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The introduction of 'Leniency Plus' as a Tool for the European Commission in the Fight Against Cartels

- *A Study in the Development of the Commission's Leniency Notice*

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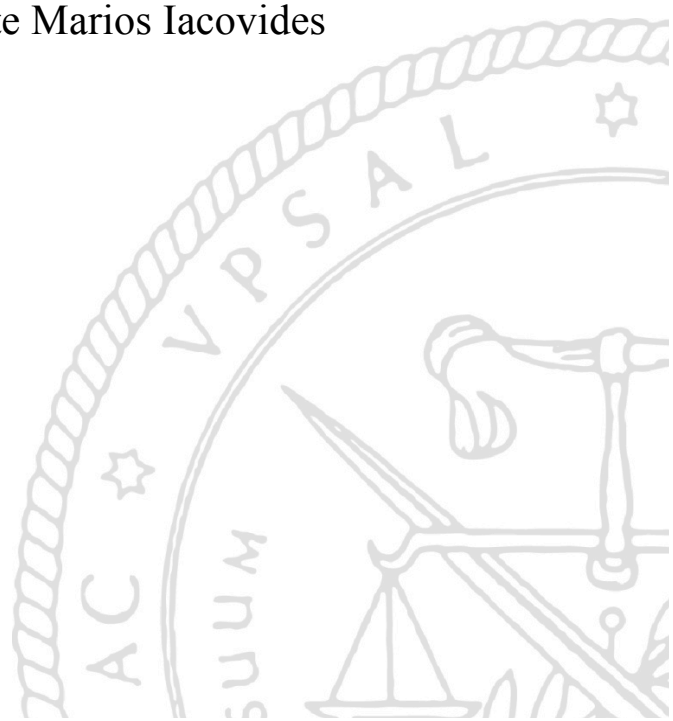

Summary

Through the current public enforcement powers, the Commission has the possibility to request information and perform inspections in order to collect such evidence that can prove an infringement of Article 101 TFEU. However, undertakings involved in cartels, that are willing to inform the Commission of the existence of such activity, should not be deterred from doing so by the high fines which they might face. Voluntary assistance from cartel participants is of great importance since cartels are secret and therefore by their very nature extremely difficult to detect and investigate without the cooperation of at least one of the participants. Immunity and reduction of fines for 'whistle blowers' has been considered justified with regard to the great reduction of cartels that follows. The EU has introduced the Leniency Notice, which aim is to fulfil these goals, and at the same time fulfil the overriding aims of competition law enforcement. The Leniency Notice has been considered necessary as a tool for the Commission to enforce competition law and has proven to be a great success.

The aim of this thesis is to investigate whether it may be justified to modify and extend the Leniency Notice further by introducing Leniency Plus. Leniency Plus is a method with the primary objective to detect more cartels. It functions by rewarding cartel participants with additional lenient treatment for disclosing *other* cartels. Leniency Plus have to be able to fulfil the goals of effective public enforcement of competition law, and at the same time operate under the general principles of EU law, mainly the principles of proportionality, equal treatment, effectiveness and legal certainty. It will be argued that an introduction of Leniency Plus in the Leniency Notice should be welcomed, subject to certain further modifications for it to function in the EU, such as limitations in the number of undertakings eligible for immunity, increase the standard of evidence provided, or to complement it with a negative sanction to enforce disclosure.

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Abbreviations

CJEU	Court of Justice of the European Union
ECN	European Competition Network
EU	European Union
Fining Guidelines	Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, Official Journal C 210/02, 1.9.2006.
Leniency Notice	European Commission Notice on Immunity from fines and reduction of fines in cartel cases 2006, Official Journal, C 298/17, 8.12.2006.
NCA	National Competition Authority
Regulation 1/2003	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
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
US	United States
US DoJ	United States Department of Justice

1 Introduction

"*Fighting cartels is one of the most important areas of activity of any competition authority and a clear priority for the Commission. Cartels are cancers on the open market economy, which forms the very basis of our Community*" – Mario Monti.[1]

In the work of preventing non-competitive behaviour and especially cartels, different methods have been applied by the European Commission (the 'Commission') and the National Competition Authorities ('NCA'). The method proven to be the most efficient in the fight against cartels is the use of leniency. According to the Commission Notice on Immunity from fines and reduction of fines in cartel cases (the 'Leniency Notice' or 'Notice'), the term 'leniency' refers to immunity as well as a reduction of any fine, which would otherwise have been imposed on a cartel participant because of an infringement of European Union ('EU') competition law.[2] Immunity or a reduced fine is given in exchange for the voluntary disclosure of information regarding a cartel.[3] Because of their efficiency there has been a rapid development and increased use of leniency programmes. The purpose of leniency programmes is to assist the competition authorities in their efforts to detect and terminate cartels and to punish the cartel participants.[4] The programmes are intended to undermine cartel stability by modifying the incentives for undertakings and individuals to come forward and cooperate with the competition authorities by providing them with information. Moreover, besides from destabilising already existing cartels, a well-functioning leniency programme can also deter undertakings from creating new cartels.[5]

Cartel activities are considered to be the most serious violation of competition law.[6] Cartels injure consumers by causing increased prices and restrictions of supply. In the long term, cartels will lead to a loss of competitiveness and reduced employment opportunities on the market. Undertakings involved in these types of infringements of competition law, which are willing to put an end to their participation in a cartel and inform the authorities of the existence of such activity, should not be deterred from

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[1] Monti, M., *Opening Address at the 3rd Nordic Competition Conference in Stockholm*, 11 September 2000.
[2] Point 1, European Commission Notice on Immunity from fines and reduction of fines in cartel cases (2006/C 298/17).
[3] Thépot, F., *Leniency and Individual Liability: Opening the Black Box of the Cartel*, p. 221.
[4] Para. 2, ECN Model Leniency Programme, Explanatory Notes, 2012.
[5] MEMO 06/356 Competition: the European Competition Network launces a Model Leniency Programme – frequently asked questions.
[6] Point 1, The Leniency Notice.

doing so by the high fines to which they might face. Voluntary assistance from cartel participants is of great importance for the competition authorities since cartels are secret and therefore by their very nature extremely difficult to detect and investigate without the cooperation of at least one of the participants. It is therefore considered to be in the public interest to grant favourable treatment to undertakings that decide to approach and cooperate with the authorities.[7] Immunity and reduction of fines for 'whistle blowers' has been considered to be justified with regard to the economic well-being of consumers, individual Member States, as well as the internal market of the EU.[8] The system's logic creates a race between cartel participants where the last company to confess its infringement will face difficulties in avoiding the imposition of heavy fines. Not only because the company will not be able to benefit from leniency, but also because by then the authorities will have obtained all the necessary information to build and present a strong case.[9]

However, as will be made evident throughout this work, an interesting question is how far the justification for immunity and reduction of fines for cartel members can be extended. The use of leniency has been seen as a major derogation from the original idea of punishments for infringers of competition law. Nevertheless, NCAs of some EU Member States have introduced even stronger tools and methods in their work to grant beneficial rewards for undertakings or individuals to encourage them to reveal cartels, or deter the uprising of new cartels. The so-called 'Leniency Plus' ('Leniency Plus'), also known in the United States ('US') as 'Amnesty Plus', has been implemented by some EU Member States. Leniency Plus provides an opportunity for cartel participants who are not given immunity or reduction of fines in one cartel investigation to receive leniency by assisting the authorities to reveal the existence of another cartel.

Leniency Plus is aimed to attract an increase of leniency applications by encouraging undertakings that are proven to have been taking part of a cartel in one market to report their collusive agreements in other markets.[10] The Leniency Plus method encourages cartel members to disclose their participation in cartels that operate in another distinct product or geographical market. As a reward for its cooperation, not

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[7] Para. 1, ECN Model Leniency Programme, Explanatory Notes, 2012, Points 1 and 3, The Leniency Notice.
[8] Para. 2, ECN Model Leniency Programme, Explanatory Notes, 2012.
[9] Ortiz Blanco, L., *EC Competition Procedure*, p. 222.
[10] Lefouili, Y., Roux, C., *Leniency programs for multimarket firms: The effect of Amnesty Plus on cartel formation*, p. 1.

only will the undertaking be granted full immunity for being the first to reveal the existence of a cartel in the second market, but it will also receive a substantial reduction in fine for its participation in the cartel in the first market.[11]

1.1 The Purpose

In this work the current Leniency Notice will be examined, and the purpose is to see whether an introduction of a method of Leniency Plus should take place and can be justified according to the general principles of EU law.

The answer will be dependent on the multiple interests and *rationale* of the work against anti-competitive behaviour and the public enforcement of EU competition law. In order to achieve the purpose, the current enforcement powers of the Commission will be presented and analysed with regard to the overriding objectives of enforcement of competition law and the general principles of EU law. Thereafter, the potential introduction of Leniency Plus as an additional tool will be presented and analysed. This involves many considerations and opinions. Regard need to be taken to the diverse objectives of competition law and to the sometimes conflicting interests in the fight against cartels and public enforcement as a whole. The interest of putting cartels to a quick end will be balanced against the interest of punishing all cartel participants and of trying to deter undertakings from entering into cartel. The granting of immunity is a delicate issue since it constitutes a major derogation from the imposing of fines in the case of the most serious violations of competition law.[12] Some are of the opinion that Leniency Plus is a step too far in the fight against cartels, whereas others consider it to be a highly efficient method. The purpose of a leniency programme is normally twofold. In the short run the aim is to facilitate the detection of cartels and thereby reduce cost of legal enforcement, whereas in the long run the aim is to deter undertakings from competition law infringements.[13] The question is whether the method of Leniency Plus will be able to provide stability in the dynamic of deterrence and destabilisation of cartels.

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[11] McElwee, D., *Should the European Commission Adopt Amnesty Plus in its fight against hardcore cartels*, p. 562.
[12] Competition Policy Newsletter, Number 2, 2002, p. 19.
[13] Brenner, S., *An empirical study of the European corporate leniency program,* p. 639.

1.2 Delimitation

In order to provide an in-depth analysis, this work will solely focus on the development of leniency and the question if Leniency Plus should be introduced in the Leniency Notice. Space precludes a detailed treatment of other methods used by the Commission to terminate and deter cartel participation, such as commitments and settlements.[14] The Commission does not have the powers to impose penalties on individuals. In the EU, the grant of immunity to an undertaking does not concern its directors, management or employees, and there is no other policy of immunity for individuals.[15] Consequently, the major discussion of giving the Commission the power to impose criminal sanctions on individuals for infringements of EU competition law will not be covered in this work.

Only the public enforcement of competition law will be thoroughly presented, whereas private enforcement will not be discussed for answering the question of this work.[16] This means that limited scope will be given *inter alia* the interesting legal development concerning compensation to individuals who have suffered economically from market abuse.

Finally, the work does not intend to investigate the technicalities of introducing a method of Leniency Plus, only whether such a method should be introduced. Likewise, the discussion is not dedicated to technical legal obstacles, but rather general principles of EU law that need to be taken into concern when deciding if such a method can and should be introduced.

1.3 Method and Material

The method used when writing this work is the legal dogmatic method. The method is normally conducted by starting out by an interpretation of the generally accepted sources of law, and performing a general and systematic description of these sources in

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[14] See Article 9 Regulation 1/2003 and Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation No 1/2003 in cartel cases, (OJ 2008/C 167/1).
[15] Wils, W.P.J., *Efficiency and Justice in European Antitrust Enforcement*, p. 119.
[16] It is possible for Leniency Plus to fill a potential gap between private and public enforcement of competition law. When a consumer have suffered a financial harm due to a cartel, that harm may not be so significant for each consumer. Even if the total harm on the market is major, it might not be beneficial for an undertaking to bring civil action. What Leniency Plus can do is to fill this gap, since it generates in a significant reduction on cartels. Therefore the net result will be the same, reduced numbers of cartels and less harm for the consumer.

accordance with the hierarchy of norms.[17] Thereinafter, a systematic analysis is performed and the end-result is intended to reflect the content of these sources.[18] This work has therefore been conducted by analysing the background and idea to the use of leniency in competition law enforcement in the EU. Consequently, the current method of competition law enforcement has been presented together with the relevant overriding EU principles for competition law enforcement in order to analyse the legal impacts of an implementation of Leniency Plus. The leniency method and the Leniency Notice have been analysed, both after and prior to their implementation. The analysis of Leniency Plus has been made in the light of the different policy interests when publicly enforcing competition law and the overriding objectives and principles of EU competition law. A *de lege ferenda* perspective has been adopted with regard to the question if Leniency Plus should be introduced.

The legal doctrine used in this work is primarily EU legislation in the form of treaties, directives, regulations and other legislative acts from the EU concerning competition law. Working documents from the Commission in the form of Green Papers, White Papers, press-releases, studies, decisions etc. have also been used for guidance in the analysis. The importance of case-law from the Court of Justice of the European Union ('CJEU') when interpreting EU law cannot be disregarded.[19] Therefore certain cases of interest for competition law enforcement will be presented and analysed.

Since the use of the leniency method in competition law originally derives from the United States Department of Justice ('US DoJ'), some regard has been taken to the legal material and writings from the US. However this does not mean that the text is comparative, merely that some influences will be taken from the use of leniency in the US. The same is true for the United Kingdom ('UK'), which is an EU Member State that has implemented Leniency Plus. The opinion of legal scholars in literature and articles will also be presented and analysed.

Concerning treaty legislation mentioned in *inter alia* case law before the introduction of the Lisbon Treaty, the numbering of that legislation is changed to the current of TFEU used after the introduction of the Lisbon Treaty.

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[17] Peczenik, A., *Juridikens allmänna läror,* p. 252. Sandgren, C., *Är rättsdogmatiken dogmatisk?,* p. 649.
[18] Kleineman, J., *Rättsdogmatisk metod*, p 21, 26. See also Peczenik, A., *Juridikens allmänna läror,* p. 249.
[19] Hettne, J., *EU-rättslig metod*, p. 49.

1.4 Disposition

The work will commence with a concise introduction to the purpose and objectives of competition law and public enforcement in chapter 2. This is because it is relevant for the reader to be aware of the goals that public enforcement of competition law is supposed to achieve. In chapter 3 the public enforcement of competition law will be presented with regard to the overriding principles of competition law enforcement. In the same chapter, the Commission's enforcement powers will be presented and discussed. Chapter 4 will deal with the Leniency Notice. In order to give the reader a background of the principle ideas of a leniency programme, the development of leniency, both in the US and in the EU will be presented. Subsequently in chapter 5 the Leniency Plus method will be presented and discussed more thoroughly. The method will be analysed with regard taken to the different interests and considerations that it needs to fulfil, in order to decide whether it should be introduced or not. Chapter 6 will contain a short summary of the work and the conclusions that have been made.

