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A Critical Analysis of the European Commission's Leniency Policy From 1996 - 2017 And Future Solutions To Its Shortcomings

Bachelor thesis

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I hereby declare that I am the sole author
of this Bachelor Thesis and it has
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Abbreviations

TFEU	Treaty on the Functioning of the European Union
MS	Member State
OECD	Organisation for Economic Cooperation and Development
CA	Competition Authority
NCA	National Competition Authority
OSS	One-Stop-Shop
CJEU	Court of Justice of the European Union
ECN	European Competition Network

Introduction

Since the latter half of the past century, economy has been at the forefront of ensuring peace in Europe. When drafting the Paris Treaty to establish the European Steel and Coal Community, the delegates of Belgium, France, West Germany, Italy, the Netherlands and Luxembourg saw that peace and prosperity in Europe can only be built through cooperation and common goals.[1] The economic focus continued with the creation of European Economic Community with the Treaty of Rome in 1957,[2] and finally the realisation of the European Internal Market came with the Treaty of Maastricht in 1993.[3] The EU pays considerable concern on the proper functioning of its common market. Article 101 of the Treaty on the Functioning of the European Union,[4] setting forth EU competition rules, are extremely important in this regard.

Cartels are a grave distortion of competition and thus by their very nature incompatible with the Internal Market. Cartels can be remarkably beneficial for the parties involved, which makes discouraging collusion a considerable challenge. Leniency, the doctrine of granting favourable treatment to a cartel participant in exchange for cooperation in the procedure for prohibiting and punishing that cartel, can be a valuable tool. The Commission has operated a Leniency Policy since 1996 and has achieved much, but has not been without - sometimes heavy - criticism.

This thesis will explore the background, evolution and the future prospects of the Commission's Leniency Policy, mainly focusing on the Leniency Notices, asking, just how appropriate it has been in combating cartels, and what are the legal concerns and challenges attributed to it. The methods for this assessment include reviewing the Notices themselves, studying relevant articles and commentaries, legislation, official publications, cartel statistics and cases of particular interest. **The author's hypothesis is that while leniency appears to be an easy and effective solution for improving an antitrust enforcement policy, certain issues need to be addressed before optimal balance can be found.** For the purposes of this thesis, 'cartel' shall refer to horizontal cartels, agreements between competitors.

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[1] Treaty establishing the European Coal and Steel Community. www.cvce.eu/content/publication/1997/10/13/11a21305-941e-49d7-a171-ed5be548cd58/publishable_en.pdf (09.11.2015)

[2] The Treaty of Rome.ec.europa.eu/archives/emu_history/documents/treaties/rometreaty2.pdf (5.3.2017)

[3] Treaty on European Union. europa.eu/european-union/sites/europaeu/files/docs/body/treaty_on_european_union_en.pdf (5.3.2017)

[4] Treaty on the Functioning of the European Union.eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_2&format=PDF (3.5.2017)

1. Cartels and leniency

1.1. Article 101 TFEU and cartels

Article 101 prohibits as incompatible with the internal market any acts of, or between undertakings that have as their object or effect the prevention, restriction or distortion of competition within the internal market, including, but not limited to price fixing; limiting or controlling production, markets, technical development or investment; sharing markets or sources of supply; applying dissimilar conditions to trading parties, placing them at a competitive disadvantage; and making the conclusion of contracts subject to acceptance of arbitrary and disconnected obligations for the other party.

Cartels especially are caught by Article 101. A cartel is a group of similar, independent companies which join together to fix prices, to limit production or to share markets or customers between them.[5] Cartels evidently distort competition, and are thus detrimental to the market, as competition is of great benefit to it.[6] The benefits of partaking in a cartel include, but are not limited to larger profit margins as less effort is required to stay competitive, and the limited possibilities of the customers to opt for a cheaper alternative due to a nigh universal price hike often agreed upon by the cartel members. Price fixing is indeed maybe the most common form of cartel collaboration, and it effectively eliminates the price competition between the colluding parties. The other main categories of cartel agreements are, in addition to price fixing, output restrictions, market allocation and bid rigging. Additional effects of cartels include 'umbrella effect', in which other market actors not partaking in the cartel are able to raise their products' prices due to the general price hike in the relevant product market by the cartel members. Cartels became notably regulated in the US with the Sherman Act of 1890,[7] which was complemented by the Clayton Act in 1914,[8] and have since been a mainstay element in competition law. Fines and ramifications for partaking in a cartel can be extremely punishing, and may even include imprisonment.[9]

It has been estimated by the Commission that removed overcharges of detected cartels amounted

[5] European Commission. Competition, Overview on Cartels ec.europa.eu/competition/cartels/overview/index_en.html (5.3.2017)
[6] Bayoumi, T., *et al*. Benefits and Spillovers of Greater Competition in Europe: A Macroeconomic Assessment. NBER Working Paper No. 10416, April 2004 www.nber.org/papers/w10416.pdf (5.3.2017), p 30-31.
[7] The Sherman Antitrust Act gwclc.com/Library/America/USA/The%20Sherman%20Act%201890.pdf (5.3.2017)
[8] The Clayton Act gwclc.com/Library/America/USA/The%20Clayton%20Act.pdf (5.3.2017)
[9] European Commission. Antitrust: Commission fines truck producers € 2.93 billion for participating in a cartel. Press release. Brussels 19 July 2016 europa.eu/rapid/press-release_IP-16-2582_en.htm (5.3.2017)

for €7.2 billion.[10] Additionally, the total potential harm caused by cartels has been estimated as 13.7 times larger than the harm detected.[11] From such astronomical numbers it is clear that cartels are an exceedingly harmful phenomenon, ultimately at the expense of the consumers. The elimination, or at least reduction of cartels and their effects is thus of the utmost importance to any Competition Authority. The European market is the largest in the world with its GDP of €14.600 billion in 2014,[12] and cross-border trade accounts for 62% of all trade between EU Member States (MS). Many undertakings do business in multiple MS, and many cartels have cross-border dealings. In such a small world, it is beneficial for all parties involved to have a supranational competition authority to complement the national authorities. Within the European Union, the Commission drafts the EU Competition Policy, and enforces EU Competition Laws.[13]

1.2. The European Commission as a Competition Authority

The trick to detecting and taking action against cartels is to "penetrate their cloak of secrecy"[14] as stated by the Organisation for Economic Cooperation and Development (OECD). Indeed, cartels by their nature are exceedingly secretive, as they are considered to be 'cancer'[15] and are highly illegal. To combat cartels in the EU, the Commission may start a procedure based on a complaint, its own investigation, or a leniency application. The European Commission has the powers to monitor and enforce, among others, the EU competition rules.[16][17][18] In practice, this means that the Commission will monitor that MS and undertakings operating within the European Economic Area (EEA) properly implement EU legislation, and subsequently adhere to it. With regards to undertakings, the Commission may launch an investigation if it believes that the undertaking is

[10] Daviesy, S., Ormosiz P. L. The economic impact of cartels and anti-cartel enforcement. October 7, 2014 www.diw.de/documents/dokumentenarchiv/17/diw_01.c.485189.de/ormosi_ams_oct2014_full-paper.pdf (5.3.2017), pp 22-24.
[11] *ibid*, pp 22-24.
[12] European Union. Facts and figures europa.eu/european-union/about-eu/figures/economy_en (5.3.2017)
[13] European Commission. Competition, Overview. ec.europa.eu/competition/general/overview_en.html (5.3.2017)
[14] OECD. Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programmes, 2002. oecd.org/competition/cartels/1841891.pdf (5.3.2017) p 7.
[15] Monti, M. Fighting Cartels Why and How? Why should we be concerned with cartels and collusive behaviour? Speech, 3rd Nordic Competition Policy Conference. Stockholm, 11-12 September 2000 europa.eu/rapid/press-release_SPEECH-00-295_en.htm (5.3.2017)
[16] Treaty on the Functioning of the European Union. eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_2&format=PDF (3.5.2017), p 90, p 160.
[17] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 Vol 46, 4.1.2003.eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003R0001&from=EN (5.3.2017), art 4, p 8.
[18] Commission of the European Communities. Growth, competitiveness, employment: The challenges and ways forward into the 21st century, White Paper, Bulletin of the European Communities Supplement 6/93, 5.12.1993.aei.pitt.edu/1139/1/growth_wp_COM_93_700_Parts_A_B.pdf (5.3.2017)

infringing Articles 101 or 102 TFEU, and may apply those Articles. The Commission may also impose fines on infringing parties. However, in 2014 there were around 26 million active enterprises in the EU.[19] It is reasonably safe to assume that while most of these undertakings have little impact on the internal market on their own, effectively monitoring them all is relatively impossible. Partly due to this, the Commission employs leniency in order to encourage cooperation between the undertakings and the Commission.

1.3. What is leniency?

Leniency in competition law is essentially the doctrine of awarding cartel partakers some sort of incentive to a) expose the cartel to the Competition Authority (CA), or even better b) not to collude in a cartel in the first place. With leniency programmes, the undertakings that collaborate with the CA in the investigation of the cartel may receive favourable treatment; a reduction in fines, or even full immunity.[20] As it has been previously established, the fines for partaking in a cartel can be extremely substantive, so the prospect of either reducing their amount or completely escaping them may be tempting. This also works to destabilise cartels in the first place; when no member may be sure who of their collaborators will be pressed to disclose the cartel to the CA, the stakes of entering a cartel will appear much higher and undertakings may prefer not to take the risk. The Commission first adopted its leniency policy with the 1996 Commission Notice on the non-imposition or reduction of fines in cartel cases, and currently follows the 2006 Commission notice on immunity from fines and reduction of fines in cartel cases, which was amended in 2015.

1.3.1. Requirements of an effective Leniency Policy

The aim of a leniency policy is to combat cartels. The method by which this is achieved, is to encourage the disclosure of cartels by their participants to the relevant Competition Authority in exchange for favourable treatment in the following procedure, usually by granting immunity from, or a reduction in fines[21] In jurisdictions where colluding in a cartel is a criminal offence for which individuals may be penalised by fine or imprisonment, such as the United States,[22] the leniency

[19] Eurostat. Business demography statistics. ec.europa.eu/eurostat/statistics-explained/index.php/Business_demography_statistics#Active_enterprises_in_the_business_economy (5.3.2017)
[20] European Commission. Leniency. ec.europa.eu/competition/cartels/leniency/leniency.html (8.4.2017)
[21] Serban, A. Are EU Leniency Programmes Enough for Detecting Cartels. Romanian Competition Journal 2015, (1-2), heinonline.org/HOL/Page?handle=hein.journals/rocmpj2015&start_page=20&collection=journals&id=76 (5.3.2017) pp 20-27.
[22] Botana, P. Prevention and Deterrence of Collusive Behavior: The Role of Leniency Programs. Columbia Journal of European Law, 2006, 13 (1).

policy may also include amnesty for concerned individuals. While this in practice means that the CA will be able to obtain less 'reparations' for the infringements, the total amount of fines imposed may rise as the result of an increase in total cartel convictions, as more cartels could be disclosed through leniency than what the CA could reveal just by exercising its investigative powers alone.[23] For a leniency policy to be effective, it must possess both the threat of sanctions, and the promise of mercy.[24]

1.3.1.1. The threat of sanctions

Being revealed of having partaken in a cartel must be punishing enough for the colluding parties to on its own raise the bar for willingness of the undertakings to participate in an infringement. The repercussions for collusion must be sufficient enough to offset any gain the undertakings may have received by the virtue of colluding, so that partaking in a cartel will not end up as being beneficial regardless of whether the cartel ends up being caught by the CA or not. According to the Commission's 2006 Guidelines on the method of setting fines, undertakings colluding in a cartel may be fined for up to 10% of the total turnover of the previous fiscal year for that undertaking.[25] This is at least partly due to the reason that uncapped fines could in some cases lead to the effective elimination of undertakings from the market. However, such a hefty fine will force any undertaking to seriously consider whether colluding, and potentially getting caught is worth the risk. Fines may have three potential effects on prevention of competition infringements: the economic deterrent, as the risk of heavy fines may upset the cost - benefit -ratio; the moral effect it sends to the law-abiding that would rather prefer to not break the law and are morally committed to it; and lastly the cost of facilitating and running cartels may be raised, when through leniency or other measures the amount of fines the colluders stand up to face can be affected.[26] The more work the effective running of the cartel takes, the more expensive it will be.

heinonline.org/HOL/Page?handle=hein.journals/coljeul13&start_page=47&collection=journals&id=53 (5.3.2017), pp 47-82.

[23] Serban (2015, *supra* nota 21, pp 20-27.

[24] Aubert, C., et al. The Impact of Leniency and Whistleblowing Programs on Cartels. 21.6.2005. idei.fr/sites/default/files/medias/doc/by/rey/leniency.pdf (5.3.2017), pp 1-39.

[25] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ 2006, vol 49, 1.7.2006. eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006XC0901(01)&from=EN (5.3.2017), p 4.

[26] Wils, W. Optimal Antitrust Fines: Theory and Practice. World Competition, 2006, 29 (2) heinonline.org/HOL/Page?handle=hein.kluwer/wcl0051&start_page=183&collection=kluwer&id=187 (5.3.2017), pp 183-208.

Several factors need to be considered when deciding the exact amount of the fine.[27] Is the undertaking facing the fine a first- or a repeat offender? What has been the undertakings role in the cartel, has it been an instigator or has it been coerced to collude? To what extent has it participated in the infringements? Failure to take these considerations into account may lead to short sighted decisions, such as in the *Eurocheque: Helsinki Agreement* -case, in which the Commission only fined the concerned undertaking for the exact amount of profit it had derived from the arrangement.[2829] This kind of simplistic decision does not serve the policy considerations discussed above, as it only serves to mitigate the benefit the undertaking has obtained, but not to effectively punish the undertaking or to deter other undertakings from similar conduct. For the fine to be proportionate to the infringement, it must always be considered on an ad hoc basis, as no universal formula for an 'optimal fine' exists.[30] This is addressed in the 2006 Fining Guidelines and Leniency Notice, as recidivism is seen as an aggravating factor and heavier fines may be imposed,[31] and any undertaking that has acted as a coercer will not be able to obtain immunity from fines.[32]

As stated above, certain jurisdictions (e.g. USA, Canada, Italy, France, UK, Germany, Denmark, Japan, Australia etc.)[33343536] consider collusion as a criminal offense for which individuals may be

[27] *ibid*, pp 183-208.
[28] *ibid*, pp 183-208.
[29] Commission decision of 25 March 1992 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/30.717-A — Eurocheque: Helsinki Agreement), OJ 9.4.1992. eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31992D0212&from=EN (5.3.2017)
[30] Wils (2006), *supra* nota 26, pp 183-208.
[31] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ 2006, vol 49, 1.7.2006. eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006XC0901(01)&from=EN (5.3.2017), p 4.
[32] Commission. Communication from the Commission, Amendments to the Commission Notice on Immunity from fines and reduction of fines in cartel cases, OJ 5.8.2015. eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015XC0805(01)&from=EN (5.3.2017)
[33] Whelan, P. Legal Certainty and Cartel Criminalisation within the EU Member States, The Cambridge Law Journal, 2012, 71 (3). www.cambridge.org/core/services/aop-cambridge-core/content/view/8DD797BDE2D7843C369A3145F74CDD5B/S0008197312000864a.pdf/div-class-title-legal-certainty-and-cartel-criminalisation-within-the-eu-member-states-div.pdf (5.3.2017), p 678.
[34] Mehta, K.; Centella, M. Settlement Procedure in EU Cartel Cases. Competition Law International, 2008, 4(2). heinonline.org/HOL/Page?handle=hein.journals/cmpetion4&start_page=17&collection=journals&id=78 (5.3.2017), pp 11-16.

