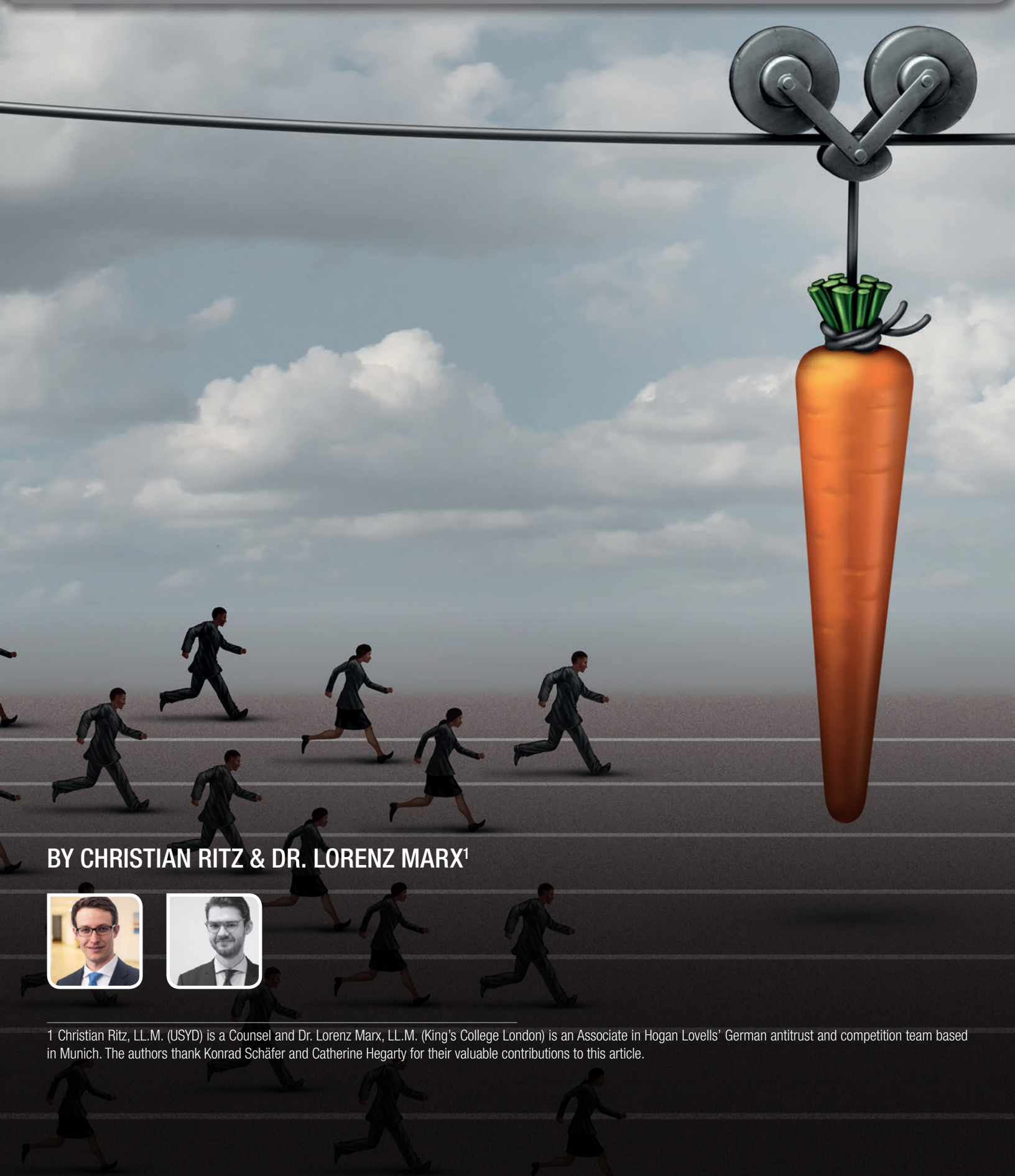
LENIENCY CARROTS AND CARTEL STICKS – A PRACTITIONERS' VIEW ON RECENT TRENDS AND CHALLENGES PRESENTED BY THE EU LENIENCY PROGRAM