2 EU Competition Law Enforcement

The principal idea of this work is to describe and analyse the development of using leniency as a tool when publicly enforcing competition law and the potential of adding Leniency Plus to the Notice. However, before presenting this specific type of enforcement method, it is necessary to clarify how cartels arise and the effect cartels have on the market (2.1) but also to describe the overriding ideas and objectives present in all competition law enforcement, and in particular the public enforcement of competition law (2.2).

2.1 Cartels

When a cartel arises, its participants artificially limit the competition that would normally prevail between them on the market. The aim of a cartel is to coordinate the competitive behaviour of the undertakings and distort competition through practices such as the fixing of purchase or selling prices or other trading conditions, the allocation of production or sales quota, the sharing of markets, including bid-rigging, restrictions of imports or exports and/or anti-competitive actions against other competitors. By distorting competition the undertakings avoid the pressure that normally leads them to innovate, both in terms of product development and the introduction of more efficient production methods. Cartels will restrict competition without producing any countervailing benefits for the market consumer.[20] Among the benefits an undertaking would receive from entering a cartel could be the possibility to be more cost-efficient in short term, and to avoid the need to finance innovation and efficiency. A successful cartel raises prices above the competitive level and reduces output.[21] Thereby it creates a possibility for the undertakings to stay at a high price and all undertakings in the cartel will be able to make a profit. Also non-profitable and non-functional undertakings will be able to survive and stay on the market. Maintaining a successful cartel can be difficult and requires effort. The members of the cartel need to select and coordinate their behaviour and strategies in order for the cartel partnership to be profitable.

For the abovementioned reasons, cartels are prohibited under Article 101 of the Treaty on the Functioning of the European Union ('TFEU'). The Article clearly

[20] Jones, A., Sufrin, B., *EU Competition Law*, 2014, Oxford University Press, p. 666.
[21] OECD, *Fighting Hard Core Cartels, Recent Progress and Challenges Ahead.* See also Jones, A., Sufrin, B., *EU Competition Law*, p. 667.

prohibits "*all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention or distortion of competition within the common market*". Article 101(2) TFEU states that an agreement like this should be automatically void. It is considered that all cartel arrangements, even solely national, will have an effect on the trade between Member States since such cartels also hinder competitors from other Member States from entering a market, which results in an effect on the common market.[22] Cartel participants are most often aware of their illegal conduct, and therefore it is important that the sanctions they might face are so considerable that applying for leniency is an attractive alternative.

2.2 Aims of Competition Law

Mr Monti, former EU Competition Commissioner, has stated that the open market economy is crucial to the functioning of the EU.[23] Competition is of highest priority in the work of maintaining an open market economy. Among many things that competition does is that it encourages innovation, sets the appropriate price levels, and forces non-functioning undertakings to either improve or exit the market. These are principal concerns that need to be reflected in the open market economy. In the work of protecting these ideas it is necessary to regulate the market. This can be considered as derogating from the idea of a self-regulating free market economy, but as will be made clear in the following, it is something that has been necessary in order to protect the market.

Article 3 of the Treaty on European Union ('TEU') clearly states that the EU shall establish an internal market that is highly competitive. Moreover, Article 3(1)(b) TFEU states that one of the areas in which the EU has exclusive competence is the establishing of the competition rules necessary for the functioning of the internal market. With competition it is possible to achieve certain outcomes that benefit society, more specifically essentially economic progress and the economic welfare of the people and organisations that make the society.[24] Protocol (No 27) on the Internal Market and Competition also states that the internal market includes a system ensuring that

[22] Jones, A., Sufrin, B., *EU Competition Law*, p. 800.
[23] See also Article 3 TEU.
[24] Goyder, J., Albors-Llorens, A., *EC Competition Law*, p. 10.

competition is not distorted.[25] Articles 101 and 102 TFEU are essential in order to achieve these goals and constitutes fundamental provision for the accomplishment of the tasks entrusted to the Commission and, in particular for the functioning of the internal market.[26] It is therefore of greatest importance that the provisions can be applied effectively throughout the EU in order for the internal market to be competitive and not to be distorted by any means. Articles 101 and 102 TFEU can either be publicly enforced by actions taken by the Commission and NCAs of the Member States, or enforced by private enforcement actions allowing parties that have suffered economic harm due to the actions of the infringers to be compensated, thereby obtaining corrective justice.[27] The priority is to protect the competitive process by preventing undertakings to restrict competition between themselves or with third parties from reducing welfare of the final consumer of the products in question.[28] This is meant to ensure the maintenance of a highly competitive market.[29] The competition laws are also crucial to ensure that the consumers in the end are granted the positive results that an efficient enforcement process results in.[30]

It has been considered that enforcement of competition law should fulfil three main objectives.[31] First of all, it should bring infringements to an end. This does not only include negative measures, for example an order to abstain from the alleged conduct, but also measures of a positive character, encouraging the infringers to end their transgressions in the future.[32] Secondly, competition law needs to punish the undertakings for their anticompetitive behaviour and deter them and other undertakings from possible infringements in the future. These two mechanisms, the prevention mechanism and the deterrent mechanism, will prove to be important when discussing leniency, and have to be taken into account when discussing whether Leniency Plus should be introduced. The difference between the two mechanisms is their time of

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[25] Protocol (No 27) on the Internal Market and Competition, Official Journal 115, 09/05/2008 P. 0309 – 0309.
[26] Case C-126/97 *Eco Swiss China Time Ltd. v. Benetton International NV* ECLI:EU:C:1999:269, para. 36.
[27] Jones, A., Sufrin, B., *EU Competition Law*, p. 1082.
[28] Case T-168/01 *GlaxoSmithKline Services Unlimited v. Commission* ECLI:EU:2006:265, para. 118.
[29] Commission Communication, *The Commission's Annual Report on Competition Policy for 2000,* 24 November, 199COM(1999), p. 642.
[30] 2004 Guidelines on the application of Article 81(3) of the Treaty, [2004] OJ C101/97, para. 13.
[31] Komninos, A.P., *EC Private Antitrust Enforcement: Decentralised Application of EC Competition Law by National Courts*, p. 7.
[32] Komninos, A.P., *EC Private Antitrust Enforcement: Decentralised Application of EC Competition Law by National Courts*, p. 7

enforcement. A prevention mechanism will act on a cartel before one is created, while a deterrent mechanism relies on sanctions imposed after a cartel has taken place.[33] Consequently the Commission duties involve more than applying Articles 101 and 102 TFEU in individual cases. The Commission has a broader supervisory role, which includes the duty to pursue a general policy designed to apply the principles laid down by the Treaty and to guide the conduct of undertakings in light of those principles.[34]

A third objective of competition law enforcement, attained through private enforcement, is to compensate the victims who have suffered a loss because of an undertaking's anticompetitive behaviour.[35] At the end of the day, it is consumers who suffer for cartels by paying higher prices for cartelised goods and services.[36] The Commission has also clearly emphasised the importance to defend consumer rights as a primary objective.[37] The antitrust victims are compensated through sanctions of a civil character, which the national courts impose upon the infringers. However, although being of great interest – especially since the European Parliament and the Council have recently adopted a Directive on antitrust damages – it will not be discussed here.[38] Unlike private enforcement, public enforcement imposes administrative sanctions in the form of fines and the objective is, as mentioned above, to be effective in the termination of cartels and other anti-competitive conduct, as well as being deterrent. It has been considered difficult for public enforcement to fulfil the goal of compensation to victims, but in combination with private enforcement, all three objectives can be fulfilled.[39] Public enforcement is considered better in achieving the general policy objectives of the competition policy.

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[33] Carmona Botana, P., *Prevention and Deterrence of Collusive Behaviour:The Role of Leniency*, p. 48.
[34] Joined Cases 100/80 to 103/80 *Musique Diffusion Francaise* ECLI:EU:C:1983:158, para. 105. See also Frese, M.J., *Fines and Damages under EU Competition Law: Implications of the Accumulation of Liability*, p. 400.
[35] Komninos, A.P., *EC Private Antitrust Enforcement: Decentralised Application of EC Competition Law by National Courts*, p. 7.
[36] Canenbley, C., Steinvorth, T., *Effective Enforcement of Competition Law: is There a Solution to the Conflict Between Leniency Programmes and Private Damages Actions?*, p. 315.
[37] White Paper on Damages actions for breach of the EC antitrust rules, 2.4.2008, COM(2008) 165 Final, p. 2.
[38] Directive of the European Parliament and of the Council of the European Union 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, PE-CONS 80/14. Adopted by the council on the 10th of November 2014 Press release by the European Commission IP/14/1580, 10 November 2014.
[39] Komninos, A.P., *EC Private Antitrust Enforcement: Decentralised Application of EC Competition Law by National Courts,* p. 8.

3 Public Enforcement of Competition Law

In *Dansk Rørindustri* the CJEU stated that:

> "*The supervisory task conferred on the Commission by Articles 101(1) and 102 […] not only includes the duty to investigate and punish individual infringements but also encompasses the duty to pursue a general policy designed to apply, in competition matters, the principles laid down by the Treaty and to guide the conduct of undertakings in the light of those principles*."[40]

The statement above makes clear that it is of great importance that the Commission is constantly following the principles of EU law when using the powers given to it in order to prevent infringements of EU competition law. From the enforcement powers the Commission has been awarded, it is evident that the Commission also possesses a wide margin of discretion in deciding what undertakings or what line of business it decides to investigate.[41] Since the Commission can perform its duties under its own discretionary assessment, it is even more important that the Commission always follows the principles of EU law. Similarly, when introducing a new legal method, giving the Commission additional powers and tools in the fight against cartels, it is essential that the EU legislator or the Commission itself balance the possible effects and results of its powers against the important principles of proportionality, effectiveness, equal treatment and legal certainty.[42] These are the essential principles of public enforcement of competition law.[43] In the following section, the relevant principles for the enforcement of competition law will be presented. It is not the intention to cover all principles of EU law that might have an effect on competition law, but rather the ones necessary for accurately presenting the topic of leniency and the potential introduction of Leniency Plus.

3.1 The Relevant Principles of Public Enforcement of Competition Law

The function of the general principles of EU law is primarily, or as some would say most importantly, to serve as interpretative measures of EU law, used notably by the

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[40] Joined Cases C-189/02 P, 202/02 P, and 213/02 P *Dansk Rørindustri A/S and others v. Commission* ECLI:EU:C:2005:408, para. 170. See also Jones, A., Sufrin, B., *EU Competition Law*, p. 933.
[41] Jones, A., Sufrin, B., *EU Competition Law*, p. 1038.
[42] Tridimas, T., *The General Principles of EU Law*, p. 36.
[43] Frese, M.J., *Fines and Damages under EU Competition Law: Implications of the Accumulation of Liability,* p. 402-403.

Court of Justce of the European Union ('CJEU') in its decisions.[44] The general principles of EU law may also be used as aid for the interpretation of national measures that fall within the scope of EU law.[45] Another function is that the general principles of EU law are the most used grounds for review declarations of invalidity under Article 263 TFEU.[46]

When discussing the enforcement tools of the Commission, it is important to know how far-reaching its powers are. In addition to this, it should be borne in mind that the Commission's powers are given through legal acts, which also need to be aligned with the principles of EU law. It is important that the Commission manages to punish serious infringements of competition law at the same time as an undertaking's right of not being sanctioned for behaviour which they are innocent of is being upheld.[47]

The principles discussed in what follows are the most important in the following context of discussing leniency programmes. They need to be seen in the light of the overriding imperatives of competition law enforcement – to bring infringements to an end and to punish the ones guilty of such infringements.

3.1.1 The Principle of Proportionality

The methods used by the Commission in its enforcement actions need to follow the principle of proportionality as set out in Article 5 of TEU. The principle of proportionality requires that a measure is appropriate and necessary to achieve its objectives.[48] In order for a provision of EU law to be in accordance with the principle of proportionality it is necessary to establish whether the means it employ correspond to the importance of the aim and whether they are necessary for its achievement.[49] The principle requires that the burden imposed on an undertaking must not exceed what is necessary to achieve the objectives pursued.[50] In *Otis* the CJEU concluded that the fines imposed must not be disproportionate to the aims pursued, and that the amount of the fine for an infringement of competition law must be proportionate to the infringement

[44] Tridimas, T., *The General Principles of EU Law*, p. 29.
[45] Tridimas, T., *The General Principles of EU Law*, p. 31.
[46] Tridimas, T., *The General Principles of EU Law*, p. 31.
[47] Whish, R., Bailey, D., *Competition Law*, p. 249.
[48] Tridimas, T., *The General Principles of EU Law,* p. 139.
[49] Case C-66/82 *Fromançais SA v FORMA* ECLI:EU:C:1983:42, para. 8.
[50] Tridimas, T., *The General Principles of EU Law*, p. 140.

viewed as a whole.[51] As a primary condition it needs to be established if the measure is suitable to achieve a legitimate aim, and secondly whether the measure is necessary, or in other words if there are other less restrictive means of achieving the same result.

3.1.2 The Principle of Effectiveness

When carrying out its task under the competition rules, the Commission also needs to abide by the principle of effectiveness because in order to effectively protect the EU principles, effective enforcement of EU law is required. In the context of competition law enforcement, the principle requires that the Commission is effective in its work, while at the same time it allows the Commission to focus its resources where they are most needed. In competition law enforcement the principle of effectiveness is not the same as ensuring effective judicial protection and the right of access to court.[52]

It is not possible for the Commission to act upon every infringement in order to maintain an effective competition policy.[53] In *Automec II,* the CJEU stated that there is no need for the Commission to initiate an investigation against every alleged infringement of Article 101 and 102 TFEU, but rather to concentrate its resources on certain cases.[54] The Commission therefore has the discretion to decide which cases to prioritise. In *Visa,* it was concluded by the CJEU that the Commission has a wide margin of discretion when setting the amount of fines and that this margin of discretion also extends to deciding the appropriateness of imposing a fine or not.[55] Consequently, for the sake of effectiveness it is up to the Commission to decide whether a case is of the importance to investigate and initiate a proceeding against, and finally whether to impose penalties upon that undertaking or not.