[35] Milton, E. Putting the Price-Fixers in Prison: The Case for the Criminalisation of EC Competition Law. Hibernian Law Journal, 2004-2005, 5. heinonline.org/HOL/Page?handle=hein.journals/hiblj5&start_page=159&collection=journals&id=165 (5.3.2017), p 169.
[36] Simpson, M. The criminal cartel offence around the world. Competition World, A global survey of recent competition and antitrust law developments with practical relevance, Quarter 2 2016.

punished. While many EU Member States indeed have criminalised partaking in cartels, the Commission does not hold the power to pass criminal sentences, as precluded by the Regulation 1/2003.[3738] Leniency in jurisdictions in which cartels are criminalised may be more effective, than in those featuring just administrative fines. This is due to the persons who often make the call to either collude in a cartel or to disclose it, have personal stakes in the matter.[39] The threat of prison is likely to make the incentive to opt for collusion at least somewhat less attractive.

1.3.1.2. The possibility of favourable treatment

Where the fines serve to intimidate colluding undertakings, favourable treatment is there to offer a way out with lesser consequences. Favourable treatment is generally obtained by cooperating with the CA, and usually manifests itself as either full immunity from fines, or a reduction thereof. In some jurisdictions, such as the US,[40] colluding in a cartel is a criminal offense where executives of a company may face imprisonment, and leniency may offer a spare those people concerned. These options serve to make coming forward to the CA with information regarding the infringement more alluring to undertakings partaking in cartels.

However, there are factors which affect the attractiveness of a leniency policy. Main considerations here are predictability, transparency and the level of favourable treatment.[41] If an undertaking is unable to predict the outcome of its revelations to the CA, it may be disinclined to do so. If there is an immeasurable risk of the leniency application being denied, the undertaking will just have discriminated itself, which would be especially discouraging if the infringement had so far been undetected.[42] For this reason it is necessary for the undertaking to be able to predict the outcome of its application to at least an extent, instead of facing the risk of walking away with just a hefty fine to show. Transparency compliments predictability by offering more information based on which the undertakings may calculate whether disclosing the infringement to the CA

www.nortonrosefulbright.com/files/competition-world--q2-2016-141176.pdf (5.3.2017), p 7.
[37] Milton (2004-2005), *supra* nota 35, pp 160-162.
[38] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 Vol 46, 4.1.2003. eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003R0001&from=EN (5.3.2017)
[39] Botana (2006), *supra* nota 22, pp 47-82.
[40] Wils, W. Is Criminalization of EU Competition Law the Answer? World Competition: Law and Economics Review, Vol. 28, No. 2, June 2005. pspe.org.pl/dokumenty/137_IsCriminalizationofEUCompetitionLawtheAnswer.pdf (5.3.2017), p 10.
[41] Wikberg, O. Leniency v. kartellit. Doctoral thesis, University of Helsinki, Department of Law, 2009. helda.helsinki.fi/bitstream/handle/10138/18377/leniency.pdf?sequence=1 (5.3.2017), pp 181-193.
[42] *ibid*, pp 181-193.

would be desirable or not. The more the undertakings will be able to know about the process, the more accurate predictions they will be able to make.[43] Arguably the most important aspect is the amount of leniency awarded, i.e. how much the colluders stand to win. There has been much scrutiny over the optimal amount for fines,[44][45] but most arrive to the same conclusion; high enough to cause a severe deterrence, but not high enough to be unproportionate and to cause insolvency, which in turn has a multitude of additional negative economic consequences to it.[46]

Undertakings also cannot just dump their information on the cartel and expect full immunity. For the leniency policy to maintain its effectiveness, it must be 'tough but fair', and reward those that contribute the most, creating a race for the colluders in which first price is full immunity, and the slower/less useful an undertaking is, the less benefit it will gain.[47] In practice this means that the first undertaking to disclose a cartel to the CA is usually granted full immunity, provided that the information is sufficient, and the subsequent undertakings to do so will receive reduced fines. This serves to create a situation in which time may literally be money, as the fastest undertakings to disclose the cartel will receive the most benefit. Constant cooperation with the CA for the duration of the investigation is usually required.

1.3.2. Positive effects of a Leniency Policy

Leniency policies have become extremely popular and they can be found in most legal systems.[48] It is thus likely that the benefits such a policy brings to the field have been found to be desirable. While the obvious final benefit of a leniency policy is the decrease of cartels in general, the different factors attributing to it should be examined.

First, the work of the CAs becomes somewhat easier, as they will receive information from the colluders first hand, instead of having to investigate everything by themselves, or by receiving information from third parties. Not only does such information hold considerably higher evidential value by coming from the infringers themselves, but is usually much more extensive and definite.

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[43] *ibid*, pp 181-193.
[44] Allain, M-L., *et al.* Are cartel fines optimal? Theory and evidence from the European Union. International Review of Law and Economics, Volume 42, 2015.
www.sciencedirect.com/science/article/pii/S0144818814000878 (8.4.2017), pp 38-47.
[45] Wils (2006), *supra* nota 26, pp 183-208.
[46] *ibid*, pp 183-208.
[47] Wikberg (2009), *supra* nota, pp 181-193.
[48] International Competition Network. Leniency Materials. http://www.internationalcompetitionnetwork.org/working-groups/current/cartel/awareness/leniency.aspx (8.4.2017)

[49] The requirement for the undertakings to continuously cooperate with the CA will also benefit the investigation with an on-demand supply of information, which effectively transfers some of the economic burden of investigating to the undertaking. The CA will receive more precise and substantial information, in a much more effective manner than it could ever by itself accomplish, improving its efficiency and frees resources to be used for other needs, for example another investigation.[50] Resources will also be saved as the legal process becomes shorter, as prosecuting an undertaking that wilfully admits the infringement is much easier than an undertaking that vehemently denies any involvement.

The existence of a leniency policy will also increase the difficulty of creating and maintaining a cartel.[51] Trust is a necessary element in forming a successful cartel. When the threat of a colluding party breaking ranks and disclosing the infringement to the CA is increased by the allure of immunity under the leniency policy, finding and keeping trustworthy allies becomes considerably more difficult.[52] The fact that the colluding undertakings are competitors and may well stand to gain from the others' misfortune, does not make matters easier. Disclosing one's own as well as competitors' involvement may very well become more beneficial than continued maintaining of the cartel. For these reasons cartel stability is lowered and it is likely that more cartels will be found and prosecuted by the CA than before while discouraging the formation of new cartels, leading to a market where less infringements are present.[53] The increased amount of fines conferred are an additional benefit.

1.3.3. Negative effects of a Leniency Policy

However, if the leniency policy is too lenient, or not lenient enough, trouble may arise. In a too harsh system there is not enough incentive to disclose a cartel and the positive effects of leniency will have a lessened effect. If the system is too lenient, undertakings may attempt to take advantage of it, and even use it to obtain net gain.[54][55]

[49] Wils, W. The Use of Leniency in EU Cartel Enforcement: An Assessment after Twenty Years. 6.10.2016. World Competition: Law and Economics Review, Vol. 39, No. 3, 2016. ssrn.com/abstract=2793717 (5.3.2017), pp 11-12.
[50] *ibid*, pp 11-12.
[51] *ibid*, pp 13-15.
[52] *ibid*, pp 13-15.
[53] *ibid*, pp 13-15.
[54] *ibid*, pp 17-19.
[55] Milton (2004-2005), *supra* nota 35, pp 163.

In system where the requirements for obtaining leniency are low, or the fines too small undertakings may simply opt to let the cartel run its course and apply for leniency if there is a danger of the infringement being revealed.[56] Forming a cartel will also become more beneficial if obtaining leniency is so easy or the fine so insignificant that colluding would generate net gain, naturally leading to there being more cartels on the market, in which case the leniency policy would not only be useless, but harmful. There also exists the risk of colluding undertakings disclosing common infringements to the CA simply to damage their competitors. This behaviour was also listed under the previous topic of positive effects of a leniency policy, but the issue should be seen as a double-edged sword, rather than a contradiction. While the decreased cartel stability due to erosion of trust is a positive effect, the possibility to exploit the system is not. This was the matter in the series of cartel cases in the chemical industry during the 90's (Vitamins, Organic Peroxides, MCAA Chemicals, Animal Feed Vitamins etc.), where the infringing parties consecutively disclosed collusion in cartels that had long before failed, likely partially to damage their competition.[57] A too lenient leniency policy will also diminish the amount of fines conferred and subsequently lower the income gained from them.

A policy that is too harsh, will in turn discourage undertakings from disclosing infringements to the CA, simply because it is not worth it. If the estimated benefit from just burying the cartel once it has run its course and risk the unlikely investigation is greater than what would be gained from cooperating with the CA, it is not hard to deduce which option the undertakings will choose.[58] Especially as the colluding undertakings are much more unified in a system where breaking the ranks has more negative consequences than positive. When the colluders face the same perils together, there is less incentive for infighting. Extremely large fines are also counterproductive, due to the adverse effects they may have on the market.[59] As mentioned above, insolvency as the consequence of an antitrust fine is not in the CA's interests. The only ones that will benefit beyond the initial fine filling the treasurer's chambers, are the undertakings whose competition has now been forced out by the CA itself, saving the other undertakings all the hard work. As competition

[56] Wils (2016), *supra* nota 49, p 17.
[57] Stephan, A. An Empirical Assessment of the European Leniency Notice. Journal of Competition Law and Economics, 2009, Vol. 5(3). heinonline.org/HOL/Page?handle=hein.journals/jrcolaec5&start_page=537&collection=journals&id=543 (5.3.2017), pp 537-561.
[58] Wils (2016), *supra* nota 49, p 17.
[59] *ibid*, pp 23-25.

is diminished, the consumer loses, as per the rules of capitalism and free market.[60]

There is no perfect model for a leniency policy. Compromises will always be necessary in order to satisfy the demands of existing legislation and policy goals, and time is needed to sandpaper the faults. This can be observed from the following chapters in which the evolution of the Leniency Policy of the European Commission will be studied.

[60] Bayoumi (2004), *supra* nota 40.

2. The European Commission's Leniency Notices

2.1. Presenting the Leniency Notices

The Leniency Notices of 1996, 2002 and 2006 are the most important pieces of the Commission's Leniency Police, as they dictate the terms on which the Commission offers leniency. For this reason, it is necessary to review them thoroughly and with appropriate fidelity. The Notices themselves have greatly increased in lucidity since the first iteration, and the 2006 edition is a far cry from the original. Indeed, vagueness and unclarity have been some of the greatest causes for criticism of the Notices throughout the years of their implementation.[61] The following chapters will present the three Leniency Notices, their subject matter, implications and criticism.

2.2. 1996 Leniency Notice

The Commission under Jacques Delors published its White Paper on Growth, Competitiveness, and Employment during the turbulent year of 1993, when Europe was facing recession and around 10% of the workforce were unemployed. The paper called for numerous measures to help the newly formed European Union steer its economy back on the right track and to stay competitive on the global market. One of these measures was to develop the single market by providing a favourable business environment, in which ensuring competition was a key issue.[62] The Commission saw combating cartels as an important aspect in this endeavour, and as a result published its first leniency notice, probably at least partly inspired by the US Amnesty Program of 1993,[63] the Commission Notice on the non-imposition or reduction of fines in cartel cases in 1996.[64]

The 1996 Commission Notice on the non-imposition or reduction of fines in cartel cases sets out the criterion under which a participant to a cartel may be granted either a reduction of a fine, or even full immunity. The Notice begins by justifying the need to combat cartels, and that the interest

[61] Little, D. R. European Commission's Revised Leniency Notice for Cartel Cases. Trinity College Law Review, 2007, 10. heinonline.org/HOL/Page?handle=hein.journals/trinclr10&start_page=136&collection=journals&id=145 (5.3.2017), pp 136-144.
[62] Commission of the European Communities. Growth, competitiveness, employment: The challenges and ways forward into the 21st century, White Paper, Bulletin of the European Communities Supplement 6/93, 5.12.1993. aei.pitt.edu/1139/1/growth_wp_COM_93_700_Parts_A_B.pdf (5.3.2017)
[63] Stephan, A. An Empirical Assessment of the 1996 Leniency Notice. Working paper, ESRC Centre for Competition Policy and The Norwich Law School, University of East Anglia, September 2005. competitionpolicy.ac.uk/documents/8158338/8256120/CCP+Working+Paper+05-10.pdf (5.3.2017)
[64] Commission. Commission notice on the non-imposition or reduction of fines in cartel cases, OJ 18.7.1996 eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31996Y0718(01)&from=EN (5.3.2017)

to grant favourable treatment to colluding undertakings in exchange for cooperation in the investigation of a cartel can outweigh the interest to fine them. The possibilities for favourable treatment established in the Notice are (i) non-imposition of a fine or a very substantial reduction in its amount; (ii) substantial reduction in a fine; and (iii) significant reduction in a fine.

To qualify for the (i) non-imposition of a fine or a very substantial reduction in its amount (75% - 100%), an undertaking must a) inform the Commission of the cartel before the Commission has undertaken an inspection by decision, provided that it does not yet have sufficient information to establish the existence of the cartel; b) be the first to provide decisive evidence of the cartel; c) immediately end its involvement in the cartel upon informing the Commission of its existence; d) provide the Commission with all the relevant information, documents and evidence available to it, and to maintain a continuous and complete cooperation throughout the investigation; e) not have compelled another undertaking to partake in the cartel, acted as an instigator or played a determining role in the cartel.

In order to qualify for a (ii) substantial reduction in a fine (50% - 75%), the undertaking concerned must satisfy the points b) to e) of the previous section and disclose the cartel to the Commission after it has undertaken an investigation (dawn raid) on the premises of the parties to the alleged cartel without being able to obtain necessary evidence to initiate the procedure leading to a decision.

To qualify for a significant reduction in a fine (10% - 50%), it must cooperate with the Commission without having met all the conditions for options (i) or (ii). The notice gives two examples (providing the Commission with evidence which materially contribute to establishing an infringement before a statement of objections is sent; or informing the Commission of not substantially contesting the facts on which the Commission bases its allegations, after receiving a statement of objections), but makes no mention of any definite criterion.

The undertaking applying for favourable treatment under the 1996 Leniency Notice should contact the Directorate-General for Competition. Only persons empowered to represent the undertaking may do this. The Commission will determine whether the undertaking qualifies for favourable treatment under points (i), (ii) or (iii), or even none at all, at the adoption of a decision in the case.

As the conditions for qualifying apply throughout the procedure, granting immunity or a reduction before its end would be appropriate. Failure to meet any of the conditions at any point of the procedure will result in the loss of the relevant favourable treatment. The Notice does not prejudice any civil law consequences in relation to partaking in the cartel. The name and role of the undertaking in the cartel will be displayed in the decision in all cases.