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I. INTRODUCTION

To file, or not to file: giving the right answer in the right moment to this crucial question, can, at least at first sight, save a company a significant amount of money. € 1.2 billion was the sum apparently saved by the truck manufacturer MAN by submitting its leniency application to the European Commission, thereby uncovering the so-called truck cartel. While MAN benefited from full immunity from fines for being the first company to blow the whistle on the truck cartel, other truck manufacturers involved were fined a total of € 2.93 billion.

The German freight company DHL Express had less luck: Due to unfortunate circumstances and a lack of harmonization among European leniency programs, it was fined € 6.6 million by the Italian competition authority, despite benefiting from full immunity from fines at the European Commission level.

After the U.S. substantially revised their leniency program (which had originally been established in 1978) in 1993, the European Commission adopted its own leniency policy in 1996 (EU Leniency Program). Four years later the German Federal Cartel Office ("FCO") introduced its own leniency program. Today leniency programs are established in more than 80 jurisdictions across the globe.[2] Having been hailed by competition law enforcers in Europe as a great success, especially in late 1990s and early 2000s, leniency applications have declined in recent years. The EU Commission's director of the cartel enforcement unit, Eric Van Ginderachter recently stated that competition authorities need to send the message that "leniency carrots are sweet, and cartel sticks are heavy" if they want the success of leniency programs to prevail.[3]

The overall purpose of leniency programs is to create a sufficient level of incentives for companies involved in cartel activity to blow the whistle on an alleged cartel and to fully cooperate with the authorities to uncover and sanction the cartel. The effect of leniency programs so far has been significant: in Germany about half of the cartels that have been sanctioned to date have been uncovered by leniency applicants;[4] and more than 90 percent of European Commission decisions in cartel cases so far have been preceded by a leniency application.[5]

Leniency programs are a very important tool in the fight against cartels. However, such programs are currently facing mounting challenges coming from various directions:

2 See Leah Nylen, "After 25 years, is leniency still a bargain?," MLex Comment, October 9, 2018.

3 See MLex Report of October 16, 2018 from the "Cartel Workshop" of the International Competition Network in Tel Aviv.

4 See German Federal Cartel Office, Annual Report 2017, p. 39.

5 See Wouter P. J. Wils, "The Use of Leniency in EU Cartel Enforcement: An Assessment after Twenty Years," Kluwer Law International 2016 (Vol. 39 Issue 3), p. 327 et seqq.

- First, private enforcement has gained steam across Europe and leniency applicants are a popular first target of follow-on damages claims, while competition authorities are no longer trusted to protect the confidential information provided in leniency applications;

- Second, a lack of harmonization of leniency programs across the European Union and the absence of a European one-stop-shop system creates uncertainties for companies considering applying for leniency; and

- Third, as leniency applications usually trigger large-scale internal investigations, companies face the risk of "spillover effects," i.e. of investigations affecting other business areas and other regulatory risks (e.g. such as the risks resulting from the new data protection laws introduced under the Global Data Protection Regulation ("GDPR")). These developments threaten the success of leniency programs worldwide, as applicants are hoping to suffer as little harm as possible.

This article is intended to give a practitioner's overview of the EU Leniency Program, to trace recent developments challenging the success of leniency programs, and to highlight current efforts to solve these issues, as well as to provide a practical outlook on the factors to take into account when considering a leniency application.