The principle of effectiveness also requires the Commission not only to be effective in discovering infringements, but also to be able to terminate and penalise infringements effectively. It has been suggested that persisting infringements require a remedy that effectively terminates them, but how this is achieved is less important, as long as the means are effective.[56] Regardless if the infringement is intentional or

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[51] Joined Cases T-141, T-142, T-145 and T-146/07 *General Technic-Otis and Others v Commission*, para. 284.
[52] Tridimas, T., *The General Principles of EU Law*, p. 140, 419.
[53] Frese, M.J., *Sanctions in EU Competition Law*, p. 100.
[54] Case T-24/90 *Automec II* ECLI:EU:T:1992:97, para. 66-67.
[55] Case T-461/07 *Visa Europe and Visa International v Commission* ECLI:EU:T:2011:181, para. 212.
[56] Frese, M.J., *Sanctions in EU Competition Law,* p. 102.

negligent, persisting or terminated, it is still necessary that the penalties imposed by the Commission are effective. The CJEU has also made it clear that Articles 101 and 102 TFEU would be ineffective if not accompanied by the enforcement measures provided for in Article 103 TFEU, namely fines and penalties.[57]

3.1.3 The Principle of Equal Treatment

The principle of effectiveness may need to be balanced against the principle of equal treatment, which also governs the Commission's application of EU law.[58] In accordance with this principle, similar situations may not be treated differently and different situations may not be treated similarly, unless there is an objective justification for such treatment.[59] Rather than requiring total equality, the principle of equal treatment demands that any difference in treatment is proportionate to the difference in circumstance.[60] With regard to Article 101 and 102 TFEU, one should compare the treatment of every single element that has a bearing on the gravity of the sanction. Though not of imminent relevance in case of leniency, which are characterised – and motivated – by a difference in treatment of the undertakings by the Commission, the principle has sometimes been found to apply. In *Bolloré,* the General Court made a thorough analysis of the usefulness of documents submitted under a leniency application.[61] Furthermore there is no possibility for undertakings to claim that the Commission should not impose a fine on them, because of not having imposed a fine on another undertaking for a similar conduct in the market.[62] It is thus impossible to take account of every difference that may exist among the undertakings on the market.[63]

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[57] Case C-429/07 *Inspecteur van de Belastingdienst v X BV* ECLI:EU:C:2009:359, para. 36-37.
[58] Frese, M.J., *Sanctions in EU Competition Law,* p. 89.
[59] Jones, A., Sufrin, B., *EU Competition Law*, p. 1012. Article 21(2) of the EU Charter, Article 18 TFEU, Case C-29/95 *Eckehard Pastoors and Others v Belgium* ECLI:EU:C:1997:28, See Frese, M.J., *Sanctions in EU Competition Law,* p.89.
[60] Frese, M.J., *Sanctions in EU Competition Law*, p. 91.
[61] Joined Cases T-109, T-118, T-122, T-125, T-126, T-128, T-129, T-132 and T-136/02 *Bolloré* ECLI:EU:T:2007:115, para. 694-708.
[62] Joined Cases C-89, C-104, C-116, C-117 and C- 125-29/85 *Ahlström Osakeyhtiö v Commission* ECLI:EU:C:1993:120. para. 197. See also Case T-86/95, Case *Compagnie Général Maritime and Others v Commission* ECLI:EU:T:2002:50, para. 487, Case T-17/99 *KE KELIT v Commission* ECLI:EU:T:2002:73, para. 101, Frese, M.J., *Sanctions in EU Competition Law*, p. 92.
[63] Judgment of 19 December 1961 *Commission of the EEC / Italy* 7/61 ECLI:EU:C:1961:31, para. 325.

Moreover, the principle of equal treatment cannot preclude the legislature from adopting a criterion of general application.[64]

3.1.4 The Principle of Legal Certainty

The principle of legal certainty expresses the fundamental premise that those subject to the law must know what the law is as to be able to plan their actions accordingly.[65] The principle of legal certainty is of great importance within the field of competition law. In *ThyssenKrupp Nirosta* the CJEU made it clear that the principle of legal certainty requires that competition enforcement rules enable those undertakings concerned must be able to ascertain unequivocally what their rights and obligations are and take steps accordingly.[66] The consequences of an infringement of Articles 101 and/or 102 TFEU need to be foreseeable for an undertaking. This is of special importance for the imposition of fines which was made evident in *Dansk Rørindustri* where the CJEU concluded that the method used by the Commission to impose fines on undertakings for infringements of Article 101 and 102 TFEU needs to ensure legal certainty for the undertaking.[67]

3.2 Powers of the Commission

It is a top priority for the Commission to be able to obtain accurate information and sufficient evidence that can prove an alleged infringement.[68] It is therefore necessary that the Commission is given enough powers in order to be efficient in its work in establishing a system which ensures effective competition. A significant, and welcomed, change in the Commission's work took place in connection with the introduction of Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 101 and 102 of the Treaty ('Regulation 1/2003' or

[64] Opinion of Advocate General Jacobs in Case C-13/92 to C-16/92 *Driessen and others v Minister van Verkeer en Waterstaat*, (ECLI:EU:EU:C:1993:828) ECLI:EU:C:1993:222, p. 4780.
[65] Tridimas, T., *The General Principles of EU Law*, p. 242.
[66] C-352/09 P *ThyssenKrupp Nirosta,* [2011], para. 81.
[67] Cases C-189/02 P, 202/02 P, and 213/02 P, *Dansk Rørindustri A/S and others v. Commission* [2005] ECR I-5425, para. 213.
[68] Cases 29/83 and 30/83 *CRAM and Rheinzink v Commission* [2007] 4 CMLR 153, para. 20, Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85, C-125/85, C-126/85, C-127/85, C-128/85 and C-129/85 *Åhlström Osakeytiö v Commission ('Woodpulp II')* [1993] ECR I-1307, para. 127.

'the Regulation').[69] The Regulation introduced some major changes and has clearly improved the Commission's work in enforcing Articles 101 and 102 TFEU. In fact, the Commission itself has considered the Regulation to be 'a landmark reform for the enforcement of competition law in the EU'.[70] What the Regulation did was to introduce a system based on the direct application of the EU competition rules in their entirety. It empowered the NCAs and national courts to apply all aspects of the EU competition rules, and it also introduced a new close form of cooperation between the Commission and the NCAs.[71] In this way it became possible for the Commission to focus its resources on the most serious infringements of competition law, namely cartels.

Regulation 1/2003 has also given the Commission extensive investigation powers relating to its enforcement of competition law, enabling it to devote more resources to investigating cases and conducting inquiries in key sectors in the market economy that suffers from market distortions.[72] Of specific importance is the decision-making powers, the powers of investigation and the power to impose penalties.[73] In the forthcoming presentation of the public enforcement of EU competition law, only the Commission's powers of investigation and enforcement will be presented on the basis of Regulation 1/2003.

3.3 Enforcement under Regulation 1/2003

Regulation 1/2003 provides the basis for the Commission's enforcement procedure and gives it the powers to investigate and take decisions requiring the termination of infringements.[74] The procedure is normally divided into two stages.[75] The first is a stage of preliminary investigation where the Commission gathers all the relevant information confirming the existence of an infringement of Article 101 and/or 102 TFEU, and

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[69] See 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.
[70] Communication from the Commission to the European Parliament and the Council *Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives* COM(2014) 453, para. 1.
[71] Communication from the Commission to the European Parliament and the Council *Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives* COM(2014) 453, para. 1.
[72] Communication from the Commission to the European Parliament and the Council *Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives* COM(2014) 453, para. 5, Jones, A., Sufrin, B., *EU Competition Law*, p. 1027. See also Article 4 of Regulation 1/2003.
[73] Whish, R., Bailey, D., *Competition Law*, p. 252.
[74] Kerse, C.S., Khan, N., *EC Antitrust Procedure*, p. 37.
[75] Case T-99/04 *AC-Treuhand AG v Commission* ECLI:EU:T:2008:256, para. 47.

adopts an initial position of how the procedure is to proceed. The second stage covers the period from the notification of a statement of objections until the final decision.[76] The continuation of this work will focus on the first stage, the investigation stage. That is because it is in this stage where the Leniency Notice has proven to be helpful. This investigation stage performed by the Commission can also be divided into three different phases, where the main emphasis is to gather information.[77] First the Commission will investigate the market and undertakings active on it. As a second phase it will use its powers to request information or perform investigations. The last and final phase is the decision it will take on the case and the possible imposition of penalties.

3.3.1 First Phase – The Commission Conducting General Surveys

Article 17 of Regulation 1/2003 enables the Commission to conduct an investigation into a sector of the economy or a type of agreement where it appears that there may be a restriction or distortion of competition.[78] An Article 17-investigation can be used by the Commission for example because of the lack of new entrants into a market or the rigidity of prices.[79] Article 17(2) of Regulation 1/2003 enables for the Commission to request information for the purpose of conducting a sectoral investigation.[80] This fact-finding procedure has been described as a period intended to enable the Commission to gather all the relevant information confirming or not the existence of an infringement of the competition rules and to adopt an initial position on the course of the procedure and how to proceed.[81] Consequently, the Commission will supervise and observe the market and its actors, and out of the data collected and received it will try to detect and prove a violation of competition law.[82] Nonetheless, as will be made evident in 3.4, being able to prove an infringement with this type of evidence can be difficult, therefore additional methods of requesting information from undertakings have been added to the Commission's powers. The Commission can also initiate a proceeding by relying on information provided by third parties. Competitors or customers who have suffered

[76] Jones, A., Sufrin, B., *EU Competition Law*, p. 938.
[77] Kerse, C.S., Khan, N., *EC Antitrust Procedure*, p. 38.
[78] Whish, R., Bailey, D., *Competition Law*, p. 267.
[79] Whish, R., Bailey, D., *Competition Law,* p. 267-268.
[80] Whish, R., Bailey, D., *Competition Law,* p. 268.
[81] See Case T-99/04 *AC-Treuhand AG v Commission* ECLI:EU:T:2008:256, para. 47.
[82] Wils, W.P.J., *Is Criminalization of EU Competition Law the Answer?,* p. 127.

economically due to the existence of a cartel may provide the competition authorities with information on what they believe to be an infringement of competition law. However, such information can be difficult to prove in a subsequent process and therefore it is more efficient if such information can be obtained directly from an undertaking involved in the cartel.[83]

3.3.2 Second Phase – The Commission's Request for Information and the Power to Conduct Inspections

Articles 18 to 21 of Regulation 1/2003 open up the possibility for the Commission to request relevant information from the undertakings allegedly involved in anticompetitive behaviour.[84] These formal powers are crucial for obtaining information when undertakings do not provide it voluntarily.[85] The use of these powers is however often contested by the undertakings under the general principles of EU law.[86] Under Article 18 of Regulation 1/2003, it is possible for the Commission to request information from the undertakings to be provided voluntarily. However where the Commission investigates a suspected infringement it is frequently looking for information which the undertakings would rather not give in and which the undertakings may have taken active steps to conceal. Moreover, the Commission is not entitled to request information for a purpose other than the enforcement of competition rules, and when exercising its discretion under Article 18 of Regulation 1/2003 it has been considered that the Commission must have regard to the principle of proportionality.[87]

The Commission can also turn to third parties, such as customers, competitors or suppliers and request them to supply information.[88] Recital 23 of Regulation 1/2003 however makes clear that undertakings cannot be forced to admit that they have committed an infringement. At the same time, the same recital states that the undertakings are in any event obliged to answer factual questions and to provide documents, even if this information may be used to establish against them or against

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[83] Wils, W.P.J., *Is Criminalization of EU Competition Law the Answer?,* p. 128.
[84] Whish, R., Bailey, D., *Competition Law,* p. 267.
[85] Jones, A., Sufrin, B., *EU Competition Law*, p. 939.
[86] Jones, A., Sufrin, B., *EU Competition Law*, p. 939.
[87] Case C-36/92 P *SEP v Commission* ECLI:EU:C:1994:205. See also Whish, R., Bailey, D., *Competition Law*, p. 269.
[88] Jones, A., Sufrin, B., *EU Competition Law*, p. 940.

another undertaking the existence of an infringement. The CJEU has concluded that there is a limited freedom against self-incrimination in EU law, which entitles undertakings to refuse to answer questions.[89] But it does not entitle the undertakings to refuse to hand over documents to the Commission which might serve to establish an infringement. The privilege against self-incrimination is only granted where the Commission requires information under compulsion according to Article 18(3) of Regulation 1/2003, not when it does a mere request under Article 18(2) of Regulation 1/2003.[90]

It is often the case that the undertakings involved in a cartel are the only ones in possession of the information needed to prove the existence of the cartel. In order for the Commission to obtain such information directly from the undertakings, surprise on-the-spot investigations has been considered necessary. Article 20 of Regulation 1/2003 enables the Commission to conduct all necessary inspections on the undertakings' premises. These inspections are often better known as 'dawn raids'. It is not necessary initially to request for information under Article 18 of Regulation 1/2003, but the Commission can proceed directly to conducting the on-the-spot inspections. The undertakings inspected have an obligation to cooperate actively with the investigative measures.[91] Article 20 of Regulation 1/2003 gives the Commission a wide margin of discretion in deciding whether to perform an inspection or not. It is therefore necessary that the principle of proportionality is taken into account when deciding to perform an inspection or not. If the undertakings do not comply with the investigations, it is possible for the Commission to impose penalties upon them of up to one per cent of the total turnover in the preceding business year.[92] Finally, Article 21 of Regulation 1/2003 opens up for inspections of other premises, including the homes of individual persons. This is a truly controversial aspect of the inspection powers given to the Commission.

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[89] Case C-374/87 *Orkem SA v. Commission* ECLI:EU:C:1989:387. See also Whish, R., Bailey, D., *Competition Law*, p. 269 and Tridimas, T., *The General Principles of EU Law*, p. 374.
[90] Case C-407/04 P *Dalmine v Commission* [2007] ECR I-835, paras. 33-36.
[91] Case C-374/87 *Orkem SA v. Commission* ECLI:EU:C:1989:387, para. 27.
[92] Article 23(1)(c) of Regulation 1/2003.

3.3.3 Third Phase – The Commission's Imposition of Fines

The imposition of fines is done in the second stage of the procedure. However, it is necessary to present how the fines are set since it is of great relevance in the use of leniency.