The 1996 Leniency Notice was considered a success by the Commission, and was hailed by Competition Commissioner Mario Monti as 'instrumental'.[65] The number of cartel cases under the 1996 leniency notice (1996-2003) amounted to a total of 38 cases, compared to the 23 cases between 1990-1995. The total amount of fines before reductions rose to €6.713.100.000 from €1.006.300.000.[66] According to the Commission, a total of 188 applications for leniency were made under the 1996 notice.[67] The decision not to impose any fine or to grant a very substantial reduction (75% to 100%), or a significant reduction (50% to 75%) was made in 17 cases. A lesser reduction was granted in roughly half of the cases, as estimated by the Commission. Looking at the numbers, the 1996 Leniency Notice indeed appears a success. The number of total cartel cases by the Commission rose, and the amount of fines increased sharply. However, the Leniency Notice drew much criticism from scholars, and the impressive numbers have been attributed to the success of the US antitrust enforcement and chance, rather than the quality of the Commission's Leniency Policy.[68]

The 1996 Leniency Notice was criticised for being vague and leniency applicants being left out in the dark. First of all, the requirements for full immunity in the notice dictated that the enterprise had to bring in evidence before the Commission had initiated an investigation on the cartel in question. However, the applicants had no way of knowing if this was the case, and were thus forced to 'fly in the dark' in this regard. Additionally, as the Commission would only determine the level of reduction the enterprise would receive, if any, at the end of the whole process, which usually

[65] Commission. Commission launches debate on draft new leniency rules in cartel probes. Press release, 18.6.2011. europa.eu/rapid/press-release_IP-01-1011_en.htm (5.3.2017)
[66] Brenner, S. An empirical study of the European corporate leniency program. International Journal of Industrial Organization, 27 (6), November 2009. ac.els-cdn.com/S0167718709000290/1-s2.0-S0167718709000290-main.pdf?_tid=8c61e0be-fce2-11e6-9522-00000aacb35d&acdnat=1488196243_7e2c10280b180b703545cb680443d79e (5.3.2017), pp 639–645.
[67] Commission. Joint answer given by Ms Kroes on behalf of the Commission to written questions E-0890/09 , E-0891/09 , E-0892/09. Parliamentary questions, 2.4.2009. www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2009-0892&language=EN (5.3.2017)
[68] Stephan (2005), *supra* nota 50, pp 3-7.

took several years with the applicants not necessarily having any information on which to base their expectations.

Almost ¾ of the cartels investigated under the 1996 Notice were also subject to prior or simultaneous investigation in the United States, implying that the US Department of Justice's Amnesty Programme was more efficient than the Commission's Leniency Notice,[69] as it was able to attract applicants in international cartels quicker than the Commission. Another argument for the unattractiveness of the Leniency Notice is that many of the enterprises applying for leniency under had been participants in cartels that had already failed, meaning that for ongoing cartels continuing to collude was more beneficial than applying for leniency under a relatively uncertain programme.[70]

The 1996 Leniency Notice appears not to have been such a success as the Commission would have maybe liked, and in 2002 the Commission published a revised version of the Leniency Notice, as it considered having accumulated enough experience on the matter.

2.3. 2002 Leniency Notice

After five years of implementation, the Commission addressed the criticism of the 1996 Leniency Notices' vagueness in the 2002 Commission notice on immunity from fines and reduction of fines in cartel cases, stating that "[...] effectiveness would be improved by an increase in the transparency and certainty of the conditions on which any reduction of fines will be granted. A closer alignment between the level of reduction of fines and the value of a company's contribution to establishing the infringement could also increase this effectiveness."[71] The new notice replaced the 1996 version from 14.2.2002 in all cases in which no undertaking had yet contacted the Commission for favourable treatment.

The 2002 Leniency Notice concerns cartels between competitors, thus not applying to vertical cartels. The Notice justifies the need to combat cartels, the interest to grant favourable treatment to colluding undertakings that disclose the cartel and cooperate willingly over the interest to fine

[69] Stephan (2009) *supra* nota 47, pp 540-544.
[70] *ibid*, pp 540-544.
[71] Commission notice on immunity from fines and reduction of fines in cartel cases (2002/C 45/03), OJ 19.2.2002. eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52002XC0219(02)&from=EN (5.3.2017)

them, and acknowledges the benefit an increase in transparency and certainty in the leniency process would have to accomplish these goals, and that the revision of the 1996 Leniency Notice is thus warranted. The favourable treatment consists of two main alternatives; a) immunity from fines and b) reduction of a fine.

In order to qualify for (a) immunity from fines, the undertaking must either (i) be the first to submit evidence which in the Commission's view will enable it to carry out an investigation on the alleged cartel and that the Commission did not have sufficient information to carry out an investigation before; or to (ii) be the first to submit evidence on a cartel which in the Commission's view will enable it to find an infringement of Article 81 EC (Article 101 TFEU), and that the Commission did not have sufficient evidence to find such infringement before, and that no undertaking has already been granted conditional immunity under point (i) in the same case. Additionally, the applicant undertaking must fulfil the cumulative conditions to 1) cooperate fully, continuously and expeditiously throughout the procedure and provide the Commission with all relevant evidence in its possession or available to it, and to swiftly answer to any Commission's relevant request; 2) end its involvement with the alleged cartel no later than at the time it submits the evidence under points (i) or (ii); and that 3) the undertaking did not take steps to coerce other undertakings to participate in the cartel.

When applying for immunity under the 2002 Leniency Notice, the applicant undertaking should contact the Directorate-General for Competition. The undertaking will be immediately informed if immunity under points (i) or (ii) is not available. If immunity under points (i) or (ii) is available, the undertaking must immediately provide the Commission with all the relevant evidence; or initially present the evidence in hypothetical terms, in which case it must present a list of evidence it shall disclose at a later agreed date. The undertaking will be provided with a written acknowledgement of its application. Once the evidence has been verified as meeting the conditions of points (i) or (ii), the undertaking will be granted conditional immunity. In case of hypothetical evidence, the conditional immunity may be granted once the evidence has been provided by the undertaking and verified as meeting the previous conditions and corresponding to the list the undertaking earlier provided. In case the evidence fails to meet the conditions, the undertaking may withdraw it or request the Commission to consider it for b) reduction of a fine. The Commission will not consider other applications for immunity before taking a position on an

existing application. If the undertaking has met all the conditions described above, it will be granted immunity from fines in the Commission's decision at the end of the procedure.

To qualify for b) a reduction of a fine, the undertaking must provide the Commission with evidence that holds significant added-value to the evidence already at the Commission's possession; and to end its involvement with the cartel by the time it submits the evidence. 'Added value' refers to the quality of the evidence and its value in aiding the Commission establish its case. The Commission will establish in its decision at the end of the procedure whether or not the applicant undertaking for a reduction of fines has provided it with evidence holding sufficiently significant added value. The first undertaking to meet these criteria will be granted a reduction of 30% - 50%, the second undertaking a reduction of 20% - 30%, and subsequent undertakings a reduction of up to 20%. To determine the exact reduction, the Commission will take into account the time at which the evidence was disclosed, the added value it represented. The extent and continuity of the undertakings cooperation may also be considered. Any previously unknown evidence that serves to increase the level of gravity of the infringement of the undertaking that disclosed said evidence will not be taken into account when setting the fine for that undertaking.

The applicant undertaking for a reduction in a fine should provide the Commission with evidence of the relevant cartel. The undertaking shall be presented with a receipt of the date and time on which it disclosed the evidence. The Commission will not consider any submissions of evidence before it has taken a position on any existing application for a reduction of a fine in the same case. If the evidence disclosed represents sufficient added value, the undertaking will be notified in writing of the Commission's intention of applying a reduction of a fine in its decision at the end of the procedure without prejudice to the Commission's final position. Failure to meet any of the requirements set out in the Notice may result in the loss of any favourable treatment. The Notice does not prejudice any civil law consequences in relation to partaking in the cartel.

The 2002 Leniency Notice was able to clarify some of the issues with the 1996 Notice. Applicants for immunity would now be informed for both the unavailability of immunity, or the approval for conditional immunity. The vagueness of the terms 'instigator' and 'determining role' has been replaced with the term 'coerce' when it comes to the criteria for immunity from fines, which may offer some simplification. The requirement for the evidence in fine reduction application to possess

significant added value still provides for a subjective criterion to be fulfilled.

Under the 2002 Leniency Notice the Commission received 107 applications for immunity and 116 applications for reduction of fines. Conditional immunity was granted in 58 cases, and retracted in one.[7273] By 2007 a total of nine cartel decisions under the 2002 Notice had been handed out. Of these cases, eight had been revealed by colluders, all of whom received immunity. Three cases were simultaneously investigated by the US Department of Justice, which implied that the Commission was catching up.[74] A less encouraging observation was that four of the cases concerned the chemical industry, and included the repeat offenders Atofina, Degussa, Solvay, AkzoNobel and Bayern AG Group.

2.4. 2006 Leniency Notice and 2015 Amendment

The 2002 Leniency Notice was once again revised in December 2006, further developing the notice.[75] Its main goals were to provide more guidance to the applicant undertakings, and to make the whole process more predictable and transparent.[76] It was amended in 2015. When referring to 2006 Leniency Notice, the author will consider the Notice in the form it stands at present, in 2017, unless otherwise stated.

The 2006 Notice, like the 2002 version, gives out the requirements and procedure for applying for leniency, as well as a new addition, the regulation of corporate statements for qualification. Once again, the Notice only applies to undertakings partaking in cartels with competitors. Undertakings colluding in vertical cartels are not covered and are unable to apply for leniency.

The 2006 Notice offers the possibility of receiving either full immunity or a reduction of a fine.

[72] Commission. Joint answer given by Ms Kroes on behalf of the Commission to written questions E-0890/09 , E-0891/09 , E-0892/09. Parliamentary questions, 2.4.2009. www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2009-0892&language=EN (5.3.2017)

[73] Van Barlingen. B., Barennes. M. The European Commission's 2002 Leniency Notice in practice, European Commission, Competition Policy Newsletter, Vol 3, Autumn 2005. ec.europa.eu/competition/publications/cpn/2005_3_6.pdf (5.3.2017)

[74] Stephan (2009) *supra* nota 47, p 557.

[75]European Commission. Communication from the Commission. Amendments to the Commission Notice on Immunity from fines and reduction of fines in cartel cases (2015/C 256/01). OJ 5.8.2015. eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015XC0805(01)&from=EN (5.3.2017)

[76] Schroeder, D. Squaring the Circle in Cartel Cases: Compliance, Fines, Leniency and Settlement from Private Practitioner's Perspective. Competition Law International, 2008, 4(2). heinonline.org/HOL/Page?handle=hein.journals/cmpetion4&start_page=42&collection=journals&id=103 (5.3.2017), pp 39-42.

There are two ways to gain immunity: by providing the Commission with information that enables it to (i) carry out a targeted inspection; or (ii) find an infringement of Art 101 TFEU in connection with the alleged cartel. For the undertaking to satisfy the demands of option (i), it must disclose to the Commission a) a corporate statement which includes detailed information of the cartel arrangement; the name and address of the submitter of the application, and all the other undertakings that collude or did so in the past; relevant information of all the persons that are or have been, to the applicant's knowledge involved in the cartel; information on whether any other CA has, or has been approached in relation to the alleged cartel, and b) other evidence relating to the alleged cartel, especially contemporaneous. In order to satisfy the demands for option (ii), the Commission must not have had at the time of the submission necessary evidence to find an infringement of Art 101, and that no undertaking has been granted conditional immunity under point (i) in the case. The undertaking must be the first to provide contemporaneous and incriminating evidence of the alleged cartel together with a corporate statement containing the information specified under (i)(a). Additionally, in order to qualify for immunity, the undertaking must also firstly cooperate genuinely, fully, expeditiously and on a continuous basis. This includes providing the Commission with any available relevant information as soon as possible, remaining at the Commission's disposal to swiftly answer any relevant request, making present, and if possible former employees available for interviews, not destroying, falsifying or concealing relevant information, and not disclosing the fact or any content of its application prematurely, unless otherwise agreed. Secondly, the undertaking must end colluding in the cartel immediately, unless it could jeopardise the investigation. Thirdly, the undertaking must not have destroyed, falsified or concealed evidence of the alleged cartel nor disclosed the fact or any of the content of its contemplated application, except to other competition authorities. Any undertaking that attempted to coerce others to either join or remain in the cartel will be unable to receive immunity, but reduction of a fine may be available, given that all the other conditions are fulfilled.

As before, the undertaking applying for immunity shall contact the Directorate General for Competition, and either apply for a marker, or immediately file a formal application. The marker is a way of the undertaking to secure its place as the first through the door, at a point in time when it does not yet possess all the necessary information, or has not had the time to prepare a formal application. To secure a marker, the undertaking must provide the Commission with information of its contact details, members of the alleged cartel in question, affected products and markets, the

estimated duration of the cartel and the nature of the cartel conduct, any past or possible future leniency applications in relation to the cartel, as well as a justification for its request for the marker. Once being granted a marker, the undertaking will be informed by the Commission of the date by which the undertaking must perfect the marker by providing all the necessary information required for immunity. Otherwise the applicant has the option of making a formal application that includes all the information required in (i) or (ii) and subsequent points, or it may present the evidence in hypothetical terms, in which case it must present a detailed list of the evidence it intends to provide later. The information requirements for the hypothetical application are otherwise the same as when applying for a marker, but the name of the applicant undertaking and other members of the cartel do not have to be disclosed before the rest of the evidence is submitted. In case of a successful formal application, the Commission will grant the applicant undertaking conditional immunity and inform it in writing. If the application was made as hypothetical, the Commission will grant conditional immunity and inform the applicant in writing after the it has disclosed the evidence required in time, and it has been found to fulfil the requirements. If immunity is not available, or the applicant has not fulfilled the conditions of options (i) or (ii), the Commission will inform the undertaking in writing. In such case the undertaking may withdraw the evidence or request the Commission to consider it for a reduction of a fine. The Commission will not consider other applications for immunity before it has taken a position on an existing application. Final immunity will be granted at the end of the procedure, unless the undertaking has failed to cooperate with the Commission as required, continued to partake in the cartel or destroyed, falsified or concealed evidence prior to its application, or is found to have been a coercer in the cartel, in which case the immunity will be withdrawn.

In order to qualify for reduction of a fine, the applicant undertaking must provide the Commission with evidence of significant added value compared to the evidence currently at the Commission's disposal, as well as fulfil the conditions for genuine, full, continuous and expeditious cooperation with the Commission, not partaking in the cartel after the submission of the application, and not having destroyed, falsified or concealed evidence prior to the submission of the application. The more direct and incriminating value the evidence has, the better. The first undertaking to provide significant added value will receive a reduction of a fine of 30% - 50%, the second 20% - 30%, and subsequent undertakings a reduction of up to 20%. If the undertaking is the first to provide evidence that adds to the gravity of the infringement, and thus to the amount of the fine, that

evidence will not be taken into account when setting the fine for that undertaking.

In order to qualify for a reduction of a fine, the applicant undertaking must make a formal application to the Commission disclosing all the relevant evidence. The Commission will not take any position on an application for a reduction of a fine before it has taken a position on any existing applications for conditional immunity from fines in relation to the same alleged cartel. If the application is successful, the Commission will inform the undertaking in writing that it intends to apply a reduction of a fine at the end of the proceedings. The Commission will also inform the undertaking in similar fashion if it does not qualify for a reduction. The Commission will determine in its final decision at the end of the procedure whether the evidence held significant added value, whether all the relevant additional conditions were met, and the exact level of reduction the undertaking will receive.

The corporate statement is a voluntary presentation by an undertaking. The statement may be given orally at the Commission's premises. The undertaking may correct their statement within a given time limit. Access to the statements is restricted to addressees of a statement of objections and their legal counsel, and they may only be accessed at the Commission's premises, and may not be copied. The statements will only be used for judicial or administrative proceedings. The Commission will not at any time transmit leniency corporate statements to national courts for use in actions for damages for breaches of those Treaty provisions.