II. KEY ASPECTS OF THE EU LENIENCY PROGRAM

There is no specific "leniency act" at the European Union level. The only legal basis for the EU Leniency Program is the *Commission's Notice on Immunity from fines and reduction of fines in cartel cases*.[6] Additional guidance can be found in the *Commission's Antitrust Manual of Procedures*.[7]

To obtain full immunity from fines, a leniency applicant must be the first to submit sufficient information and evidence which will enable the Commission to carry out a targeted inspection or find an infraction of competition law committed by the alleged cartel. In order to do so, the leniency applicant must provide a detailed description of the alleged cartel arrangement, including for instance its aims, activities and functioning, the products or services concerned, and the geographic scope. Furthermore, the name and address of all legal entities and individuals involved in the alleged cartel as well as all competition authorities to which a leniency application has been or will be submitted must be provided.

The focus of this section should be on the Commission's marker system and its expansive interpretation of the duty to fully cooperate.

A. "First-come First-served" – The Setting Down of Markers by the European Commission

Timing and pursuing the right strategy are crucial when considering whether to apply for leniency. The opportunity for full immunity from fines puts high pressure on companies to file their application before other companies involved in the cartel do so. Although it is possible that a leniency applicant who applies as the second or third, or even later, will also receive a reduced fine, full immunity will only be granted to the first applicant. The first applicant alone will benefit from additional specific advantages, e.g. in civil damages proceedings. Thus, there exists a "winner takes it all" and "first-come first-served" principle of sorts, which means that speed is definitely one of the most important factors to consider when preparing a leniency application.

Companies involved in cartel activity therefore have a strong interest in submitting their applications as quickly as possible. The European Commission is accommodating towards companies in this respect: It is possible to apply for a so-called marker before the actual application for leniency.[8] This has a rank-securing function, so that the subsequent application is deemed to have been filed at the moment the marker is applied for. Meanwhile, the formal and content requirements for the marker are relatively easy to manage.

6 See Commission Notice of Immunity from fines and reduction of fines in cartel cases, Official Journal (OJ) of December 8, 2006, C 298/17 (*Leniency Notice*), available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52006XC1208(04)& from=EN.

7 See European Commission, Antitrust Manual of Procedures, Internal DG Competition working documents of procedures for the application of Articles 101 and 102 TFEU, March 2012, available at http://ec.europa.eu/competition/antitrust/antitrust_manproc_3_2012_en.pdf.

8 See Leniency Notice, paras. 14 et seqq.

According to the Commission's Leniency Notice, applying for a marker is only possible with regard to the granting of full immunity, whereas the procedure for the reduction of a fine does not provide for the application for a marker. It is possible to set a marker before, during or after a targeted inspection by the Commission. Full immunity from fines is still possible, as long as the Commission does not have sufficient evidence to prove the infringement. However, applications for a marker after the Commission has conducted a targeted inspection are rarely seen in practice.

The application for a marker may be filed either by e-mail or, after giving 24 hours' notice, orally to the Commission. In terms of content, the applicant must provide the Commission with information concerning its name and address, the parties to the alleged cartel, the affected products and territories, the estimated duration and the nature of the alleged cartel conduct. The marker should also contain a justification for not submitting the leniency application right away. In practice, it is not sufficient to simply justify the marker by the fact that the applicant's rank will be secured. Rather, it should be clear from the marker that the violation has just been discovered and that further time is needed to fully clarify it.

If these conditions are met, it is up to the Commission to decide whether or not to grant a marker. If the Commission grants a marker, it will set a deadline for the applicant to submit a complete leniency application. This deadline is determined on a case-by-case basis.[9] In practice, however, this deadline is often only three weeks long and can – if at all – only be extended by a few days. During such a short period it will be almost impossible in practice to completely review the facts and submit a complete leniency application.

If the Commission is not yet aware of the cartel, the company should already have a nearly complete picture of the facts before it applies for a marker. Otherwise, the applicant risks letting the deadline elapse and ending up without full immunity or without a reduction of fines.