At the end of the investigation stage, and after the undertaking has been given the opportunity of being heard, Article 7 of Regulation 1/2003 empowers the Commission to impose on undertakings behavioural or structural remedies, which are proportionate to the infringement and necessary to bring the infringement effectively to an end. Such behavioural remedies can be negative, such as the order to stop a certain kind of conduct, or positive, demanding an undertaking to do something.[93] In a cartel case, the Commission will normally require the participating undertakings to stop the illegal behaviour, and to refrain from any act or conduct having the same or a similar object or effect in the future.[94] Articles 23 and 24 of Regulation 1/2003 further empower the Commission to impose fines and periodic penalty payments upon undertakings both for procedural infringements and substantive infringements of the competition rules. The Commission cannot impose penalties or fines on individuals, except if the individual is acting as an undertaking.[95] According to the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation 1/2003[96] ('Fining Guidelines'), the Commission's power to impose fines on undertakings is one of the means conferred on it in order to carry out the tasks entrusted to it by the Treaty.[97] Furthermore, it is clear from these guidelines that the effects of imposing the fines are intended to be deterrent.[98] As with the general aims of competition law, the Commission's power to impose fines also need to be used in accordance with the general principles of EU law.[99] The Commission is allowed by decision to impose fines on undertakings of up to ten per cent of the undertakings total turnover from the preceding business year.[100] When

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[93] Whish, R., Bailey, D., *Competition Law*, p. 253.
[94] Whish, R., Bailey, D., *Competition Law*, p. 253. See also Joined Cases 6/73 and 7/73 *Commercial Solvents Co v Commission* ECLI:EU:C:1974:18 where the CJEU confirmed the ability for the Commission to make a positive order on an infringer.
[95] Whish, R., Bailey, D., *Competition Law,* p. 275.
[96] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (2006/C 210/02).
[97] Point 4 of the Fining Guidelines.
[98] Joined Cases 100/80 to 103/80 *Musique Diffusion francaise and others v Commission* [1983] ECR 1825, para. 106.
[99] Point 4 of the Fining Guidelines.
[100] Article 23(2)(a) of Regulation 1/2003.

setting the fine, the Commission takes into account all relevant facts of the case as to the gravity and duration of the infringement and whether it was deliberate or merely negligent.[101] It is important that the principle of proportionality is observed in the fining process, in order to relate the fine to the infringement, the size of the undertaking concerned and its responsibility for the infringement. The assessment is complex since it involves different legal and economic factors that need to be weighed together, at the same time as regard needs to be taken to the principle of proportionality. A careful case-by-case approach is thus necessary. In *Musique Diffusion* the CJEU stated that the ten per cent limit seeks to prevent fines from being disproportionate in relation to the size of the undertaking, in accordance with the principle of proportionality.[102] If the situation has occurred where multiple undertakings involved in the same cartel are imposed with fines, it is moreover important that the principle of equal treatment is respected and that the Commission ensures that the final amount of fines reflects any distinction between the undertakings in terms of turnover.[103]

The method used for setting the amount of the fines is conducted in a two-step process.[104] First the Commission will determine a basic amount of the fine for each undertaking. The amount will be set by reference to the value of sales, which in short will be calculated on a case-by-case basis where the gravity of the infringement is multiplied by the number of years the infringement has continued.[105] The profit which the undertakings were able to derive from their practices is also a factor to be considered.[106] As a second stage of the process the Commission will take aggravating and mitigating circumstances into consideration. Aggravating circumstances can be repeated offences, refusal to cooperate and that the undertaking has been acting as an instigator of the infringement.[107] Mitigating circumstances are found when an undertaking has cooperated with the Commission in its investigation and provided evidence to terminate the infringement, but also, of most significance relating to Leniency Plus, when the undertaking has effectively cooperated with the Commission

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[101] Joined Cases 100/80 to 103/80 *Musique Diffusion Francaise* ECLI:EU:C:1983:158, Jones, A., Sufrin, B., *EU Competition Law*, p. 1002. Article 23(3) of Regulation 1/2003.
[102] Joined Cases 100/80 to 103/80 *Musique Diffusion Francaise* ECLI:EU:C:1983:158, paras. 119-120.
[103] Joined Cases C-189/02 P, 202/02 P, and 213/02 P *Dansk Rørindustri A/S and others v. Commission* ECLI:EU:C:2005:408, para. 312.
[104] Point 9 of the Fining Guidelines.
[105] Point 13-26 of the Fining Guidelines.
[106] Joined Cases C-189/02 P, 202/02 P, and 213/02 P *Dansk Rørindustri A/S and others v. Commission* ECLI:EU:C:2005:408, para. 292.
[107] Point 28 of the Fining Guidelines.

outside the scope of the Leniency Notice and beyond its legal obligation to do so.[108] Finally, point 34 of the Fining Guidelines declares that the Commission will apply its leniency rules in line with the Fining Guidelines. The final amount imposed on the undertaking may however not exceed ten per cent of the undertaking's worldwide turnover in the preceding business year.[109] Fines are imposed to deter the undertakings involved in the infringement from engaging in further violations, but if the fine is set high enough, it will also deter third parties from engaging in cartel activities.[110]

The Commission enjoys a wide margin of discretion concerning the imposition of fines. However, the Commission's policy task is not merely to enforce Articles 101 and 102 TFEU in individual cases. It also has a larger role of supervision, which includes a duty to pursue that undertakings are generally deterred from committing infringements.[111] In order for the Commission to ensure that the EU policy of competition law is being maintained, it has the discretion to raise the general level of fines at any time and deviate from earlier fining practice, however within the boundaries of Regulation 1/2003.[112]

3.4 Deficiencies with the Powers of Inspection and the Problem of Proving Cartels

Even though the investigative powers of the Commission are often used as a relatively effective tool, they do however have their limits. Requests and inspections can only be used to obtain existing physical documents. And before using those means, the Commission needs to be in the possession of some sort of evidence concerning the existence of the cartel and needs to specify the subject matter and purpose of the investigation.[113] It can be difficult for the Commission to identify the suspected infringement 'with reasonable precision' as is needed.[114] When conducting the inspection, the Commission needs to be able to present the legal nature of the alleged

[108] Point 29 of the Fining Guidelines.
[109] Article 23(2) of Regulation 1/2003.
[110] Canenbley, C., Steinvorth, T., *Effective Enforcement of Competition Law: is There a Solution to the Conflict Between Leniency Programmes and Private Damages Actions*, p. 316.
[111] Frese, M.J., *Sanctions in EU Competition Law*, p. 187.
[112] Joined Cases C-189/02 P, 202/02 P, and 213/02 P *Dansk Rørindustri A/S and others v. Commission* ECLI:EU:C:2005:408, para. 191.
[113] Art 20(4) of Regulation 1/2003.
[114] Opinion of Advocate General Jacobs in Case C-36/92 P *SEP v Commission* (ECLI:EU:C:1994:205) ECLI:EU:C:1993:928, para. 30.

infringement and have knowledge about what kind of information to look for as well as where to find it.[115] The connection between the information and the alleged infringement must be of such standard that the Commission can reasonably suppose that the information will help it determine if the alleged infringement has taken place.[116] And even if the Commission knows what to look for during an inspection, it will still be a costly and time-consuming procedure when processing all the retrieved documents and information. Evidence that has been obtained by request or by inspection has a risk of being non-trustworthy. The undertaking can give misleading information regarding the scope and size of the cartel in order to avoid being imposed with higher fines. It will also be difficult for the Commission to establish and punish such untruthful conduct by an undertaking.

Another issue is the necessity of the market being able to trust that the Commission does not use its powers of investigation excessively. It is therefore important that the Commission maintains a high standard of its reason when requesting information or performing inspections. What this means is that there must exist a correlation between the request for information and the presumed infringement.[117] The Commission should not be able to go beyond the standards required in Regulation 1/2003 and perform so-called fishing expeditions in its hunt for cartels.

However, even though the Commission possesses powers of investigation, it is still a major concern for the Commission to be able to prove the existence of cartels with the certainty that is required by the CJEU.[118] Article 2 of Regulation 1/2003 provides that the burden of proving an infringement of Article 101 or 102 TFEU is on the person or competition authority alleging the infringement.[119] It is therefore important for the Commission to gather such information that enables it to initiate an investigation and thereafter being able to fulfil the burden of proof.

But the problem of proving infringements has not been solved under Regulation 1/2003.[120] From the undertakings' viewpoint, it is necessary that the Commission manage to produce sufficient reliable evidence to support the allegation of the

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[115] Peretz, G., Ward, T., Kreisberger, R., *Bellamy & Child European Community Law of Competition*, p. 1200.
[116] Peretz, G., Ward, T., Kreisberger, R., *Bellamy & Child European Community Law of Competition*. p. 1200.
[117] Case T-39/90, *SEP v Commission* ECLI:EU:T:1991:71, para. 29.
[118] Jones, A., Sufrin, B., *EU Competition Law*, p. 677, 1019.
[119] Case T-66/89 *Publishers Association v EC Commission* [1992] ECR p. II-1995, ECLI:EU:T:1992:84, paras 5-6.
[120] Ortiz Blanco, L., *EC Competition Procedure*, p. 162.

infringement.[121] All the elements of an infringement must be proved; the products concerned, the restrictions, and the duration. The Commission has considered it necessary to present 'sufficiently precise and consistent evidence to support the firm conviction that the alleged infringement took place'.[122] It has however been considered necessary to vary the standard of proof after the circumstances of every specific case, and the ultimate test should be whether the Commission presents sufficiently convincing evidence.[123] In *Knauf Gips,* it was established that it is not necessary for every item of evidence produced by the Commission to satisfy those criteria in relation to every aspect of the infringement, but it is sufficient if the body of evidence as a whole meets that requirement.[124]

The secrecy of cartels make it hard to provide strong evidence. Consequently the Commission has the possibility to gather the necessary evidence from various sources; relying on complaints from third parties and on the observation of abnormal market behaviour, but also the possibility of requesting information from the undertakings concerned and conducting on-the-spot investigations. However, it has still been considered difficult for the Commission to establish and prove an infringement.[125] The best information is obtained directly from the undertakings that have committed the infringement. Having one or several undertakings turn into informants has proven to be successful. It is for this reason that leniency was introduced to EU competition law.

[121] Ortiz Blanco, L., *EC Competition Procedure*, p. 163.
[122] Joined Cases T-67/00 *JFE Engineering* ECLI:EU:T:2004:221, para. 179.
[123] Colombani, A., Kloub, J., Sakkers, E., *Cartels*, p. 1236.
[124] Case C-407/08 P *Knauf Gips v Commission* ECLI:EU:C:2010:389, para. 49.
[125] Colombani, A., Kloub, J., Sakkers, E., *Cartels*, p. 1080.

4 The Introduction and Development of the Leniency Notice

As stated in the introduction, the principle idea of leniency is to offer total immunity to the first undertaking involved in a cartel to come forward and submit evidence which is sufficient for the Commission to either launch an inspection or to find an infringement.[126] When applying for leniency the undertaking must also end its participation in the cartel. Undertakings willing to approach the Commission later and which contribute with added value to the investigation are eligible for a fine reduction, subject to the same requirement of cooperation with the Commission as for immunity applicants.[127] In the following sections the Leniency Notice will be presented.[128] The Commission has managed to find and punish a majority of the detected cartels through the Leniency Notice.[129] Between 2004 and 2013, three quarters of the Commission's total cartel investigations were triggered by the use of leniency.[130]

4.1 The Leniency Notice

In order for the Commission to be efficient in gathering information when enforcing competition law and at same time call for a cooperative attitude from the undertakings, the Commission has been rewarded with the enforcement tool of using leniency as an alternative method to achieve the desirable results of a functional competitive market. The Leniency Notice applies to secret cartels between two or more competitors, involved in practices such as price fixing, production or sales quotas, sharing markets, including bid rigging, restricting imports or exports, and/or anti-competitive actions against other competitors.[131]

[126] European Commission Competition Policy, Procedures in Anticompetitive Agreements (Article 101 TFEU Cases).
[127] European Commission Competition Policy, Procedures in Anticompetitive Agreements (Article 101 TFEU Cases).
[128] Commission Notice on Immunity from fines and reduction of fines in cartel cases [2006] OJ C298/17.
[129] See the Commission's 2005 and 2006 Reports on Competition Policy.
[130] Commission Staff Working Document SWD (2014) 230 - Ten Years of Antitrust Enforcement under Regulation 1/2003 (SWD(2014) 230/2, 9.7.2014), para. 17.
[131] Point 1 of the Leniency Notice.

4.1.1 Immunity from Fines

The Leniency Notice will grant total immunity from fines only to one of the participating undertakings. To qualify for this reward, this undertaking needs to be the first to submit information and evidence which in the Commission's view will enable it to carry out a targeted inspection in the cartel investigation or find an infringement of Article 101 TFEU.[132] For the Commission to carry out a targeted inspection the undertaking has to provide the Commission with a corporate statement that includes a very detailed description of the cartel, *inter alia* its functioning, the geographic scope, the duration, names of its participants and information on which other competition authorities, inside or outside the EU, that have been approached or are intended to be approached concerning the alleged cartel.[133] It also needs to provide other evidence relating to the alleged cartel that is in its possession. Immunity will however not be granted if the Commission already had evidence sufficient to carry out an inspection related to the alleged cartel, or if the Commission already carried out an inspection.[134] Immunity will neither be granted if the Commission did already have sufficient evidence to find an infringement or if another undertaking had already been granted conditional immunity.[135] The leniency applicant must also be the first to provide contemporaneous, incriminating evidence as well as the corporate statement describing the cartel.

In addition to the abovementioned criteria, the undertaking must also cooperate fully, on a continuous basis and expeditiously throughout the process.[136] The undertaking is also required, as stated before, to terminate its involvement in the cartel, and make sure that no evidence is destroyed or falsified. Neither should it disclose that it has applied for leniency. Any undertaking that has acted as an instigator, by coercing other undertakings to join or remain in the cartel is however by no exception able to receive immunity under the Leniency Notice.[137]

Instead of only receiving existing, readily available documents found through inspections, the use of leniency makes it possible for the Commission to obtain all

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[132] Wils, W.P.J., *Efficiency and Justice in European Antitrust Enforcement*, p. 118. Points 8(a), 8(b) and 10 of the Leniency Notice. Concerning the inspections it refers to Regulation 1/2003 Art 20(4).
[133] Point 9(a) of the Leniency Notice.
[134] Point 10 of the Leniency Notice.
[135] Point 11 of the Leniency Notice.
[136] Point 12 of the Leniency Notice.
[137] Point 13 of the Leniency Notice.

different types of information; oral statements, reconstructions etc.[138] Leniency does not create any benefits for the undertaking in providing false or misleading information, since doing so would only generate in a risk of losing the possibility of immunity, and immunity from the fines is the greatest reward of leniency that the undertaking could possibly obtain.

4.1.2 Reduction of Fines

If an undertaking is not able to meet the conditions for immunity, it may still be eligible for a reduction of fines. In order to be rewarded with a reduction, the undertaking needs to contribute with such evidence to the investigation that represents 'significant added value' compared to the evidence already known.[139] The first undertaking to provide significant added value will receive a reduction of 30 to 50 per cent of its fine, the second undertaking a reduction of 20 to 30 per cent, and subsequent undertakings will receive a reduction of up to 20 per cent.[140] In point 25 of the Leniency Notice it is stated that the concept of added value refers to the extent to which the evidence that is provided strengthens the Commission's ability to prove the alleged cartel.[141] Moreover, the degree of corroboration from other sources required for the evidence submitted to be relied upon against other undertakings involved in the case will have an impact on the value of that evidence, so that compelling evidence will be given a greater value than evidence such as statements which require corroboration if contested.[142]

The leniency method will however only function properly if the concerned undertakings perceive a risk that the authorities will potentially discover the cartel also without the recourse to leniency.[143] The level of fines is not the only deterrent factor for undertakings that consider entering into cartels. Above all, what is important is the increased possibility that a cartel will be detected and actually punished. Deterrence will only be effective if a company abstains from taking part in a cartel because the potential of loss, in terms of sanctions, is larger than the prospect of gain.[144]

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[138] Wils, W.P.J., *Is Criminalization of EU Competition Law the Answer?,* p. 129.
[139] Point 24 of the Leniency Notice.
[140] Point 26 of the Leniency Notice.
[141] Point 25 of the Leniency Notice.
[142] Point 25 of the Leniency Notice.
[143] Wils, W.P.J., *Is Criminalization of EU Competition Law the Answer?,* p. 130.
[144] Colombani, A., Kloub, J., Sakkers, E., *Cartels*, p. 1078.

