Public enforcement

Public enforcement deals with the use of public agents (inspectors, tax auditors, police, prosecutors) to detect and to sanction violators of competition rules.

7.1.1 European Union

The main responsibility of disclosing, investigating and punishing undertakings acting contrary to competition law (as included in TFEU and respective regulations) has been given to the European Commission, which shares certain powers with national competition authorities (NCA's). Under Article 105 TFEU, the European Commission is charged with the duty of ensuring the application of Articles 101 and 102 TFEU and of investigating suspected infringements of these Articles. For this purpose, the European Commission and NCA's have wide on-site investigation powers thoroughly described in the Regulation 1/2003[73]. Article 105 TFEU entrusts in these institutions extensive investigative powers including the power to carry out dawn raids[74] on the premises of suspected undertakings (and even private homes), powers to request information, powers of obtaining copies of evidence during dawn raids etc. The awareness of the European Commission of competition law infringements might be invoked by competent authorities of Member States, by undertakings or by individuals. In the case where the Commission confirms an infringement, it is obliged to impose a fine on the undertaking involved. This procedure must be carried out pursuant to Article

[73]Council Regulation No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Article 101 TFEU (ex Article 82 TEC) and Article 102 TFEU (ex Article 82 TEC) of the Treaty

[74]A dawn raid is understood to be a situation when the Commission arrives at an undertaking's premises unexpectedly and with the intent of carrying out an inspection. For more information see Chapter 1.7.

23 of **Regulation 1/2003** and pursuant to the **Commission guideline on the method of setting fines imposed pursuant to Article 23 (2) (a) of Regulation 1/2003**[75] **andCommission Notice on cooperation within the Network of Competition Authorities.**

7.1.2 United States

Sherman Act[76] declares illegal ´every contract, in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations´. Similarly, section 2 prohibits monopolies, or attempts and conspiracies to monopolize. Moreover, **Clayton Act**[77] prohibits exclusive dealing agreements and mergers achieved by purchasing stock. The authorities in charge of enforcing both Acts are the **Department of Justice**[78] (Antitrust Division) and **Federal Trade Commission**[79]. The institutions as well as the procedures of law enforcement are described carefully in other chapters.

7.2 Private Enforcement

Private enforcement denotes the enforcement of competition law in disputes or, more commonly, law suits between two or more persons in private law. The most common form is an **action for damages**. Such satisfaction serves as compensation for damages incurred by the cartels existence. As mentioned before, the basic task of a cartel is to encroach the market share in line with increasing the customer prices. Such a strategy has many adversarial effects including loss of profit for companies not involved in the cartel or decreasing their market share.

The European Union does not have a remarkable record of private enforcement cases related to leniency and therefore let me use the classical terminology in this chapter.

[75]The aspects of imposing fines and the procedural aspects related to the leniency program are to be found in Chapter 6 about Financial Aspects.
[76] For more detailed information see Chapter 4.2.1.
[77] For more detailed information see Chapter 4.2.2.
[78] For more detailed information see Chapter 5.2.1.
[79] For more detailed information see Chapter 5.2.2.

The actions could be divided into two groups – firstly, so called **stand-alone actions** and secondly, the **follow-on actions**. The criterion of their division is simply whether the ruling on the cartel existence has been made or not. Stand-alone actions precede the decision on the cartels existence whilst follow-on actions are subsequent actions. Another division could be according to the number of complainants. Individual actions are sole actions of individual market competitors somehow harmed by the cartel existence whilst **collective/class[80] actions** include several market competitors with the same aim – obtaining damages.

7.2.1 European Union

Suffering damage as a result of a breach of the European Union competition rules (Articles 101 and 102 TFEU[81]) constitutes the right of every citizen or business to obtain reparation from the party who caused the harm. The biggest problem is that there is no binding legislation which would provide a detailed system of how the adversely affected citizens or businesses should proceed in such case. The only ideas of non-binding character were included in the Green Paper and the White Paper. Let me summarize the basic ideas included therein.

The European Union still has not developed a complex system of private anti-cartel enforcement. However, commonly, the potentional solutions have already been proposed in a non-binding document – **the Green Paper[82]**. For the purpose of private enforcement, the Green Book proposes three potential solutions. Firstly, the applicant for leniency will be granted full immunity from any private enforcement. Whilst this solution certainly strengthens the applicant's position, unfortunately it undermines the complainant's chances of getting their damages. Secondly, a conditional reduction of damages which corresponds with the reduction of the fine is

[80] Class action or representative actions are actions where a large group of people collectively brings a claim suing one or a class of defendants.

[81] OJ C 115/47Consolidated version of the Treaty on the functioning of the European Union (2008), Available from http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:en:PDF

[82] **European Commission (2005):** *Damages actions for breach of the EC antitrust rules - ´Green Paper´*

received as a penalty for cartel membership from the anti-cartel authority. This seems to be a fair and proportionally reasonable decision for both sides – the applicant and the potential complainant. And thirdly, rewarding the applicant by limiting his liability for private damages to only his part of liability and exempt him from application of joint and several liability. In all three cases the other companies would be subject to joint and several liability. In conclusion, the European perspective relies on several and joint liability, plus double damages, and therefore the position of the applicant remains unclear.

The debate over this matter mainly raises issues with regard to world hard-core cartels. By facing an unlimited number of actions from an unlimited number of states could mean the termination of a company's existence. Despite the still rather theoretical problem, the need for precise legal regulation is increasing.An example which pushed the Commission to develop some of its practises is the requirement to provide written evidence as a part of the leniency application. Providing that this evidence is revealed in a civil suit, the applicant for leniency suddenly appears in the most unfavourable position of all the cartel members as there is no supporting evidence for them but convicting evidence against them. One of the ways to avoid this controversy is to provide oral statements. The access to such recordings is then granted only to the addressee of the statement of objectives cumulatively with their oath that they and their legal representatives will not make any copies of the evidence or information. Any infringement of these conditions incurs penalties – again only theoretically, as the practise has not experienced any of these. Complainants are banned from gaining access to this information/evidence. Any public disclosure of this information/evidence made by the applicant understandably constitutes a lack of application of the special rules for protection of confidentiality.

7.2.2 Action for damages

Actions for damages are available to any person or firm adversely affected by anti-competitive behaviour. They may bring the matter before the courts of the Member States and seek damages. Commission´s decision on the cartel existence is a binding proof that the anticompetitive behaviour took place and was illegal which can be used in cases before national courts with no respect to the fine imposed by the Commission. Damages may be awarded without these teduction on account of the Commission fine.

7.2.3 United States

U.S. law environment generally prefers an action as a universal tool for solving problems of public-private as well as private-private character. Its application is well-known and frequently used in cartel cases.Different traditions forming the local environment, easier procedural position of private complainants and general knowledge of this tool means that the number of private actions is multiplicably higher than in the European Union and its member states legal environment. **Class actions** in combination with **treble damages**[83]and the doctrine of joint and several liability are the Magna Charta of the private anti-cartel actions. **Joint and several liability** doctrine simplifies the complainants position in the court decision enforcement – they can turn to any of the cartel participants and require the payment of the complete amount of damages incurred regardless of the intensity or market share of the cartel member they turned to. Taking into consideration the fact that the cartel member is granted a fine from national authorities, its reputation is subject to considerable defamation before its consumers and potentionally market collaborators (suppliers, distributors…) and finally it must face an unlimited number of private actions, makes this legal Framework tremenduously effective.

[83]Tripling the amount of actual damages to be paid to a prevailing party in a lawsuit. Treble damages are sometimes provided by law in order to punish intentional or willful behavior of the losing party.

In some cases however, it would be fair not to expose the cartelists to facing joint and several liability or to being required to pay treble damages in the context of civil litigation.

Under **AntitrustCriminalPenaltyEnhancementandReformActof2004** (hereinafter referred to as ´ACPERA´)**,** there is a chance of limiting the damages to only those incurred as a direct result of applicant's pro-cartel conduct. The qualification for this purpose requires that the applicant must provide "satisfactory co-operation" to the civil plaintiff. Unfortunately, the ACPERA does not provide any satisfactory definition of what the term "**satisfactory cooperation**" stands for.

To conclude this chapter, European Union is in need of complex and unified law regulating the problematics of private enforcement and the world is in need of public law agreement on the rules of the information Exchange in cartel cases.

8 LENIENCY-RELATED SUBSTANTIAL LAW ASPECTS

8.1 European Union

8.1.1 The treaty on the functioning of the European Union

The treaty on the functioning of the European Union (hereinafter referred to as ´TFEU´) regulates cartel-related and monopoly-related matters in Articles 101 (ex Article 81 TEC) and 102 (ex Article 82 TEC).Let me paraphrase their wording so as to make them more ´user-friendly´ but without any change of their legal meaning.

Article 101 TFEU(ex Article 82 TEC)holds incompatible with the internal marketall agreementsbetween undertakings, decisions by associations of undertakings and concerted practices which mayaffect trade between Member States and which have as their object or effect the prevention, restrictionor distortion of competition within the internal market. The anticompetitive behaviour / conduct may be direct or indirect fixing of purchase or selling prices or any other trading conditions;limiting or controlling production, markets, technical development, or investment; sharing markets or sources of supply; applying dissimilar conditions to equivalent transactions with other trading parties, thereby placingthem at a competitive disadvantage; making the conclusion of contracts subject to acceptance by the other parties of supplementaryobligations which, by their nature or according to commercial usage, have no connection with thesubject of such contracts.Any agreements or decisions prohibited pursuant to this Article are automatically void. However, there are some exceptions.[84]

[84]The stated provisions might be declared inapplicable in the case of any agreement or category of agreements between undertakings, any decision or category of decisions by associations of undertakings, any concerted practice or category of concerted practices,which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit. This was a positive definition. The negative one excludes those undertakings which impose on the undertakings concerned restrictions which are not ndispensable to the attainment of these objectives or afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Article 102 TFEU(ex Article 82 TEC) prohibits any abuse by one or more undertakings of a dominant position within the internal market or in asubstantial part of and any similar behaviour as can be incompatible with the internal marketin so far as it mayaffect trade between Member States. It also provides some examples of such illegal abuse: direct or indirect imposing unfair purchase or selling prices or other unfair trading conditions; limiting production, markets or technical development to the prejudice of consumers; applying dissimilar conditions to equivalent transactions with other trading parties, therebyplacing them at a competitive disadvantage;making the conclusion of contracts subject to acceptance by the other parties of supplementaryobligations which, by their nature or according to commercial usage, have no connection with thesubject of such contracts.

8.1.2 The 2006 Leniency Notice

8.1.2.1 Immunity from fines

The 2006 Leniency Notice principally extends and specifies provisions included in 2002 Leniency Notice. To qualify for immunity from fines, the undertaking must be the first undertaking to submit information and evidence which are of such character so as to enable the Commission to carry out a targeted inspection or find an infringement of Article 101 TFEU in connection with the alleged cartel.

The character of evidence and information must be provided to the extent which will not jeopardise the inspections – the decision whether it has a potential to put the inspection at jeopardy is at discretion of the Commission. That is, more or less, the same wording as in the 2002 Leniency Notice.

For the first time, the Notice thoroughly describes data legally required for a full-bodied application. Firstly, the Commission requires a detailed description of the alleged cartel arrangement (aims, activities, functioning, scope, duration, dates, locations, participants) whereby each piece of evidence needs to be supported with a relative explanation or proof of confirmation of its existence. Secondly, the Commission must receive names and addresses of legal entities submitting the immunity applications as well as the others that

participated in the alleged cartel. Thirdly, the personal data requirement goes further and includes names, positions, office locations and home addresses of individual persons acting on behalf of applicants and other alleged cartel members. Fourthly, it is understood that the evidence provided to other competition authorities, inside or outside Europe, must be equally provided to the Commission. And finally, the listing is not enumerative as the final clause makes the Commission open to any other information relating to the alleged cartel in possession of the applicant.

However, submission of all of the above stated proprieties does not necessarily qualify the Commission for granting of immunity from fines. The aspect of being faster than the Commission itself plays an important role as well. Providing that the Commission itself disposes of evidence of such nature that makes it eligible for adoption of a decision to carry out an inspection in connection with the alleged cartel or had already done so, then all the previous efforts of the undertaking – applicant are waived[85]. Such cases are rare and the Commission treats such applicants as eligible for the fine reduction and even cases of addition of two types of fine reductions occurred.

The additional conditions guaranteeing preservation of the favourable immunity treatment copy the 2002 Leniency Notice ones. The undertaking is obliged to co-operate genuinely, fully and on a continuous basis and expeditiously. Such behaviour is desired from the moment of submission of the application. Any relevant newly discovered information must be submitted immediately to the Commissionand without any other entity utilising it earlier than the Commission. At the Commission's direction, a person must be prepared to promptly answer any request that may contribute to the establishment of facts. All employees, not only those who are subjectively related to the cartel performance from the applicant's view, must be available

[85] This situation is understandable. I would not like to express any doubts about the Commission´s trustworthiness but from the point of view of legal certainty, the de lege lata clause stating the necessity of the confirmation of the fact that Commission had had such evidence in real would be appropriate. I am certain that cases where the Commission has a certain evidence probably suitable to convict the cartel but is still unsure whether to carry out an inspection on this basis and out of a sudden appears a company confirming the same allegations the Commission had had before. On the one hand, the Commission had disposed of sufficient evidence to adopt a decision but the real incentive came afterwards by the application of the undertaking. And my question remains? Should the Commission grant full immunity or fine reduction? And if any what shall bethe criteria setting the boundaries for the different evaluation of these two cases?

for Commission interviews. The evidence and information relating to the alleged cartel provided to the Commission must be neither destroyed, nor falsified nor concealed. The information and evidence at stake cannot be revealed until the moment before the Commission has issued a statement of objections.

As for the undertakings activities in the cartel, it must cease the illegal cartel activity immediately with the submission of the application, except for the situation which would, from the Commission's point of view, endanger the integrity of the future inspections.

In the case that the undertaking does not adhere to any of these conditions, either by taking steps to coerce other undertakings to joint the cartel or to remain in it, thence the eligibility for immunity is cancelled. Despite this, the undertaking can still be eligible to fine reduction.

8.1.2.2 Reduction in fines

Not meeting the conditions under provisions for granting leniency still does not mean the end of the undertaking's hopes. Any undertaking disclosing its evidence or information confirming its participation in an alleged cartel may be eligible to qualify for reduction of a fine which would otherwise have been imposed. As explained above, the undertaking must provide the Commission with evidence of significant added value with respect to the evidence already in the Commission's possession. Additionally, the undertaking must adhere to genuine, continuous and expeditious co-operation including prompt provision of all relevant information and evidence, making the directors and employees available for the Commission's questioning, the obligation not to destroy, falsify or conceal relevant information or evidence, and not disclosing the content of its application unless the statement of objectives has been issued.

8.1.2.3 The concept of significant added value

Significant added value is an artificially invented concept which puts emphasis on the extent to which the evidence provided strengthens the Commission's ability to prove the alleged cartel. The criteria taken into consideration are the nature and the level of detail of the evidence or information. The Commission prefers evidence originating from particular cartel periods and directly relating to these periods to those which were additionally subsequently established. The quality of incriminating evidence required is described as compelling, which basically means that there are no doubts over the origin and content of such evidence or information. On the other hand, the Commission also accepts indirect evidence, evidence requiring additional corroboration or even contradictory evidence. But understandably, they are of lower relevance in comparison with those which are direct and compelling.