B. The European Commission's Expansive Interpretation of the Duty to Fully Cooperate

Following a leniency application, the applicant has to cooperate fully and continuously from the submission of its application throughout the entire administrative process. In general, it has to end its involvement in the alleged cartel immediately following its application and must not destroy, falsify or conceal evidence of the alleged cartel nor disclose the fact or any of the content of its contemplated application.

The European Commission interprets the duty of full cooperation expansively, leaving leniency applicants, but also applicants for a reduction of fine, with an onerous burden of cooperation. This usually requires the applicant to conduct an in-depth internal investigation, including extensive document review and the interviewing of a significant pool of employees at different levels of seniority. The duty to fully cooperate also usually requires the applicant to respond to extensive requests for information by the Commission which are costly and always bear the risk of widening the scope of the investigation.[10]

Applicants who disclose their participation in an alleged cartel and do not meet these conditions, especially where they are not the first applicant, may be eligible for a reduced fine. In order to qualify for such reduction, an applicant must provide the Commission with evidence of the alleged infringement which represents significant "added value" to the evidence already in the Commission's possession. The Commission can still grant reductions of up to 50 percent for the second applicant, up to 30 percent for the third and up to 20 percent for the fourth applicant.

III. RECENT DEVELOPMENTS CHALLENGING THE SUCCESS OF EUROPEAN LENIENCY PROGRAMS

While it is true that the EU Leniency Program has been a huge success in the fight against cartels, recent years have seen a growing number of developments challenging the success of global leniency programs, especially in Europe. Main challenges derive from (1) a significant increase in private enforcement through civil follow-on damages claims; (2) practical risks for leniency applicants resulting from non-harmonized leniency programs and ambitious authority expectations in Europe; (3) potential spill-over effects of leniency triggered investigations from one business area into another; and (4) potentially limiting effects for internal investigations resulting from new data protection laws.

9 See European Commission, December 7, 2006, MEMO/06/469, "Revised Leniency Notice – frequently asked questions," p. 6.

10 See Christof R. A. Swaak & Rein Wesseling, "Reconsidering the leniency option: if not first in, good reasons to stay out," (2015) 36 E.C.L.R., Issue 8, p. 346 (351).

Swaak & Wesseling[11] have provided a comprehensive overview of potential factors for leading companies to reconsider their leniency options where they are not the first applicant. This section in turn mainly focuses on the challenges caused by the rise of civil follow-on litigation and the need for a harmonization of European leniency programs, both of which are the main deterrents affecting companies in practice.[12] The section concludes with some remarks on the current efforts by the European Union to empower national competition authorities ("NCA") to be more effective enforcers in the so-called ECN+ Directive,[13] which aims to resolve some of the issues mentioned by harmonizing aspects of competition law enforcement and granting additional powers to the NCAs.

A. The Effects of Rising Private Enforcement Activity on Leniency Applications

Private enforcement of competition law is on the rise, especially in Europe. Injured market participants are encouraged by recent legislative developments to claim damages from the alleged cartel participants. Follow-on damages claims may result in far higher financial risks than the fines originally imposed by the authorities. Leniency programs only grant immunity in administrative proceedings before the respective competition authority and do not protect against private damages actions. The incentive to participate in leniency programs may therefore be, at least partially, jeopardized by an excessive risk of liability in subsequent follow-on damages claims, especially as the leniency applicant is likely to be the easiest target of such claims.

These reasons lead potential leniency applicants to shy away from making an application. In practice, discussions usually center around the question of whether it may be better to keep quiet and hope that the cartel will not be discovered, rather than become a potential target of follow-on damages claims as the leniency applicant. Even if the cartel is discovered, companies hope to get off comparatively cheaply or to at least lengthen the administrative process by denying the accusations and thereby deterring potential claimants.