What needs to be done by the Commission is therefore not to exclusively concentrate on the high levels of fines, but to increase the possibility for cartel members to be detected.[145] The undertakings must perceive a certain risk for being detected, either because the Commission's previous work in collecting information has proved effective, or because of its reputation of detecting cartels based on earlier success. Since the reward of immunity is only granted to the first applicant, the timing of when the leniency application is filed is essential for the undertaking. The existence of leniency thus creates a sort of 'prisoner's dilemma', causing a fear within the cartel that a member will report the cartel, and thereby avoid penalties, on the expense of the other cartel members.[146] The fear of an undertaking for having another cartel member cooperating with the authorities before they do creates a 'race to cooperate' which strengthens the benefits of leniency. It follows from the above, that such a race will only begin if one undertaking considers that at least one other undertaking is of the belief that the infringement possibly will be detected. Leniency thereby also generates a preventive dimension against the establishment of cartels, by creating a climate of constant suspicion between the cartel members.

Restricting immunity only to the first informant has generally been considered as strictly better than granting it to all informants.[147] It is stated that a well-designed and well-functioning leniency programme must maximize the incentives of the cartel participants to betray the cartel by reporting important information to the authorities, while at the same time limiting as much as possible the reduction of the fines imposed on the whole cartel.[148] Maximizing the award given to the first undertaking that comes forward, but keeping the award restricted to that particular undertaking could achieve this desired result.

4.2 Development of the Leniency Notice

Since its introduction, the Leniency Notice has been updated several times and developed in the direction of increased legal certainty and effectiveness. It should be noticed, however, that the Commission granted advantageous rewards to undertakings that decided to cooperate even before the introduction of the Notice. This section

[145] Colombani, A., Kloub, J., Sakkers, E., *Cartels*, p. 1078.
[146] Colombani, A., Kloub, J., Sakkers, E., *Cartels,* p. 1080.
[147] Sauvagnat, J., *Are leniency programs to generous?*, p. 324.
[148] Spagnolo, G., *Leniency and whistleblowers in antitrust*, p. 293.

provides a description of the development of the Leniency Notice, which is of use for understanding the analysis of the benefits and disadvantages of introducing Leniency Plus, discussed in chapter 5.

4.2.1 Early Cooperative Methods Used by the Commission

Although the Commission possessed powers of inspection before the Leniency Notice was introduced, it was already proven that being able to obtain direct evidence of the existence of a cartel is much easier if one of its participants can be convinced to turn into an informer. In the *Cartonboard* case from 1994, the first undertaking's confession was soon followed by another undertaking that decided to come forward and help the Commission as well.[149] In this cartel two Swedish undertakings, Stora and Rena, decided to come forward and cooperate with the Commission. The Commission stated that:

> "*although there was already strong documentary evidence to prove the existence of a cartel, Stora's spontaneous admission of the infringement and the detailed evidence which it provided to the Commission contributed materially to the establishment of the truth, reduced the need to rely on circumstantial evidence and no doubt influenced other producers who might otherwise have continued to deny all wrongdoing. Rena for its part provided important documentary evidence to the Commission on a voluntary basis. There will therefore be a very substantial reduction in the fine which would otherwise have been imposed upon Stora and the minor producer Rena*."

As a reward for its cooperation, the undertakings' fines were reduced by two thirds, representing three per cent of their turnover in the EU rather than nine per cent which the coercers of the cartel was faced with.[150] The *Cartonboard* case can be considered as the starting point of the use of leniency in EU competition law.[151] Although, what should be noticed is that this was not an official standpoint by the Commission, but only an *ad hoc* arrangement in the specific case. The Commission was not able to provide any guarantees of reduced fines or immunity for the undertakings that decided to

[149] Para 171, Commission Decision *Cartonboard* 13.07.1994 Infringement Art.81, [1994] OJ L 243.
[150] Jones, A., Sufrin, B., *EU Competition Law*, p. 1019.
[151] Colombani, A., Kloub, J., Sakkers, E., *Cartels*, p. 1080.

cooperate.[152] But this can nevertheless be seen as a starting point for the legislature in considering it to be in the public interest to induce cartel members to come forward by granting them lenient treatment in exchange for their cooperation.[153]

4.2.2 Influence from the United States Department of Justice

The reason for the Commission's actions in the *Cartonboard* case can be explained by influence from the US. The US DoJ was the first competition authority to develop and use a leniency programme.[154] The US DoJ adopted its first leniency programme as early as in 1978, but it was first in 1993 – after the authorities decided to modify some of the features – that there was a considerable increase in the number of applications.[155] The increase of applications has been explained by leniency becoming automatic in cases where no prior investigation had been initiated.[156] The US DoJs Antitrust Division frequently prosecutes individuals under criminal law for their involvement in cartels, meaning that managers of undertakings participating in cartels have a personal responsibility and will suffer financially or even with the loss of their personal freedom if the cartels are detected.[157] This can be seen as an additional incentive for the undertakings to take the decision of coming forward and cooperate with the authorities. However, what must be taken into concern is the risk that the managers who decided to enter the cartel might not still be active in that undertaking, which opens up for a risk of severe punishments of employees who were only following what they thought to be (legal) business practices. The US DoJ also provides for a Leniency Policy for Individuals[158], which applies to *individuals* who decide to come forward irrespective of any confession related to an undertaking. The US DoJ is also able to guarantee a high level of anonymity for the applicants, making it difficult for potential private enforcers who seek damages to use the evidence.[159]

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[152] Commission Decision 07.12.1982 Infringement Art 81. 82/253 *National Panasonic* [1982] OJ L 354/28 – 16/12/1982, Celex No.: 382D08 53-IV/30070.
[153] Colombani, A., Kloub, J., Sakkers, E., *Cartels*, p. 1080.
[154] United States Department of Justice - The Corporate Leniency Policy.
[155] Arbault, F., Sakkers, E., *Cartels,* p. 800-801.
[156] Arbault, F., Sakkers, E., *Cartels*, p. 801. Footnote 399.
[157] Stephan, A., *An Empirical Assessment of the European Leniency Notice*, p. 541.
[158] US Department of Justice, Leniency Policy for Individuals, (10/8 1994).
[159] Stephan, A., *An Empirical Assessment of the European Leniency Notice,* p. 541.

The US policy only grants immunity to the first undertaking to come forward if it manages to fulfil certain conditions, very similar to the criteria of the Commission.[160] The conditions are that the US DoJs Antitrust Division must not already be aware of the cartel activity, the undertaking needs to stop its participation in the cartel and cooperate with the US DoJs Antitrust Division throughout the process, and it cannot have been coercing other undertakings to enter into the cartel.[161] When it comes to subsequent applicants, they cannot be rewarded with any lenient treatment, as is the case is in the EU. Their fines can only be reduced outside the scope of the leniency policy if the authorities start a separate process and use a 'plea bargain'.[162] What it means is that the undertakings are able to negotiate the exact level of the fines they potentially might face. This can be seen as adding to an increase of predictability and certainty for the undertaking in knowing what they potentially might be facing in terms of penalties.

The US leniency programme proved that an effective leniency programme could dramatically increase the rate at which cartels were detected and increase the rate of punishment, as well as enhance deterrence.[163] Due to its success in the US, the EU legislator was not late to follow. Beyond the EU leniency programme, the US system has contributed to the introduction of leniency programmes in other parts of the world.[164]

4.2.3 The 1996 Leniency Notice

Leniency was first introduced in the EU in 1996 through the Commission Notice on the non-imposition or reduction of fines in cartel cases ('the 1996 Leniency Notice'). [165] In similarity with the current Leniency Notice, the 1996 Leniency Notice provided that the first undertaking that was able to present 'decisive evidence' of the existence of a cartel could receive a reduction of fine of 75 per cent or full immunity from fines.[166] If however, the Commission already had started an investigation of an alleged cartel, a

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[160] United States Department of Justice - The Corporate Leniency Policy, August 10 1993, Section A (1)-(6).
[161] United States Department of Justice - The Corporate Leniency Policy, August 10 1993, Section A (1)-(6).
[162] Stephan, A., *An Empirical Assessment of the European Leniency Notice,* p. 541.
[163] Jones, A., Sufrin, B., *EU Competition Law*, p. 1020, footnote 566. Stephan, A, *An Empirical Assessment of the European Leniency Notice*, p. 541.
[164] Arbault, F., Sakkers, E., *Cartels,* p. 801.
[165] 1996 Commission Notice on the non-imposition or reduction of fines in cartel cases, Official Journal C 207, 18.07.1996, p. 4-6.
[166] 1996 Commission Notice on the non-imposition or reduction of fines in cartel cases, Section B.

reduction of fine between 50 to 75 per cent could be provided.[167] Undertakings that were not able to meet the conditions of providing 'decisive evidence' but decided to cooperate with the Commission could receive a reduction fine of between 10 to 50 per cent.[168] The idea was that it should be in the interest of the applicants to cooperate as early as possible in order to maximise the chance for qualifying for a 100 per cent reduction, since this was not guaranteed.[169] The 1996 Leniency Notice was considered to be very successful and it resulted in more than 80 applications in six years.[170] However, the 1996 Leniency Notice also received heavy criticism for not providing sufficient incentives for the undertakings to apply for leniency.[171] It was uncertain whether the undertakings would be able to receive any reward in return for their cooperation, since a potential reward was not presented until the end of the administrative process.[172] The uncertainty led to the fact that over 60 per cent of the cases under the 1996 Leniency Notice were already under investigation in either the EU or in another jurisdiction when the first application for leniency was filed.[173] As mentioned above, for a leniency programme to be effective, and hence for the Commission to detect cartels earlier and meet the requirements of the principle of effectiveness, it must be in the interest of the undertakings to apply for leniency as early as possible in order to receive full immunity. Consequently, a great concern under the 1996 Leniency Notice was the reluctance among the undertakings to approach the Commission spontaneously.[174] Furthermore, according to the 1996 Leniency Notice the applicants not only needed to be the first to supply information, the evidence provided also needed to be 'decisive'.[175] If the undertaking did not manage to supply 'decisive evidence' it was disqualified from immunity, and if the Commission already was in

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[167] 1996 Commission Notice on the non-imposition or reduction of fines in cartel cases, Section C.
[168] 1996 Commission Notice on the non-imposition or reduction of fines in cartel cases, Section D. See also Ortiz Blanco, L., *EC Competition Procedure*, p. 250.
[169] Arbault, F., Sakkers, E., *Cartels,* p. 807.
[170] Report on Competition Policy (Commission, 2006), para. 175. See also Jones, A., Sufrin, B., *EU Competition Law*, p. 1020.
[171] Ortiz Blanco, L., *EC Competition Procedure*, p. 250.
[172] Ortiz Blanco, L., *EC Competition Procedure*, p. 250. See also Jephcott, M., *'The European Commission's New Leniency Notice – Whistling the Right Tune'.* Arp, D.J., Swaak, C.R.A., *'A Tempting Offer: Immunity from Fines from Cartel Conduct under the European Commission's New Leniency Notice',* p. 11.
[173] Arbault, F., Peiró, F., *The Commission's new notice on immunity and reduction of fines in cartel cases: building on success*, p. 17.
[174] Arbault, F., Peiró, F., *The Commission's new notice on immunity and reduction of fines in cartel cases: building on success*, p. 17.
[175] 1996 Commission Notice on the non-imposition or reduction of fines in cartel cases, Section B(b). See also Ortiz Blanco, L., *EC Competition Procedure*, p. 250.

possession of the evidence provided by the undertaking, it was not enough for granting immunity or reduced fines. As a consequence, many undertakings might have been uncertain whether the information they were willing to provide would increase their possibility for immunity or whether the information would be used against them in a self-incriminating way.

Since a great percentage of the applications under the 1996 Leniency Notice were filed late in the proceedings, the subsequent investigations lost their effect of surprise. When an undertaking chose to approach the Commission, the undertaking was often already aware of the Commission's knowledge of the cartel. Thus, an application for leniency was only filed when the undertaking felt that it had no other option than confessing its participation in the cartel. If the undertaking decided to come forward late in the process, it might have hold in as much information as possible since it was in the interest of the undertaking trying to keep the case as fragile as possible. Any weakness could result in a minor scope of the infringement being found, which would have resulted in lower fines and an easier subsequent litigation.[176] For these reasons, the positive contribution the 1996 Leniency Notice was intended to have was not working properly, and the Commission saw reasons for improving its system of enforcement.[177]

4.2.4 The 2002 Leniency Notice

Due to the criticism the 1996 Leniency Notice received, it was considered necessary to start granting a more significant reward to the first leniency applicant. Another objective was to increase the level of legal certainty for the undertakings, allowing them to know what was expected in order to receive immunity or a reduction of fines.[178] To be able to optimise the incentives for undertakings to cooperate at an early stage, the Commission decided to guarantee the first undertaking a conditional immunity.[179] Full immunity was in the end only granted if the evidence enabled the Commission to take decisive step forward in proving the cartel. In the 2002 Commission Notice on immunity from fines

[176] Arbault, F., Peiró, F., *The Commission's new notice on immunity and reduction of fines in cartel cases: building on success*, p. 18.
[177] Arbault, F., Peiró, F., *The Commission's new notice on immunity and reduction of fines in cartel cases: building on success*, p. 18.
[178] Point 5, 2002 Commission Notice on immunity from fines and reduction of fines in cartel cases. See also Ortiz Blanco, L., *EC Competition Procedure*, p. 250.
[179] Point 25, 2002 Commission Notice on immunity from fines and reduction of fines in cartel cases, Arbault, F., Peiró, F., *The Commission's new notice on immunity and reduction of fines in cartel cases: building on success*, p. 19.

and reduction of fines in cartel cases ('the 2002 Leniency Notice') it was only required that the evidence provided enabled the Commission to start an investigation.[180] Thus, the minimum threshold to qualify for immunity when the cartel was undetected was lower in the 2002 Leniency Notice. In situations where the Commission already had started an investigation, but not obtained enough evidence to establish a breach of Article 101 TFEU, it was possible for the first undertaking that enabled the Commission to find a breach to be granted full immunity from fines.[181] If the Commission had granted immunity to one undertaking, it was still possible for subsequent undertakings to obtain reductions of fines. The applicants that managed to supply evidence which proved to be of 'significant added value' when compared to what was already known by the Commission, after having received information from the first applicant, was granted a reduction.[182] Nevertheless, the more applications that were submitted, the greater the risk that the Commission already had knowledge of the 'new' evidence provided. Therefore the Commission decided that the reduction of fines should also be given in relation to whether the applicants was the first, second, third or subsequent undertaking to meet the criterion of 'significant added value'.[183]