8.1.2.4 The level of the granted reduction in a fine

The level of reduction granted to the undertaking is determined in the final decision adopted at the end of the administrative procedure. The basis for calculating the amount of the reduction in a fine is the amount of fine which would otherwise be imposed. The first undertaking (providing that it meets all required conditions) receives a reduction of 30-50 %, the second a reduction of 20-30 % and any subsequent undertakings a reduction of up to 20 % is utterly dependent on the Commission’s discretion. When determining the exact reduction in a fine within the boundaries as stated in the previous sentence, the Commission will take into account the time when the evidence of significant added value was submitted and its extent. Submitting compelling evidence, which can effectively be used to establish additional facts, increasing the gravity or the duration of the infringement, generally constitutes an important attenuating circumstance and is also carefully evaluated to the benefit of the applicant when setting the level of reduction in a fine.

8.1.2.5 Immunity from fines v. reduction in a fine

Not meeting the requirements under above stated rules and conditions for the qualification for the immunity from fines under section II in the notice does not necessarily mean that the undertaking does not receive any leniency. Despite the provision of basic information and evidence from the undertaking which qualified for immunity from fines, the option of the reduction of a fine still remains an option to qualify for.

Nonetheless, there is still a necessity to meet two basic conditions – one is the same as in the case of immunity from fines and concerns the general behaviour of the undertaking towards the cartel and towards the Commission andthe second is somehow a modified condition for the quality of evidence.

8.2 United States

The most important procedural aspects concerning the leniency policy were adopted in 1993 in newly published corporate leniency (immunity) policy / corporate amnesty. They were subject to changes but only of minor importance and mainly as a reaction to defficiencies discovered in its relatively frequent application. Interestingly, for the first time, the Program provides a limited but definition of "Leniency" as not charging a firm criminally for the activity being reported. Let me divide the procedural steps using the same hierarchy as described in the Programme.

8.2.1 Leniency before an investigation has begun

Granting leniency under these circumstances requires that the corporation reports illegal activity but before the initiation of the cartel investigation has begun. Additionally, the corporation must come forward with kind of information or evidence about the illegal cartel activity that the Division has not received from any other source. Reporting the illegal conduct must also be followed by taking prompt and effective actions to terminate the corporation´s part in the illegal activity. However, the leniency is still only conditional and the corporation must prove further interest in the cartel disclosure by continuing and complete cooperation with the Division throughout all the investigation.

The confession´s character might be corporate or individual/isolated depending on the person making it – either the corporation or individual executives or officials. The corporation should also prove effort to make restitution to injured parties. As it has been mentioned above, the U.S. system has a discriminatory character in relation to cartel ringleaders and therefore the corporation that coerced another party to participate in the illegal activity and clearly was the leader in, or originator of, the activity, is exempt from granting full immunity. However, it is not disqualified from getting a reduction in fine.

8.2.2 Alternative Requirements for Leniency

Not meeting all six of the conditions set out above does not necessarily disqualify the company from getting leniency. There is a second chance for the corporation which sets another seven conditions which must be met cummulatively. This time it does not depend on the fact whether the evidence or information is provided before or after an investigation has begun. The corporation must be the first one to come forward and qualify for leniency with respect to the illegal activity being reported (the same as in the first case). But differently from the previous conditions,the Division must be in a situation when it does not yet have evidence against the company that would be likely to result in a sustainable conviction. Similarly as before, reporting the illegal conduct must also be followed by taking prompt and effective actions to terminate the corporation´s part in the illegal activity. Making restitution to injured parties should be carried out where possible. And as an additional extra condition is added a discretionary power of the Division which determines whether granting leniency would not be unfair to others in that particular case. What should be taken into consideration by the Dividion is the nature of the illegal activity, the confessing corporation's role in it, and when the corporation comes forward. The burden of satisfying condition 7 will be low if the corporation comes forward before the Division has begun an investigation into the illegal activity. That burden will increase the closer the Division comes to having evidence that is likely to result in a sustainable conviction.

8.2.3 Leniency for Corporate Directors, Officers, and Employees[86]

8.2.4 United States Amnesty Plus and Penalty Plus Programmes

Amnesty Plus is a program which guarantees a company, already being under investigation, an opportunity to obtain amnesty against prosecution and fines. The price is reporting an additional and unrelated cartel activity previously not known to the Department of Justice or it might benefit from Amnesty plus in a limited way - by receiving an additional discount on its fine for the first conspiracy. The first in the door policy prefers favourable position to only one applicant for leniency. Amnesty Plus is therefore another chance for the corporation to receive either immunity or fine discount. The psychological background of Amnesty Plus is based on the inception of uncertainty among all cartellist who are not lenient. The first one of them who applies for Amnesty Plus wins and the other are subject to fines and civil suits. However, the punishment for not reporting under Amnesty Plus is called **Penalty Plus**. Penalty plus is applied in cases when the Department of Justice becomes aware of unrelated illegal activitythat a company under investigation engaged in. Cummulatively, the company was aware of that and did not report it. Inthis event, the company will be subject to a harsher punishment for its involvement in theadditional activity. It should be noted that the reason that the company had not reported willbe a factor of the severity of the penalty. For example, a company that was fully aware ofa second offense and chose not to report it is likely to be subject to more severe penaltiesthan a company that was unaware of the second offense because of an inadequate internal investigation. The failure to self-report usually meansthe difference between a potential fine as high as 80 percent or more of affected commerce or no fine at all under Amnesty Plus.

[86]Some states in the European Union use the criminalisation of natural persons in cases of cartel disclosure; the main aim is generally to reinforce the deterrent effect of the punishment. The liability of the undertaking is not as threatening as imprisonment or huge financial penalties imposed directly on natural persons (mainly undertaking's executives). For more information see the Chapter 10.

9 LENIENCY-RELATED PROCEDURAL ASPECTS

9.1 European Union

9.1.1 Treaty on the functioning of the European Union

The Article 105 **of the** (hereinafter referred to as ´TFEU´) empowers the Commission with ensuring the application of the principles laid down in Articles 101 and 102 TFEU (formerly 81 and 82). *´Such application can proceed either on application by a Member State or on its own initiative and in cooperation with the competent authorities in the Member States. The Member States are obliged to give it their assistance.*

The Commission shall investigate cases of suspected infringement of these principles. If it finds that there has been an infringement, it shall propose appropriate measures to bring it to an end. If the infringement is not brought to an end, the Commission shall record such infringement of the principles in a reasoned decision. The Commission may publish its decision and authorise Member States to take the measures, the conditions and details of which it shall determine, needed to remedy the situation The Commission may adopt regulations to combat anticompetitive proceedings as understood by Articles 101 and 102 TFEU.´[87]Currently, two legal acts include procedural aspects related to anticompetitive conduct:**Commission guideline on the method of setting fines imposed pursuant to Article 23 (2) (a) of Regulation 1/2003** and **Commission Notice on immunity from fines and reduction of fines in cartel cases (2006/C 298/11).**

[87]see the Article 105 of the Treaty on the functioning of the European Union.

9.1.2 Commission Notice on immunity from fines and reduction of fines in cartel cases (2006/C 298/11)

9.1.2.1 Immunity from fines procedure

The first step is to apply for immunity at the Commission's Directorate General for Competition. The direct way is to make a formal application. In the case that the undertaking has not managed to collect all the necessary evidence and information, but it wants to have its position guaranteed before the others, it can initially apply for a marker. Any application may be disregarded on the ground that the statement of objectives has already been submitted and issued.

9.1.2.1.1 Granting a marker

The Commission can grant a marker which protects the applicant's position qualifying it for immunity in the queue of other undertakings. The applicant is obliged to provide such evidence in a period as set case-by-case by the Commission. To be eligible to secure a marker, the applicant must provide the Commission with the following information:

- name and address of the undertaking
- parties to the alleged cartel, affected product(s) and territory(ies)
- the estimated duration of the alleged cartel
- the nature of the alleged cartel conduct

The applicant should also inform the Commission about previously submitted leniency applications and generally justify its request for the marker. Perfecting a marker by submitting the formal application in hypothetical terms is not possible. On condition that the applicant provides the evidence and information within the period as set by the Commission, the information and evidence will be understood as if it was submitted on the date when the marker was granted.

9.1.2.1.2 Formal immunity application

The undertaking is obliged to provide the Commission with all the information and evidence relating to the alleged cartel in case it intends to apply for full immunity.

9.1.2.1.3 Hypothetical application

The undertaking has a chance to present its evidence and information hypothetically in a detailed descriptive list of evidence that might be revealed in the future. The list should help the Commission understand the nature and content of the evidence. The provided copies can be used but only those where sensitive parts have been removed. The name of the undertaking need not be disclosed until the evidence presented is formally submitted.

9.1.2.1.4 Acknowledgement of receipt

Upon the undertaking's request, the Directorate General for Competition can provide an acknowledgement of receipt of the undertaking's application for immunity from fines. This acknowledgement confirms the date and time of application.

9.1.2.1.5 Verification

Following verification that all conditions set out in qualification requirements have been met, the undertaking shall be granted conditional immunity from fines in writing. In case of hypothetical terms, the Commission will verify that the nature and content of the evidence meets the conditions and the undertaking is informed accordingly. Subsequently, the disclosure of the evidence no later than on the date agreed, the Commission will grant conditional immunity from fines in writing.

Similarly, when not qualifying for the conditions enabling the granting of immunity, the Commission informs the undertaking in writing. The

undertaking can withdraw the evidence presented or can apply for consideration under the Reduction of fines procedure. These decisions however do not prevent the Commission from using its normal powers to investigate.

The need for legal certainty invokes the necessity to wait until the Commission takes a position on an existing application irrespective of the presentation of immunity formally or by the marker request.

The administrative procedure ends either by meeting all the legal conditions or not performing so. In the first case, the Commission is obliged to grant immunity from fines by the decision. On the other hand, providing that the undertaking does not meet the conditions that are set here, it will not benefit from favourable treatment. Cartel performance as a coercer unconditionally withholds the undertaking's immunity.

9.1.2.2 Reduction in fine procedure

9.1.2.2.1 Formal application

Firstly, the undertaking applying for the fine reduction must contact the Commission and secondly, it must submit formal application and enclose the required evidence of significant added value. Finally, the application must be clearly identified as being an application for a reduction of a fine at the time of its submission.

9.1.2.2.2 Acknowledgement of receipt

Similarly, as in the case of an application for immunity from a fine, the Directorate General for Competition provides an acknowledgement of receipt of the undertaking's application. The content describes its application for fine reduction and submission of evidence and confirmation of date and time for each submission. In the case of the existence of more applications which the Commission receives, it is obliged to deal with each one according to the date (respectively time) of their submission. In other words, the Commission takes their position on the first dated application, then on the following one etc.

9.1.2.2.3 Preliminary conclusion

The undertaking will be informed in both cases – provided that the evidence submitted by the undertaking constitutes, and on the other hand does not constitute, significant added value. The undertaking will in such a case be informed in writing and this information must not be submitted later than the date on which a statement of objectives is notified. The issuance of the statement of objectives creates a threshold before which the Commission accepts an application for a reduction of fines and after which any such application must be disregarded.

9.1.2.2.4 Final decision

The end of any administrative procedure related to the applications for reduction is concluded by an adoption of final decision. This will include the evaluation of the final position of each undertaking. The final decision must include the decision whether the evidence provided by the undertaking can be considered of significant added value or not. Then, the undertakings meeting of the conditions of co-operation with the Commission and behaviour towards the cartel members must be confirmed, and most importantly, the Commission must set the exact level of reduction granted to the undertaking. The undertaking will not be entitled to benefit from any treatment under this notice if it does not meet any of the above stated conditions.

9.1.2.2.5 Corporate statements

A Corporate statement is a voluntary presentation given by the corporate representatives which is aimed at a description of the role of the undertaking within the cartel. It should also include all other relevant knowledge which might be of benefit to the potential Commission's investigations. Any statement submitted to the Commission creates a part of the file on the cartel and as such should be used in evidence. The corporate statement can be provided either in a written form or oral form.

9.1.2.2.5.1 Oral corporate statements

Provision of the oral corporate statement is appropriate in cases where the applicant has not already disclosed the content of corporate statements to third persons and for any reason does not wish to do so. The recording and transcription is carried out at the Commission's premises. Understandably, and in accordance with Council Regulation No. 2003/1[88], the undertaking is subsequently allowed to review the technical accuracy of the recording and potentially correct the substance of the oral statements to a permitted extent. Waiving the right to correct the oral statement by the undertaking means irrevocable agreement with its approval. Any listening of the recordings and any check of their accuracy must be performed at the premises of the Commission. Refusal to do so or breach of this rule leads to an automatic loss of any beneficial treatment by the Commission (immunity from fines, reduction in a fine).

9.1.2.2.6 Access to corporate statements

Before the statement of objections, the only entitled entity with access to corporate statements is the Commission. After the statement of objections is issued, its addressees and their legal counsels are granted full access to them but only on condition that they commit not to copy the corporate statement by any means. The usage of such information is strictly limited to purposes of judicial or administrative proceedings for the application of the Community competition rules at issue in the related administrative proceedings. Providing that such information is used for any other purpose than as stated in the Notice, the Commission can consider such behaviour as a lack of co-operation with all the aftermaths related to it The punishment gets even stronger in cases where the Commission has adopted a prohibition decision but the undertaking acted in non-conformance with that, the Community Courts are entitled to increase the undertaking's fine in any legal proceedings.[89] The Commission generally

[88] OJ L 1, 4.1.2003, p. 1.
[89] Usage of the information for a different purpose than the stated in the Notice with an involvement of an outside counsel may bereported as inappropriate behaviour by the

considers any disclosure of the corporate statement to third parties as an expression of the intention of the party not to enjoy the specific protection of secrecy.

9.1.3 Council Regulation 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

9.1.3.1 Article 12 - Exchange of information

Currently, there is no harmonized legal reglementation of the leniency program and therefore it was necessary to create a special legislation governing the Exchange of information between the state competition authorities and the Commission. The matters in question are included in a Article 12 of Council Regulation No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Article 101 TFEU (ex Article 82 TEC) and Article 102 TFEU (ex Article 82 TEC)of the Treaty (hereinafter referred to as ´Regulation 1/2003´). The basic rule is that States acting on the basis of Article 101 TFEU (ex Article 82 TEC) and Article 102 TFEU (ex Article 82 TEC) are obliged to inform the Commission in a writtten form immediately after the initiation of the investigatory proceedings. The Commission then has a discretion as to whether to submit the information or evidence to other member state competition authorities.

9.1.3.2 Article 18 – Power to request information

The undertakings are obliged to provide all necessary information when asked to do so. The provision of information can be either by a simple **request** or **decision**. Simple requests do not found the necessity to respond. In case of simple requests, the undertaking is limited so that it cannot provide misleading or incorrect information to the Commission. Failure to do so means there is a possibility of the Commission imposing a fine up to a maximum of 1% of the

Commission to the bar of that counsel with a threat of disciplinary action in accordance with the respective law.

total turnover in the preceding year. Decisions imply a necessity to respond to them. Where the undertaking intentionally or negligently supplies incorrect, incomplete or misleading information, or where the undertaking simply refuses to respond to the Commission's questions, the Commission can impose a fine up to a maximum of 1% of the total turnover in the preceding year. Penalty payment of 5% of the average daily turnover can be granted as leverage for obtaining the required complete and correct information.

9.1.3.3 Article 20 – Power to conduct 'all necessary inspections'

Such a power belongs exclusively to the Commission and when doing so, the Commission must specify the subject-matter and purpose of the inspection. The inspections can be performed on two different bases – pursuant to an **authorization** or pursuant to a **decision**. The authorization enables the undertaking to refuse the Commission's inspection. On the other hand, in case of a decision, the undertaking is obliged to submit to inspections. Refusal to do so means the Commission has the possibility to incur a fine of 1% of the undertaking's turnover. 5% of the average daily turnover as a penalty payment could be granted to compel it to submit to the previously ordered inspection by a decision. The empowerment to conduct 'all necessary inspections' includes entering business premises, examining and copying business records, sealing business premises and records for a period and to the extent necessary for carrying out the inspection, and also asking any staff member on-the-spot questions. The rejection to perform on-the-spot questions as mentioned before can mean the imposition of a fine not exceeding 1% of the total turnover.