The 2006 Leniency Notice must be to an extent be studied in conjunction with the 2006 Commission Guidelines on the method of setting fines. The Fine Guidelines set the maximum fine as 10% of the undertakings total turnover for the previous year.[77] Meanwhile the Leniency Notice awards the cartel whistle blower more room for manoeuvre than before, thus effectively attempting to both make the stick bigger and the carrot tastier. Noteworthy changes to the Leniency procedure compared to the earlier versions include the Commission's approach to permit further collusion in the cartel if necessary to ensure the integrity of the investigations, the possibility to obtain a marker to protect the applicant's place in the queue, and the additional guidance on the part of the Commission. These factors improve the undertakings ability to form legitimate expectations and

[77] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (2006/C 210/02), OJ 1.9.2006. eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006XC0901(01)&from=EN (5.3.2017)

alleviate the risks of applying for leniency. The changes also increase the effectiveness of the investigation. Previously the applicant would have to cease all involvement in the cartel by the time it submitted its evidence to the Commission. This in turn could cause the other members to realise something was wrong, effectively working as an early warning system, and to give them a chance to prepare for the possibility of an impending investigation.[78] The 2015 amendments[79] subsequently added the notions that the Commission will not transfer corporate statements to national courts for use in actions for damages for breaches of those Treaty provisions, and further defined the access to the Commission files regarding the investigation. Both these amendments improve the legal protection of the applicant undertakings.

The 2006 Leniency Notice has not been without criticism, though. There is still no way of knowing just how useful the information provided to the Commission will be, as the amount and quality of evidence already at the disposal of the Commission is unknown.[80] The Commission has also added new criterion the applicant should fulfil, such as the evidence provided should be 'contemporaneous' and 'incriminating', and the cooperation 'genuine'. This gives the Commission somewhat considerable leeway in determining whether or not the applicant shall qualify for immunity or what the level of fine reduction, if any, shall be. The original wordings of the 2006 Leniency Notice also left out the possibility of corporate statements being used in civil proceedings in certain cases. This 'loophole' was closed with the 2015 amendment, but one could argue that nine years is a long period for such an oversight. The fact that such an amendment eventually was made, in the author's opinion proves that this possibility became, or at least had the very real potential of becoming an actual problem. The marker procedure was criticised for having a possible 'chilling' effect, as the rush to be the first past the door in order to obtain full immunity would be halted as soon as any applicant was able to obtain a marker.

From the statistics published by the Commission,[81] it would appear that the 2006 Notice continued to function at least as well as the 2002 version. The number of cartel cases decided remains similar, but there is a considerable increase in the fines imposed. The fines from the 2005-2009 period,

[78] Stephan (2009) *supra* nota 47, pp 553-554.
[79] Commission. Communication from the Commission: Amendments to the Commission Notice on Immunity from fines and reduction of fines in cartel cases (2015/C 256/01), OJ 5.8.2015. eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015XC0805(01)&from=EN (5.3.2017)
[80] Little (2007), *supra* nota 48, pp 136-144.
[81] Commission. Cartel statistics, 2017. ec.europa.eu/competition/cartels/statistics/statistics.pdf (5.3.2017)

€7.920.497.226,50, are more than double the amount of all fines combined from 1990-2004. The level of fines imposed has since stayed roughly the same.

The 2006 Leniency Notice remains the longest standing of the three notices of the Commission, with more than 10 years since its implementation. The European Competition Network's Model Leniency Programme of 2012[82] is evidently largely influenced by it, suggesting that the 2006 Notice is a reasonably complete document, well suited for its role in the Commission's Competition Policy.

[82] European Competiton Network. ECN model leniency programme, 2012. ec.europa.eu/competition/ecn/mlp_revised_2012_en.pdf (5.3.2017)

3. Assessment of the European Commission's Leniency Policy 1996-2017

3.1. The effects of the Leniency Policy

Since the first Leniency Notice in 1996, the Commission's Leniency Policy has evolved considerably. Where the first version was a vague paper of little more than a thousand words, the current iteration is almost four times longer. The Commission has in its Leniency Notices noted that the Notice will be revised if the Commission deems it necessary after acquiring sufficient experience. In this section of the thesis the author will assess the Leniency Policy's strengths and shortcomings further in depth for the time period of 1996 to 2017.

The success of a leniency policy could in simple terms be observed from the amount of leniency applications and the number of decisions that follow. In this light, the introduction of the Leniency Notices has been a success.

As can be seen from the tables,[83] the amount of decided cases and fines greatly increases for 2000 - 2004 and subsequent periods. When considering the impact of the Leniency Notices introduced, it serves to remember that cartel investigations often take several years,[84] which in turn causes a 'lag' in statistics. A study concerning 52 Commission cartel decisions between 2004 and 2014 revealed that in 49 of the cases at least one undertaking had applied for leniency. Additionally, 56% of all the 333 undertakings involved in the 52 cases applied for leniency. 46% were granted a reduction in fines, and 11% were granted full immunity.[85] Clearly the Leniency Notices have been at least partly successful. However, numbers are not everything, as leniency has implications beyond just the number of caught colluders.

3.2. Early inefficiency and dependence on the US Leniency Programme

As previously noted, the U.S. Department of Justice's Corporate Leniency Policy of 1993 was an inspiration and an example for the 1996 Leniency Notice. Studies have since shown that the Corporate Leniency Policy provided considerable tug assistance to the 1996 Notice, and played a large part in the early European leniency applicants coming forward.[86] To understand why, it is

[83] See Annexes, Table 1: Cartel cases decided by the European Commission - period 1990 - 2017, and Table 2: Fines imposed (adjusted for Court judgments) - period 1990 – 2017
[84] Slaughter and May. The EU Competition Rules on Cartels. March 2006. www.slaughterandmay.com/media/64584/the_eu_competition_rules_on_cartels.pdf (5.3.2017)
[85] Wils (2016), *supra* nota 49, p 10.
[86] Stephan (2009) *supra* nota 47, pp 538-540.

necessary to take a brief look at the American policy.

The single most important difference between the American and European systems is that in the United States, colluding in cartels has been criminal offence throughout the nation since the 1890 Sherman Act, for which fines and jail sentences may be passed to individuals in addition to the fines for the undertakings.[87] This has not only applied to US citizens, but the USA has routinely sought extradition of foreign cartel leaders. As of 2004, an individual may face up to 10 years of imprisonment and a fine of $1.000.000.[88] This is a stark division to the EU, where the executives of an undertaking participating in a cartel face no personal risk. Additionally, the US leniency policy offers more anonymity to the colluders than the European policy. Undertakings in the US thus have a stronger incentive to apply for leniency.

Considering, it is no wonder that when the US extended its conciliatory hand in the form of the 1993 Corporate Leniency Policy and 1994 Individual Leniency Policy, cartel colluders were quick to answer. When the 1996 Leniency Notice was introduced in the EU, naturally the reaction was similar. What is peculiar, however, is that many of the EU leniency applicants were already subject to a prior or contemporaneous investigation by the US CA. Indeed, of the 23 cartel cases that were triggered by a leniency application and in which the Commission adopted a decision between 1996 and 2007, 15 had already been concluded or were subject to simultaneous investigation in the US.[89] This leaves just eight cases that were initiated solely in the EU.
Of the remaining eight cartels, there is evidence of failure long before any application for leniency was made. Only Copper Plumbing[90] was still operating when the Commission was approached by Mueller.[91] The failure of the 1996 Leniency Notice to attract but one cartel that was not already under investigation in the United States, or had not already failed prior to the leniency application serves as compelling evidence for the notion that the original Notice was not an overwhelming success by itself, but was rather complemented by the superior US Leniency Policy and coincidental cartel failures.

[87] Wils (2005), *supra* nota 40, pp 10-11.
[88] *ibid*, pp 11-12.
[89] Stephan (2009) *supra* nota 47, pp 540-544.
[90] European Commission. Commission fines companies in copper plumbing tubes cartel. Press release. Brussels 3.7.2016 europa.eu/rapid/press-release_IP-04-1065_en.htm?locale=en (5.3.2017)
[91] Stephan (2009) *supra* nota 47, pp 545.

3.3. Problems with recidivism in cartel cases

The Commission has struggled with recidivism in relation to cartel involvement. Recidivism has been defined as the situation "where an undertaking continues or repeats the same or a similar infringement after the Commission or a national competition authority has made a finding that the undertaking infringed Articles 101 or 102 TFEU" in the 2006 Guidelines on the method of setting fines.[92] According to a study of cartel appeals between 1995 - 2004, it was found that there is an 'awesome level of recidivism' when it comes to cartels.[93] The 2006 Fining Guidelines provides the Commission with the possibility of increasing the basic fine for recidivist colluders by 100% per prior infringement.[94] Already before this the Commission has increased the fines of repeat offenders.[95] This was confirmed in the CJEU practice.[96] The Commission has not, however, made full use of the possibility to increase fines. It has in practice only used increments of 50%, 60%, 90% and 100% for one, two, three or four prior infringements respectively.[97] Despite this, the amount of recidivists has been on the decline.

As can be seen from the table,[98] the amount of recidivist undertakings has fallen during the period of 2006 - 2010. This would imply that the threat of increased fines has been enough to deter repeat offenders. The Commission has, and does award recidivists the same access to leniency as first time colluders.

3.4. Strengths of the Commission's Leniency Policy

For all its shortcomings, the European Commission's Leniency Policy is far from a failure. The amount of cartel decisions adopted by the Commission, as well as the amount of fines imposed

[92] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ 2006, vol 49, 1.7.2006. eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006XC0901(01)&from=EN (5.3.2017), p 4.
[93] Harding C., Gibbs A. Why go to court in Europe? An analysis of cartel appeals 1995-2004. European Law Review 3.
cadair.aber.ac.uk/dspace/bitstream/handle/2160/7917/Why%20go%20to%20court%20in%20Europe.pdf?sequence=2&isAllowed=y (5.3.2017), pp 349-370.
[94] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ 2006, vol 49, 1.7.2006. eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006XC0901(01)&from=EN (5.3.2017), p 4.
[95] Wils, W. Recidivism in EU Antitrust Enforcement: Legal and Economic Analysis. World Competition 35(1), 2012. heinonline.org/HOL/Page?handle=hein.kluwer/wcl0057&g_sent=1&collection=kluwer&id=9 (5.3.2017), pp 5-26.
[96] CJEU (8.2.2007), C-3/06 P, *Danone.* curia.europa.eu/juris/liste.jsf?language=en&num=C-3/06 (5.3.2017)
[97] Wils (2012), *supra* nota 84, pp 5-26.
[98] See Annexes, Table 3: Amount of recidivist undertakings in cartel cases.

skyrocketed after the introduction of the 1996 Leniency Notice.[99] It is thus safe to say that the Commission's Leniency Policy possesses good qualities that manifest themselves as these impressive statistics.

The first, and in the author's opinion most important, is the Commission's perseverance in applying and developing its Leniency Policy. The phrase "the Commission will examine whether it is necessary to modify this notice once it has acquired sufficient experience in applying it" from the 2002 Leniency Notice[100] captures well the stance that the Leniency Policy is not finished, but will continue to improve in the future. Curiously the same sentiment is absent from the 2006 Notice,[101] but the publication of the 2015 Amendment on the 2006 Leniency Notice proves that the previous approach has not disappeared. As has previously in this paper been found, the 1996 Leniency Notice was nowhere near the document the current iteration is. Nevertheless, diligent development of the Policy has made it a useful tool in combating cartels.

Since 2004, the Commission also enjoys the benefit of the European Competition Network,[102] an organisation facilitating the cooperation of EU NCAs. The combined efforts of the European NCAs along with the impressive investigative machinery of the Commission advantage the effective antitrust enforcement within the Union, but also compliment the Leniency Policy itself, making it more attractive through the increased risk of detection by CAs, and other derivative reasons outlined in Chapter One.

[99] See Annexes, Table 1: Cartel cases decided by the European Commission - period 1990 - 2017, and Table 2: Fines imposed (adjusted for Court judgments) - period 1990 – 2017
[100] Commission notice on immunity from fines and reduction of fines in cartel cases (2002/C 45/03), OJ 19.2.2002. eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52002XC0219(02)&from=EN (5.3.2017)
[101] Commission notice on immunity from fines and reduction of fines in cartel cases (2006/C 298/11) OJ 8.12.2006. eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006XC1208(04)&from=EN (8.4.2017)
[102] European Commission. European Competition Network, Overview. ec.europa.eu/competition/ecn/index_en.html (8.4.2017)

4. Hallmark EU cartel cases in which leniency has been applied

4.1. Vitamins

On the 21st of November, 2001, the Commission announced that it had fined eight companies for a total of €855.22 million.[103] The eight undertakings in question, F. Hoffmann-La Roche AG, BASF AG, Aventis SA, Solvay Pharmaceuticals BV, Merck KgaA, Daiichi Pharmaceutical Co Ltd, Eisai Co Ltd and Takeda Chemical Industries Ltd, had been found to have colluded in eight distinct cartels concerning vitamin products (Vitamin A, Vitamin E, Vitamin B1, Vitamin B2, Vitamin B5, Folic Acid, Vitamin C, Vitamin D3, Vitamin H, Beta Carotene, Carotinioids), from 1989 to 1999. The cartels were formed as a response to the rapid increase of Chinese exports of vitamins from the 80's to the 90's, and operated by sharing markets and fixing prices.[104] The main culprits were F. Hoffmann-La Roche AG and BASF AG, of which the former was an instigator in almost every cartel uncovered, and BASF AG following the lead. This was reflected in the fines, as the two were fined for €462 million and €296.16 million respectively, for a total of €758.16 million, some 89% of the gross amount of fines.

The Vitamins case was the first time that the Commission granted full immunity to a leniency applicant. Aventis SA came forward with information regarding two of the cartels it had colluded in (Vitamin A, Vitamin B), and provided the Commission with decisive evidence. It was however fined for its involvement in still another cartel it did not disclose (Vitamin D3). F. Hoffmann-La Roche AG and BASF AG were also granted a 50% reduction in fines for their cooperation in the case. The rest of the fined undertakings also cooperated, and were granted lesser reductions.[105] While the case was an important landmark in the EU antitrust enforcement, it was still during the period when cartel cases were initiated in the US first, and the EU second, as discussed in Chapter 3.1.. So was the case with Vitamins, as investigation by the US CA preceded that of the Commission.[106]

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[103] European Commission. Press release, Commission imposes fines on vitamin cartels. Brussels, 21.11.2001. europa.eu/rapid/press-release_IP-01-1625_en.htm?locale=en (8.4.2017)

[104] Clarke, *et al.* Deterrent Effects of National Anticartel Laws: Evidence from International Vitamins Cartel. 48.3 Antitrust Bull 2003. heinonline.org/HOL/Page?handle=hein.journals/antibull48&start_page=689&collection=journals&id=697 (8.4.2017), pp 697-725.