As stated earlier, under the 1996 Leniency Notice, undertakings had been deterred from applying for leniency by fear that some of the information they disclosed would have adverse consequences for the level of the fine to which they were exposed.[184] Such was especially the case if the evidence supplied proved the cartel to have a greater scope than the Commission believed. Therefore, in the 2002 Leniency Notice, the Commission decided to implement the principle that when an applicant provided evidence previously unknown, which had a direct connection and significance on the gravity or duration of the cartel, the Commission would not take this into account when setting the level of fines for that undertaking.[185] Another new feature in the 2002 Leniency Notice was the introduction of the possibility for cartel participants to consult and negotiate with the Commission anonymously, doing a hypothetical application, to

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[180] 2002 Commission Notice on immunity from fines and reduction of fines in cartel cases Official Journal C 45, 19.02.2002, p. 3-5.
[181] Point 11, 2002 Commission Notice on immunity from fines and reduction of fines in cartel cases.
[182] Arbault, F., Sakkers, E., *Cartels*, p. 809.
[183] Arbault, F., Sakkers, E., *Cartels*, p. 809.
[184] Arbault, F., Peiró, F., *The Commission's new notice on immunity and reduction of fines in cartel cases: building on success*, p. 19.
[185] Arbault, F., Peiró, F., *The Commission's new notice on immunity and reduction of fines in cartel cases: building on success*, p. 19.

make sure that the information provided would fulfil the thresholds for receiving leniency.[186]

4.2.5 The 2006 Leniency Notice

Five major changes of importance for this work were made in 2006 in the creation of the current Leniency Notice. The immunity thresholds was rewritten and are now more clear and predictable as to what kind of information and evidence the applicants must supply in order to qualify for immunity.[187] A second change was that the Commission clarified that only such evidence that requires little or no confirmation has a greater value and may qualify for an additional reward.[188] Moreover, the general conditions for what is required by the leniency applicants were made more explicit, explaining what applicants are and are not required to produce in their application.[189] The Commission also introduced a marker system allowing leniency applicants to preserve their right to priority while having more time to obtain and deliver further evidence regarding the alleged cartel.[190] A fifth change that was made was the development of a system to protect evidence collected under the Leniency Notice from being used in civil damages procedures.[191]

4.2.6 Creating a One-Stop-Shop For Leniency

If an alleged cartel is affecting trade in different Member States, it is important for an undertaking to know where to file its application. It is also important for the undertaking to be fully ensured that the information provided will be kept confidential so it does not end up in another infringement investigations initiated in other Member States. Undertakings would be dissuaded from confessing their involvement in a cartel

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[186] Ortiz Blanco, L., *EC Competition Procedure*, p. 232. This can also be seen in Recital 38 of Regulation 1/2003 which states the following: *Legal certainty for undertakings operating under the Community competition rules contributes to the promotion of innovation and investment. Where the cases rise to genuine uncertainty because they present novel or unresolved questions for the application of these rules, individual undertakings may wish to seek informal guidance from the Commission.*
[187] Arbault, F., Sakkers, E., *Cartels,* p. 810.
[188] Arbault, F., Sakkers, E., *Cartels*, p. 810.
[189] Jones, A., Sufrin, B., *EU Competition Law*, p. 1021.
[190] Riley, A., *The Modernisation of EU Anti-Cartel Enforcement: Will the Commission Grasp the Opportunity?*, p. 5.
[191] Arbault, F., Sakkers, E. *Cartels*, p. 810.

if they were potentially faced with fines in one jurisdiction, on the basis of information provided when applying for leniency in another.

In a system of subsidiarity, where parallel competences are held by the Commission and the many NCAs, an application for leniency to one authority is not considered as an application for leniency in another authority's jurisdiction.[192] It is therefore in the potential applicant's interest to apply for leniency in all Member States affected by the infringement and which may be considered well placed to act against the infringement.[193] Some authors say that the discrepancy between leniency programmes in Member States creates a race to the top.[194] An undertaking applying for leniency will only apply if it can qualify under the most restrictive programme and if it is satisfied with the lowest degree of legal certainty provided by the least beneficial programme.[195]

Surely, the differences between leniency programmes may deter undertakings from applying for leniency. However, within the EU, efforts have been made to create a fairly substantial convergence of national systems of leniency.[196] In Regulation 1/2003, it is stated that the Commission and the NCAs of the Member States shall apply the competition rules in close cooperation and allocate enforcement competences in such a way that the provisions of the Regulation are effectively complied with.[197] In *VEBIC,* the CJEU also made clear that Member States jointly should ensure the effective enforcement of Articles 101 and 102 TFEU.[198] It was therefore decided to create a network of European NCAs and the Commission. The European Competition Network ('ECN') was created by the different NCAs of the Member States also including the Commission.[199]

The ECN has also adopted a so-called Model Leniency Programme. In line with the objectives of the ECN, the purpose of the programme is to ensure that potential leniency applicants are not discouraged from applying for leniency as a result of the discrepancies between existing leniency programmes. The ECN Model Leniency Programme is not legally binding or a programme in which applications actually can be

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[192] Para. 1, ECN Model Leniency Programme.
[193] Para. 1, ECN Model Leniency Programme.
[194] Gauer, C., Jaspers, M., *Designing a European Solution for a "Ones Stop Leniency Shop"*, p. 686-687.
[195] Gauer, C., Jaspers, M., *Designing a European Solution for a "Ones Stop Leniency Shop"*, p. 686-687.
[196] Whish, R., Bailey, D., *Competition Law*, p. 281.
[197] Art 11, Art 35 of Regulation 1/2003.
[198] Case C-439/08 *VEBIC* ECLI:EU:C:2010:739. See also Frese, M.J., *Sanctions in EU Competition Law*, p. 11.
[199] Commission Notice on cooperation within the Network of Competition Authorities [2004] OJ C101/43.

made. The idea is that it should work as a framework, aiming to align key aspects of the leniency programmes of the Commission and the NCAs, setting out the principal elements which the ECN members believe should be common in all programmes in order to create uniformity within the EU.[200] Most Member States have aligned their leniency programmes with the key features of the ECN Model Leniency Programme.[201]

There might be costs of coordinating this, but the increased enforcement capacity within the EU will outweigh these costs of centralisation. Aiming to adapt national systems to the ECN Model Leniency Programme will hopefully enable the leniency procedure to be far more efficient. A good sign for this is the fact that also the Leniency Notice is fully in line with the ECN Model Leniency Programme.[202]

[200] Frese, M.J., *Sanctions in EU Competition Law*, p. 19. See also MEMO/06/356 Brussels, 29 September 2006, Competition: *the European Competition Network launches a Model Leniency Programme – frequently asked questions*.
[201] Whish, R., Bailey, D., *Competition Law,* p. 290. See also MEMO/09/456, 15 October 2009, *Report on Assessment of the State of Convergence.*
[202] Jones, A., Sufrin, B., *EU Competition Law*, p. 1059.

5 Introducing Leniency Plus

Leniency can be considered as a clear derogation from the basis of competition law enforcement and it is therefore important to stress a few preliminary points. By the use of leniency it is possible for competition law offenders to avoid being imposed with fines and thereby also avoid responsibility for their actions. Consequently it can be argued that leniency needs to be designed and used in such manner as to guarantee that no more leniency is granted than what is strictly necessary to obtain the positive effects that the system is intended to generate.[203] As will be made evident, Leniency Plus can be seen as a step in the other direction. It facilitates for cartel participants to avoid sanctions, but it also facilitates for the competition authorities to receive information enabling them to terminate more infringements and thereby resulting in a more competitive market. In this chapter, Leniency Plus will be presented, and its potential introduction in EU law will be discussed. Throughout this discussion it is important to consider the above-mentioned principles of EU law and the overriding interests of public competition law enforcement.

5.1 The Idea of Granting Additional Lenient Treatment

Leniency Plus is a method with the primary objective to detect more cartels. It functions by rewarding cartel participants with additional lenient treatment (hence the 'plus') for disclosing additional information that it has about *other* cartels. If an undertaking is taking part in one cartel, cartel A, it is possible that the same undertaking is also part of another cartel, cartel B.[204] By taking part in one cartel, the undertaking will most probably have obtained valuable understanding about the functioning and the benefits of cartels, and in most cases considered the illegal conduct to be profitable. The Leniency Plus method creates incentives for such an undertaking not only to reveal its role in cartel A, but also to reveal the existence of cartel B. As explained above, if an undertaking has not been the first undertaking to contact the Commission in the investigation of cartel A, the undertaking is not granted immunity. What the Leniency Plus method does is that it gives the undertaking an additional reduction of the fine in cartel A, and full immunity in cartel B, if it provides useful information also of the

[203] Wils, W.P.J., *Is Criminalization of EU Competition Law the Answer?,* p. 139.
[204] Wils, W.P.J., *Leniency in Antitrust Enforcement: Theory and Practice*, p. 60.

latter. As an instrument, Leniency Plus is intended for multimarket cartelists, since firms operating on a single market do not have the possibility to benefit from this method. The question is thus if it can be considered necessary to modify the method's scope because there might as well be multiple cartels on the same market. These types of cartels might however not be so difficult for the competition authorities to discover when already investigating that market. The focus of Leniency Plus should therefore be on cartels on different product- or geographical markets.

5.1.1 Influence from the United States' 'Amnesty Plus'

As with regular leniency, Leniency Plus is also a tool developed by the US DoJ, known in the US as 'Amnesty Plus'. The US DoJ's Antitrust Division will consider the disclosure of infringements of competition law in market B as a mitigating factor when assessing an undertaking's illegal conduct in market A.[205] The size of the reduction of fines for participation in cartel A will depend on the strength of the evidence provided, as well as the scope of the infringement that is reported in terms of volume of commerce, geographic scope and the number of undertakings involved. Lastly, concern will also be taken to the likelihood of the US DoJs Antitrust Division discovering the infringement without the information provided.[206]

The US Amnesty Plus programme has been considered a major success since its introduction in 1999.[207] Nearly half of the investigations of international cartels were initiated on the basis of evidence obtained as a result of an investigation of a completely separate market.[208] By exposing a single member of a single cartel, it has thus shown to be possible to bring down multiple cartels. The primary difference from the EU is that in the US leniency is given in an all-or-nothing approach. Only one undertaking will attain immunity, whereas subsequent applicants do not even receive reduced fines. This will encourage other participants of the same cartel to disclose another cartel in order to

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[205] US Department of Justice, Antitrust Division Manual, 5th edition (March 2014), III-102, See also Cartel Leniency in the United States: *Overview*, Question 13.
[206] Hammond, S.B., *Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters,* US Department of Justice, November 19 2008, para. 9.
[207] Ortiz Blanco, L., *EC Competition Procedure,* p. 242. See also United States Department of Justice Antitrust Division, *Status Report: An overview of Recent Developments In the Antitrust Division's Criminal Enforcement Program,* February 2004.
[208] Hammond, S.B., *Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations,* Antitrust Division, US Department of Justice, 29th of March 2006, p. 9. See also Barnett, T.O., Assistant Attorney General, US Department of Justice, Antitrust Division, *Criminal Enforcement of Antitrust Law: The U.S. Model*, 2006.

receive leniency under the Amnesty Plus programme. This difference should be kept in mind when discussing the introduction of a similar system in the EU. Another difference between the US and the EU is that in the US it is possible for individuals to be imposed with criminal penalties. This certainly provides a very strong deterrent effect, since the potential economic benefits of collusion cannot compensate the risk of losing one's personal freedom.[209] Consequently, this is a great incentive for the managers and executives of an undertaking to apply for leniency. In the EU, Article 4(3) TEU requires the Member States to take any appropriate measures to ensure the fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. However, according to Article 23(5) of Regulation 1/2003 it is clear that the sanctioning powers of the Commission cannot be of criminal nature. In principle there is no possibility for the Commission to sanction individuals. It is therefore very unlikely that such method is something that can be used by the Commission and supported by all Member States in a foreseeable future. Most EU Member States have also shown a tendency of not being positive towards criminal sanctions in competition law, but to instead focus on effective leniency programmes and the imposition of fines.[210] Nevertheless, what can be done is to implement a solution that enables the disqualification of managers from engaging in commercial activities. This is however outside the scope of this work, but the key point is that if a jurisdiction possesses some sort of remedy on the person behind an undertaking that is guilty of an infringement of competition law, this will most certainly increase the deterrent effect, especially if immunity is also granted for the individual.

5.1.2 Developments in an EU Member State: the Case of the United Kingdom

In July 2013 Leniency Plus was added as a tool for the NCA of the UK, to fight cartels.[211] Leniency applicants in the UK may receive a further reduction of fines if they

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[209] Motta, M., *On cartel deterrence and fines in the EU*, p. 10

[210] Reynolds, M., Anderson, D., *Immunity and Leniency in EU Cartel Cases: Current Issues,* p. 82. See also Billiet, P., *How Lenient is the EC Leniency Policy? A Matter of Certainty and Predictability*, p. 18. The potential implementation of criminal sanctions has nevertheless recently been discussed by the Commission, see Commission Staff Working Document SWD (2014) 231 - Enhancing competition enforcement by the Member States' competition authorities: institutional and procedural issues (SWD(2014) 231/2, 9.7.2014.

[211] OFT Applications for Leniency and No-action in Cartel Cases (OFT 1495 2013). (2013 Leniency Guidance), chapter 9. The Office of Fair Trading (OFT) is from 2014 known as the Competition and Markets Authority (CMA).

confess to being part of a second cartel in a distinct market. The undertakings must however also fulfil the original conditions of leniency in order to receive additional leniency in the second cartel under the Leniency Plus method.[212] The NCA of the UK has stated that it will not be possible to apply for additional leniency in a second cartel if the NCA already has information about it.[213]

5.2 The Rationale of Using Leniency Plus

It should not be difficult for a competition authority to conclude that if one cartel has been detected, its participants may also have taken part in other cartels. Thereafter it would be clear for the authorities to focus their investigations on the undertakings which were involved in the first cartel, or on the other markets were the undertakings operate. Conducting investigations in one market may also reveal cartels and other infringements on other markets.[214] This will increase the probability of undertakings being detected as being part of another cartel and it might encourage the undertaking to come clean about their entire cartel activity when cooperating with the Commission in cartel A. This results in the benefit of having direct information from the cartel participants rather than for the Commission to gather evidence themselves. Leniency Plus increases the natural instability of cartels by creating a 'spill over'-effect from on-going investigations.[215] This standpoint is based on two assumptions. Firstly, an undertaking involved in a cartel tends to replicate its collusive conduct in the various markets in which it operates and enter into other cartels.[216] A sign of this is that undertakings working internationally often are more likely to be involved in cartels in different product or geographical markets.[217] The Commission has also recently confirmed that when it is investigating one market it has also led to leniency applications and subsequent applications in related markets.[218] Secondly, if the undertaking does not obtain an additional reward for the information provided, the undertaking does not have any incentive to disclose the involvement in cartel B. This is

[212] Frese, M.J., *Sanctions in EU Competition Law*, p. 19.
[213] OFT Applications for Leniency and No-action in Cartel Cases (OFT 1495 2013). (2013 Leniency Guidance), chapter 9, para 2.42.
[214] Wils, W.P.J., *Is Criminalization of EU Competition Law the Answer?,* p. 150.
[215] Arbault, F., Sakkers, E., *Cartels,* p. 855.
[216] Arbault, F., Sakkers, E., *Cartels*, p. 855, footnote 603.
[217] Ortiz Blanco, L., *EC Competition Procedure*, p. 242.
[218] Commission Staff Working Document SWD (2014) 230 - Ten Years of Antitrust Enforcement under Regulation 1/2003 (SWD(2014) 230/2, 9.7.2014), paragraph 20.

certainly the case if the undertaking is confident enough to rely on the other cartel members not coming forward and revealing the cartel for the Commission.[219] What the Commission need to do is to create incentives for the undertakings to tell on each other within the cartel. A well designed leniency program must maximise the incentives for an undertaking to betray the cartel, while at the same time limit as much as possible the fines on the whole cartel.[220] This can be achieved by maximising the award to the first applicant, but it may also be necessary to give an additional reduction for discovering more cartels.