The National Competition Authority (NCA)[90] can accompany the Commission in cases where requested by the Commission or by the NCA. Their performance is thence considered as the Commission's performance under Regulation No 1/2003. The NCA must be given a notice before the conduct of an inspection pursuant to authorization. The NCA must also be consulted before carrying out an inspection based on a decision. The opposition towards the conduct of an inspection may invoke the Commission's entitlement

[90] National Competition Authority can be requested by the Commission to carry out a dawn raid on Commission´s behalf without its presence.

to request any necessary assistance – police or any other body of equivalent authority. Providing that the national law requires judicial authorisation for such assistance, then the legal procedure must be adhered to[91].

9.1.3.4 Article 21 – Power to enter private premises

The Commission may enter any other premises, land and means of transport, including homes of director's, managers and other members of staff of the undertaking. Such a disputable[92] action can be only carried out in the case that the Commission has a reasonable suspicion that business-related records that may prove the violation of the competition rules are available at those people's premises. **On-the-spot questions** and **sealing the premises** is not permitted under the law. Entering private premises and examining the records and making copies are permissible. Before any entering of private premises, a consultation with the NCA is necessary. Formally, entering premises must be based on a decision which includes the subject-matter and purpose of the inspection and it must inform the applicant that it can be reviewed by the European Court of Justice. Prior authorization from the judicial authority is not necessary.

The regulation offered a too general legal Framework and practise showed the need to provide the system with more complex provisions – this led to passing the Regulation 1/2003 regulating the exchange of information related to the leniency application. The obligation to inform the Commission and its entitlement to spread the information further was newly made subject to a more complex regulation. The information spread by the Commission must not be used by other state competition authorities for the initiation of investigatory proceedings. Additionally, the information exchange must be approved by the applicant. This certainly cannot be applied in cases when the

[91] In Case 94/00 Roquette Freres SA v DGCCF [2002] ECR I-9011 the Court set out the scope of the judicial review that can be taken by the national court. The national court may confirm the authenticity of Commission´s decision, the non-excessivity and non.arbitrariness of coercive decisions. The national court may request the Commission for the reasons why it suspects the undertaking from the participation in a cartel. The court may not question the necessity for the inspection and cannot demand information from the Commission´s file.

[92] This Commission´s power has been many times questioned in comparison with Article 6 of ECHR on anti-discrimination and mainly Article 8 with the right to privacy.

same applicant submitted application in both state competition authorities. Furthermore, the applicants approval is not necessary in cases where the states guarantees in a written form that exchanged information or information gathered soon after the information exchange will not be used for the purpose of fine imposition on any undertaking, any individual or any employees for which the applicant shall request leniency. The exchange of information which were collected during the cartel investigation on behalf of other member state in relation to the alleged infringement Article 101 TFEU (ex Article 82 TEC) and Article 102 TFEU (ex Article 82 TEC) is also not subject to applicant´s agreement.

9.1.4 Aspects of concurrent jurisdictions

Being granted immunity form fines (leniency) by a European member state anticartel authority currently does not constitute any entitlement to any leniency at other anticartel authorities in other member states. Effective leniency for the whole European Union territory can be granted only by the Commission but it is conditioned by its approval to do so. Submitting an application to the Commission constitutes only the entitlement to review of the legitimacy of whether to grant the keniency or not. Generally, the impact of the cartel must cause market deformations at least in three member states. Unfortunately for the cartel, it might happen (and it happens) that the application is rejected. In that case, the undertaking must quickly submit the applications to individual member states hoping that the other cartel members do not do so faster than it and guessing what jurisdictions might have been affected by the cartel existence. Two extreme uncertanties. In practise, all undertakings primarily submit their application to the Commission and wait. This situation is thoroughly solved in the ECN Model Leniency Program[93]. Unfortunately, the programme is only of de lege ferendae character and therefore neither constitutes any legitimate expectations nor imposes any

[93]To promote the awareness about the potentional future legislation relating leniency indefficiencies and leniency procedural aspects, ECN published a kind of de lege ferendae document called ECN Model Leniency Program in 2006. For more information see Chapter 12.1.

obligations nor prescribes any procedures. For more detailed information see the following chapter.

9.2 United States Process

The most important procedural aspects concerning the leniency policy were adopted in 1993 in newly published corporate leniency (immunity) policy / corporate amnesty. They were subject to changes but only of minor importance and mainly as a reaction to defficiencies discovered in its relatively frequent application. Interestingly, for the first time, the Program provides a limited but definition of "Leniency" as not charging a firm criminally for the activity being reported. Let me divide the procedural steps using the same hierarchy as described in the Programme.

9.2.1 Internal Leniency Process

If the division staff receives the request for leniency, they must decide whether the corporation qualifies for and should be accorded leniency. In that case, they should forward a favorable recommendation to the Office of Operations and include a detailed explanation including the reasons why leniency should be granted particularly to this corporation. Such a recommendation must not be submitted later than a fact memo recommending prosecution of others is prepared. Subsequently, the Director of Operations reviews the request and forwards it to the Assistant Attorney General for final decision. Negative recommendation (against leniency) given by the staff does not mean the end of hopes. Despite the fact that i tis nt legally prescribed, the corporate counsel may seek an appointment with the Director of Operations to share their opinions on this matter. The Character of the procedur eis indirectly and partly described in the substantial law chapter and in the rest, there are only customary proceedings similar to the European Union ones (markers etc.) but not legally incorporated.

10 ASPECTS OF LENIENCY-RELATED INTERNATIONAL AND SUPRANATIONAL COOPERATION IN CARTEL CASES

10.1 Commission Notice on cooperation within the Network of Competition Authorities (2004/C 101/03)

10.1.1 European Competition Network (ECN)

Council Regulation 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 (hereafter the 'Regulation 1/2003') created a **system of parallel competences** in which the Commission and the Member States' competition authorities (hereafter the 'NCAs') can apply Articles 101 and 102 TFEU (formerly Articles 81 and 82 of the EC Treaty). NCAs and the Commission form a network of public authorities: they act in the public interest and cooperate closely in order to protect competition. The network is the basis for the creation and maintenance of a common competition culture in Europe. The network is called '**European Competition Network' (ECN)**.

The structure of the NCAs varies between Member States. Some states have one body - one NCA which investigates cases and takes all types of decisions. Some states use a system of the division of these two functions and some states certain decisions can only be taken be taken by a court with a prosecutor bringing the case before that court. No matter which of these systems is used, the network formed by the competition authorities in the European union should ensure both an efficient division of work and an effective and consistent application of EC competition rules. The system is therefore based on consultations and information exchange within the network.Each NCA is fully responsible for ensuring due process in the cases it deals with.

10.1.2 Principles of allocation

The system of cooperation is based on a system of parallel competences in which all NCAs and the Commission have the power to apply Articles 101 and 102 TFEU and are in charge of an efficient division of work where each NCA and Commission retain full discretion in deciding whether or not to investigace a case. The system of parallel competences solves the situation whether the competitioncases will be dealt with by a single NCA (supported by NCAs of other Member States), several NCAs acting in parallel or the Commission.

General rule is that the authority that receives a complaint or starts an **ex-officio procedure** remains in charge of the case. Sometimes re-allocation is found to be necessary for aneffective protection of competition and of the Community interest, in this case, network members will endeavour to re-allocate cases to a single well placed competition authority[94] as often as possible ensuring speed and efficiency of reelocation process and avoid holding up ongoing investigations. Parallel action by two or three NCAs may be appropriate where an agreement or practice has substantial effects oncompetition mainly in their respective territories and in which case the action of only one NCA would not be sufficient to bring the entire infringement to an end and/or to sanction it adequately. Acting in parallel action requires that the NCAs endeavour to coordinate their action to the extent possible[95]. The Commission is particularly well placed if the agreement(s) or practice(s) have effects on competition in more than three Member States and if it is closely linked to other Community provisions and if the Community interestrequires the adoption of a Commission decision to develop Community

[94]The competition autority can be considered to be well placed to deal with a case firstly, if the agreement or practice has substantial direct actual or foreseeable effects on competition within its territory, is implemented within or originates from its territory. Secondly, the authority is able to effectively bring to an end the entire infringement, i.e. it can adopt a cease-and-desist order the effect of which will be sufficient to bring an end to the infringement and it can, where appropriate, sanction the infringement adequately and finally it can gather, possibly with the assistance of other authorities, the evidence required to prove the infringement.

[95]They may find it useful to designate one of them as a lead authority and to delegate tasks to the lead authority such as for example the coordination of investigative measures, while each authority remains responsible for conducting its own proceedings.

competition policy when a newcompetition issue arises or to ensure effective enforcement.

10.1.3 Information at the beginning of the procedure

To avoid parallel unnecessary investigations, to ensure that cases are dealt with by a well placed competition autority and to ensure effective and quick reallocation of cases where necessary, the members of the network have to be informed as soon as possible about certain information related to the case in question. NCAs are obliged to inform the Commission when acting under Articles 101 and 102 TFEU before or without delay after commencing the first formal investigative measures. Similarly, the Commission informs NCAs. Network members inform each other of pending cases. Such information provides limited details of the case.[96] Re-allocation issues must be resolved swiftly,optimally within a period of twomonths. Material changes occuring during the course of the proceedings are the only reason for re-allocation of a case after the initial allocation period of two months.

10.1.4 Suspension or termination of proceedings

Parallel investigations of several competition authorities no matter whether they have received acomplaint or have opened a procedure on their own initiative, which are not desired as they would mean multilication of investigation , can mean suspending proceedings or rejecting a complaint on the grounds that another authority is dealing with the case or has dealt with the case.[97] Such situation can arise when another authority has dealt or is dealing with the competition issue raised by the complainant, even if the authority in question has acted or acts on the basis of a complaint lodged by a different complainant or as a result of an *ex-officio* procedure. Generally, this situation

[96]That means the authority dealing with the case, the product, territories and parties concerned, the alleged infringement, the suspected duration of the infringement and the origin of the case and updates when a relevant change occurs.

[97]Dealing with the case does not merely mean that a complaint has been lodged with another authority. It means that the other authority is investigating or has investigated the case on its own behalf.

happens when the agreement or practice involves the same infringement(s) on the same relevant geographic and product markets.

Multiple jurisdictions would be waste of time and costs and therefore an NCA may suspend or close its proceedings under such circumstances. The decision whether to continue in investigation, whether to suspend it and whether to terminate it depends therefore on each individual case. Suspension or termination of proceedings might establish a need to transfer the information provided by the complainant to the authority which is to deal with the case. Partial suspension or partial termination of proceeedings are also possible. In this case, the rest of the complaint must be investigated in an appropriate manner. Suspension and termination of ex-officio proceedings or rejecting complaints might be performed according to their NCA´ s national procedural law. Rejection of a complaint for lack of Community interest or other reasons pertaining to thenature of the complaint are posssible.

10.1.5 Exchange and use of confidential information

The power of all the competition authorities to exchange and use information evidence on any matter of fact or of law, including confidential information for the purpose of applying Articles 101 and 102 TFEU is a precondition for efficient and effective allocation and handling of cases. This includes exchanges of information between an NCA and the Commission and amongst NCAs. Importantly, the question whether information was gathered in a legal manner by the transmitting authority is governed on the basis of the law applicable to this authority. The minimum level of protection throughout the Community is created by a that that the Commission and the competition authorities of the Member States, their officials, servants and other persons working under the supervision of these authorities cannot disclose information acquired or exchanged which is ‘of the kind covered by the obligation of professional secrecy’[98]. This does not apply in cases when legitimace interest

[98]Professional secrecy includes in particular business secrets and other confidential information.

of undertakings in the protection of their business secrets may not prejudice the disclosure of information necessary to prove an infringement of Articles 101 and 102 TFEU.

Information which has been exchanged within the network can only be used in evidence for the application of Articles 101 and 102 TFEU and for the subject matter for which it was collected.

Information collected from undertakings cannot be used in a way which would circumvent the higher protection of individuals. The collection of evidence respected by the transmitting authority must be guaranteed by thereceiving autority. If both the legal systems provide for sanctions of a similar kind, fines can be imposed on a member of the staff of an undertaking who has been involved in the violation of Articles 101 and 102 TFEU. If both legal systems do not provide for sanctions of a similar kind, the information can only be used if the same level of protection of the rights of the individual has been respected in the case at hand. Consequently, custodial sanctions can only be imposed where both the transmitting and the receiving authority have the power to impose such a sanction.

10.1.6 Investigations

NCA may ask another NCA for assistance in order to collect information or carry out fact-finding measures on its behalf. The assisting NCA must then transmit the information it has collected to the requestingNCA in accordance with the rules stated in the previous paragraph. Acting on behalf of means being pursuant to its own rules of procedure and acting under its own powers of investigation. Similarly, the Commission can adopt a decision or issue a request towards the NCA to carry out an inspectionon its behalf. In such a case, the NCA officials exercise their powers in accordance with their national law. Commission´s agents may assist the NCA during the inspection.

10.1.7 Position of undertakings

The allocation of cases must be a quick and efficient process. The companies involved in or affected by aninfringement are not entitled to have the case dealt with by a particular authority. The application of the allocation criteria must lead to the conclusion that only the authority, which is well-placed to deal with the case by single or parallel action, will be chosen. All competition authorities are obliged to apply Communitycompetition law in a consistent way. The undertakings concerned and the complainant(s) must be informed about the re-allocation of a case within the network as soon as possible by the competition authoritiesinvolved. The Commission is obliged to reject complaints if it does not investigate the complaint or prohibit the agreement or practice complained of. The rights of complainants who lodge a complaint with an NCA are governed by the applicable national law. The Commission and the NCAs have the possibility of suspending or rejecting a complaint on the ground that another competition authority is dealing or has dealt with the same case.

10.1.8 Position of applicants claiming the benefit of a leniency programme

Granting favourable treatment to undertakings which co-operate with it in the investigation of cartelinfringements must be of high importace within the European Union. One of the main obstacles to these is a lack of fully harmonised leniency programmes. Therefore, within the current European leniency procedural system, an application for leniency to a given authority is not to be considered as an application for leniency to any other authority. The applicants themselves must consider whether it would be appropriate to file leniency applications with the relevant authorities simultaneously depending on whether their anticompetitive behaviour has had adversely affected the state where the given competition autority has its seat. This is understandably very problematic. There are however some framework guarantees in respect of leniency. Where an NCA or the Commission deal with a case which has been initiated as a result of a leniency application, it must inform the Commission

and may make the information available to other members of the network. In such cases, the information submitted about the leniency application; or other informatik that has been obtained during or following an inspection or by means of or following any other fact-finding measures must not be used by other members of the network as the basis for starting an investigation on their own behalf. Applicant´s consent to the transmission to that autority is understood as voluntary submission of its application for leniency. However little complicated, this leniency system encourages leniency applicants to give such consent to be the first to obtain lenient treatment. But the companies must be careful as there is no chance of withdrawing once granted consent.

There are, on the other hand, circumstances where no consent is required. Firstly, the **receiving authority**has also received a leniency application relating to the same infringement from the same applicant as the**transmitting authority.**[99] Secondly, when the receiving authority has provided a written commitment that no leniency case-related information transmitted to it or later obtained in relation to this transamission are used by it or by any other authority to which the information is subsequently transmitted to, itis not permitted to impose sanctions on the leniency applicant, on any other legal or natural person covered by thefavourable treatment offered by the transmitting authority as a result of the application made bythe applicant under its leniency programmeand on any employee or former employee of any of thepersons covered by both previously mentioned options. In such a case, the applicant must be provided a copy of the receiving authority's written commitment. And finally, transmission of information is not subject to applicant´s consent in cases where such information is transmitted to or is used by the network memberto whom the application was made. Any leniency application-related information are made available to those NCAs that unconditionally commit themselves to respecting the principles set out above.