[105] European Commission. Press release, Commission imposes fines on vitamin cartels. Brussels, 21.11.2001. europa.eu/rapid/press-release_IP-01-1625_en.htm?locale=en (8.4.2017)

[106] First, H. The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law. Antitrust Law Journal 68(3), 2001. heinonline.org/HOL/Page?handle=hein.journals/antil68&start_page=711&collection=journals&id=721 (5.3.2017),

4.2. TV and computer monitor tubes

On the 5th of December, 2012, the Commission announced it had fined seven undertakings for €1.470.515.000 for their involvement in a TV and computer monitor tubes cartels spanning from 1996 to 2006. The colluding undertakings had fixed prices, shared markets, allocated customers and restricted their output. The cartels covered the EEA. Of the colluding undertakings, Chunghwa, Samsung SDI, Philips, and LG Electronics participated in both cartels, while Technicolor, Panasonic, Toshiba and MTPD participated in only the TV tubes cartel. Cartel meetings between top executives were often conducted under the guise of golf games, and lower level meetings were held on a basis ranging from quarterly to weekly. Documents revealed in the investigation proved that the colluding undertakings were completely aware of the illegal nature of their actions and took particular care to dispose of evidence relating to the infringement.[107]

Investigation on to the cartels begun in November 2007 as the Commission launched unannounced inspections,[108] and subsequently issued a statement of objections in November 2009.[109] Chunghwa being the first to come forward with information regarding the cartels was awarded full immunity from fines, while Samsung SDI, Philips and Technicolor were granted reductions in fines of 40%, 30% and 10% respectively. One of the companies was granted a reduction based on its inability to pay the original fine. The fines are presented in Table 5.[110]

Following the Commission's decision, Panasonic and MTPD,[111] Samsung SDI,[112] LG Electronics,[113] Philips[114] and Toshiba[115] took the matter to CJEU General Court. The General

pp 711-734.

[107] European Commission. Press release, Antitrust: Commission fines producers of TV and computer monitor tubes € 1.47 billion for two decade-long cartels. Brussels, 5.12.2012. europa.eu/rapid/press-release_IP-12-1317_en.htm (8.4.2017)

[108] European Commission. Press release, Antitrust: Commission carries out inspections in the cathode ray tubes sector. Brussels, 8.11.2007. europa.eu/rapid/press-release_MEMO-07-453_en.htm (8.4.2017)

[109] European Commission. Press release, Antitrust: Commission confirms sending Statement of Objections to alleged participants in TV and computer monitor tubes cartel. Brussels, 26.11.2009. europa.eu/rapid/press-release_MEMO-09-525_en.htm?locale=en (8.4.2017)

[110] See Annexes, Table 5: Total fines in the TV and computer monitor tubes cartel case.

[111] CJEU 9.9.2015, T-82/13, *Panasonic and MTPD.* curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=T-82/13&td=ALL (8.4.2017)

[112] CJEU 9.9.2015, T-84/13, *Samsung and Others.* curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=T-84/13&td=ALL (8.4.2017)

[113] CJEU 9.9.2015, T-91/13, *LG Electronics.* curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=T-91/13&td=ALL (84.2017)

[114] CJEU 9.9.2015, T-92/13, *Philips.* curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=T-92/13&td=ALL (8.4.2017)

[115] CJEU 9.9.2015, T-104/13, *Toshiba.* curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=T-

Court delivered its judgement on the 9th of September 2015, upholding the majority of the Commission's decision. The fines concerning Panasonic and MTPD, as well as Toshiba were adjusted by the General Court, but the rest of the actions were dismissed. All undertakings save for Philips appealed the judgements. As of present, the appeals of Panasonic and MTPD, Samsung SDI and Toshiba have been dismissed and the LG Electronics case is still in progress.[116][117][118][119]

4.3. Euro interest rate derivatives

On the 7th of December, 2016, the Commission fined Crédit Agricole, HSBC and JPMorgan Chase for a total of €485 million for their involvement in a euro interest rate derivatives cartel. The cartel included seven banks, Barclays, Crédit Agricole, HSBC, JPMorgan Chase, Deutsche Bank, RBS and Société Générale, covering the EEA. The cartel operated by sharing trading and corporate information, which enabled them to distort the normal pricing procedures. The cartel operated from September 2005 to May 2008.[120]

The Commission initiated its investigation by conducting dawn raids in October 2011. In early 2013, The Commission opened proceedings and imposed total fines of €824.583 million on Barclays, Deutsche Bank, Société Générale, and RBS. Barclays received full immunity for being the first to cooperate with the Commission, while RBS, Deutsche Bank and Société Générale received reductions of 50%, 30% and 5% respectively under the 2006 Leniency Notice. The aforementioned undertakings also received a further 10% reduction for agreeing to settle the case with the Commission in December 2013. As for Crédit Agricole, HSBC and JPMorgan Chase, the case continued until 2016 as they were unwilling to settle.[121][122]

The case was significant not only for the high amount of fines imposed, but for the nature of the collusion. Manipulating financial instrument benchmarks is a very serious offense, and the case

104/13&td=ALL (8.4.2017)
[116] CJEU 7.7.2016, C-608-15 P, *Panasonic.* curia.europa.eu/juris/liste.jsf?num=C-608/15&language=en (8.4.2017)
[117] CJEU 9.3.2017, C-615/15 P, *Samsung.* curia.europa.eu/juris/liste.jsf?num=C-615/15&language=en (8.4.2017)
[118] CJEU 18.1.2017, C-623/15 P, *Toshiba.* curia.europa.eu/juris/liste.jsf?num=C-623/15&language=en (8.4.2017)
[119] CJEU C-588/15 P, *LG Electronics.* curia.europa.eu/juris/liste.jsf?num=C-588/15&language=en (8.4.2017)
[120] European Commission. Press release, Antitrust: Commission fines Crédit Agricole, HSBC and JPMorgan Chase € 485 million for euro interest rate derivatives cartel. europa.eu/rapid/press-release_IP-16-4304_en.htm (8.4.2017)
[121] *ibid*
[122] European Commission. Press release, Antitrust: Commission fines banks € 1.49 billion for participating in cartels in the interest rate derivatives industry. Brussels, 4.12.2013. europa.eu/rapid/press-release_IP-13-1208_en.htm (8.4.2017)

prompted the Commission to propose new European rules to prevent such actions, which were adopted in July 2016.[123]

4.4. Trucks

On the 19th of July, 2016, the Commission made public that it had uncovered a large-scale cartel in the medium and heavy truck market, and had imposed record fines of €2.926.499.000 on the colluders MAN, Daimler, DAF, Iveco and Volvo/Renault.[124] MAN received full immunity under the 2006 Leniency Notice. The case is extremely important, as it is by far the largest uncovered by the Commission, with the colluding undertakings' products amounting to roughly 9 out of 10 trucks currently produced in Europe. The collusion lasted for 14 years from 1997 until 2011, when the Commission launched dawn raids on the cartel.

The Trucks cartel begun in Brussels, January 1997. For the first seven years, meetings were concluded frequently between the senior managers of the partaking undertakings. From 2004, the collusion was organised by the participants' subsidiaries in Germany, and information transfer by email started. The collusion concerned the coordination of prices, timing for the introduction of new emission technologies to comply with the European emissions standards,[125] and the transfer of the price of these new technologies on to the customers. MAN blew the whistle in 2011 by providing the Commission with sufficient evidence to launch unannounced inspections on the premises of the partaking undertakings. A statement for objection was sent to the undertakings in 2014. For its cooperation, MAN was granted full immunity from fines under the Leniency Notice. Subsequently, Volvo/Renault, Daimler and Iveco also cooperated with the Commission, with each of them qualifying for a reduction of fine under the Leniency Notice. The aforementioned undertakings plus DAF all opted to settle under the 2008 Settlement Notice, for an additional 10% reduction of the fine. The 2008 Settlement Notice is an instrument enabling the Commission to speed up the procedure and adopt a decision faster for a 10% trade off in the fines of the concerned colluders. Scania was the only party to the cartel that decided not to settle, and the case continues. For this reason, the Commission has not yet disclosed any official publication on the Trucks cartel.

[123] European Commission. Statement, Financial benchmarks: Commission welcomes agreement on new rules to prevent manipulation. Brussels, 25.11.2015. europa.eu/rapid/press-release_STATEMENT-15-6169_en.htm (8.4.2017)
[124] European Commission. Antitrust: Commission fines truck producers € 2.93 billion for participating in a cartel. Press release. Brussels 19 July 2016 europa.eu/rapid/press-release_IP-16-2582_en.htm (5.3.2017)
[125] Commission. Transport Emissions, 27.6.2016 ec.europa.eu/environment/air/transport/road.htm (5.3.2017)

The Trucks case is a significant victory for the Commission's Leniency Policy, as it is by far the single largest cartel case in history.[126] Even though the case is still ongoing and not much information is available, it is decidedly worthy of mention. An interesting development will also be the emergence of class action law suits against the colluders. The Commission notes that "Any person or firm affected by anti-competitive behaviour as described in this case may bring the matter before the courts of the Member States and seek damages. The case law of the Court and Council Regulation 1/2003 both confirm that in cases before national courts, a Commission decision constitutes binding proof that the behaviour took place and was illegal. Even though the Commission has fined the companies concerned, damages may be awarded without being reduced on account of the Commission fine."[127] The Antitrust Damages Directive 2014/104/EU provides that "[...] anyone who has suffered harm caused by an infringement of competition law by an undertaking or by an association of undertakings can effectively exercise the right to claim full compensation for that harm from that undertaking or association."[128] With the EU member states being required to have implemented the Directive by 27th of December, 2017, the colluders may soon feel the pressure from the private sector. Indeed, many new and existing law firms have seized the moment and are now preparing class action claims against the concerned undertakings.[129] Some sources have estimated that the price damage caused by the cartel action to be around €10.500 per truck, meaning that the theoretical total damages could rise to over €100 billion.[130] While this remains to be seen, it is evidently clear that the Trucks cartel will be the source of much scrutiny in the coming years, and even decades.

4.5. The significance of the cases

One common feature all the cases share, is that immunity was granted in all of them. As has been established in Chapter 3, obtaining immunity necessitates substantial contribution to the

[126] See Annexes, Table 4: Total fines in the Trucks cartel case as of yet

[127] European Commission. Antitrust: Commission fines truck producers € 2.93 billion for participating in a cartel. Press release. Brussels 19 July 2016 europa.eu/rapid/press-release_IP-16-2582_en.htm (5.3.2017)

[128] Directive 2014/104/EU of the European Parliament and the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ 5.12.2104, Art 1. eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0104&from=fi (5.3.2017)

[129] The Road Haulage Association. European Truck Manufacturers Cartel: Register Your Interest. 2016. www.rhatruckcartelclaim.co.uk/ (5.3.2017)

[130] Bentham. Proposed Truck Cartel Claim. Media release, London, 14 November 2016 www.benthameurope.com/en/proposed-truck-cartel-claim-media-release (5.3.2017)

Commission's investigation. Whether this has been disclosing a so far undetected cartel or providing information once the investigation had started, the important aspect is that without the allure of leniency, the Commission would not necessarily have been able to prosecute the colluders as successfully as it did, or maybe at all. The success the Commission had regarding these cases cannot unequivocally be attributed to its Leniency Policy alone, but it is reasonable to assume it played a part. The cases stand out also for the extremely high fines conferred in them, even when accounting for the reductions in their amount. Fines of this magnitude have only begun to appear after the introduction of the Leniency Policy in 1996. As such, a certain correlation is possible to deduce existing between leniency and increased cartel prosecutions. The presentation of these cases was necessary in order to comprehensively demonstrate the positive effect of leniency with regards to cartel prosecution in practice.

5. Issues to be resolved for an improved Leniency Policy and the ECN+

5.1. Presented issues

As previously stated, the Commission's Leniency Policy is constantly evolving. Even though the Leniency Policy is generally considered as successful, it is not free of criticism.[131] This chapter shall explore some of the most discussed future concerns, the issue of *ne bis in idem* principle in the context of antitrust enforcement, the introduction of a 'one-stop-shop' (OSS) for leniency applications, and the possibility of cartel criminalisation within the EU, as well as examine the Commission's proposal to improve the cooperation of MS NCAs with the ECN+ programme.[132]

5.2. Ne bis in idem and the lack of harmonisation within the EU

A substantial problem in antitrust enforcement in the European Union is the fact that it consists of multiple jurisdictions, all of which have somewhat different procedures. When the Commission adopts a decision in one case, it is definite proof regarding that cartel and will surely lead to consequences in other concerned jurisdictions, such as damages claims. Damages claims will not be discussed here, as they are considered compensatory, as opposed to punitive.[133] This may deter an undertaking from applying for leniency. Different practices in different member states and the Commission will also make the coordination of leniency applications in multiple jurisdictions difficult.

Currently when a whistleblowing undertaking seeks to apply for leniency, it must do so separately in all jurisdictions concerned.[134] As the NCAs all operate more or less on the principle that the first through the door is the only one eligible for full immunity, an undertaking must thus be first through the first to disclose everywhere in order to qualify. As requirements in each jurisdiction may vary, filing an application may become a considerable hassle for the undertaking, which unsurprisingly is contradictory to the rationale of any sensible leniency programme. A curiosity

[131] Carmeliet, T. How lenient is the European Leniency system. An Overview of current (dis)incentives to Blow the Whistle. Jura Falconis, 48, 2011-2013. http://www.law.kuleuven.be/jura/art/48n3/carmeliet.pdf (8.4.2017), pp 511-512.
[132] European Commission. Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market. Brussels, 22.3.2017. ec.europa.eu/competition/antitrust/proposed_directive_en.pdf (8.4.2017)
[133] Europe Institute. Reaction to the Green Paper on damages actions for breach of EC antitrust rules. Leiden University. ec.europa.eu/competition/antitrust/actionsdamages/files_green_paper_comments/europe_institute.pdf (8.4.2017)
[134] Serban (2015, *supra* nota 21, pp 20-27.

within the Union is Malta, which still has no leniency programme,[135] though it is working on implementing one.[136] All these discrepancies within the EU do not optimally serve the purpose they were instated for; to make applying for leniency attractive.

Another issue is the *non bis in idem* principle in connection to antitrust enforcement. According to the principle no defendant can be prosecuted or punished more than once for the same offence.[137] The principle can be found in Article 4 of Protocol 7 of the European Convention on Human Rights[138] and Article 50 of the Charter of Fundamental Rights of the European Union.[139] Both have been found to have wide meaning and are applicable to antitrust enforcement within the EU.[140] As of present, there are five different scenarios in which *ne bis in idem* may be infringed.[141]

First of all, an undertaking may face double jeopardy when facing investigation by the Commission and third countries.[142] In the case *Shova Denko v Commission* the CJEU found that the defendant having already been subject to fines in the US, Canada and Japan prior to the Commission's own investigation on the matter does not necessitate consideration on the Commission's behalf as regards to the *ne bis in idem* principle, due to the specific nature of legal interests protected, excluding the application of the principle.[143]

The second scenario may arise when the Commission adopts two decisions concerning an

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[135] *ibid*, pp 20-27.
[136] Ministry for Social Dialogue, Consumer Affairs and Civil Liberties. Draft legislation. Immunity from Fines and Reduction of Fines in Cartel Investigations Regulations. ec.europa.eu/competition/antitrust/proposed_directive_en.pdf (8.4.2017)
[137] Louis., *et al*. Ne Bis in Idem, Part Bis. 34.1 World Competition 2011. heinonline.org/HOL/Page?handle=hein.kluwer/wcl0056&start_page=97&collection=kluwer&id=101 (8.4.2017), pp 99-101
[138] Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms. Strasbourg, 22.11.1984. Art 4. rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007a082 (8.4.2017), pp 32-33.
[139] Charter of Fundamental Rights of The European Union (2000/C 364/01). OJC 43, 2000. Art 50. http://www.europarl.europa.eu/charter/pdf/text_en.pdf (8.4.2017)
[140] Wils, W. The Principle of 'Ne Bis in Idem' in EC Antitrust Enforcement: A Legal and Economic Analysis (February 11, 2003). World Competition: Law and Economics Review, Vol. 26, No. 2, 2003. ssrn.com/abstract=1319252 (8.4.2017), p 6.
[141] Di Federico, G. EU Competition Law and the Principle of Ne Bis in Idem. European Public Law 17, 2011, 2. heinonline.org/HOL/Page?handle=hein.kluwer/epl0017&start_page=241&collection=kluwer&id=247 (8.4.2017), p 250.
[142] *ibid*, pp 250-251.
[143] CJEU 29.6.2006, C-289/04 P, *Showa Denko*, para 50-63. curia.europa.eu/juris/liste.jsf?language=en&num=C-289/04 (8.4.2017)

undertaking due to either new elements capable of affecting the outcome of the final decision arising,[144] or a first decision being annulled for procedural reasons.[145][146][147] A third possibility is that the Commission investigates and makes a decision in a case that has previously been dealt with by a NCA with regards to Articles 101 or 102 TFEU.[148] Under Article 11 (6) Regulation 1/2003, a NCA will be relieved of their competence to apply Articles 101 and 102 TFEU once the Commission begins investigating the same issue.[149] Curiously enough, this does not work the other way around. Currently undertakings under investigation or already punished by the NCA are not protected from a new investigation on the same case by the Commission, or simultaneous investigations by other NCAs, provided that the Commission has not yet begun their own investigation.[150] As such, it is entirely possible that an undertaking that has partaken in a cartel would first have to pay a fine conferred on it by the NCA, and subsequently by the Commission for breaching Article 101. While NCAs are entirely within their rights not to punish a colluding undertaking under Article 13 of the Regulation,[151] the Commission's explanatory memorandum on the Regulation provides that it is "neither necessary nor appropriate to oblige other competition authorities to suspend or terminate their proceedings. It is the task of the network to ensure in practice that resources are used efficiently."[152] - Explanatory Memorandum to COM(2000)582. It is however necessary to point out that this third scenario only concerns the application of Articles 101 and 102, not national legislation.