Since a leniency application as well as a potential subsequent settlement in practice amounts to an admission of guilt, appeals against the Commission's fining decision before the European courts are regularly waived by the leniency applicant. Usually cartel proceedings against the leniency applicant are the first to be launched and concluded. This leads to the leniency applicant also being the first to be targeted by cartel damages claims. In addition, since the leniency applicant has already more or less admitted to the alleged competition law infringement and the courts, in general, are bound by the findings of the competition authority, the question raised in these proceedings is usually (only) the exact amount of the damages rather than whether the damages have occurred in the first place.

1. Protection of leniency applicants

It was clearly one of the main objectives of the European legislator, when adopting the EU Damages Directive,[14] to prevent such consequences as much as possible. The EU Damages Directive, which was required to be transposed into national law by the EU Member States by December 27, 2016, contains three central points to protect the leniency applicant: First, by keeping the application secret and not granting potential plaintiffs access to the leniency application; second, by exempting in principle the leniency applicant from joint and several liability; third, by limiting the leniency applicant's direct liability to damages caused to its direct and indirect customers.

Consequently, other injured parties must first try to collect damages from the other cartelists. Only if these cartelists are insolvent or the damages cannot be collected from them, can claimants then seek damages from the immunity recipient. The immunity recipient is therefore effectively only liable for his "own share" of the responsibility, i.e. the damage caused to his direct and indirect customers. The rationale for this is that the immunity recipient should not be overburdened as the first target of follow-on damages claims.

11 See Christof R. A. Swaak & Rein Wesseling, "Reconsidering the leniency option: if not first in, good reasons to stay out," (2015) 36 E.C.L.R., Issue 8, p. 346 et seqq.

12 The issue of the GDPR as a limiting factor in internal investigations and leniency applications has recently been considered by practitioners, but should be reserved for a different paper. See MLex Report of October 16, 2018 from the "Cartel Workshop" of the International Competition Network in Tel Aviv.

13 See Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market as adopted by the Council on December 4, 2018 (*ECN+ Directive*), available at http://data.consilium.europa.eu/doc/document/PE-42-2018-INIT/en/pdf.

14 See Directive 2014/104/EU of the European Parliament and of the Council of November 26, 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (*EU Damages Directive*).

2. Balancing of interests threatens trust in protection of leniency files

The access of potential damages claimants to the leniency files has long been a controversial issue. The legitimate interests of leniency applicants need to be balanced with the interests of potential plaintiffs to enforce their damages claims. According to the European legislator, private enforcement strengthens the overall effectiveness of antitrust enforcement and must therefore not be made excessively difficult. This balancing act has been left to the national courts in each individual case.[15] With the coming into force of the EU Damages Directive, at least as far as the actual leniency applications are concerned, the leniency applicant is given more favorable treatment. However, this does not completely rule out the possibility that information from the leniency application may become public. In *Akzo Nobel*, the General Court held that the inclusion of information from a leniency application in the non-confidential version of a cartel decision is not synonymous with a disclosure of the leniency application itself to third parties.[16]

Although the EU Damages Directive relieves the burden on the immunity recipient to a considerable extent, it should be noted that the aforementioned privileges only apply to the immunity recipient, and not to later applicants for leniency that received only a reduction of fines. Potential leniency applicants should therefore bear in mind, when weighing the advantages and disadvantages of an application for leniency, that information contained in their application may become public. When balancing the opportunities and risks of filing an application, a particularly important factor to consider will be whether full immunity or at least a significant reduction of fines is to be expected. In particular, if no immunity or first or second rank reduction of fines is on the table, an application for leniency – on balance – may not be worth pursuing.[17]

B. The Lack of Harmonization in European Leniency Programs Creates Legal Uncertainty and Practical Hurdles

Although the substantive competition law framework is largely harmonized across the European Union, there still exists a rather fragmented administrative structure at the national competition authority level. In addition to the European Commission, each EU Member State has its own NCA. NCAs mainly work independently from one another. Practice has revealed several issues resulting from this fragmented situation in cartel and leniency cases, in particular, and such issues appear to deter companies from lodging leniency applications.