10.1.9 Mechanism of cooperation

[99]Provided that at the time the information is transmitted it is not open to the applicant to withdraw the information which it has submitted to that receiving authority.

Applying this mechanism in a consistent manner throughout the Community encourages faith of cartellists in this procedure. NCAs must respect the convergence rule contained in Article 3(2) of the Regulation 1/2003.[100] When ruling on agreements, decisions and practices under Article 101 or Article 102 TFEU which are already the subject of a Commission decision — the NCAs cannot take decisions, which would run counter to the decisions adopted by the Commission. The primary position is guaranteed to the Commission as to the guardian of the Treaty with the responsibility for developing policy and safeguardingconsistency when it comes to the application of EC competition law. Any NCA adopting a decision applying Articles 101 or 102 TFEU and requiring that an infringement be brought to an end, acceptingcommitments or withdrawing the benefit of a block exemption must inform the Commission no later than 30 days before doing so. At the latest 30 days before the adoption of the decision,NCAs are obliged to submit the Commission a summary of the case, the envisaged decision or, in the absence thereof, any other document indicating the proposed course of action. The information may be shared by the NCA with the other members of the network when adhering to the provisions above relativ to the way the inormation are shared within the ECN. Providing that 30-day deadline has expired, the decision can be adopted as longas the Commission has not initiated proceedings. In this case, the Commission may make written observations on the case before the adoption of the decision by the NCA. The Commission maybe asked for a swifter reaction and then is obliged to endeavour to react as quickly as possible in case of special circumstances requiring that a national decision is adopted in less than 30 days following the transmission of information. There are many other decisions which could be interesting for the NCAs as well as the Commission, i.e. decisions rejecting

[100]The application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article 81(1) of the Treaty (currently Art. 101 (1) TFEU), or which fulfil theconditions of Article 81(3) of the Treaty (currently Art. 101 (3) TFEU) or which are covered by a Regulation for the application of Article 81(3) of the Treaty (currently Art. 101 (3) TFEU). Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings.

complaints, decisions closing an *ex-officio* procedure or decisions ordering interim measures, These can be subject to the above described procedure as well. When the procedures, which had been previously notified to the NCAs and the Commission, are closed, all members of the network should inform each other about that.

10.1.10 The initiation of proceedings by the Commission under Article 11(6)[101] of the Regulation 1/2003

As it has been stated before, the Commission is responsible for defining and implementing the orientationof Community competition policy. It can adopt ad hoc decisions under Article 101 or Article 102 TFEU atany time. The initiation of proceedings under Article 101 or Article 102 TFEU relieves all NCAs of their competence to apply these Articles. In other words, once the Commission has opened proceedings, NCAs cannot act under the same legal basis against the same agreement(s) or practice(s) by the same undertaking(s) on the same relevant geographic and product market. So as to avoid multiple jurisdictional application the network members will have the possibility of asking for a meeting of the AdvisoryCommittee on the matter before the Commission initiates proceedings.

The initiation of proceedings by the Commission is a formal act indicating its intention to adopt a decision. Its occurence can be carried out by the Commissionat any stage of the case investigation. Once the Commission has initiated proceedings, the NCAs can no longer start their own procedure with a view to applying Article 101 or Article 102 TFEU. Providing that an NCA is already acting on a case, the Commission will explain to it and to the other concerned members of the Network the reasons for the application of Article 11(6) of Regulation 1/2003 in writing. In case of NCA´s decision adopted before Commission´s decision will prevail over further adoption of decision by the Commission which would be in conflict with the currently

[101]The initiation by the Commission of proceedings for the adoption of a decision under Chapter IIIshall relieve the competition authorities of the Member States of their competence to apply Articles 81 and82 of the Treaty (currently Article 101 and Article 102 TFEU). If a competition authority of a Member State is already acting on a case, the Commission shall only initiate proceedings after consulting with that national competition authority.

existing decision providing that the Community interest is not at stake and providing that the NCA´s information about its decision has been properly announced in accordance with the above stated procedure.

10.1.11 Advisory committee

The Advisory Committee is an expert forum for the purpose of discussions of individual casesand general issues of Community competition law. It consists of experts from various national competition authorities. The relationship of the Commission and the Committee does not have binding but only an advisory character. There are several types of matters that are subject to Advisory Committee´s interest and the Commission must take the utmost account of the Advisory Committee´ opinion and inform theCommittee of the manner in which its opinion has been taken into account. The main benefit of the AdvisoryCommittee is that it can be consulted swiftly for decisions adopting interim measures and it can immediately provide short explanatory note or the operative part of the decision. The Commission is entitled to put a given case applying Article 101 or Article 102 TFEU being dealt with by an NCA(s) on the agenda of the Advisory Committee after having informed the NCA(s) concerned. The Advisory Committee may issue an informal statement on the matter. The Advisory Committee will also be consulted on the notices and guidelines which may be adopted by the Commission and on draft of Commission´s regulations.

The meeting of the Advisory Committee takes place at the earliest 14 days after the invitation to the meeting is sent by the Commission. Invitation must include summary of the case, a list of the most important documents,i.e. thedocuments needed to assess the case, and a draft decision. The Advisory Committee is the obliged to give an opinion on the Commission draft decision. The opinion must be reasoned upon the request of one or several members. Shorter period of time between the sending of the invitation and the meeting are acceptable in case all Member States agree on it. On condition that no Member Stateobjects, the Commission can consult the Member States by sending the documents to them and setting adeadline within which they can

comment on the draft. However, the Commission must arrange for a meeting of the Advisory Committe where a Member State requests that a meeting takes place.

The publication of Advisory Committee´s opinion is acceptable upon its recommendation and the Commission is bound to carry it out simultaneously with the decision, taking into account the legitimate interest of undertakings in the protection of their business secrets.

10.2 United States

10.2.1 The necessity of international cooperation

There are however international cartel cases where the need to solve this problem of evidence appeared – one of the most famous cartel cases – so called Vitamin case and Methione case. Both involved companies applied for leniency at the Commission but soon after that started a private litigation at the U.S. courts. The Commission appeared in an unwanted position as the U.S. courts decided to use the written confessions of the companies as an evidence. The Commission felt that doing nothing would completely undermine the trustworthiness of its Leniency Program and therefore decided to urge on the U.S. courts not to reveal the evidence. The finally persuasive argumentation in Methione case even emphasized a future weakening of cooperation in case of its disclosure. The Vitamin case unfortunately became so huge and leaks of information so excessive that the need to defend leniency applicant´s position became unnecessary.

10.2.2 International information exchange

Information sharing in case of the anticompetitive conduct of global companies is also of extreme importance. An effective co-ordination of dawn raids in different states at the same time usually means that the DOJ must collaborate uninterruptedly for several days so as to prepare a bulletproof plan

on how to carry these out. None of these can be done without an effective and confidential exchange of information.

´Information sharing generally includes:

- *notification of an investigation or proceedings that may affect the other country's interests,*
- *sharing of relevant information to the extent permitted by domestic law*
- *co-ordination of parallel investigations*
- *the application of comity principles*
- *consultation to resolve issues arising from enforcement activities.´*[102]

The only practise concerning the Exchange of information where leniency is applied is that information provided in leniency applications are subject to U.S. laws. Similarly as in the European Union, none of these can be shared without prior consent of the applicant.

10.3 Extradition of natural persons for cartel-related offences

[102]**LIBOW, D.A. - D'Allaird, L.K. (2006):***Recent Developments and Key Issues in U.S. Cartel Enforcement.*

11 FINANCIAL ASPECTSRELATED TO LENIENCY

11.1 Sanctions and Penalties in general

The basic pillar for the existence of the leniency policy are sanctions which shall be imposed on any cartel member. And their basic aim is the **deterrent effect**[103]. Any sanction incurred towards any undertaking or individual must cause a serious damage to them otherwise the system would lack the leverage effect. Providing that the amount of sanctions incurred would be lower and in some cases would correspond with the amount of benefit gained by the participation in the cartel agreement, it would definitely not motivate cartel members to announce their involvement in the alleged cartel.

There are currently two existing and applied systems of sanctions: so called **dual system** and **administrative system**. The former includes administrative as well as criminal sanctions whilst the latter only sanctions of administrative character. The ways of sanctioning are quite similar – financial sanctions (fines), imprisonment, prohibition of work performance – however, there are remarkable differences between the subject-matter of sanctioning. Some states punish only hard-core price cartels, some only hard-core cartels and some even other any anti-competitive behaviour.

The alfa and omega of effective leniency program is its application and enforcement. Only a constientious attitude towards enforcement and emphasis on the timely and consistent enforcement can prove to be effective. Needless to say, that the most important factor is the trust of the cartel member in the Commission. Such a trust can be only achieved by criteria set beforehand and a guarantee of certain treatment and guarantee of particular amount of leniency.
Incurring the amount of fines is quite a complex process dependable on many factors, such as the seriousness of the cartel impact, the period of its existence, the probability of the cartel disclosure, the position of the applicant amongst other cartel members. As supplementary criteria are added **aggravating and**

[103]OECD. *Report on the nature and impact of hard core cartels and sanctions against cartels under national competition laws* [Downloaded on 15th March 2012]. Available at: http://www.oecd.org/dataoecd/16/20/2081831.pdf.

attenuating circumstances. And finally, there should be some **maximal and minimal limits** to which the authority in charge could impose fines.

11.2 Fines

11.2.1 European Continent

The current system of rules is included in the **Guidelines on the setting of fines**[104]. The basic skeleton is bult upon two structural stones – **gravity and duration** of the infringement. Correspondingly with them, the fines are derivated. there are two more factors influencing the amount of fines – **aggravating** and **attenuating circumstances**. Finally, an unofficial and a little bit disputable is the modification of fines by the **deterrent effect.**

11.2.1.1 Gravity

When assessing the gravity, the commission puts under scrutiny two things the **type/nature of the infringement** and its **impact on the market.**

11.2.1.1.1 Very serious infringements (horizontal cartels)

The basic amount of fines in such cases ranges from over 20 million Euro. As such are punished mainly price cartels, several types of market sharing and other ways of highly dangerous practices endangering the European market in a significant way.

11.2.1.1.2 Serious infringements (vertical/horizontal cartels)

The basic amount in these cases ranges from 1 million to 20 million Euro. As such can be understood horizontal and vertical cartels with quite great interstate impact and a limited European Union impact - examples could be abuses of dominant position (loyalty rebates, refusals to supply etc).

[104]Published in 1998, write here more info

11.2.1.1.3 Minor infringements (mainly vertical cartels)

Fines in these cases are rather of symbolic and thretening effect. They range from 1000 Euro to 1 million Euro and are applied as a punishment for mainly vertical restrictions with limited effects on the markets with a limited extent to European Union.

11.2.1.1.4 Practice

Cases of minor infringements are very rare, not because their impact is neglectable but mainly because their detection is quite problematic. An important factor plays here the ´small-fish deterrent factor´ as the big cartel punishments set better deterring effects.

In practise, the infringement cases are usually considered serious and national cartel cases with high publicity are considered very serious. The decisive factor for subsumazing the particular cases is the Commission´s discretion.

11.2.1.2 Duration

Providing that the infringement lasted less than one year, the basic amount will not be increased. Providing that the infringement took from one to five years, the discretionary power of Commission enables its increase by maximally 50% of the basic amount. In the remaining cases (duration over five years), the increase up to 100% is possible.

11.2.1.3 Aggravating circumstances

I cite them as they are expressly stated:

- recidivism
- refusal to cooperate
- companies which are leaders/initiators of the infringement
- the need to increase the penalty to exceed the amount of gains

improperly made as a result of the infringement but only there where it is objectively possible to estimate the amount.

11.2.1.4 Attenuating circumstances

I cite them as they are expressly stated:

- passive role in the infringement (so called follow-my leader role)
- limited adherence to the agreed cartel restrictions
- termination of the infringement as soon as the Commission started its investigation
- reasonable doubt whether an infringement exists
- non-intentional infringement
- effective cooperation

11.2.1.5 Further rules for the imposition of fines

It must be emphasized that all these rules are superseded by the fact that the total amount of fines cannot exceed 10% of aggregate worldwide sales/turnover of the group concerned.

The consideration and discretionry power of the Commission are quite wide. The Commission can also take into consideration **specific economic context** and **the ability of the offender to pay.**

11.2.1.6 Destination of the fines imposed

The convicted undertakings generally have three months in which to pay any fine imposed. Fines are normally accounted into the budget of the European Union. Such unscheduled incomes are to be deducted from the contributions made by Member States to the EU budget, which finally leads to the benefit of the European tax payer.

Table3: Fines imposed - period 1990 - 2012

Period	Amount in €
1990 - 1994	539 691 550
1995 - 1999	292 838 000
2000 - 2004	3 462 664 100
2005 – 2009	9 647 837 500
2010 - 2012	3 737 987 432
Year Amount in €	**total 17 681 018 582**
Amounts as imposed by the Commission and not corrected for changes following judgments of the Courts (General Court and European Court of Justice) and only considering cartel infringements under Article 101 TFEU (previously Article 81 resp. 85 of the Treaty). Wherever prohibitions and fines concern infringements of Article 101 TFEU and of Article 102 TFEU (previously Articles 81resp. 85 and Article 82 resp. Article 86 of the Treaty), only those amounts have been considered which concern the Article 101 TFEU.	

Source: Annual cartel statistics: available on http://ec.europa.eu/competition

Table4: Ten highest cartel fines per undertaking (since 1969)

Year	Undertaking	Case	Amount in €*
2008	Saint Gobain	Car glass	896.000.000
2009	E.ON	Gas	553.000.000
2009	GDF Suez	Gas	553.000.000
2001	F. Hoffmann-La Roche AG	Vitamins	462.000.000
2007	Siemens AG	Gas insulated switchgear	396.562.500
2008	Pilkington	Car glass	370.000.000
2010	Ideal Standard	Bathroom fittings	326.091.196
2007*	ThyssenKrupp	Elevators and escalators	319.779.900
2008	Sasol Ltd	Candle waxes	318.200.000
2010	Air France / KLM	Airfreight	310.080.000
* Amounts adjusted for changes following judgments of the Courts (General Court and European Court of Justice).			

Source: Annual cartel statistics: available on http://ec.europa.eu/competition

Table5: Ten highest cartel fines per case (since 1969)

Year	Case	Amount in €*
2008	Car glass	1.383.896.000
2009	Gas	1.106.000.000
2007	Elevators and escalators	832.422.250
2010	Airfreight	799.445.000
2001	Vitamins	790.515.000
2008	Candle waxes	676.011.400
2010	LCD	648.925.000
2010	Bathroom fittings	622.250.782
2007	Gas insulated switchgear	539.185.000
2007	Flat glass	486.900.000

Source: Annual cartel statistics: available on http://ec.europa.eu/competition

11.2.2 United States

11.2.2.1 Antitrust Criminal Penalty Enhancement and Reform Act

Basic legislation governing the fine imposition in the United States is the **Antitrust Criminal Penalty Enhancement and Reform Act of 2004** (hereinafter referred to as ´ACPERA´). The original statutory fines included in the Sherman Act. ACPERAincreased the previous maximum to $100 million forcorporations and $1 million for individuals.´*However, there are other conditions empowering the Department of Justice to impose fines in excess of the statutory limit.The DOJ can impose fines of twice the gain derived by, or twice the loss caused by, the cartel as a whole.Indeed, the DOJ routinely employs this alternative method for calculating antitrustcriminal fines particularly in the case of international cartel activity.*´[105]

11.2.2.2 U.S. Sentencing Guidelines for antitrust offenses

The document which regulates the rules under which to calculate the right level of fines are the **U.S. Sentencing Guidelines for antitrust offenses**, The basic criteria for the fine determination is the basis of the fine is the affected volume of commerce. This is rather a complex question as the DOJ must estimate whether to involve domestic or import or export or foreign commerce. This could mean undesirable financial aftermaths for the cartellist as different state jurisdictions might take into consideration commerce which overlaps with other jurisdictions. In practise, this leads to double payment for one offense.