A fourth possible scenario concerns a situation in which two or more NCAs apply Articles 101 or

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144 CJEU 30.4.2009, T- 13/03, *Nintendo*, para 140. curia.europa.eu/juris/document/document.jsf?text=&docid=78306&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=689209 (8.4.2017)

145 CJEU 15.10.2002, Joined Cases C-238/99 P etc., *LVA NV and Others*, para 72. curia.europa.eu/juris/liste.jsf?language=en&num=C-238/99 (8.4.2017)

146 CJEU 1.7.2009, T-24/07, *Thyssen Krupp*, para 190. curia.europa.eu/juris/liste.jsf?language=en&num=T-24/07 (8.4.2017)

147 Di Federico (2011), *supra* nota, pp 251-252.

148 *ibid*, pp 252-254.

149 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 Vol 46, 4.1.2003. eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003R0001&from=EN (5.3.2017)

150 Di Federico, 2011, *supra* nota 129, pp 241-260.

151 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 Vol 46, 4.1.2003. eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003R0001&from=EN (5.3.2017)

152 European Commission. Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87 ("Regulation implementing Articles 81 and 82 of the Treaty") eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52000PC0582 (8.4.2017)

102 TFEU concurrently or subsequently.[153] As long as the Commission does not concern itself with the case, the NCAs will not lose their competence, and are not forced to suspend their investigations, as has been concluded above. The fifth scenario considered appears when an undertaking is punished by the Commission for infringements of Articles 101 or 102 TFEU, and by a NCA for infringements of national law.[154] As present, the EU and national jurisdictions are still considered to be separate.[155] The CJEU has confirmed in Case 14/68 *Walt Wilhelm v Bundeskartellamt* that two parallel procedures are not precluded by the *ne bis in idem* principle, but that in adopting a decision any previous sanctions imposed should be taken into account.[156]

The scenarios described above are not only interesting questions from an academic viewpoint, but will no doubt matter greatly to undertakings applying for leniency. The possibility of being fined multiple times is a deterring factor in disclosing evidence of an infringement, and is thus contradictory to the aims of the Commission's Leniency Policy.

5.3. One-stop-shop

At the moment applying for leniency is a tortuous in the Union. The differing legislation of the MS and the Union ensure that any undertaking seeking leniency within the Union will find it exceedingly complicated. Currently no legal connection between MS NCA and the Commission's leniency programmes exist, as established in Case C-428/14 *DHL Express (Italy) Srl, DHL Global Forwarding (Italy) SpA v Autorità Garante della Concorrenza e del Mercato*,[157] even though the summary application mechanism introduced with the 2012 European Competition Network (ECN) Model Lenience Programme was intended for that purpose.[158] Currently, if the applicant undertaking seeking to apply for leniency in multiple jurisdictions, they will have to do so simultaneously if it wish to avoid the risk of not being the first past the CA's door, and thus lose the eligibility for full immunity.[159] The different requirements for filing a leniency application in

[153] Di Federico (2011), *supra* nota 129, pp 254-255.
[154] *ibid*, pp 256-258.
[155] CJEU 14.12.1972, 7/72, *Boehringer*, para 6. eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61972CJ0007 (8.4.2017)
[156] CJEU 13.2.1969, 14/68, *Walt Wilhelm*, para 10. curia.europa.eu/juris/celex.jsf?celex=61968CJ0014&lang1=en&type=TXT&ancre= (8.4.2017)
[157] CJEU 20.1.2016, C-428/14, *DHL and* Others. eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62014CJ0428 (8.4.2017)
[158] European Commission. Commission staff working document, Enhancing competition enforcement by the Member States' competition authorities: institutional and procedural issues. 2014. ec.europa.eu/competition/antitrust/swd_2014_231_en.pdf (8.4.2017), p 24.
[159] Taladay, J. Time for a Global One-Stop Shop for Leniency Markers. Antitrust, 2012, 27.1.

different jurisdictions make this a time consuming and expensive process, which in turn has a negative impact on the attractiveness of the leniency policies in question.[160] The term one-stop-shop (OSS) refers to a system in which a leniency application lodged in one CA could be accepted in other CAs as well, eliminating the hassle of lodging a separate application in every CA. Such a system has been called for by academics for quite some time, but as of yet no decisive action has been taken by the Commission.[161]

The OSS would first and foremost be a procedural arrangement. The MSs would not give up any authority with regards to the handling of the case, but could save resources by sharing the cost of maintaining the system responsible for receiving leniency applications with the other MSs.[162] The OSS would provide leniency application markers to the applicants, and then notify the concerned MS NCAs of the application. It would then be up to the NCAs to request more information of the cartel, and subsequently decide whether to grant favourable treatment to the applicant in question, as per normal procedure and the laws of that MS.[163] To streamline the system, general requirements for the lodging the leniency application to the OSS would be introduced. Taladay proposes the recommendations of the European Competition Network's Model Leniency Programme on information attached to leniency applications.[164][165] The OSS would not necessitate any major legal revisions,[166] and as such should be relatively easy to implement once the necessary political will is found.

5.4. Criminalisation

One of the reasons as for why the US Leniency Policy has been more attractive for infringing undertakings to come forward, has been the criminal liability for colluding in a cartel. The prospect of the executives' personal liability manifesting itself as a jail sentence has made leniency applications an extremely alluring possibility. Criminalisation of cartels has recently been an

heinonline.org/HOL/Page?handle=hein.journals/antitruma27&start_page=43&collection=journals&id=45 (8.4.2017), pp 43-45.
[160] Serban (2015, *supra* nota 21, pp 20-27.
[161] Taladay (2012), *supra* nota, pp 43-44.
[162] *ibid*, p 46.
[163] *ibid*, p 46.
[164] *ibid*, p 48.
[165] European Competition Network. ECN Model Leniency Programme, 2012. ec.europa.eu/competition/ecn/mlp_revised_2012_en.pdf (8.4.2017)
[166] Taladay (2012), *supra* nota 144, pp 45-48.

increasingly popular, with many EU members following the trend,[167] and others, such as Finland, at least contemplating the benefits of similar action.[168]

The most convincing argument for criminalisation is that currently undertakings in non-criminalised jurisdictions contemplate colluding in a cartel purely from an economic cost - benefit point of view. Criminalisation would bring a new, personal aspect to consideration. The persons responsible for deciding whether or not an undertaking should collude in a cartel would have to make their own risk assessment for the action, weighing whether their personal gain from the collusion would justify the risk of going to prison if found out. Adding personal responsibility to the issue is likely to thus have two main effects. One, the prospect of colluding in a cartel would become less attractive from the beginning, as the consequences for disclosure would be more drastic than before, and second, existing cartels would become increasingly destabilised as leniency could also grant amnesty to persons responsible, in addition to the current immunity or reduction of fines, making applying for leniency an even more attractive option.

5.4.1. Obstacles in implementing criminalisation

There does exist a considerable obstacle with regards to the Commission criminalising cartel collusion. The Commission does not hold the power to employ criminal law. Regulation 1/2003 Art 25.5 unequivocally precludes such action.[169] Three reasons for this will be examined. First, regulating and enforcing criminal law is seen by the MS as an important element of state sovereignty, which makes them reluctant to relegate such powers to the Commission.[170] Especially in the current political climate, it is hard to see the MS cede any more power in favour of a stronger Union. Second, the Commission can currently act as an investigator, prosecutor and judge, when it comes to competition enforcement.[171] Handing out criminal sanctions in such a fashion would be a breach of the European Convention on Human Rights Art 6.[172] Thirdly, the cultural difference

[167] Simpson (2016), *supra* nota 36, p 7.
[168] Kartellien kriminalisointi Suomessa: Hallintomenettelyyn perustuvan järjestelmän ja rikosoikeudellisen järjestelmän yhteensovittamisen tarkoituksenmukaisuus, toteutettavuus ja edellytykset, University of Helsinki, Faculty of Law, 2014. www.helsinki.fi/oikeustiede/tutkimus_ja_julkaisut/julkaisut/forum_iuris/sahkoiset_julkaisut/Kartellien_kriminalisointi_Suomessa.pdf (8.4.2017)
[169] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 Vol 46, 4.1.2003,), art 25.5. eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003R0001&from=EN (5.3.2017), p 18.
[170] Milton (2004-2005), *supra* nota 35, pp 161.
[171] *ibid*, p 160.
[172] European Convention on Human Rights, Art 6. www.echr.coe.int/Documents/Convention_ENG.pdf (8.4.2017)

between USA and Europe with regards to anti-competitive practices has probably at the time of the drafting of the Regulation 1/2003 still been in favour of less severe sanctions.[173] The legal impediments in criminalising cartel collusion on Commission level are thus rather extensive, and would necessitate considerable revision of EU legislation before such action would be possible. As stated before, with the existing anti-federalist sentiment present in many MSs within the Union,[174] this would seem unlikely.

5.4.2 Circumventing the obstacles for a more efficient Leniency Policy

With such formidable obstacles standing in the way of criminalisation at the Commission level, a more viable approach could be to follow the current trend of MS' criminalising cartels, and to reap the benefits of strict MS legislation by opting for more harmonisation and cooperation between the CAs, while dealing with the problems related to the *ne bis in idem* principle discussed in Chapter 5.2.. Lobbying for harmonisation within the Union with regards to antitrust enforcement would likely be an easier task than attempting to vest the Commission with the power to pass criminal sanctions.[175] If cartels were criminalised in MS legislation throughout the EU, the combined effect of multiple highly efficient leniency programmes could increase the effectiveness of less effective parallel programmes by proxy. As large cartels often operate in multiple countries simultaneously, and disclosure in one of them more or less equates to disclosure in the others as well, the existence of an efficient leniency policy in one of those countries could draw leniency applications not only to that country, but to the others as well. The solution is not perfect, though, as the colluding undertakings could limit their operations to countries in which collusion is not criminalised, or to apply for leniency primarily in such jurisdictions, enabling them to escape criminal sanctions due to the *ne bis in idem* principle, and causing the NCAs of those jurisdictions receive a disproportionate amount of leniency applications compared to those with criminal sanctions.[176] An efficient system for multiple leniency applications would also be if not necessary, at least beneficial. Further study on the matter is necessary.

5.5. ECN+

On 22.3.2017, the Commission introduced its Directive proposal to make MS NCAs more efficient

[173] Milton (2004-2005), *supra* nota 35, pp 162-163.
[174] European Commission. Standard Eurobarometer 81, Spring 2014. ec.europa.eu/public_opinion/archives/eb/eb81/eb81_first_en.pdf
[175] Wils (2005), *supra* nota 40, p 48.
[176] *ibid*, pp 44-48.

in antitrust enforcement (ECN+).[177] According to the stakeholder consultations during the preliminary hearings, 61% of stakeholders found the lack of implementation of the ECN Model Leniency Programme in the Union to be problematic, as the lack of harmonisation leads to a myriad of different concerns[178] when applying for leniency.[179] With regards to the questions of cartel criminalisation and OSS, the proposition brings forth a couple of rather interesting resolutions. First of all, the ECN+ proposition intends to ensure that employees and directors of an undertaking applying for leniency will be protected from individual sanctions, provided they cooperate with the competition authorities.[180] This implies that while the Commission may be unable to criminalise cartel collusion on EU level, it feels the need to regulate the surge of cartel criminalisation within the Union by the MSs, by implementing the element of amnesty into EU legislation. The harmonising action is welcome in order to lessen the chilling effect of the uncertainty caused by the existence of multiple jurisdictions in which criminal sanctions are possible, but the requirements for obtaining amnesty may differ. The ECN+ does not unequivocally call for a OSS, even though it does stress the need for increased certainty and harmonisation with regards to leniency applications.[181] The ECN+ is mainly focused on increasing the cooperation and sharing of resources of the MS NCAs. What the completed Directive will look like once it is completed and approved will be most interesting, and likely will address many of the issues discussed in this thesis. It will also remain to be seen whether the new Directive will bring forth a new Leniency Notice in its wake.

[177] European Commission. Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market. Brussels, 22.3.2017. ec.europa.eu/competition/antitrust/proposed_directive_en.pdf (8.4.2017)
[178] See Chapter Five.
[179] European Commission, *supra* nota 174.
[180] *ibid*, p 18.
[181] *ibid*, p 8.

Conclusion

It appears clear that leniency is a valuable tool in combating cartels. The European Commission considers antitrust enforcement to be of paramount importance in order to maintain a competitive and fair internal market as indicated by Article 101 TFEU. Leniency has been employed by the Commission since the introduction of the first Leniency Notice in 1996. The Leniency Notice has been improved multiple times during the years, and has received three iterations in 1996, 2002 and 2006, with the latest amendment implemented in 2015.

A leniency policy grants favourable treatment to undertakings that have colluded in a cartel, provided that they disclose information related to that infringement to the CA in order to aid the it in its investigations concerning the cartel in question. Favourable treatment may be full immunity from fines or other sanctions, or a reduction of fines or other sanctions. In order to function effectively, a leniency policy requires relatively strict penalties for anti-competitive behaviour to complement it, so that colluding undertakings will have something to gain from disclosing the infringement to the CA.

A careful balance is however necessary. If the prospective penalty is unsubstantial, or the risk of disclosure is low, continuing to collude in the infringement may be more beneficial to the undertaking in question, making it unlikely to come forward with information relating to the cartel. On the other hand, if the ramifications for being found guilty of a cartel infringement are too severe, even accounting for the leniency available, undertakings may prefer to keep going with the cartel operation because the damage has already been done, and disclosure would bring ruin to the undertaking whether or not they are granted leniency. Other risks of an unbalanced leniency policy include undertakings disclosing cartels in order to damage their competitors and to force them out of business through the often very substantial fines that being found guilty of a cartel infringement bring, or an undertaking using the leniency policy as a ‘shield’, successively forming new cartels, disclosing them once signs of possible revelation appear, and gaining full immunity from sanctions, effectively enabling it to collude almost continuously while minimising the risk of sanctions. These risks can be countered by clearly set conditions on which undertakings may receive favourable treatment and to which extent, careful calculation of the fines imposed, implementing additional leniency or other similar procedures if an undertaking is able to establish that it is unable to pay the fine in question without compromising the competition balance in the

relevant market, and by implementing more substantial sanctions for recidivist undertakings.