5.2.1 The Economic Theory of Using Leniency Plus

The economic principle of a prisoner's dilemma can also be applied to explain the functioning of Leniency Plus. After an undertaking has been held responsible by the Commission for the involvement in cartel A, what can motivate the same undertaking to come forward regarding cartel B? What primarily will convince the undertaking to come forward under the Leniency Notice is the probability of being discovered taking part in cartel B. If Leniency Plus is added, the undertaking will probably have another reasoning. The undertaking will then be able to calculate the benefit it will receive for cooperating with the Commission regarding cartel B. The undertaking would benefit economically in both cartels with a reduction of fines in cartel A and immunity with regard to the involvement in cartel B. Since only one of the undertakings involved in cartel B will have this advantageous result, a race will begin between the cartelists. In a prisoner's dilemma version, the reason why the undertaking is likely to provide the authorities with information against its co-cartel member is because the authorities have the possibility of offering the undertakings a reduced sentence for other infringements than the ones originally being investigated for.[221] If it is not possible for the Commission to provide an undertaking with any additional reduction of fines, as is possible with Leniency Plus, there is no reason for the undertakings involved to disclose the second cartel. What thus will occur is that all undertakings in a cartel will adopt a game strategy of remaining silent. Nevertheless, when being provided the possibility of receiving a reduction of the fines for an infringement they are being held for and an

[219] Arbault, F., Sakkers, E., *Cartels*, p. 855, footnote 603.
[220] Spagnolo, G., *Leniency and whistleblowers in antitrust,* p. 293.
[221] McElwee, D., *Should the European Commission adopt "amnesty plus" in its fight against hard-core cartels?*, p. 562.

additional reward of immunity in cartel B, the requisite of trust among the undertakings is removed. All of the undertakings now fear that if not acting first and coming forward to cooperate, another cartel member will.[222] This effect also proves to be deterrent but is only effective if the expected sanctions exceed the potential benefit of remaining in the cartel. The expected sanction depends on the probability that the violation will be detected and successfully prosecuted, as well as on the sanction that will then be imposed.[223] It can be reasonable to assume that potential loyalty and honour between undertakings in this type of gentlemen's agreement is not being held when presented with the opportunity of avoiding fines. Although it might be in every cartel member's interest to keep the cartel intact in the long run, they will not remain silent because of the risk that their co-cartel member is cooperating with the Commission. This is because rational undertakings will only consider choosing long-term profits over short-term profits if they can trust their co-cartel members to do the same.[224] If a cartel member cannot trust the other members it is highly unlikely that they will stay in the cartel and the cartel will consequently come to a natural end. Since the concept of trust no longer exists it will be very unlikely for cartels to come into existence, and if they do, they will be short-lived. Therefore, the method of Leniency Plus also provides a strong deterrent effect, even stronger than what regular leniency does.

5.2.2 Efficiency of Leniency Plus

As explained when discussing the principle of effectiveness, it is essential for any competition authority to carry out its tasks effectively. The effectiveness of the inspections and requests are limited by the need for initial intelligence and it is possible for the Leniency Notice to overcome this. Leniency does not suffer from the limitation of there only being already existing physical documents, and the search costs and reliability problems are also lowered. However, detecting infringements of competition law is not only costly for the Commission, but there will also be significant costs for the undertakings when being under an investigation. These costs should be weighed against the benefit in terms of increased deterrence when determining which investigatory

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[222] McElwee, D., *Should the European Commission adopt "amnesty plus" in its fight against hard-core cartels?*, p. 562.
[223] Wils, W.P.J., *Principes of European Antitrust Enforcement*, p. 142.
[224] McElwee, D., *Should the European Commission adopt "amnesty plus" in its fight against hard-core cartels?,* p. 562.

measures that are justified.[225] In any scenario, when the same benefit in terms on increased deterrence can be achieved through different means, the least costly method should be preferred.[226] Using Leniency Plus is beneficial for the Commission in terms of being efficient in having cartels put to an end. It is also efficient for the undertakings that decide to come forward and cooperate. They will be aware of the benefits of cooperation. For the Leniency Notice to be effective the undertakings need to be convinced that the result of cooperation will be better than it would have been if not cooperating. With Leniency Plus the undertakings are already aware that the first undertaking receives immunity, but additional rewards can still be accessible. Whether or not they will decide to cooperate is dependent on the chance of being detected and punished. Since Leniency Plus is only available for undertakings already being under investigation, the risk of being detected has significantly increased. That is because the competition authorities are aware of the cartelist conduct of undertakings involved and also because co-cartel members will feel threatened by another undertaking's potential actions of disclosing.

The trust issues that this creates can be prevented if one undertaking is able to heavily monitor the cartel and its participants.[227] The costs for monitoring the cartel will however be substantial, and will probably outweigh the benefits for the undertaking to participate in the cartel. Another solution to maintain the stability of the cartel is if an undertaking has taken part in multiple cartels during the course of the years, and has thereby acquired a reputation as a trustworthy repeat player. Nevertheless, Leniency Plus creates some major difficulties also for this kind of actor. It is very difficult for one undertaking to establish a reputation of trustworthiness concerning cartel activity. Once one cartel is discovered it will increase the inducement of turning in on the other cartels in order to attain the benefits of Leniency Plus.[228] Not only will such undertakings have difficulties in finding other undertakings to cooperate with, but also their own strategy will be altered. The result of the domino effect it creates is that they too will have to be more selective in the collusive agreements they choose to enter.[229]

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[225] Wils, W.P.J., *Principes of European Antitrust Enforcement*, p. 143.
[226] Wils, W.P.J., *Principes of European Antitrust Enforcement*, p. 143.
[227] McElwee, D., *Should the European Commission adopt "amnesty plus" in its fight against hard-core cartels?,* p. 562.
[228] McElwee, D., *Should the European Commission adopt "amnesty plus" in its fight against hard-core cartels?*, p. 562.
[229] McElwee, D., *Should the European Commission adopt "amnesty plus" in its fight against hard-core cartels?,* p. 562.

5.3 Why The Leniency Plus Method is Not Already in Use

There are multiple reasons why the EU legislator has not yet decided to include Leniency Plus in the Leniency Notice as a tool for the Commission. Due to the successful use of the Leniency Notice, the Commission might not have considered the Leniency Plus method as a necessary tool to implement. It can also be the case that the Commission already considers the disclosure of additional cartels being part of the duty to cooperate. The Commission might moreover be uncertain whether the Leniency Plus method fulfils certain general principles of EU law.

5.3.1 Is Leniency Plus Already Included in the Duty to Cooperate?

The Commission might have relied on that an undertaking's decision to reveal other cartels is covered under the duty to cooperate stated in the Leniency Notice. The Leniency Notice states that in order to qualify for immunity and reduction of fines the undertaking has an obligation to cooperate 'genuinely, fully, on a continuous basis and expeditiously'.[230] Leniency applicants have to supply accurate, not misleading, and complete information. The duty for undertakings includes the obligation of providing the Commission promptly with all relevant information and evidence relating to the alleged cartel that comes into the undertaking's possession or is available to it.[231] Once an undertaking makes the decision to cooperate with the Commission, it might as well reveal all involvements in any cartels. If the Commission discovers the other cartel later on, the decision by the undertaking not to disclose it may heavily effect the calculation of fines for the second cartel.[232] The reduction of a fine must reflect an undertaking's actual contribution to the investigation. Therefore the Commission might take the silence of an undertaking about additional cartels as a lack of contribution and cooperation, as is necessary under the Leniency Notice. To remain silent about other cartel involvement will be a very difficult approach to maintain by that undertaking. This is since cartels often tend to spread from one market to a neighbouring market.[233] Thus, since it can be presumed that the second cartel also involves participants from the first one, this will increase the awareness of the investigation in the first cartel. It will

[230] Point 12 of the Leniency Notice.
[231] Arbault, F., Sakkers, E., *Cartels,* p. 855.
[232] Point 28, Fining Guidelines.
[233] Arbault, F., Sakkers, E., *Cartels*, p. 855, footnote 604.

generate in a race among the participants in the second cartel to come forward and cooperate with the Commission in order to avoid severe penalties. It is a result that probably would have occurred without the use of Leniency Plus.

5.3.2 Legal Certainty in Awarding Leniency Plus

If the Commission is relying on the duty to cooperate as reflected in the Notice this creates a great uncertainty for the undertakings involved in cartels. As has been mentioned earlier, certainty and predictability are of major importance in the enforcement of competition law. Even if an undertaking decides to reveal its involvement in other cartels in different markets, it might not be something that benefits it. It may be a chance that it is willing to take, but it is also a gamble at high stakes. It is not certain whether the Commission will consider it justified to award the same undertaking leniency twice. In *Interbrew* an undertaking that was under investigation for cartel activity in the Belgian beer market voluntarily disclosed its participation in a price-fixing cartel on the beer market of Luxemburg, a separate geographical market. [234] However, it is not confirmed that the undertaking was granted with any additional reward for its disclosure.[235] If the Commission explicitly had stated that an additional reduction would be granted for the undertaking's supplementary information, this would have created a situation of uncertainty and unpredictability of what the policy of the Commission actually is intended to achieve. When an undertaking is considering to leave a cartel and disclose the other participants, the undertaking will probably do a cost-benefit analysis. If the undertaking is not aware of what the possible benefit would be, it does not create any incentives for the undertaking to come forward and disclose any information. Without being certain of what to expect, an undertaking which provides information and cooperates fully with the Commission could find itself in a worse position than if it had not approached the Commission.[236]

Undertakings tend to be part of cartels because of their profitability, and the undertaking will only decide to leave and exploit the cartel as a last resort and only if it

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[234] Commission Decision of 5 December 2001 relating to a proceeding under Article 81 of the EC Treaty (Case IV/37.614/F3 PO/Interbrew and Alken-Maes)*)* OJ L200/1, 2003.
Commission Decision of 5 December 2001 relating to a proceeding under Article 81 of the EC Treaty (Case COMP/37.800/F3 — Luxembourg Brewers) *(notified under document number C(2001) 3914)* (1) OJ L 253/21.
[235] Commission Press Release IP/01/1739 *The Commission fines brewers in market sharing and price fixing cartels on the Belgian market.*
[236] Sandhu, J.S., *The European Commission's leniency policy: a success?*, p. 153.

is absolutely necessary. It is therefore highly unlikely that an undertaking will disclose its involvement in a second cartel if the potential benefits of immunity or a reduction of fines is not guaranteed by the Commission. The undertaking will most probably also want to know the exact reward that it will receive for its cooperation. This will not be possible if the Commission continues to consider disclosure of participation in other cartels to be included in the duty to cooperate. Certainty and predictability is a priority for the cartel participant. In order to make it more attractive for undertakings to come forward, improved transparency and legal certainty needs to be improved.

5.3.3 Proportionality in Awarding Leniency Plus

Awarding additional lenient treatment to undertakings that have conducted such a serious violation of competition law as being part of a cartel can be seen as controversial. As stated, it is a major derogation from the non-tolerance of such infringements that normally apply. Therefore careful balancing is required between punishing the undertaking through the imposition of fines and rewarding their cooperation with full immunity or reductions of fines. It has often been considered necessary not to reward more leniency than what is strictly necessary for fulfilling the objectives of deterrence and punishment. The first example of these limitations is the critical criteria in the US antitrust rules of only granting the first applicant the right of full immunity. However, the fact that the evidence provided by the first applicant often is insufficient is according to the EU legislator enough to justify granting of benefits also to subsequent applicants.[237] Granting leniency in form of a reduced fine to a second applicant might not be controversial, but granting it to several subsequent applicants can be. It is possible that cartel members will consider this as a possible loophole to get out of the cartel and dodge responsibility. This is certainly true when discussing Leniency Plus.

In order for the Commission to block this opportunity for cartel members to avoid punishment, while at the same time being able to uphold the benefits of leniency, the Commission can increase the fines. The Commission's enforcement records also show substantially higher amounts of fines today than during the earlier years of Regulation 1/2003.[238] It can be said that such increase of fines would have taken place in any case,

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[237] Wils, W.P.J., *Is Criminalization of EU Competition Law the Answer?,* p. 135.
[238] Cartel Statistics, European Commission, p.1.

and that leniency would serve as a strong incitement to reduce such high fines substantially.[239] However, as fine levels rise, leniency applications may actually as well become less. This can be seen as inconsistent, but if the starting point for fines is high enough, only full immunity will be attractive for the cartelist. Undertakings that are afraid of not being the first applicant entitled to full immunity might decide to stay in the cartel and rather take the risk of being detected.[240] At the same time, the existence of a leniency programme, which allows infringers of competition law to reduce their exposure to fines by cooperating with the authorities, and which enables the Commission to get hold of more high-quality evidence, may arguably justify the higher level of fines. Cartel participants that fail to take advantage of the beneficial opportunity to cooperate with the competition authorities could be considered more culpable and hence deserving to be sanctioned with the high fines. Or at least they might be said to have accepted more explicitly the risk of being severely sanctioned[241] With Leniency Plus however, these undertakings still has an opportunity to reduce their fines.