[105]**LIBOW, D.A. - D'ALLAIRD, L.K. (2006):***Recent Developments and Key Issues in U.S. Cartel Enforcement.* Available from http://apps.americanbar.org/intlaw/fall09/materials/O'Farrell_Alfredo_Recent%20Developments.pdf[accessed May 15, 2012]

11.2.2.3 Treble damages and injuctive relief applied in civil suits

Another chapter are civil litigations where the plaintiffs seek fortreble damages or injuctive relief. Butby statute, if the corporation obtained leniency in the criminal proceeding, its civil liability may be limited to actual damages caused which means a complete exclusion of treble damages. The situation gets more complicated in case of foreign companies. Basically, they are precluded from treble damages related to antitrust actions in US courts unless they have an anticompetitive effect in United States.

11.3 Rewards

The question of granting rewards to cartellists for the disclosure of the cartel activity has been discussed for over ten years. There are two important questions to ask before we approve or disapprove of them. 1) Would it really help to boost the disclosure of cartels if we not only provided the cartellists with either immunity from fines/full leniency or reduction of fines in relation to circumstances but if we also gave them financial rewards? 2) Would it be morally correct to have the cartellists benefited from its illegal conduct by receiving rewards? Personally, I am not a fan of such a solution as I do not consider such practise as being fair, on the other hand, I am sure it would help to convince more applicants for leniency and therefore it would increase the leniency programe efficiency. There is one state I am aware of that provides financial rewards up to £100,000 and it is Great Britain. However, it is not applicable to individuals and companies involved in the cartel. Its character is rather proclamatic, it has not been used yet and there are no exact rules on how to determine the proportionate amount of reward excluding an unclear information that £100,000 can be granted only in exceptional circumstances. However, this might be the first predecessor of wide-spread practise which will soon turn into a necessity in the legislation of all countries all over the world, the time will show.

12 LENIENCY/AMNESTY PLUS AND PENALTY PLUS

The experience of both European and Union legislations shows that companies which have been participating in one cartel tend to or tended to be engaged in in cartel activities in other adjacent markets. One of the most famous cases are inter-related acrtels of Vitamin cartel, Lysine cartel and Citric Acid Cartel. As it has already been mentined, the costs of investigatory proceedings of cartels are enormous. What is more, leniency policy guarantees a unique leniency-free position to only one applicant. Taking these to facts into consideration, one should look for some other additional incentives motivating the companies to blow the whistle. Surprisingly, all of them led to an additional subsystem of leniency based on a carrot-and-stick policy. The positive aspect for the applicant is called **Amnesty / Leniency Plus** and the negative aspect is called **Penalty Plus**. U.S. introduced this policy in 1993. Under the current EC Leniency Notices, equivalent of such programs Plus does not exist. Organization for Economic Co-operation and Development urged on the European Commission to include Amnesty Plus and Penalty Plus into the Leniency Notices. The Commission had two shots (2002, 2006) but unfortunately (and from unknown reasons to me) in neither of both possibilities did so. Let me therefore point out the main characteristics of these programmes from the American version. Both programs encourage leniency applicants to self-report additional cartel activity by offering significant rewards to those that report and harshly penalizing those that do not.

12.1 Amnesty / Leniency Plus

Once the investigation of the corporation has already started, the company is given an opportunity to obtain a form of specialized amnesty against prosecution and be exempt from fines for the additional, unrelated cartel activity previously unknown, and most importantly, it can also receive an additional discount on its fine for the first conspiracy. None of its officers, directors, and employees who cooperate will be prosecuted criminally in connection with that offense. The basic rule says that only the corporation

blowing the whistle as the first can be granted this form of leniency. Therefore, so called **first-in-the-door-rule** is fully applicable in this case as well.

The prisoner´s dilemma tells us that in the position of potentional applicants can occur more corporations with basically the starting conditions. All of them are facing a severe threat of Penalty Plus program (some even for the penalties for the cartel under investigation) and all of them are aware of the fact that blowing the whistle in Leniency Program would potentionally save them from extra fines. The question is which company triggers the Leniency Plus as the first. This is the main advantage of this program. Psychologically-motivated effect predominates long-term investigations with uncertain success.

´The size of the additional discount mainly depends on three factors: The strength of the evidence provided by the cooperating company, the potential significance of the revealed case measured in terms of volume of commerce involved, geographic scope and the number of co-conspirators, and the likelihood that the DoJ would have detected the cartel absent self-reporting.´[106]

12.2 Penalty Plus

On the opposite side is the program called ´Penalty Plus´. The basic criteria for qualifications are, to put it simply, cartel involvement, inactivity as for whistleblowing and this cartel´s disclosure. *´The counterpart of Amnesty Plus is Penalty Plus, or equivalently* ***"If Amnesty Plus is the carrot, 'Penalty Plus' is the stick."*** *If companies that neglect to take advantage of Amnesty Plus are nevertheless caught for a second time, their behavior is more severely fined than it would otherwise merit. The company's knowing failure to report aggravates the punishment, not only increasing the size of the fine but also the length of the jail sentence for its executives.´*[107]

[106] **HAMMOND, S.D. (2011):** Deterrence and Detection of Cartels: Using All the Tools and Sanctions. Available from http://www.justice.gov/atr/public/speeches/speech-hammond.html [accessed June 22 , 2012]

[107] **ROUX, C. - VON UNGERN-STERNBERG, T. (2007*):*** *Leniency programs in a multimarket setting: Amnesty plus and Penalty plus*, currently unavailable, originally downloaded from http://papers.ssrn.com/ [accessed June 30, 2012]

In case of penalties imposition, the situation is unfortunately a little bit unpredictable. There is neither any rule which would state the exact percentage increase in the case of Penalty Plus and it is nor to be deduced from the previous decisions of the U.S. Department of Justice. Generally speaking, the corporation should be fined additionally and its executives should minimally face a jail sentence and fines. So as to demonstrate DOJ´s practise: In monochloracetic acid in 2003, the German company Hoechst AG was fined roughly 130% above the minimum guideline fine due to its failure to report the illegal agreement in monochloracetic acid at the time it was convicted for its participation in the sorbates cartel. The last published FAQs of DOJ declare that the failure to self-report under the Amnesty Plus program could mean for the company the difference between a potential fine as high as 80 percent or more of the volume of affected commerce versus no fine at all on the Amnesty Plus product. For the individual, it could mean the difference between a lengthy jail sentence and avoiding jail altogether. This is partly contrary to the level of fines imposed before. It is difficult to establish any criteria unless the DOJs practise in fining settles.

13 LENIENCY FOR DIRECTORS, OFFICERS, AND EMPLOYEES

13.1 European Union

Contrary to United States legislation, the European Union does not dispose of the power to impose criminal sanctions. The Council Regulation 1/2003[108]guarantees the States a possibility to use Articles 81 and 82 (Articles 101 and 102 TFEU) directly and so as to guarantee their application the States are allowed to set their own system of punishment imposed for the infringement of related legislation. Some states in the European Union[109] use the criminalisation of natural persons in cases of cartel disclosure; the main aim is generally to reinforce the deterrent effect of the punishment. The liability of the undertaking is not as threatening as imprisonment or huge financial penalties imposed directly on natural persons (mainly undertaking's executives).

Let me choose probably the two most important states practising punishment of a natural person in relation to illegal cartel conduct – France and Great Britain.

Involvement in a cartel case in France means facing up to a four-year imprisonment or a fine up to €75,000. In the case of the French Antitrust Authority **Autorité de la concurrence**[110], if it considers certain conduct as an infringement of the respective anti-cartel provisions in **Code de Commerce**[111], it is under obligation to submit the file to the State Attorney who, at his or her discretion, initiates an investigation or not. Applying for leniency and meeting the set conditions does not guarantee, but generally is a reason for not submitting the file on this person to the State Attorney.

[108]Council Regulation 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

[109]Some examples of states which practise criminalization of cartel conduct in relation to natural persons are Australia, Canada, Chinese Taipei, Israel, Japan, Norway, Switzerland and the United Kingdom, the United States etc.

[110]The Autorité de la concurrence (Competition Authority) is France's national competition regulator. Its predecessor was Conseil de la concurrence which was established in the 1950s.

[111]The commercial code adopted by Napoleon in 1807 in line with Penal Code, Code of Civil Procedure and Code of Criminal instruction.

Great Britain implemented criminalisation of cartel conduct for natural persons into its legislation in 2002 in the form of an **Enterprise Act**[112]. The British leniency closely connects granting leniency to the undertaking and granting leniency to its executives or other employees. Applying for leniency as an undertaking constitutes so called **blanket criminal protection**[113] which protects per se undertaking's executives and other employees. On condition that the natural person is not provided leniency in this way, they can submit their own individual application for leniency to the **Office of Fair Trading**[114], and in case they provide the needed evidence or information, the Office issues a **no-action letter**[115] which guarantees the natural person conditional leniency from criminal proceedings. Great Britain also provides protection for persons from other European Union member states applying for this type of individual leniency.

13.2 United States

In line with the 1993 Leniency Program for Corporations, the Department of Justice introduced its programme for Individuals. This program applies to all directors, officers, and employees of the corporation who would otherwise be charged criminally for their illegal involvement in the cartel activities. Under this Policy, "leniency" means not charging such an individual criminally for the activity being reported. There are three basic conditions when an Individual wants to qualify for leniency. Before the beginning of the

[112]The Enterprise Act 2002 is a complex 451 – page document which brought several reforms with the main aim of cracking down on abuses that harm customers and fair-trading businesses alike and thus tries to encourage productivity and enterprise. The Enterprise Act deals with consumer codes of practice, merger control, market studies, criminalisation of cartels and finally reformed the previous register of orders and undertakings.

[113]This describes the situation when the adressee of the blanket criminal protection does not need not give testimony that could lead to his/her criminal prosecution.

[114]The OFT is the UK's consumer and competition authority. Its mission is to make markets work well for consumers. It is a non-ministerial government department established by statute in 1973.

[115]An individual or entity who is not certain whether a particular product, service, or action would constitute a violation of the law may request a "no-action" letter. Most no-action letters describe the request, analyze the particular facts and circumstances involved, discuss applicable laws and rules, and, if the authority grants the request for no action, it concludes it would not recommend that the authority in charge take enforcement action against the requester based on the facts and representations described in the individual's or entity's original letter.

cartel investigation, an Individual must come forward to report the illegal activity, but such type of illegal activity that the Antitrust Division had not been aware of, i.e.had no information about this collussion from other sources. The second condition puts emphasis on the quality of the report which must be with candor and completeness. The Individual must subsequently provide full, continuing and complete cooperation to the Antitrust Division throughout the investigation. And finally, the applicant cannot be a cartel ringleader which basically means that he neither coerced another party to participate in the illegal activity nor was the leader in, or originator of, the illegal conduct. This is an **individual leniency treatment.**

The above stated case does not apply to directors, officers or employees who belong to a corporation which attempted to qualify for leniency under the Corporate Leniency Policy. If any of these comes forward and confesses with, he/she will be considered for leniency solely under the provisions of the Corporate Leniency Policy.

Neither meeting the conditions in the first paragraph nor being considered under the provisions of the Corporate Leniency Policy means that an individual will be considered for statutory or informal immunity from criminal prosecution. In this case, the Antitrust Division decides whether to grant the immunity or not and the qualification of the applicant will be considered case-to-case.

The Deputy Assistant Attorney General for Litigation must be forwarded a favorable recommendation from the Division´s staff in reaction to receiving a request for leniency. The staff must check whether the Individual qualifies for leniency and whether he/she should be accorded leniency. The staff must also set forth the reasons why leniency should be granted. The staff should not delay making such a recommendation until a fact memo recommending prosecution of others is prepared. The role of the Deputy Assistant Attorney General for Litigation is to review the request. Then, if he agrees with staff´s reasons and leniency granting and forward it to the Assistant Attorney General for final decision. If the staff recommends against leniency, The individual (potentionally represented by a counsel) may wish to seek an appointment with the Deputy Assistant Attorney General for Litigation directly

on condition that the staff refuses to recommend them for leniency. However, there is no legal entitlement to such a meeting. The chance should generally be afforded.

Being charged with violating Section One of the Sherman Act, the executives or other employees must face the threat carrying a maximum penalty of three years imprisonment and a $350,000 fine for an individual. The maximum fine may be increased to twice the gain derived from the crime or twice the loss suffered by the victims of the crime on condition that either of those amounts is greater than the statutory maximum fine.

13.3 Extradition of natural persons for cartel-related offences

The Department of Justice has also experienced a limited number of cases of extradition of persons in cartel related criminal activity. The main impediment to this practise is the fact that not many countries in the world criminalize cartel conduct in the case of natural persons. This is a problem in the European Union which does not have any legal legislation for this situation and therefore cannot interfere with the practise of its member states. However, providing that the extradition of foreign nationals to the United States for the purposes of prosecution of cartel-related offences is possible, the United States fully cooperates and supports these efforts. The European States following the practise of extradition for this purpose are Great Britain and France.

14 DE LEGE FERENDAE LENIENCY-RELATED CONSIDERATIONS

14.1 ECN Leniency Model Program

Due to a very specific nature of the European Union, a majority of all legislation of the European Union is subject to long discussions and publication of model legislation is a common conception of making the members states familiar with the anticipated legislative changes.

As it has already been mentioned, there is no legally binding harmonization among the European member states concerning the leniency program and the applicant must ´guess´ what member states market might have been influenced by the cartel in which they participated. To promote the awareness about the potentional future legislation relating this matter, ECN published a kind of de lege ferendae document called ECN Model Leniency Program in 2006.

ECN Model leniency program is supposed to harmonize all the leniency programs of all member states by setting general standards of applicant treatment and standards of procedure for effective and fast cooperation among members states when investigating cartel-related matters. Its proces of implementation in member states is not legally-binding and therefore it tends to be slow and the only state acting in full accordance with that is the Great Britain (Fair Trade Commission).

14.1.1 Model Sanctioning

Sanctioning proposed by the Model Program is basically a reflection of the 2006 Leniency Notice[116]. The basic tool is a fine. There should be two types of fines – type 1A and type 1B. Type A1 requests evidence and information of rather limited proof value which will only enable the Commission to carry out dawn raids. Type 1B should put stronger requirements on the quality of evidence and information submitted and is used

[116]OJ C 298/17 Commission Notice on Immunity from fines and reduction of fines in cartel cases (2006/C 298/11)

in cases where the applicants were not the first to submit the application and decide to contact the national competition authority in the moment of the initiation of cartel investigations.

The Leniency Model also copies the institute of significant added value from the 2006 Leniency Notice. Any additional applicant providing the state competition authority with additional evidence and infomation of significant added value should be granted some level of fine reduction. In this respect, the Model only anticipates certain hierarchy but does not recommend any particular levels of reductions, the burden of their determination is utterly on the member states.

14.1.2 Model ECN Supranational leniency applications

In cases where the cartel agreement influenced more than three member states, (in other words, in cases where the Commission should initiate proceedings), the ECN Model recommends a unified application which could be submitted to any state competition authority and Commission. This potentional provision should help the applicant save costs for application submission and should avoid the time consuming multiple administrative procedures. What is more, in cases where the Commission would hypothetically refuse to deal with the alleged cartel case and delegated the applicant to the member states level, the applicant might loose its first position. The ECN Model Leniency Programme recommends a strong emphasis on the guarantee of the cartel applicants position and guarantees the first position to applicants mentioned in the previous sentence.

In discord with currently applicable 2006 Leniency Notice, the ECN Model Leniency Program stronly recommends to consider whether one of the conditions in the state legislation should be immediate halt of cartel membership and cancellation of all cartel-related anti-competitive activities. Such unexpected applicant´s behaviour would certainly be an indirect signal warning signal for other cartel members who could damage all the existing documentation or other evidence and such a situation would be a complete disaster for the upcoming Commission´s investigation.