When a leniency policy is properly balanced to fit the antitrust enforcement system, it has the benefit of convincing colluding undertakings to turn themselves in, in order to avoid more severe sanctions if it fails to do so. When only the first undertaking past the CA's door will be able to receive full immunity, the policy will also have a destabilising effect on cartels as all the colluding undertakings wish to make sure that if the cartel is to be disclosed, it should be them to receive immunity instead of their competitors. The erosive effect this has on trust, which is an absolutely necessary element in a cartel, is devastating. The result being, that undertakings will be more inclined to disclose infringements they are partaking in, and to be more reluctant to enter such agreements in the first place. As more undertakings disclose infringements to the CA out of their own accord, resources from investigation may be freed for other purposes, and the effective functioning of the CA is increased. While the individual fines imposed on undertakings in leniency cases may be smaller than without leniency, the total amount of fines will likely increase due to the increased amount of cases the CA is able to process, bringing into picture the side effect of larger fine income.

The first Leniency Notice of the European Commission in 1996 was inspired by the successful Amnesty Program of the United States. It was criticised for being vague and giving the undertakings contemplating disclosure too little information based on which they could conduct risk analysis and decide whether to come forward. Additionally, many of the cases in which leniency was applied were already under investigation in the US by the time the Commission was able to begin its own probing. Many of the undertakings that were caught in the US simply decided to apply for leniency in the EU before their collusion became known.

In 2002, the Leniency Notice was revised, and many of the criticisms of the previous iteration were taken into account. Certain vagueness remained, but overall it was an improvement over the 1996 version. The 2006 revision further expanded on the themes of transparency, predictability and certainty for which the Leniency Notice had drawn much criticism in the past. It was now easier for undertakings to predict what the outcome of their leniency application would be, as they received more information as to what type of information should be disclosed, and safeguards to prevent that information from causing adverse effects in the future. As undertakings were able to

conduct more accurate risk analysis, the efficiency of the Commission's Leniency Policy was increased. The 2006 Leniency Notice appears to be a reasonably complete document for its purposes set out by the Commission, as is implied by the fact that it has only received one amendment during its more than 10 years of existence and that the European Competition Network's Model Leniency Programme is rather similar in its scope.

The Leniency Policy employed by the Commission has undeniably increased the amount of both cartel cases delivered by the Commission, as well as the amount of fines imposed. If the situation before 1996 is taken as a reference point, the introduction of the Leniency Notice has had an extremely significant positive effect in the Commission's antitrust enforcement. Early inefficiency and dependence on the highly successful US antitrust enforcement have been reduced and concerns addressed.

However, the system is still far from perfect. As the Commission operates parallel to the MS NCAs, much of the current criticism of the Commission's Leniency Policy concern the relationship between the systems. Due to this symbiotic and complementary nature of the different jurisdictions within the Union, the existence of a problem may have implications beyond what is instantly perceived. The questions examined in this thesis include the application of the *ne bis in idem* principle and the lack of a one-stop-shop within the sphere of European antitrust enforcement. The former concerns the rights of the undertakings subject to cartel proceedings, while the latter is a question of efficiency. Another stipulated matter is the criminalisation of cartel collusion by the Commission.

The *ne bis in idem* principle protects the defendant from being prosecuted or punished for the same offence for more than once. However, currently several scenarios exist in which an undertaking may face sanctions for the same infringement in multiple jurisdictions within the EU. Considering the somewhat federal nature of the Union, this is a bigger issue than being, for example sanctioned by the Commission and a third nation outside the EU. As Union level jurisdiction is considered to be separate from MS national jurisdictions, the risk of an undertaking being subjected to multiple sanctions presents a challenge to the effective functioning of the Commission's Leniency Policy. If multiple sanctions are possible, the balance between leniency and the level of ramifications can be compromised. This is currently a weakness in application of the Leniency Policy that needs to

be addressed. The problem can be alleviated by revising the 1/2003 Regulation on the implementation of the rules on competition to account for the situation described in chapter 5.2.. This could have a negative effect concerning the sovereignty of the MS, but the elimination of double jeopardy would be beneficial to the whole of the Union, in the author's opinion justifying the trade-off.

The absence of a one-stop-shop is another detriment to the optimal functioning of the Leniency Policy. The matter is related to the previous question of *ne bis idem* in that the need to apply for leniency simultaneously in multiple jurisdictions is a hindrance to the undertakings contemplating disclosure. Failure to successfully apply for leniency in one of the numerous jurisdictions could mean increased costs in legal fees and in the worst-case scenario increased fines. There is little benefit to maintaining a needlessly complicated system, which may cause the undertakings concerned to rethink whether applying for leniency is worth the hassle, especially if the cartel is stable for the time being. Introducing a one-stop-shop where undertakings could receive a marker for leniency, would serve to increase the attractiveness of coming forward to the CA. As stated in Chapter 5.3., the one-stop-shop could function as a preliminary stop, where the disclosing undertakings could turn in information according to predetermined uniform requirements in order to obtain a leniency marker, after which the Commission and MS NCAs could require additional information as per their existing procedures require. The one-stop-shop could be described as a sorting centre for leniency applications.

Much of the success of the US antitrust enforcement can be attributed to the Corporate Amnesty Program. It has been demonstrated that criminal liability for the executives of an undertaking partaking in a cartel make applying for leniency more attractive. The introduction of a personal element of liability can be more persuasive than the mere possibility of fines imposed on the undertaking. As such, there have been calls to criminalise antitrust infringements within the EU. Many MSs have done exactly that, with more to follow. Introducing this element to the Commission's antitrust enforcement would likely increase its efficiency, as well as the attractiveness of leniency. However, the Commission currently lacks the competence to pass criminal sanctions, and is unlikely to receive such powers in the foreseeable immediate future. If not for the infeasibility of the idea in the current political environment, the author would cautiously advocate taking steps to vest the Commission with powers to pass criminal sentences in certain

exceptional cases. As for now, pushing for more harmonisation within the antitrust sector in the Union, encouraging the MS to implement criminal liability for cartel offenses. Due to the aforementioned parallelism of the different jurisdictions within the EU, the Commission would not necessarily have to criminalise antitrust infringements by itself, as long as the MSs would, in order to improve the efficiency of its own antitrust enforcement and Leniency Policy. It is possible, however, that if the *ne bis in idem* issue is resolved in a way beneficial to the infringers, this kind of development would lead to unwanted forum shopping between the different CAs within the Union.

After analysing all the information available, leniency appears to be an extremely useful antitrust enforcement instrument. The European Commission's Leniency Policy has evolved much since its inception in 1996, and can currently be regarded as a great success in its own right. The Leniency Policy is not without its faults, especially when it comes to the problems regarding the *ne bis in idem* principle, and the lack of a one-stop-shop for leniency applications throughout the European Union. While the Commission may for now be unable of equipping itself with more tools for solving the presented issues, it can seek synergies with the Member States' Competition Authorities. The findings presented in this thesis convince the author to confirm his hypothesis, and state that leniency as an element of antitrust enforcement is highly efficient, and that the Leniency Policy of the European Commission must be considered as a success, even though it must be stated it is by no means perfect, when taking into account the issues to be resolved.

List of sources

Science books

1. Wikberg, O. Leniency v. kartellit. Doctoral thesis, University of Helsinki, Department of Law, 2009. shelda.helsinki.fi/bitstream/handle/10138/18377/leniency.pdf?sequence=1 (5.3.2017)

Science articles

2. Allain, M-L., *et al*. Are cartel fines optimal? Theory and evidence from the European Union. International Review of Law and Economics, Volume 42, 2015.www.cirano.qc.ca/pdf/publication/2013s-24.pdf (8.4.2017)

3. Aubert, C., et al. The Impact of Leniency and Whistleblowing Programs on Cartels. 21.6.2005.idei.fr/sites/default/files/medias/doc/by/rey/leniency.pdf (5.3.2017)

4. Bayoumi, T. et al. Benefits and Spillovers of Greater Competition in Europe: A Macroeconomic Assessment. NBER Working Paper No. 10416, April 2004 www.nber.org/papers/w10416.pdf (5.3.2017)

5. Botana, P. Prevention and Deterrence of Collusive Behavior: The Role of Leniency Programs Columbia Journal of European Law, 2006, 13 (1).heinonline.org/HOL/Page?handle=hein.journals/coljeul13&start_page=47&collection=journals&id=53 (5.3.2017)

6. Brenner, S. An empirical study of the European corporate leniency program. International Journal of Industrial Organization, 27 (6), November 2009.ac.els-cdn.com/S0167718709000290/1-s2.0-S0167718709000290-main.pdf?_tid=8c61e0be-fce2-11e6-9522-00000aacb35d&acdnat=1488196243_7e2c10280b180b703545cb680443d79e (5.3.2017)

7. Carmeliet, T. How lenient is the European Leniency system. An Overview of current (dis)incentives to Blow the Whistle. Jura Falconis, 48, 2011-2013. http://www.law.kuleuven.be/jura/art/48n3/carmeliet.pdf (8.4.2017)

8. Clarke, et al. Deterrent Effects of National Anticartel Laws: Evidence from International Vitamins Cartel. 48.3 Antitrust Bull 2003. heinonline.org/HOL/Page?handle=hein.journals/antibull48&start_page=689&collection=journals&id=697 (8.4.2017)

9. Daviesy, S., Ormosiz P. L. The economic impact of cartels and anti-cartel enforcement. October 7, 2014.www.diw.de/documents/dokumentenarchiv/17/diw_01.c.485189.de/ormosi_ams_oct2014_full-paper.pdf (5.3.2017)First, H. The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law. Antitrust Law Journal 68(3), 2001.heinonline.org/HOL/Page?handle=hein.journals/antil68&start_page=711&collection=journals&id=721 (5.3.2017)

10. Di Federico, G. EU Competition Law and the Principle of Ne Bis in Idem. European Public Law 17, 2011, 2. heinonline.org/HOL/Page?handle=hein.kluwer/epl0017&start_page=241&collection=kluwer&id=247 (8.4.2017)

11. First, H. The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law. Antitrust Law Journal 68(3), 2001. heinonline.org/HOL/Page?handle=hein.journals/antil68&start_page=711&collection=journals&id=721 (5.3.2017)

12. Harding C., Gibbs A. Why go to court in Europe? An analysis of cartel appeals 1995-2004. European Law Review 3, 11.4.2008.cadair.aber.ac.uk/dspace/bitstream/handle/2160/7917/Why%20go%20to%20court%20in%20Europe.pdf?sequence=2&isAllowed=y (5.3.2017)

13. Little, D. R. European Commission's Revised Leniency Notice for Cartel Cases. Trinity College Law Review, 2007, 10, 136-144. heinonline.org/HOL/Page?handle=hein.journals/trinclr10&start_page=136&collection=journals&id=145 (8.4.2017)

14. Louis., et al. Ne Bis in Idem, Part Bis. 34.1 World Competition 2011. heinonline.org/HOL/Page?handle=hein.kluwer/wcl0056&start_page=97&collection=kluwer&id=101 (8.4.2017)

15. Mehta, K.; Centella, M. Settlement Procedure in EU Cartel Cases. Competition Law International, 2008, 4(2). heinonline.org/HOL/Page?handle=hein.journals/cmpetion4&start_page=17&collection=journals&id=78 (5.3.2017)

16. Milton, E. Putting the Price-Fixers in Prison: The Case for the Criminalisation of EC Competition Law. Hibernian Law Journal, 2004-2005, 5. heinonline.org/HOL/Page?handle=hein.journals/hiblj5&start_page=159&collection=journals&id=165 (5.3.2017)

17. Schroeder, D. Squaring the Circle in Cartel Cases: Compliance, Fines, Leniency and Settlement from Private Practitioner's Perspective. Competition Law International, 2008, 4(2), 39-42. heinonline.org/HOL/Page?handle=hein.journals/cmpetion4&start_page=42&collection=journals&id=103 (5.3.2017)

18. Serban, A. Are EU Leniency Programmes Enough for Detecting Cartels. Romanian Competition Journal 2015, (1-2). heinonline.org/HOL/Page?handle=hein.journals/rocmpj2015&start_page=20&collection=journals&id=76 (5.3.2017)

19. Simpson, M. The criminal cartel offence around the world. Competition World, A global survey of recent competition and antitrust law developments with practical relevance, Quarter 2 2016. www.nortonrosefulbright.com/files/competition-world--q2-2016-141176.pdf (5.3.2017)

20. Slaughter and May. The EU Competition Rules on Cartels. March 2006. www.slaughterandmay.com/media/64584/the_eu_competition_rules_on_cartels.pdf (5.3.2017)

21. Stephan, A. An Empirical Assessment of the 1996 Leniency Notice. Working paper, ESRC Centre for Competition Policy and The Norwich Law School, University of East Anglia, September 2005. competitionpolicy.ac.uk/documents/8158338/8256120/CCP+Working+Paper+05-10.pdf (5.3.2017)

22. Stephan, A. An Empirical Assessment of the European Leniency Notice. Journal of Competition Law and Economics, 2009, Vol. 5(3). heinonline.org/HOL/Page?handle=hein.journals/jrcolaec5&start_page=537&collection=journals&id=543 (5.3.2017)

23. Taladay, J. Time for a Global One-Stop Shop for Leniency Markers. Antitrust, 2012, 27.1. heinonline.org/HOL/Page?handle=hein.journals/antitruma27&start_page=43&collection=journals&id=45 (8.4.2017)

24. Van Barlingen. B., Barennes. M. The European Commission's 2002 Leniency Notice in practice, European Commission, Competition Policy Newsletter, Vol 3, Autumn 2005. ec.europa.eu/competition/publications/cpn/2005_3_6.pdf (5.3.2017)

25. Whelan, P. Legal Certainty and Cartel Criminalisation within the EU Member States, The Cambridge Law Journal, 2012, 71 (3). swww.cambridge.org/core/services/aop-cambridge-core/content/view/8DD797BDE2D7843C369A3145F74CDD5B/S0008197312000864a.pdf/div-class-title-legal-certainty-and-cartel-criminalisation-within-the-eu-member-states-div.pdf (5.3.2017)

26. Wils, W. Is Criminalization of EU Competition Law the Answer? World Competition: Law and Economics Review, Vol. 28, No. 2, June 2005. pspe.org.pl/dokumenty/137_IsCriminalizationofEUCompetitionLawtheAnswer.pdf (5.3.2017)

27. Wils, W. Optimal Antitrust Fines: Theory and Practice. World Competition, 2006, 29 (2), pp 183-208.

heinonline.org/HOL/Page?handle=hein.kluwer/wcl0051&start_page=183&collection=kluwer&id=187 (5.3.2017)

28. Wils, W. P. J., The Use of Leniency in EU Cartel Enforcement: An Assessment after Twenty Years. 6.10.2016. World Competition: Law and Economics Review, Vol. 39, No. 3, 2016. ssrn.com/abstract=2793717 (5.3.2017)

29. Wils, W. P. J., Is Criminalization of EU Competition Law the Answer?. World Competition: Law and Economics Review, Vol. 28, No. 2, June 2005. pspe.org.pl/dokumenty/137_IsCriminalizationofEUCompetitionLawtheAnswer.pdf (5.3.2017)