The level of fines is not an uncontroversial issue. Some authors suggest that even if undertakings would have to pay up to ten times the profits that have been made through their participation in the cartel, the fines would still not have a deterrent effect.[242] Some consider that the discretionary power of the Commission to impose fines of up to ten per cent of an undertaking's turnover can lead to the undertaking going bankrupt, and the undertaking is therefore not applying for leniency because of that risk.[243] It has indeed not in a long time been considered that there being a simple relationship between higher fines and less cartel activity. An increase of fines may also be conflicting with the principle of proportionality and possibly result in undertakings of the cartel being tempted to incur excessive costs on their sales in order to cover potential fines that they might have to face. There is no secret that there are already today undertakings that have off-set a certain percentage (most probable ten per cent) of their turnover for the event that they are fined for anticompetitive behaviour that they have been carrying out for many years.[244]

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[239] Goyder, J., Albors-Llorens, A., *EC Competition Law*, p 646.
[240] Goyder, J., Albors-Llorens, A., *EC Competition Law*, p 646.
[241] Wils, W.P.J., *Is Criminalization of EU Competition Law the Answer?,* p. 136.
[242] Billiet, P., *How lenient is the EC leniency policy? A matter of certainty and predictability*, p. 18.
[243] Stephan, A., *The Bankruptcy Wildcard In Cartel Cases*, p. 14.
[244] See for example Volvo Trucks, European Commission – Press Release, *Antitrust: Commission sends statement of objections to suspected participants in trucks cartel,* IP/14/2002, 20th of November 2014. See also TT Telegram, 2014-11-25.

In order to reduce the number of offenders able to avoid penalties, some authors are of the idea that there should be an increase in the level of evidence required by the first applicant in order to receive immunity.[245] In some scenarios, it would thereby be unnecessary to grant reductions of fines for subsequent applications, since no further evidence would be needed to prove the cartel. One reason for such a rigid approach would be that a system which allows for numerous leniency applications from the same cartel, may be detrimental to the deterrent effect which leniency is supposed to have. If the undertakings are aware that their application for leniency would be granted if being caught, and they would know that they could avoid the high fines simply by applying for leniency, the cartel would remain in existence because of the lack of incentives to come forward. For this reason, it might be a good idea to consider an increase in the quality of the information that needs to be provided by the first applicant, and to limit the number of possible subsequent applications.

Leniency Plus may very well be considered as being too generous from the Commission in rewarding the undertakings with additional reductions. But if the Leniency Notice only granted immunity to the first applicant, and no reduction to subsequent applicants, then Leniency Plus would certainly function in accordance with the idea of not having a leniency programme that is too generous.

5.3.4 The Undertaking Loses Immunity

If an undertaking is granted immunity in cartel B and a reduced fine in cartel A, difficulties will occur for the Commission if the undertaking for some reason loses its reduction in cartel A. The reason for having an undertaking's immunity revoked can be that the undertaking has failed to comply with its duty of cooperation.[246] In *Raw Tobacco Italy*, the undertaking Deltafina had its immunity revoked because it did not fulfil the cooperation duties.[247] Deltafina did not inform the Commission that it had informed the other cartel members about its application for leniency. What would have happened if the undertaking would have lost its immunity in cartel B, that was only of the Commission's knowledge as a result of the Leniency Plus method, and an additional

[245] Wils, W.P.J., *Is Criminalization of EU Competition Law the Answer?,* p. 136.
[246] Point 20 of the Leniency Notice.
[247] 2006/901/EC: Commission Decision of 20 October 2005 relating to a proceeding under Article 81(1) of the EC Treaty (Case COMP/C.38.281/B.2 — Raw tobacco Italy) (notified under document number C(2005) 4012).

reduction of fines in cartel A had already been given? It can be questioned whether the reduction of fines in the first cartel should be maintained. The Commission might also have to grant a reduction of fines in the cartel A on the basis of Leniency Plus before having been able to finalize its investigation if immunity should be given in cartel B, due to a Leniency Plus investigation. Nevertheless, this raises the concern of uncertainty that follows with two rewards being dependent on each other in two separate investigations.

5.3.5 Unequal Treatment in Leniency Plus

Since it is only the first undertaking applying for leniency that is granted immunity, Leniency Plus can be seen as derogating from the principle of equal treatment.[248] But the use of Leniency Plus creates a second chance for competition law offenders to avoid punishment. Those offenders who did not come forward first in cartel A may now receive an advantageous treatment in both cartel A and B. The General Court has considered that granting separate, differentiated levels of reduction of fines by the Commission by virtue of the Leniency Notice does not constitute a breach of the principle of equal treatment.[249] A reduction in the fine is justified only if the conduct of the undertaking concerned enabled the Commission to establish the infringement more easily. The Commission is thus perfectly entitled to grant leniency applicants different reduction in fines corresponding to the difference in the value and the timing of the cooperation.[250] The principle does not imply that the Commission must apply the same reduction in fine for comparable cooperative conduct in each case. The mere fact that the Commission in a previous case granted a certain reward for a specific cooperative conduct does not imply that it is required to grant the same proportionate reduction when assessing similar conduct in a subsequent administrative procedure.[251] Consequently each case needs to be decided on its own merits, but within an individual case the Commission must respect the principle of equal treatment.[252] Leniency Plus should be seen as the start of a separate investigation and errand and therefore treated

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[248] Wils, W.P.J., *Is Criminalization of EU Competition Law the Answer?,* p. 139.
[249] Joined Cases C-189/02 P, 202/02 P, and 213/02 P *Dansk Rørindustri A/S and others v. Commission* ECLI:EU:C:2005:408, para. 245.
[250] Colombani, A., Kloub, J., Sakkers, E., *Cartels*, p 1119, Joined Cases C-189/02 P, 202/02 P, and 213/02 P *Dansk Rørindustri A/S and others v. Commission* ECLI:EU:C:2005:408, para. 245.
[251] Case T-31/99 *ABB Asea Brown Boveri v Commission* ECLI:EU:T:2002:77, para. 239.
[252] Colombani, A., Kloub, J., Sakkers, E., *Cartels*, p 1119.

accordingly. It is however questionable whether this goes hand in hand with the principle of equal treatment since the benefit an undertaking receives in cartel A is interlinked and dependent on cartel B.

5.3.6 Complement with a 'Penalty Plus' Method

As stated earlier, the limit of how much immunity and reduction that can be given to the undertaking justifies the use of the Leniency Notice. No more leniency should be granted than is strictly necessary to obtain the positive enforcement results.[253] But the result of Leniency Plus is that the undertaking will be awarded more than 100 per cent leniency.[254] Since the probability of the second cartel being detected is higher than normal it can be questioned whether this is a necessary step to take. Is it necessary to grant immunity in cartel B, when it might be sufficient with a reduction of fines in both cartel A and B? The possible result of having this additional reward is the increased risk that an undertaking instead joins yet another cartel, since the undertaking is aware of the possibility of escaping liability when applying for leniency if caught. But it is questionable if the potential reward of avoiding fines if detected is to be seen as an incentive, and that it is something that an undertaking considers before entering a cartel. There is a possibility that the cartel participants will take advantage of, and abuse the leniency programme if applications are granted too generously to subsequent applicants. It increases the risk that Leniency Plus applications is only used by undertakings as a final solution of avoiding high fines in cartel A. If the same undertaking participates in cartels in different markets, or repeat this behaviour, a situation might occur whereby undertakings are applying for leniency for different cartels at different times, every time a cartel is or is about to be detected. In order to avoid this possible negative result and instead force undertakings to take advantage of the advantageous treatment it may be granted with Leniency Plus, the method can be complemented with something known as 'Penalty Plus'. Penalty Plus provides that if an undertaking fails to reveal information on a separate second cartel to the one being investigated, and that second cartel later is discovered, then the undertaking will receive a more substantial fine than what the

[253] Wils, W.P.J., *Is Criminalization of EU Competition Law the Answer?,* p. 142.
[254] Wils, W.P.J., *Is Criminalization of EU Competition Law the Answer?,* p. 150.

infringement would otherwise merit.[255] In order to encourage and create incentives for undertakings to apply for leniency, the carrot of Leniency Plus, can be necessary to complement with the use of a stick, Penalty Plus. Hence, Leniency Plus and Penalty Plus are not only interlinked, but they are also dependent of each other. Not availing of the first, leads to severe consequences under the other.[256] The system of Penalty Plus has however been considered to be too complicated to implement in the EU, as well as being excessively detrimental to the legal certainty that is required from an efficient leniency programme.[257] It has also been considered to be incompatible with the legal order of EU, in so far as it implies that the position of the applicant in cartel A may be negatively affected in respect of its alleged failure to report its participation in a cartel not yet proven against it.[258] This would be against the principle of proportionality and legal certainty, since the undertaking will be punished retroactively.

However, the idea of Penalty Plus can be seen as already existing in EU law. In the Fining Guidelines, there is a provision concerning this issue. In point 28 it is stated that the fines imposed on an undertaking may be increased where the Commission finds aggravating circumstances. That includes the case where an undertaking continues to repeat the same or a similar infringement after the Commission has made a finding that the undertaking infringed Article 101 or 102 TFEU. For each additional infringement being established, the Commission will increase the fine for the first infringement significantly. This can be seen as EU law is already satisfying the aims that Penalty Plus is intended to do. It is however not certain if the aggravating circumstances reflect exactly the same issues that Penalty Plus is intended to do. On the other hand, it might be the case that the Penalty Plus method is solely focusing on the withholding of information and not the specific anticompetitive conduct by the undertaking. Nevertheless, the intended result will be the same with both methods, that in the end if an undertaking is not disclosing further infringements and being caught, it will receive additional fines for this.

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[255] McElwee, D., *Should the European Commission adopt "amnesty plus" in its fight against hard-core cartels?,* p. 561.
[256] Martyniszyn, M., *Leniency (Amnesty) Plus: A Building Block or a Trojan Horse,* p. 5.
[257] Riley, A., *The Modernisation of EU Anti-Cartel Enforcement: Will the Commission Grasp the Opportunity?*, p. 8, footnote 40. See also Arbault, F., Sakkers, E., *Cartels,* p. 856.
[258] Arbault, F., Sakkers, E., *Cartels,* p. 856.

6 Conclusions

The extra reward that is given to an undertaking in return for its cooperation with the Commission is justified by its contribution to the overriding aims of competition law, mainly deterrence and destabilisation. The extensive, time-consuming and complicated procedure for the Commission to prove that an undertaking has infringed Articles 101 TFEU can be facilitated through the assistance from one of the undertakings involved. In the interest of saving resources and guaranteeing a serious reduction of cartels on the internal market, the Commission should provide the financial incentives of Leniency Plus to encourage undertakings to assist the Commission in its work of gathering relevant information and evidence. Introducing a culture of a race to cooperate among cartel participants due to the increased mistrust within a cartel is something that should be encouraged by the Commission. The positive result of using Leniency Plus will extend to the end-consumers, whose welfare will increase, if cartels are put to an end as soon as possible.

There is a possibility for the Commission to use the Leniency Plus method without formally having it as a tool. It can be achieved by operating outside the Leniency Notice and thereby rewarding undertakings that are providing additional information about a second cartel. The Fining Guidelines already provide for a reduction of fines where the undertaking concerned has effectively cooperated with the Commission 'outside the scope of the Leniency Notice and beyond its legal obligation to do so.'[259] The Commission could use this opportunity to set the agenda for a potential introduction of Leniency Plus. It should be noted that leniency became accepted subsequent to the ruling in *Cartonboard.* In a similar way, the Commission could develop its powers and search the acknowledgement of the CJEU for the adoption of Leniency Plus as a permanent tool of competition law enforcement. If Leniency Plus would have been used at the time of *Interbrew* it would have been certain for the undertaking in that case to be rewarded with an additional reduction in cartel A for its information concerning cartel B. In such situations, the Commission should have the choice to encourage the undertaking to self-report by providing incentives under Leniency Plus that outweigh the disincentives for that undertaking to provide necessary information.

[259] Point 29 of the Fining Guidelines.

By complementing the use of Leniency Plus with a system of Penalty Plus, and subjecting undertakings participating in cartels to a larger risk if they do not give up the profitability of being parts in multiple cartels, the Commission would furthermore be able to reduce the costs and time spent when these undertakings report themselves for a second infringement. Even if Penalty Plus can be considered as already existing through the Fining Guidelines, it will be necessary to further clarify and explicitly state in the Leniency Notice that if an undertaking is not disclosing its full cartel activity, and this later comes to the Commission's knowledge that undertaking will be imposed higher fines. Introducing also the Penalty Plus method explicitly in the Leniency Notice would persuade the undertaking that there are only two options: either it cooperates to the fullest extent and reveals all infringements, or it faces higher fines for non-cooperation. If Leniency Plus is introduced in the Leniency Notice, it will be a waste of its potentials if not used to its maximum utility, which is why it is necessary, in the light of the above to make it mandatory and not optional through the simultaneous introduction of Penalty Plus.

When adopting the 1996 Leniency Notice, the Commission was not shy of implementing a public enforcement method from the US. The Commission has recently suggested some changes to the present Leniency Notice that are taken directly from the leniency programmes of the US and the UK in order to further optimise the attractiveness of leniency.[260] None of these ideas, however, concerned a potential introduction of Leniency Plus. But since the Commission does not seem reluctant to implement ideas from these jurisdictions, it cannot be far-fetched to claim that a Leniency Plus programme could still very well be introduced. One alternative could be for the ECN to implement Leniency Plus in its Model Leniency Programme. It might however be best to await and analyse the result that Leniency Plus will have in the UK. This is most probable since the ECN Model Leniency Programme, which is based on the idea of consensus between the Member States is influenced through the different experiences of the latter.

Still, when reviewing Leniency Plus from a perspective of justice, some difficulties arise. In the end, Leniency Plus constitutes an additional award for an undertaking that has participated in more than one cartel, which is the most serious infringement of competition law. In the Leniency Notice, the immunity or the reduction

[260] Commission Staff Working Document SWD (2014) 230 - Ten Years of Antitrust Enforcement under Regulation 1/2003 (SWD(2014) 230/2, 9.7.2014), para. 219.

of fines is a reward for total commitment and cooperation with the Commission. With regard to the difficulties that exist in discovering cartels, this reward has been considered justified. But with Leniency Plus, an infringer of competition law will have the opportunity to receive benefits for another disclosed cartel. A concern that arises is what justifies the award in cartel A. The violator is not contributing with any additional information concerning cartel A, only cartel B. Taking into account the necessity to create a climate of distrust among cartelist, this additional, and to some extent unjustified, award might however be necessary and justified for maintaining market stability in the long run.

Notwithstanding, in order to achieve the positive results that Leniency Plus brings, it would be best to change the Leniency Notice to restrict the immunity, under the "normal" rules, only to the first applicant. This is to optimise the effect, by encouraging an undertaking participating in a cartel to disclose its involvement in a cartel out of fear that another undertaking will do so first and prevent the first participant from being rewarded with immunity. Such a system would evidently further undermine the stability of the cartel and the only possibility for a second undertaking to reduce its fines in cartel A would be through disclosing information about another infringement of competition law. Through this development of the Leniency Notice, the interest of the consumer and the internal market would be fully recognised by the EU, and the Commission would be able to reinforce the mechanism for prevention and deterrence of infringements of EU competition law. And not to forget: the EU would strengthen its leniency policy by increasing the legal certainty, equal treatment and efficiency for all parties.

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