The conditions for granting type 1A or 1B leniency should include:

- the possibility of interview with employees of the alleged cartel undertaking
- the prohibition of publication of application content
- the prohibition of damage, deformation, modification or hiding of evidence which are enclosed to the application

The obligation to comply with all above stated conditions is tied with the date of the submission of the application.

The program also aims at punishment of only juridical persons despite the increasing occurence of cartel crimes of natural persons in European Union member states. The program recommends to members states a very careful attitude towards natural persons as any unfavourable treatment with them might undermine the leniency program aims.

14.2 Implementation of Leniency Plus and Penalty Plus Program

The 2006 Leniency Notice[117] did not include any analogy of Leniency Plus Program as included in the U.S. system of leniency policy. The Leniency Plus Program encourages applicants not qualifying for full leniency to whistleblow on the existence of other cartels existing in an unrelated market, in exchange for lowering its fine. The present European legal regulations also take such information or evidence into consideration but evaluate them as an attenuating circumstance, which also lowers the level of fine imposed.

The advantages brought about by the disclosure do not need to be discussed in a sophisticated way: a reduction of the Commission's costs otherwise spent on cartel investigation and the inception of uncertainty seeded among cartel members of the newly disclosed cartel.

The implementation of this additional institute is only a matter of the nearest leniency program amendment or new leniency program. The Leniency Plus Program's benefits are high and there are no aspects hindering its usage.

[117]OJ C 298/17 Commission Notice on Immunity from fines and reduction of fines in cartel cases (2006/C 298/11)

15 SELECTED NATIONAL LENIENCY PROGRAMES

All national Leniency programes could be basically characterised by the same principles. This is understandable as all of them are either intentionally harmonized with the European Legislation or used 2006 Leniency Notice as an inspiratory source. More importantly, the majority of the European Member States simply implemented the **Commission Notice on Immunity from fines and reduction of fines in cartel cases (2006/C 298/11)** into their national legislation. The reason is that the concept of leniency is quite new and the Members States had had no previous experience of that. However, there are occasional slight legal differences between the national regulations. Let me therefore outline the basic principles which could be considered as common for all member states and then mention the exceptionalities of each regulation in separate subchapters.

All states have their own program – some in a legally-binding form, some only as a descriptive document. Each Member State has its own authority/ies which deal(s) with the competition-relatedstuff. All state have the same system of granting either full immunity or reduction in fine. The conditions for qualification, the markers and the procedural aspects are basically the same. Consequently, my role is limited to pointing out only the deviations from the general regulatory framework shared by all states. Of high importance are mainly the provisions related to the way the powers between the national authorities and the European Commission are shared.

15.1 Germany

German regulation of Leniency Program is included in the**Notice no. 9/2006 on the immunity from and reduction of fines in cartel cases** - Leniency Program. The last version was published on 7 March 2006 and came into force on 15 March 2006 and replaced notice no. 68/2000. The authority in charge of leniency-related matters is the **Bundeskartellamt**– particularly its Special Unit for Combating Cartels.

The Notice generally divides the **cartel participants** (official terminology) into those applying for leniency and those applying for the reduction in fine. The basic criterion for granting a full immunity is sufficient evidence to obtain a search warrant. The other cartel participants can only be entitled to reduction in fine up to 50 per cent(all conditions for qualification for full immunity and the reduction in fine are the same as in case of Commission´s Notice). The Declaration of willingness to cooperate (marker) and application must placed verbally or in writing, in German or English. English version of the application for immunity must be accompanied by a written German translation without undue delay. It must contain details about the type and duration of the infringement, the product and geographic markets affected, the identity of those involved and at which other competition authorities applications have been or are intended to be filed.

After the marker has been placed the Bundeskartellamt sets a time limit of a maximum of 8 weeks for the drafting of an application for leniency.Providing that the company has filed an application with the Commission or intends to do so, the Bundeskartellamt can exempt the applicant who has placed a marker for immunity from filing an application. If the European Commission does not conduct the proceedings, the Bundeskartellamt can request the applicant to submit an application.Cartel participants are not entitled to submit joint applications. The discreationary powers of the Bundeskartellamt entitle it to refuse applications by private third parties and the evidence provided by the applicant.

Granting full imunity generally means that the Bundeskartellamt is not allowedto **skim off the economic benefit** (Section 34 Act against Restraints of Competition) and also cannot order a **forfeiture** (Section 29a Administrative Offences Act). Fine in reduction guarantees a skim-off of the proportion of the economic benefit or order partial forfeiture.

The anticompetitive conduct can be considered criminal conduct under the **German Criminal Code**in particular within the meaning of Section 298 of the Criminal Code, on fraud relating to bids. Therefore, the Bundeskartellamt must refer proceedings against a natural person to the public prosecutor under

Section 41 of the **Administrative Offences Act** if it is of the opinion that the activity concerned constitutes a criminal offence. Private enforcement of competition law is guaranteed.

15.2 United Kingdom

The legal basis for the purpose of leniency-related regulation is the **Competition Act** of 1998. However. precisely described leniency program and explanation of all related matters is included in OFT guidances which are published by the main national competition authority - the **Office of fair Trading (OFT).**

Firstly, the United Kingdom concept of competition law works with a complex definition of 'business'. Basic characteristics are - engagement in economic activity irrespective of their legal status (comparable to the definitive provided by ECJ) and it includes companies, partnerships, Scottish partnerships and individuals operating as sole traders.

All leniency-related procedures (the regulation of application, full imunity, reduction in fine, marker, fines, statement of objections etc. is the same as in European union 2006 Leniency Notice). The only diference is in the terminology used. Instead of full imunity and reduction in fine – the guidelines use total immunity and significant reduction.

The Competition Act 1998 provides an enumerative outline of some anticompetitive behaviour - i.e. price fixing (including resale price maintenance), bid-rigging (collusive tendering), the establishment of output restrictions or quotas, and market sharing or market dividing.

Special regulation is provided in case of natural persons. Providing the information about cartel immunity in the form of a **'no action letter'** may guarantee protection from fines imposed by the Office of fair Trading, from disqualification from being a director and from criminal prosecution. The last one is particularly important as anyone who dishonestly engages in cartel arrangements in the United Kingdom is liable for a criminal offence under the Enterprise Act 2002 for an individual to. *"Receiving a total imunity as a business sets alsofull protection for all of itsmanagement, employees and ex-employees from criminal prosecution for the criminal cartel offence, and full*

protection from possible sanctions under the director disqualification order regime."[118]

Of no importace is the formulation of the guarantee to ensure confidentiality of the cartel-related information in case of the full imunity. All states including the European Commission guarantee certainty of no leaks of such information. However, the OFT declares that it will endeavour, to the extent possible, to keep the identity of any such businesses confidential. Such attitude is highly symphatetic to me as almost all national competition authorities including the European Union faced the shame of data leaks and have never admitted that full confidentionality cannot be 100% guaranteed – the UK guideline admit this problem. Understandably, the formulation increases uncertainty among cartellists.

An individual or business which is not certain whether its behaviour can or cannot be considered in a violation of the law may request a "no-action" letter. The addressor describes the request, states the particular facts and circumstances involved. In response to that, the OFT comments on what legal consequences might such behaviour have. The **"no-action letters"** should ensure anonymity and help the adressor face its legal options.

The Office of Fair Trading issues extremely detailed **quick guides**and **competition law guidelines** on all competition-related matters. The most important ones for the leniency-related matters are: Competing fairly (OFT447), How your business can achieve compliance (OFT424), Under investigation? (OFT426), Cartels and the Competition Act 1998 (OFT435), Leniency in cartel cases (OFT436), Agreements and concerted practices (OFT401), Abuse of a dominant position (OFT402), Market definition (OFT403), Powers of investigation (OFT404), Concurrent application to regulated industries (OFT405), Enforcement (OFT407), Trade associations, professions and self-regulating bodies (OFT408), Assessment of conduct (draft) (OFT414a), Assessment of market power (OFT415), Vertical agreements (OFT419), Land agreements (OFT420), Services of general economic interest exclusion (OFT421), OFT's guidance as to the appropriate

[118]The cartel offence: guidance on the issue of no-action letters for individuals (OFT513)

amount of the penalty (OFT423), Modernisation (OFT442), Competition disqualification orders (OFT510), and The cartel offence: guidance on the issue of no-action letters for individuals (OFT513).

The head competition autority is the Office of Fair Trading, but applications can also be submitted to and information might be obtained from Northern Ireland Authority for Energy Regulation (OFREG NI), Office of Water Services (OFWAT), Office of Rail Regulation (ORR) and Civil Aviation Authority (CAA).

15.3 Italian Leniency Program

Italy adopted its first leniencyprogramme in 2007. The "Leniency Notice" was published as ***Comunicazione sulla Non Imposizione e sullaRiduzione delle Sanzioni ai sensi dell'Articolo 15 della Legge 10Ottobre 1990,*** **N. 287** by the Italian Competition Authority**Autorità Garante della Concorrenza e del Mercato** (hereinafter referred to as ″NCA″). Basic leniency-related provisions were formerly included in **Codice di Commercio (1882)** and are currently included in the **Nuovo Codice Commerciale(2011).** Having no previous experience with leniency provisions, the notice copies the 2006 Leniency Notice.

Unfortunately, it deviates considerably from the general level of confidentiality provided in the European Union in relation to competition law investigations and Member States cooperation. The main problem is providingwritten and oral statements. Normally, the Leniency Programes (also 2006 Leniency Notice) guarantee maximum level of protection of such information. In Italy, *the applicant"needs to provideadequate reasons for its oral statement request in order to obtain the competition authority'sauthorisation, which is broadly discretionary. The fact ofapplying orally does not exempt the applicant from the obligation toprovide the competition authority with all the relevant documentary evidence in itspossession. The access to authority's case file isgranted also to complainants and any other "persons having a direkt concern"including e.g. anyinterested consumer associations. To make matters worse, all these complainants are not prevented from making copies of the statement/transcript,*

or fromusing the information obtained also for purposes other than the purposes of judicial or administrative proceedings for the application of the Community competition rules at issue in the related administrative proceedings."[119]. It is very arguable whether such provisions guarantee sufficient information confidentionality. Minimally, such regulation considerably increases information leaks which cannot be considered positive. Information leaks subsequently increase the effectivity of civil damages follow-on litigations. Such regulation should be put under a strong criticism of the European Commission without undue delay and Italy should comply with general level of confidentiality in leniency matters as normally provided in the European Union.

A remarkable case in Leniency Program is so called **Trombini Group Case**. Trombini group reported the existence of a cartel in the wooden chipboard panel industry. It was compelled to be a cartel member by the ringleader company. Trombini gave a notice to the competition autority in 2003 during the preliminary negotiations over the cartel establishment. There had been **no** leniency program at that time in Italy. Trobini´s application to the NCA was submitted at the end of 2006 just one day before the NCA published its leniency program but only for comments. Finally, the NCA granted immunity toTrombini directly on the basis of the enabling provision on which the Leniency Noticewas later adopted. The NCA´s decision visibly lacked any legal background. From May 17, 2007 on (the first official NCA´s decision), all leniency-related decisions were directly based on the Comunicazione sulla Non Imposizione e sulla Riduzione delle Sanzioni.

The Italian legal framework does not provide effective protection for leniency applicants and should be subject to Commission´s criticism for constituting such legal disharmony within the European union.Italian system also lacks provisions on the leniency of individuals.

[119]**SIRAGUSA, M. – RIZZA, C. (2010):** *The International Comparative Legal Guide to: Cartels & Leniency 2010 - Practical insight to cross-border Cartels & Leniency* Available from*http://www.cgsh.com/files/Publication/164a2da8-5880-435a-b504-7709618c39/Presentation/PublicationAttachment/15ff0a0b-d6d6-42ce-9001-68dff751ca95/C%26L10_Chapter-23_Italy.pdf*[accessed June 16, 2012]

15.4 French Leniency Program

The new French Competition Authority **Autorité de la concurrence** formally begandischarging its regulatory functions in 2009. It replaced the **Competition Council (Conseil de la Concurrence)**, an independent authority set up in 1986.Autorité de la concurrence brings into force a new French revised competition law included in **Code de Commerce**. Specifically, anticompetitive agreements and practices are prohibited by Article L. 420-1 and Article L. 464-2 sets the principles and guidelines for leniency policy. Therefore, unlike many other countries in the world, where leniency programs result from simple guidelines or communications of competition authorities, the French originates directly in the law and order made thereunder.The new legislation is part of atrend towards the modernization of French competition law which began in 2001 and isbeing pursued under the growing influence of EC law. An additional legislation is the procedural notice of2006 related to leniency program.

The most exceptional leniency-related matter is the institutional organisation of competition authorities. There are several authorities in charge of the initiation and carrying out cartel investigations. Autorité de la concurrence or by the**Directorate General for Competition, Consumer Policy and Repression of Fraud (Direction Générale de la Concurrence, de la Consommation et de la Répression des Fraudes)** an administrative agency under the authority of the **Ministry of Economy**.The Minister of Economy is also entitled to settle and order measures as to **micro-anticompetitive practices**[120].

France has a very complex system of fines imposed on individuals as well as on companies. Let me hereby cite their overview.*"Obstruction of investigations, such as refusal to submit certain documents, destruction of documents, or provision of false and/or misleading information, may be subject*

[120]The Minister has jurisdiction over micro anticompetitive practices where (i) the combined turnover in France of all the undertakings involved does not exceed €100 million, (ii) the turnover of each of the undertakings in France does not exceed €50 million and (iii) the practices do not fall within the scope of Articles 81 and 82 of the EC Treaty. If the parties agree to a settlement, the amount of fine imposed will not exceed €75 million or 5 per cent of the parties' latest turnover achieved in France, if this amount is of lesser importance.

to fines of up to €7,500 and up to six months' imprisonment. The Competition Authority[121]*, at the instigation of the head reporting officer, the power to impose a fine, after hearing the undertaking concerned and the State Commissioner. The maximum fine may amount to 1 per cent of the highest worldwide turnover realised by the undertaking concerned in any financial year during the period in which the practices took place. Pursuant to Article L. 464-2 I and II of the Code, the main penalties for breach of the cartel prohibition are fines of up to 10 per cent of the highest worldwide turnover realised by the undertakings that took part in the anticompetitive practice in any financial year during the period in which the practices took place. The Competition Authority may impose periodic penalty payments of up to 5 per cent of the daily average turnover, generated during the latest closed financial year, for every day of delay in the implementation of either a decision of the Competition Authority or an injunction imposed by the Competition Authority. The Competition Authority may impose fines on individuals engaged in economic activities amounting to a maximum of €3 million for breach of Article L. 420-1 of the Code.*′This provision is designed to cover sole traders who engage in cartel-type behaviour.′*According to Article L. 420-6 of the Code, individuals may be subject to criminal penalties amounting to fines of up to €75,000 and terms of imprisonment of up to four years where they have fraudulently taken a personal and decisive action in the conception, organisation and/or implementation of the anticompetitive practices. These penalties are not imposed by the Competition Authority itself, but by criminal courts following referral by the Competition Authority to the Public Prosecutor (Procureur de la République).*"[122]Therefore, individuals may be criminalized for cartel-related behaviour and punished not only by fines but also by imprisonment.

[121]understand Autorité de la concurrence

[122]**ASSADI TARDIF, N. - COHEN D. (2009):***France: Cartels & Leniency In France* In: The International Comparative Legal Guide to: Cartels & Leniency**,** London, 2009; Available from http://www.mondaq.com/article.asp?articleid=74438[accessed May 20, 2012]

Current French Leniency Program is fully modern but a simplification of the institutional background and fining system would certainly be of benefit to the clarity and simplicity of the legal regulation.