30. Wils, W. The Principle of 'Ne Bis in Idem' in EC Antitrust Enforcement: A Legal and Economic Analysis. World Competition: Law and Economics Review, Vol. 26, No. 2, 2003. ssrn.com/abstract=1319252 (8.4.2017)

31. Wils, W. Recidivism in EU Antitrust Enforcement: Legal and Economic Analysis. World Competition 35(1), 2012. heinonline.org/HOL/Page?handle=hein.kluwer/wcl0057&g_sent=1&collection=kluwer&id=9 (5.3.2017)

EU Legal acts and conventions

32. Charter of Fundamental Rights of The European Union (2000/C 364/01). OJC 43, 2000. http://www.europarl.europa.eu/charter/pdf/text_en.pdf (8.4.2017)

33. Commission notice on immunity from fines and reduction of fines in cartel cases (2002/C 45/03), OJ 19.2.2002. eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52002XC0219(02)&from=EN (5.3.2017)

34. Commission notice on immunity from fines and reduction of fines in cartel cases (2006/C 298/11) OJ 8.12.2006. eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006XC1208(04)&from=EN (8.4.2017)

35. Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 Vol 46,

4.1.2003. eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003R0001&from=EN (5.3.2017)

36. Directive 2014/104/EU of the European Parliament and the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ 5.12.2104. eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0104&from=fi (5.3.2017)

37. European Commission. Commission notice on the non-imposition or reduction of fines in cartel cases, OJ 18.7.1996 eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31996Y0718(01)&from=EN (5.3.2017)

38. European Commission. Communication from the Commission. Amendments to the Commission Notice on Immunity from fines and reduction of fines in cartel cases (2015/C 256/01). OJ 5.8.2015. eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015XC0805(01)&from=EN (5.3.2017)

39. European Convention on Human Rights, Art 6. www.echr.coe.int/Documents/Convention_ENG.pdf (8.4.2017)

40. Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ 2006, vol 49, 1.7.2006. eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006XC0901(01)&from=EN (5.3.2017)

41. The Treaty of Rome. ec.europa.eu/archives/emu_history/documents/treaties/rometreaty2.pdf (5.3.2017)

42. Treaty establishing the European Coal and Steel Community, www.cvce.eu/content/publication/1997/10/13/11a21305-941e-49d7-a171-ed5be548cd58/publishable_en.pdf (09.11.2015)

43. Treaty on European Union. seuropa.eu/european-union/sites/europaeu/files/docs/body/treaty_on_european_union_en.pdf (5.3.2017)

44. Treaty on the Functioning of the European Union. eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_2&format=PDF (3.5.2017)

National legal acts of the states

45. The Clayton Act. gwclc.com/Library/America/USA/The%20Clayton%20Act.pdf (5.3.2017)

46. The Sherman Antitrust Act. gwclc.com/Library/America/USA/The%20Sherman%20Act%201890.pdf (5.3.2017)

Other legal acts

47. Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms. Strasbourg, 22.11.1984. Art 4. rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007a082 (8.4.2017)

Case law

48. CJEU (8.2.2007), C-3/06 P, *Danone.* curia.europa.eu/juris/liste.jsf?language=en&num=C-3/06 (5.3.2017)

49. Charter of Fundamental Rights of The European Union (2000/C 364/01). OJC 43, 2000. http://www.europarl.europa.eu/charter/pdf/text_en.pdf (8.4.2017)

50. CJEU 1.7.2009, T-24/07, Thyssen Krupp, para 190. curia.europa.eu/juris/liste.jsf?language=en&num=T-24/07 (8.4.2017)

51. CJEU 7.7.2016, C-608-15 P, Panasonic. curia.europa.eu/juris/liste.jsf?num=C-608/15&language=en (8.4.2017)

52. CJEU 9.3.2017, C-615/15 P, Samsung. curia.europa.eu/juris/liste.jsf?num=C-615/15&language=en (8.4.2017)

53. CJEU 9.9.2015, T-82/13, Panasonic and MTPD. curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=T-82/13&td=ALL (8.4.2017)

54. CJEU 9.9.2015, T-84/13, Samsung and Others. curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=T-84/13&td=ALL (8.4.2017)

55. CJEU 9.9.2015, T-91/13, LG Electronics. curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=T-91/13&td=ALL (84.2017)

56. CJEU 9.9.2015, T-92/13, Philips. curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=T-92/13&td=ALL (8.4.2017)

57. CJEU 9.9.2015, T-104/13, Toshiba. curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=T-104/13&td=ALL (8.4.2017)

58. CJEU 13.2.1969, 14/68, Walt Wilhelm, para 10. curia.europa.eu/juris/celex.jsf?celex=61968CJ0014&lang1=en&type=TXT&ancre= (8.4.2017)

59. CJEU 14.12.1972, 7/72, Boehringer, para 6. eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61972CJ0007 (8.4.2017)

60. CJEU 15.10.2002, Joined Cases C-238/99 P etc., LVA NV and Others, para 72. curia.europa.eu/juris/liste.jsf?language=en&num=C-238/99 (8.4.2017)

61. CJEU 18.1.2017, C-623/15 P, Toshiba. curia.europa.eu/juris/liste.jsf?num=C-623/15&language=en (8.4.2017)

62. CJEU 20.1.2016, C-428/14, DHL and Others. eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62014CJ0428 (8.4.2017)

63. CJEU 29.6.2006, C-289/04 P, Showa Denko, para 50-63. curia.europa.eu/juris/liste.jsf?language=en&num=C-289/04 (8.4.2017)

64. CJEU 30.4.2009, T- 13/03, Nintendo, para 140. curia.europa.eu/juris/document/document.jsf?text=&docid=78306&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=689209 (8.4.2017)

65. CJEU C-588/15 P, LG Electronics. curia.europa.eu/juris/liste.jsf?num=C-588/15&language=en (8.4.2017)

66. Commission decision of 25 March 1992 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/30.717-A — Eurocheque : Helsinki Agreement), OJ 9.4.1992. eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31992D0212&from=EN (5.3.2017)

Other

67. Bentham. Proposed Truck Cartel Claim. Media release, London, 14 November 2016 www.benthameurope.com/en/proposed-truck-cartel-claim-media-release (5.3.2017)

68. Commission of the European Communities. Growth, competitiveness, employment: The challenges and ways forward into the 21st century, White Paper, Bulletin of the European Communities Supplement 6/93. 5.12.1993.aei.pitt.edu/1139/1/growth_wp_COM_93_700_Parts_A_B.pdf (5.3.2017)

69. European Commission. Antitrust: Commission fines truck producers € 2.93 billion for participating in a cartel. Press release. Brussels 19 July 2016 europa.eu/rapid/press-release_IP-16-2582_en.htm (5.3.2017)

70. European Commission. Cartel statistics, 2017. ec.europa.eu/competition/cartels/statistics/statistics.pdf (5.3.2017)

71. European Commission. Commission fines companies in copper plumbing tubes cartel. Press release. Brussels 3.7.2016 europa.eu/rapid/press-release_IP-04-1065_en.htm?locale=en (5.3.2017)

72. European Commission. Commission launches debate on draft new leniency rules in cartel probes. Press release, 18.6.2011. europa.eu/rapid/press-release_IP-01-1011_en.htm (5.3.2017)

73. European Commission. Commission staff working document, Enhancing competition enforcement by the Member States' competition authorities: institutional and procedural issues. 2014. ec.europa.eu/competition/antitrust/swd_2014_231_en.pdf (8.4.2017)

74. European Commission. Competition, Overview. ec.europa.eu/competition/general/overview_en.html (5.3.2017)

75. European Commission. Competition, Overview on Cartels ec.europa.eu/competition/cartels/overview/index_en.html (5.3.2017)

76. European Commission. European Competition Network, Overview. ec.europa.eu/competition/ecn/index_en.html (8.4.2017)

77. European Commission. Joint answer given by Ms Kroes on behalf of the Commission to written questions E-0890/09 , E-0891/09 , E-0892/09. Parliamentary questions, 2.4.2009. www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2009-0892&language=EN (5.3.2017)

78. European Commission. Leniency. ec.europa.eu/competition/cartels/leniency/leniency.html (8.4.2017)

79. European Commission. Press release, Antitrust: Commission carries out inspections in the cathode ray tubes sector. Brussels, 8.11.2007. europa.eu/rapid/press-release_MEMO-07-453_en.htm (8.4.2017)

80. European Commission. Press release, Antitrust: Commission confirms sending Statement of Objections to alleged participants in TV and computer monitor tubes cartel. Brussels, 26.11.2009. europa.eu/rapid/press-release_MEMO-09-525_en.htm?locale=en (8.4.2017)

81. European Commission. Press release, Antitrust: Commission fines banks € 1.49 billion for participating in cartels in the interest rate derivatives industry. Brussels, 4.12.2013. europa.eu/rapid/press-release_IP-13-1208_en.htm (8.4.2017)

82. European Commission. Press release, Antitrust: Commission fines Crédit Agricole, HSBC and JPMorgan Chase € 485 million for euro interest rate derivatives cartel. europa.eu/rapid/press-release_IP-16-4304_en.htm (8.4.2017)

83. European Commission. Press release, Antitrust: Commission fines producers of TV and computer monitor tubes € 1.47 billion for two decade-long cartels. Brussels, 5.12.2012. europa.eu/rapid/press-release_IP-12-1317_en.htm (8.4.2017)

84. European Commission. Press release, Commission imposes fines on vitamin cartels. Brussels, 21.11.2001. europa.eu/rapid/press-release_IP-01-1625_en.htm?locale=en (8.4.2017)

85. European Commission. Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87 ("Regulation implementing Articles 81 and 82 of the Treaty") eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52000PC0582 (8.4.2017)

86. European Commission. Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market. Brussels, 22.3.2017. ec.europa.eu/competition/antitrust/proposed_directive_en.pdf (8.4.2017)

87. European Commission. Standard Eurobarometer 81, Spring 2014. ec.europa.eu/public_opinion/archives/eb/eb81/eb81_first_en.pdf (8.4.2017)

88. European Commission. Statement, Financial benchmarks: Commission welcomes agreement on new rules to prevent manipulation. Brussels, 25.11.2015. europa.eu/rapid/press-release_STATEMENT-15-6169_en.htm (8.4.2017)

89. European Commission. Transport Emissions, 27.6.2016 ec.europa.eu/environment/air/transport/road.htm (5.3.2017)

90. European Competition Network. ECN Model Leniency Programme, 2012. ec.europa.eu/competition/ecn/mlp_revised_2012_en.pdf (8.4.2017)

91. European Competiton Network. ECN model leniency programme, 2012. ec.europa.eu/competition/ecn/mlp_revised_2012_en.pdf (5.3.2017)

92. European Union. Facts and figures europa.eu/european-union/about-eu/figures/economy_en (5.3.2017)

93. Europe Institute. Reaction to the Green Paper on damages actions for breach of EC antitrust rules. Leiden University. ec.europa.eu/competition/antitrust/actionsdamages/files_green_paper_comments/europe_institute.pdf (8.4.2017)

94. Eurostat. Business demography statistics. ec.europa.eu/eurostat/statistics-explained/index.php/Business_demography_statistics#Active_enterprises_in_the_business_economy (5.3.2017)

95. International Competition Network. Leniency Materials. http://www.internationalcompetitionnetwork.org/working-groups/current/cartel/awareness/leniency.aspx (8.4.2017)

96. Kartellien kriminalisointi Suomessa: Hallintomenettelyyn perustuvan järjestelmän ja rikosoikeudellisen järjestelmän yhteensovittamisen tarkoituksenmukaisuus, toteutettavuus ja edellytykset, University of Helsinki, Faculty of Law, 2014. www.helsinki.fi/oikeustiede/tutkimus_ja_julkaisut/julkaisut/forum_iuris/sahkoiset_julkaisut/Kartellien_kriminalisointi_Suomessa.pdf (8.4.2017)

97. Ministry for Social Dialogue, Consumer Affairs and Civil Liberties. Draft legislation. Immunity from Fines and Reduction of Fines in Cartel Investigations Regulations. ec.europa.eu/competition/antitrust/proposed_directive_en.pdf (8.4.2017)

98. Monti, M. Fighting Cartels Why and How? Why should we be concerned with cartels and collusive behaviour? Speech, 3rd Nordic Competition Policy Conference. Stockholm, 11-12 September 2000 europa.eu/rapid/press-release_SPEECH-00-295_en.htm (5.3.2017)

99. OECD. Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programmes, 2002. oecd.org/competition/cartels/1841891.pdf (5.3.2017)

100. The Road Haulage Association. European Truck Manufacturers Cartel: Register Your Interest. 2016. www.rhatruckcartelclaim.co.uk/ (5.3.2017)

Annexes

Period	Cases decided
1990 - 1994	10
1995 - 1999	10
2000 - 2004	30
2005 - 2019	33
2010 - 2014	30
2015 - 2017	12

Table 1: Cartel cases decided by the European Commission - period 1990 - 2017[182]

Period	Amount in €
1990 - 1994	344.282.550,00
1995 - 1999	270.963.500,00
2000 - 2004	3.157.348.710,00
2005 - 2019	7.920.497.226,50
2010 - 2014	7.608.375.579,00
2015 - 2017	4.159.116.000,00

Table 2: Fines imposed (adjusted for Court judgments) - period 1990 – 2017[183]

[182] European Commission. Cartel statistics, 2017. ec.europa.eu/competition/cartels/statistics/statistics.pdf (5.3.2017)
[183] *ibid*

Year	Recidivists as % of total cartel participants	Total number of recidivist undertakings
2006	24%	11
2007	11%	7
2008	13,5%	5
2009	13%	5
2010	4%	3

Table 3: Amount of recidivist undertakings in cartel cases.[184]

	Reduction under the Leniency Notice	Reduction under the Settlement Notice	Fine in €
MAN	100%	10%	0 (~1.200.000.000)
Volvo/Renault	40%	10%	670.448.000
Daimler	30%	10%	1.008.766.000
Iveco	10%	10%	494.606.000
DAF		10%	752.679.000
Total			2.926.499.000

Table 4: Total fines in the Trucks cartel case as of yet[185]

[184] *ibid*

[185] European Commission. Antitrust: Commission fines truck producers € 2.93 billion for participating in a cartel. Press release. Brussels 19 July 2016 europa.eu/rapid/press-release_IP-16-2582_en.htm (5.3.2017)

Undertaking	Reduction under the Leniency Notice	Fine for the TV tubes cartel in €	Fine for the computer monitor tubes cartel in €	Total fine in €
Chungwha	100%	0	0	0
Samsung SDI	40%	81.424.000	69.418.000	150.842.000
Philips	30%	240.171.000	73.185.000	313.356.000
LG Electronics	0%	179.061.000	116.536.000	295.597.000
Philips & LG Electronics	30% (only for Philips)	322.892.000	69.048.000	391.940.000
Technicolor	10%	38.631.000	-	38.631.000
Panasonic	0%	157.478.000	-	157.478.000
Toshiba	0%	28.048.000	-	28.048.000
Panasonic, Toshiba & MTPD	0%	86.738.000	-	86.738.000
Panasonic & MTPD	0%	7.885.000	-	7.885.000
Total		1.142.328.000	328.187.000	1.470.515.000

Table 5: Total fines in the TV and computer monitor tubes cartel case[186]. Certain undertakings appear several times as legal entities within the undertaking may be held jointly and severally liable for the whole or part of the fine imposed.[187]

[186] European Commission. Antitrust: Commission fines producers of TV and computer monitor tubes € 1.47 billion for two decade-long cartels. europa.eu/rapid/press-release_IP-12-1317_en.htm (8.2017)
[187] *ibid*