15.5 Spanish Leniency Programme

Based on **Ley 15/2007 de Defensa de la Competencia (Law 15/2007 for the Defense ofCompetition),** the new Spanish leniency program entered into force in 2008 afterpublication of an implementing regulation. The national competition autority in charge of the enforcement of competition law is the **Comisión Nacional de la Competencia**which replaced the two bodies, the Servicio de Defensa de la Competencia and the Tribunal de Defensa de la Competencia.

The Spanish competition law is fully in accordance with 2006 Leniency Noticewith a complex regulation of leniency for individuals with an emphasis on thein fining and exemption. *"Comisión Nacional de la Competencia can impose fines on companies´ legal representatives or directorswho have participated in the illegal agreement or practice. Under Law 19/1989, legalrepresentatives could be fined up to €30,000. Under the LDC, the maximum fine that canbe imposed on representatives of undertakings will be €60,000. Both the previous Law19/1989 and the LDC exclude the members of the executive boards from the posibility of being fined if they did not attend the meetings or if they did not vote in favour (orvoted against) the concerned agreement or decision."*[123]

There is also one important safeguard in Articles 65 and 66 Ley 15/2007de Defensa de la Competencia. Spanish competition authorities may not provide information relating to these Articles to Spanish Commercial Courts when they intervene injudicial proceedings relating to the application of Articles 81 and 82 EC Treaty (Articles 101 and 102 TFEU) .

[123]**CLEARY GOTTLIEB STEEN & HAMILTON LLP (2008):***Spanish competition law update - Spanish Leniency Program Enters Into Force.* Available from http://www.cgsh.com/files/News/53b67417-7494-4273-84d0-6d5dc82d5609/Presentation/NewsAttachment/a271ddde-8b23-413b-bc05-70162ef6855a/24-2008.pdf[accessed June 12, 2012]

Comisión Nacional de la Competencia also issues leniencyguidelines. In conclusion, spanish legal system belongs to the most beneficially simplified leniency systems guaranteeing real leniency program safeguards.

16 TOP TEN LENIENCY-RELATED DECISIONS

16.1 Car glass cartel (EU/US)

An infamous victory in the unofficial competition for the first cartel which breaks the €1bn fine barrier was gained by the car glass cartel. Four companies Asahi/AGC, Pilkington, Saint-Gobain and Soliver were collectively fined over €1.3 billion (£1 billion) for the engagement in illegal market sharing, exchanging commercially sensitive information regarding deliveries of car glass within the European Union, allocating customers and discussing target prices. The companies held meetings at different airports and hotels all over the European continent and co-ordinated the cartel policy successfully for over five years, starting in 2003. The case received extensive publicity because of the fact that at the time of the cartel disclosure, these four companies together were in control of over 90% of the car glass production within the European Union. The amount of fines imposed was a result of a combination of several factors – repeated recidivism in the case of the cartel ringleader (Saint-Gobain), the large territorial extent of the cartel, and specifically, the extreme seriousness of the case itself.

The importance of this industry might not seem to be of such extreme importance. However, it is necessary to realise that car glass is used in many ways in the automotive industry (windscreens, sunroofs, sidelights or backlights). The first affected subject in the manufacturing chain was the main customers of the car glass suppliers – car manufacturers who used these companies glass during assembly. Understandably, the increased price at the last stage was passed down to customer purchasers. During the last full year of the cartel, its market share was estimated to be worth about €2bn.

Saint-Gobain recieved the highest fine ever imposed on an individual company - €896m. Its extraordinarily high level must be attributed to the fact the standard level of the fine was increased by 60% as a result of recidivism. Saint-Gobain had previously been involved in two glass cartels. The second company Asahi/AGC Flat Glass received a 50% reduction due to its leniency application, despite this they were ordered to pay €113.5m. The European

Commission initiated its investigation based on a tip-off from an anonymous source. The first dawn raid led to Asahi/AGC Flat Glass submitting its leniency application. Asahi/AGC immediately provided additional information which finally helped the Commission to disclose and declare the competition law infringement. The Soliver company only occasionally participated in the cartel meetings and its involvement in the cartel was not comparable with the other companies.

16.2 Stolt-Nielsen case (US)

In 2008, the Department of Justice revoked the conditional leniency which had originally been granted to a shipping company Stolt-Nielsen. The core of the problem was that there has been a considerable period between the granting of full leniency by the Department of Justice and the cease of the participation of the Stolt-Nielsen company in the cartel. Despite immoral conduct of the company, there has been no experience in solving such a case and the Department´s Antitrust Division´s Attorney signalled law infringement and revoked the granted leniency.

Such an unprecedented step evoked extreme controversy over DOJ´s powers and to make the defamation even stronger, the federal District Court decided that Department of Justice is obliged to keep the terms as granted in the leniency agreement. In case of the Stolt-Nielen company, all charges were finally dismissed. In reaction to this controversy, the Department of Justice introduced new leniency guidelines **– Model Conditional Leniency Letters** and an additional document of **Frequently Asked Questions.** However, the fear among potentional whistleblowers or self-reporters that was unintentionally initiated by the Department of Justice´s revocation grew and the threat of the Department´s revocation of previously confirmed leniency decision made the whole leniency programme much less attractive than it had been before. The Department of Justice´s representatives (Attorneys) has been constantly defending their decision emphasizing the unique character of the case not admitting the controversy of their decision until now.

16.3 Graphite cartel (EU)

In 2002 the Commission fined a group of manufacturers of graphite-related products. The case was unique for the cartel complexity and several different types of fines imposed on companies involved. Additionally, it helped to disclose a different operating cartel where two companies of graphite cartel had been involved. One of these companies, despite its membership in both cartels, benefited from full leniency as it helped the Commission with the provision of cartel-related documentation provision in both cartel cases.

The companies involved werefined with €51.8 million for mainly price-fixing practises for the involvement in the market of isostatic specialty graphite.The companies were SGL Carbon AG, Le Carbone-Lorraine S.A., Ibiden Co., Ltd., Tokai Carbon Co., Ltd, Toyo Tanso Co.,Ltd., NSCC Techno Carbon Co., Ltd., Nippon Steel, Chemical Co., Ltd., Intech EDM B.V. and Intec EDM AG.The biggest sinner- SGL Carbon AG – received a fine of € 8.81 million increased by aggravating circumstances in the form of its involvement in another price-fixing cartel of extruded specialty graphite. In a completely different situation was GrafTech International Ltd. (at the time of the cartel ivestigation under the name of UCAR)which also participated in both cartels but finally it benefited from a 100% reduction of the fines. UCAR completely disclosed the cartel's existence to the Commission, described its structure and supported these by sufficient evidence

The Commission immediately initiated an investigation in 2000 and later added information that the cartel functioned between 1993 and 1998, it was characterized by exchange of sensitive commercial information, occasional market sharing and mainly price fixing in case of isostatic specialty graphite products (electrodes, continuous casting dies, hot press moulds, semiconductor applications, extruded graphite used in electrolytic anodes and cathodes, boats, sintering trays, crucibles. The Commission estimated that the infringement period concerned a market which would be worth somewhere about 30-60 million. So called 'Top Level meeting' in Japan in 1993 helped to set the basic principles of cartel cooperation and was followed by several other meetings of several levels of management of different specialization which

mainly monitored the cartel situation and cartel member adherenece to the cartel program. Intech company became a member in 1994 and the mani whistleblower UCAR entered the cartel in 1996. Its later membership in combination with its whistleblowing raises many questions over the motivations of this company since the beginning of the entrance in this cartel.

16.4 The auction cartel (EU/US)

Sotheby's and Christie's have always been the world's largest and the most reliable auction houses whose fierce competition has been a pure example of the effectivity of market forces. The more scandalous was the disclosure at the breach of 2000/2001 when Christie´s admitted 5-year mutual cartel cooperation with Sotheby´s. The cartel purpose was price fixing and intermittently encroaching on sellers' commissions and buyers' premiums. The case received a great publicity even later in 2001 due to a civil suit ending in a settlement of both cartellists with a group of plaintiffs.

Cutting commission rates paid by sellers, making donations to sellers' favourite charities and extending financial guarantees to sellers prior to 1995 characterized a fierce competition between Sotheby's and Christie's.[124] Suddenly, the competition came to a suspicious immediate halt. Sotheby´s and Christie´s formed a cartel fixing the prices of seller´s and buyer´s charges. In 2000, the Christie's recently resigning chief executive started cooperation with the Department of Justice which soon initiated an investigation. Sotheby's admitted its cartel involvement instantly. The most serious threat for both auction houses became a set of civil filed by other auction houses which was later consolidated into one class action. Again, Sotheby's and Christie's did not delay the agreement and each paid 256 million dollars to the plaintiffs.

The case is unique for the fact that even companies famous for their reputation over centuries can easily become involved in a hard-core global cartel. Later both auction houses faced investigation by the European

[124]**ASHENFELTER, O. - GRADDY K. (2001):** *Anatomy of the rise and fall of a pricefixing conspiracy: auctions at Sotheby's, and Christie's*, In:Journal of Competition Law and Economics 1(1), pp. 3–20. Available from http://www.econ.ucsb.edu/~tedb/Courses/Ec1F07/ashenfeltersothebychristie.pdf[accessed July 3, 2012]

Commission which ended the same way – Christie´s receiving full leniency and Sotheby´s being fined. Notably, both auction houses did not put their reputation at stake in case of public and private enforcement and without causing any complication subordinated to all fines imposed and managed to agree on civil suit settlements without any obstacles caused to the plaintiffs.

16.5 The vitamin cartel (EU/US)

A $500 million penalty, representing the largest penalty ever imposed by the United States Department of Justice, was given to the famous, global pharmaceutical company Hoffmann-LaRoche Ltd. Less than half the fine ($225 million) received by BASF A.G. of Germany. This all happened in 1999. Similar fines were imposed by the European Commission and most importantly, subsequent investigation showed a complex system of cartelists co-operating in several separated markets of different vitamins. The other cartel members included the largest national pharmaceutical champions such as Merck (Germany), Aventis SA (France), Solvay Pharmaceuticals (the Netherlands), Daiichi Pharmaceutical, Esai and Takeda Chemical Industries (Japan) etc.

The global market for all basic vitamins - vitamins A, E, B1, B2, B5, B6, C, D3, Biotin, Folic acid, Beta Carotene and carotinoids - was precisely divided among the cartel participants to the half-percentage point. Other anticompetitive conduct included setting production quotas, prices allocating sales quotas, implementing globally co-ordinated price increases and issuing price announcements in accordance with agreed procedures. The cartel initially looked innocent; however endless investigations and new facts discovered by national or supranational authorities, as well as in civil suits, kept on disclosing more and more shocking facts over the ´Hoffman-La-Roche´ cartel.

The estimated duration of the cartel was somewhere between 10 to 15 years in relation to each vitamin market individually. The seriousness of the case was demonstrated to American people by emphasizing that vitamins were *´an unthinkable part of every kitchen cabinet in America and included morning supplemental pills to enriched milk and orange juice, fortified breakfast*

cereals, breads, butters and meats´[125]. European and American vitamin markets were worth almost two billion Euros a year.

The ringleaders Hoffman-La Roche and BASF set up a sophisticated mechanism of monitoring and enforcing their agreements. Company representatives regularly met at so called ´Top-Notch Meetings´. *´Senior managers of all pharmaceutical companies were in charge of the exchange of sales values, volumes of sales and pricing information on a quarterly or monthly basis at regular meetings, and the preparation, agreement and implementation and monitoring of an annual "budget" followed by the adjustment of actual sales achieved so as to comply with the quotas allocated.´*[126]

The most probable instigator and shadow eminence of the cartel was Dr. Kuno Sommer, former Director of Worldwide Marketing, Hoffmann-La Roche Vitamins and Fine Chemicals Division. In 1997, in so called ´Citric Acid case´, Roche paid a $14 million fine and promised to co-operate with investigators. In an attempt to cover-up an already existing cartel, Dr. Sommer lied and managed to prolong the cartel existence for two more additional years. During the investigations in 1999, he pleaded guilty to charges, served four months in prison and paid a $100,000 fine. Interestingly, all Hoffman-La Roche´s and BASF´sexecutives ordered the destruction of all evidence despite being sure that the conviction had been inevitable. The only company co-operating on the American continent was Rhone Poulenc which was not fined after co-operating with federal investigators and the Commission.

Similar situation as to be seen on the European continent. The companies were fined at that time a record fine of £523 million. In comparison with the United States, the number of the illegally colluded companies increased to 13. The second main cartellist after Hoffman La-Roche, German chemical group BASF, which was fined £185m, even expressed anger at the punishment and indicated several times an intention to appeal. Following the lawyer´s advice, it finally did not do it.

[125]http://companyethics.com/vitamins.htm[accessed May 30, 2012]
[126]http://www.uow.edu.au/~bmartin/dissent/documents/health/pharmfraud.html#Roche[accessed May 30, 2012]

The main initiator of the Commission´s investigation was Stanley Adams – a Swiss citizen and an old man who blew the whistle on Roche for the first time at the beginning of 1970s. At that time, he gave the documents to the European Economic Community (hereinafter reffered to as ´EEC´) which perfectly detailed how Roche kept the price of vitamins high with the support of its market rivals. Adams agreed to cooperate on condition that EEC in return for anonymity, he would provide photocopies of some incriminating documents. Unfortunately, the EEC did not manage to gurantee its full secrecy and the materils as well as their origin occurred in public. To make matters worse, the majority of the documentation had Adam´s signature on it. Swiss authorities arrested him and called him a spy. Being announced that he was facing a 20-year imprisonment for the criminal act of industrial espionage, his wife committed suicide.

I detailed the story of this man so as to demonstrate how unprepared and unreliable the European authorities were approximately 40 days ago. No system of protection to whistleblowers, no support from the European authorities when the whistleblower gets into problems due to their fault and mainly unpreparedness in relation to solving such cartel matters. The procedural and substantial leniency law went through a thunderstorm, mainly through the last twenty years, with random leniency cases in the 1970s, 1980s, tiny increase in 1990s and boom after the new millenium.

16.6 Gas Cartel (EU/US)

The second largest fine ever imposed by the European Commission was over 750 million Euros: So called ´Gas insulated switchgear cartel´ or shortly ´Gas cartel´ operated for over 16 years.It involved the following companies (see the level of the fine imposed in the brackets): ABB (€ 0), Alstom (€ 65 mil.), Areva (€ 54 mil.), Fuji Electric € 4 mil), Hitachi Japan AE Power Systems (€ 52 mil.), Mitsubishi Electric Corporation (€ 119 mil.), Schneider (€ 8 mil.), Siemens (€ 397 mil.), Toshiba (€ 91 mil.) and VA Tech (Siemens subsidiary – 22 mil.). Between 1988 and 2004, the companies rigged bids for

procurement contracts, fixed prices, allocated projects to each other, shared markets and exchanged commercially important and confidential information. The applicant for the leniency which initiated the Commission´s investigation was ABB which received full immunity from fines being the first company to come forward with information about the cartel. The total fines imposed in this case (€ 750 712 500) made it the largest set of fines ever imposed on a single cartel, and the fine of €396 562 500 on Siemens, Germany constituted the largest ever fine that the Commission had imposed on a single company for a single cartel infringement. The case also followed a number of civil suits.

" The market which was adversely effected Gas insulated switchgear (GIS) is heavy electrical equipment used to control energy flows in electricity grids, and is the major component of turnkey power substations. Substations are auxiliary power stations where electrical current is converted from high to low voltage or the reverse. GIS is sold both as items of equipment to be integrated into a turnkey power substation and as an integral part of turnkey power substations. Sales of GIS normally include services such as transport, testing and insulation. Public utility companies and other clients usually organise tenders, trying to find the best GIS for their needs at the lowest price."[127]

Starting in 1988, GIS suppliers bound themselves to inform each other of calls for tender for GIS and co-ordinated their bids in order to secure projects for the cartel members according to their respective cartel quotas or they agreed on respecting minimum bidding prices. The position of Japanese companies in the cartel was quite unique. They agreed to avoid selling in Europe in Exchange for the promise of European not to sell in Japan. Despite that, the Japanese companies also received fines. They met the condition of direct contribution to the restriction of competition on the EU market.

The cartel´s secrecy was kept by code names for individual employees as well as companies. Anonymous emails, message encription and ban of using home and company computers helped the cartel function effectively for several years. Strategic issues were discussed at top management level of companies and lower management levels prepared fictive bids to leave an impression of

[127] Available on http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/80

competition and at a lower level to divide projects and to prepare sham bids by the companies not supposed to win the tender, in order to leave an impression of genuine competition.

In case of Siemens, Alstom and Areva, the Commission took into consideration their ringleader´s role, long cartel duration and both – the considerable size of companies and considerable size of the market in question. As mentioned before, ABB received full immunity from fines. This case also involved an application of a very importand case law that *´if the parent company within a group exercises decisive influence over commercial behaviour of its subsidiaries, then both form part of the same economic undertaking. There is a presumption that a parent company exercises decisive influence over its wholly owned subsidiary. Legal responsibility for the infringement and the related fine can be imputed to both the subsidiary that actually participated in the cartel and the parent company or companies that exercised decisive influence over the commercial behaviour of that subsidiary at the relevant time.´*[128]

16.7 Air cartel(EU/US)

The enormous fine of €799 million was imposed on 11 air cargo carriers in the biggest European price fixing cartel in air transport industry. Several known airlines are among the 11 undertakings fined, namely Air Canada, Air France-KLM, British Airways, Cathay Pacific, Cargolux, Japan Airlines, LAN Chile, Martinair, SAS, Singapore Airlines and Qantas coordinated their action on surcharges for fuel and security without discounts. The six-year cooperation as disclosed by Lufthansa which received full immunity from fines providing evidence about the existence of the cartel.

"The contacts on prices between the airlines concerned initially started with a view to discuss fuel surcharges. The carriers contacted each other so as to ensure that worldwide airfreight carriers imposed a flat rate surcharge per kilo for all shipments. The cartel members extended their cooperation by introducing a security surcharge and refusing to pay a commission on

[128] This situation is called "parental liability" in accordance with Court´s ruling C-97/08 *Akzo Nobel NV and Others v Commission.*

surcharges to their clients (freight forwarders). The aim of these contacts was to ensure that these surcharges were introduced by all the carriers involved and that increases (or decreases) of the surcharge levels were applied in full without exception. By refusing to pay a commission, the airlines ensured that surcharges did not become subject to competition through the granting of discounts to customers."[129]

The Commission finally had to face ´one-third´success. The Commission also investigated the companies on further surcharges and regarding freight rates. Despite being in the Statement of Objections, the Commission finally decided to drop them from the case for insufficient evidence. What is more, the original Statement of objections was sent to 22 companies including a consultancy firm. Therefore, 11 of them left unpunished.

The Commission was extremely lenient and took into consideration the fact that some cartel harm has been caused out of the European Economic Area – all companies received a 50% reduction on fine in relation to sales between the EEA and third countries. Furthermore, the extra character of the surcharges market environment making the companies coordinate their prices meant another 15% discount on fines imposed. 4 companies provided the Commission with evidence of significant added value and were granted additional 10% discount on fines. On the other hand, SAS company got its fine increased by 50% for its previous involvement in an airline-related cartel in the airline sector. The Commission also respected the rule of not excessing 10% of companies´ annual turnover and the amount of the fine imposed had to be reduced to this level. Lufthansa and its subsidiary Swiss remained unpunished thanks to meeting the rules for granting full immunity. The final fine discounts are thus: Martinair (50%), Japan Airlines (25%), Air France-KLM (20%), Cathay Pacific (20%), LAN Chile (20%), Qantas (20%), Air Canada (15%), Cargolux (15%), SAS (15%) and British Airways (10%).

The US Department of Justice proved to be much more successful when proving the cartel membership to the airliners. It charged 18 airlines, some top-management executives and imposed more than $1.6bn (£997m) in fines. The

[129]Available on http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1487

Commission's decision will have an impact on several pending legal actions by European companies against some of the airlines. Almost all airline carriers involved in the cartel were subsequently sued for hudreds of millions of euros. Surprisingly, all the class-actions were settled within two years after their initiation.

16.8 Lift cartel (EU)

The European Commission fined a record €992 million euros were granted to lift manufacturers for fixing prices and carving up markets. Half of the total amount of the fine were granted to a German cartel ringleader ThyssenKrupp mainly due to its cartel importance and repeated offence. The adversely affected market was quite limited in this case. It included only Belgium, Germany, Luxembourg and the Netherlands. The cartel operated almost ten years between 1995 and 2004. The companies fixed prices, did a bid-rigging and allocated projects to each. The long-term effects of the cartel will be felt for many decades as the installation of the lift is one thing and its subsequent maintence and exchange of spare parts, which means additional considerable income for the lift manufacturers, another. The sole headquarters of the European Commission, the Berlaymont, also had had this type of lifts installed.

All top-ten cases include some kind of application. However, the companies involved in this case did not even try to cooperate. The second main actor was Otis – a European subsidiary of one of the largest American technological corporations - by United Technologies. Otis received 225 million euros and United Technologies had all local employees dismissed as the parent company had no knowledge of its subsidiary´s practises. Kone) of Finland was fined 142 million. Schindler of Switzerland was fined 144 million euros. Mitsubishi Electric Corp of Japan was fined 1.8 million for certain illegal activities in the Netherlands.

The companies managed to allocate the key markets in the European Union and due to the lifetime of the lifts, the necessity of regular maintenance, they guaranteed themselves a unique position in the European market. The

gained profits in a long-term will certainly be much higher than the fine imposed. This case is an unfortunate case of the fact that being a villain is sometimes worth – even on the market.

16.9 Citric acid cartel (EU/US)

In 1995 and 1997, the U.S. Department of Justice and the European Commission launched investigations into the food and feed additives industry. Between 1991 and 1995, Hoffmann-La Roche AG, Archer Daniels Midland Co (ADM), Jungbunzlauer AG, Haarmann & Reimer Corp and Cerestar Bioproducts B.V. were fined a total of € 135.22 million for participating in a price-fixing and market-sharing cartel in citric acid. The adversely affected area included European Economic Area, Norway, Iceland and Liechtenstein. The market in question was worth €320 million.

"Citric acid is used as a flavoring in many preparations of Vitamin C, and has a wide variety of other uses. In industry, citric acid can be used to make good "natural" cleaners, though some may still contain chemicals that are not exactly natural. It's also now commonly used in preparing photographs."[130]

The founding members ADM, H&R, Roche and JBL met in Switzerland for the first time and agreed on the main principles of the cartel functioning. The last company Cerestar joined them one year later. The four main types of anticompetitive conduct performed by the companies was the ´allocation of specific sales quotas for each member and adherence to these quotas, fixing 'target' and 'floor prices' for citric acid, exchanging specific customer information, and eliminating price discounts (only in case of large customers and no more than 3%).´

The companies held regular 'Sherpa' meetings to solve technically oriented market "difficulties" and 'Masters' meetings aimed at strategic marketing matters. Each company had to report its monthly sales figures to the cartel. In case that any cartel member oversold its allocated quota, it was obliged to provide compensation to the others. One of the main reasons of the

[130] Available on http://www.wisegeek.com/what-is-citric-acid.htm

cartel establishment was not only an objective of price increase but also a market combat against Chinese manufacturers. Under the pressure of strong Chinese competition, the cartel lost a considerable proportion of its clients. In order to regain them back, the cartel members created so called 'Serbia List' which was regularly monitored during the already mentioned 'Sherpa' meetings.

The investigation started in the United States where the cartel members received huge fines and faced several civil suits in the USA as well as in Canada. The European Union only reacted to this situation. Cerestar Bioproducts was the first undertaking to provide the Commission with decisive information. Unfortunately, it was only a self-preservative attempt and it received only a 90% reduction. In reaction to that, ADM provided detailed information including hand-written notes taken during cartel meetings and price instructions which helped the Commission convict H&R, Roche and JBL of their participation in the citric acid cartel. The final verdict of ADM was a 50% reduction. As an aggravating factor was considered cartel ringleader´s position of ADM and Roche but they did not receive full 50% increase, but only 35 % as they confirmed the majority of the meetings and the identity of the participants. as well as the facts in question. JBL indicated the quotas that were allocated to each of the cartel participants, the Commission granted JBL a reduction of 40%. The reductions might have been even higher but all the companies´ cooperation arrived at the time when the Commission´s investigation was in a progress.

The final fines imposed by the European Commission were as follows: Hoffmann-La Roche AG received a 63.5 mil. Fine, Archer Daniels Midland Company Inc. 39.69 mil. Fine, Jungbunzlauer AG (JBL) 17.64 mil. fine, Haarmann & Reimer Corp. 14.22 mil. fine and the first whistleblower Cerestar Bioproducts B.V 0.17 mil. fine. The DOJ imposed fines of over $197 million on nine companies. The DOJ accused three executives at Archer Daniels Midland and they were sentenced to 7,5 years in prison.In the United States, the investigation was joined to Lysine cartel investigation. The European Union joined the investigation with the choline cloride cartel. Mainly the Hoffman-La-Roche´s performance during the investigation was later

considered as an aggravating circumstance in the Vitamin case as it kept under secrecy any information on the Vitamin case and intentionally lied to the Commission as well as to the Department of Justice in order to escape any suspicion. Several years later, the Vitamin cartel collapsed disclosing these information.

16.10 Lysine cartel (US)

After a 40-year gap of unsuccessful cartel disclosure, the U.S. Department of Justice managed to convict several top-managers from five companies for illegal price-fixing and more importantly, disclosed and sucessfully prosecuted an international Lysine cartel.

"Lysine, or L-lysine, is an essential amino acid. That means it is necessary for human health, but the body can't manufacture it. You have to get lysine from food or supplements. Amino acids like lysine are the building blocks of protein. Lysine is important for proper growth, and it plays an essential role in the production of carnitine, a nutrient responsible for converting fatty acids into energy and helping to lower cholesterol. Lysine appears to help the body absorb calcium, and it plays an important role in the formation of collagen, a substance important for bones and connective tissues including skin, tendon, and cartilage."[131]

The cartel started in the middle of 1990s by a simple price-fixing strategy and it had been able to raise lysine prices 70% within the first year of cooperation.The cartel ringleader was an American company Archer Daniels Midland, other involved compannies were Ajinomoto (Japan), Kyowa Hakko Kogyo (Japan), Sewon America Inc. (Korea) and Cheil Jedang Ltd. (Korea). The total amount of fine imposed exceeded $105 million with a two-third account of ADM ($70 million). The investigation proceeded in accordance with the citric acid investigation where the ADM received additional fine of $30 million. To make matters worse, the DOJ´s criminal investigation resulted in a three-year prison sentences for three executives of ADM. All the remaining foreign companies settled with DOJ in 1996. **Lysine purchasers in**

[131] Definition available on http://www.umm.edu/altmed/articles/lysine-000312.htm.

the United States and Canada managed to recover about $100 million in damages and ADM paid $38 million to settle mismanagement suits by its shareholders.

The source of the information wasMark Whitacre, an ex-divisional president of ADM's BioProducts Division. Under the pressure of his wife, he informed the FBI on the cartel existence and his attendance of all global cartel meetings. Whitacre worked undercover and helped FBI obtain several cartel-related documents, videos and audios documenting the alleged crimes. The subsequent investigation of ADM was one of the main incentives to start prosecution in respect to vitamins and graphite electrodes cartel.

The investigation was unique due to the quality of the evidence provided to the DOJ and the courts. Direct information not permitting any doubts helped the DOJ push all cartellists to immediate settlements and the DOJ broke the ices of 40-year lack of success in cartel tracking. At that time, the amount of records imposed was a record and served as a very good incentive or deterrent for other cartels. Generally speaking, the disclosure of this case in combination with 1993 Leniency Programme initiated a new era of successful fight combat.

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CONCLUSION:

Five decades of leniency´s existency cannot be considered a long journey. Many doctrines and newly established systems needed centuries to prove their quality. However, despite being a very narrow branch of competition law, the leniency is increasing on its importance. The antitrust/competition authorities have learnt to be very precise when granting conditional immunity as well as reduction in fine and on the other hand, the undertakings/corporations learnt to stick carefully to all conditions to benefit from leniency programs. Only a constant and mutually reassuring practise can help evolve a reliable legal tool for fighting cartels.

The first notable progress is visible in case of the European Union. In spite of uncertain beginnings of leniency policies (1996, 2002, 2006), it managed to create an effective anticartel system imposing billions of euro on fines almost every year. It took the Commission only two decades to develop a very good and very deterrent anticartel stimulant. In case of the United States, the period was twice longer. My personal prediction is that we can expect a boost of leniency cases with higher intensity and accompanied by more complex legislation rather on the European continent than in the United States as they are still recovering from some controversies related to their leniency programme from the previous years.

A challenge for both – the European Union and the United States is the cartel-related liability of individuals. Some European states already have such legislation imposing fines and prison, however despite the need, there is no globally unified and unconditionally respected system or custom of extraditions. The United States introduced leniency of individuals in 1994 and had a chance to apply its provisions several times. I guess that the same development could be predicted also on the European continent but only on condition that there was any binding supranational legislation to extradite and impose fines on individuals.

An unpleasant reality are indefficiencies occuring in both leniency systems. Some are painful for the state authorities (see Stolt-Nielsen case), some are painful for the undertakings/corporations (applications at states where

the cartel adversely affected local market or relying on being granted a leniency by the Commission and finally lose it and be exposed to civil suits or loss of first position to apply at state authorities). The Commission as well as Department of Justice (in collaboration with) Federal Trade Commission try hard to avoid repeating such situations and constantly and gradually improve the substantial as well as procedural aspects of leniency. However, the situation gets complicated by formalisms. The European Commission must prepare a binding document (possibly only rewrite current ECN Model Leniency Policy into a law) and start enforcing it otherwise the situation remains the same with only hopes and no guarantee.

A very proverbial chapter are fines. The trend is to impose unmerciful and real fines which is of benefit to the detterent effect and it also motivates cartel members to whistleblow as much as possible. The Graphite Cartel, the Car glass cartel or theVitamin cartel show that the space for enforcing leniency policy is wide. In comparison with previously critised uncertainty as to how the antitrust/anticartel estimate the level of fines, nowadays both legislations – European as well as American guarantee clear boundaries of fines – their basis and the circumstances causing increase or decrease of fines. Clarity and certainty help to promote the leniency programs the best.

I am aware of the fact that I praise mainly Europe for its progress ahead with leniency application. Unfortunately, there is anevery important fact for which I must put European leniency legislation under a strong criticism. And it is a simple supplement of current leniency called Amnesty Plus and Penalty Plus. I cannot understand why the legislator forgot to incorporate such easy tools into the 2006 Leniency Program. Not to mention how big success it has on the American continent. The simple psychologically and financially motivated promise to grant additional leniency in case of providing information about yet unknown cartel, unrelated to that one under investigation, is a long-term investment with no costs. Under the current situation, it will take years before the new European Leniency Policy will be released and hopefully it will include Amnesty Plus as well as its more aggressive sibling – Penalty Plus.

To conclude two endless months of my life, I would like to note that the amount of information I collected about leniency surpassed my expectations

exponentially. Originally, I wanted to provide a basic description of leniency with some additional practical examples. What started my motor was the fact that approximately five Czech law students have already written a thesis on leniency-related topic. And I simply wanted to be original and focused at providing exhausting description of all leniency-related matters and attempted to compare the European and American legislation. Hopefully, I did well.

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