1. The absence of a European one-stop-shop for leniency applicants

As competition authorities can take on cases independently from one another, it is sometimes unclear which authorities have (potentially even parallel) jurisdiction. This is particularly problematic when planning and filing for leniency in relation to an international cartel, as the absence of a European one-stop-shop may leads to a situation where a leniency application must be unexpectedly filed with NCAs that had not been previously considered. Finally, full immunity is only granted if the applicant is the first to apply, i.e. the first undertaking to submit an application and to provide the authority with comprehensive information which it did not previously have. As there is no European one-stop-shop for leniency applications, it is not enough to apply for leniency with just one authority, e.g. the European Commission. However, applying for leniency with all potentially concerned authorities may tip off competition authorities who might not have otherwise dealt with the case.

Furthermore, the potential leniency applicant must not only ensure that the application is submitted to all relevant authorities, but they must also indicate all possible competition law infringements. This also applies in situations where it is expected that the Commission will declare itself competent to assess several specific infringements. The *DHL Express case*[18] in particular acts as a deterrent. In this case, the logistics company DHL Express applied for leniency to the European Commission. DHL Express stated that it was involved in prohibited cartel agreements in the air, sea and road transport sectors. The undertaking also placed an almost identical marker with the Italian competition authority, but without mentioning the road transport sector. While the Commission granted DHL Express full immunity from fines in the air transport sector, it did not pursue the other two sectors. The Italian competition authority, however, later took on the case and imposed a fine against DHL Express for its dealings in the road transport sector, which the company had omitted in its application to the Italian authority.

15 See CJEU, judgment of June 14, 2011, EU:C:2011:389, C-360/09 –*Pfleiderer*, para. 32.

16 See General Court, judgment of January 28, 2015, EU:C:2015:50, T-345/12 – *Akzo Nobel and others v. EU Commission* (*Akzo Nobel*), paras. 87, 114.

17 See Andreas Kafetzopoulos, 36 E.C.L.R., Issue 7 2015, p. 295 (296).

18 See CJEU, judgment of January 20, 2016, EU:C:2016:27, C-428/14 – *DHL Express (Italy) and DHL Global Forwarding (Italy) v. Autorità Garante della Concorrenza e del mercato* (*DHL Express*).

In its appeal heard before the CJEU, DHL Express argued that it had submitted a comprehensive application to the European Commission covering all three transport sectors, including road transport. It stated that the Italian authority should have taken this into account as the marker submitted to the Italian authority was based on the leniency model established by the ECN[19] – a forum composed of the European Commission and the NCAs of the European Union. The CJEU dismissed the appeal. It held that agreements made in the ECN framework have no binding effect on NCAs. Instead, they were free to organize their leniency systems independently. According to the court, there was "no legal link" between the application submitted to the Commission and the one made in Italy. The Italian competition authority was therefore neither obliged to assess the Italian summary application in light of the application made in Brussels, nor was it required to contact the Commission in order to obtain information on the facts or results of the application made to the Commission.

While this result can be viewed as legally sound, it is unsatisfactory for the practical user and reveals the problems resulting from the absence of harmonisation in the field of leniency programs.[20] From a practitioner's point of view, the simplicity and transparency of leniency programs would be enhanced by establishing a central office for leniency applications in the European Economic Area. This would remove some of the uncertainty surrounding potential leniency applications, simplify the process for such applications, and possibly lead to a revival of the European leniency program.

As the ECN+ Directive, which is intended to streamline the NCA's enforcement practice, will not introduce such a Europe-wide one-stop-shop, this issue is unlikely to be solved in the near future. As long as this remains the case, leniency applicants must be very careful when formulating their international leniency strategy. In particular, they should be advised to arrange parallel global filings of leniency applications in all jurisdictions where individual competition law infringements may be considered by NCAs.

2. The impracticality of the European Commission's marker system

In practice, the marker system under the EU Leniency Notice is impractical as it does not do justice to the interests of potential leniency applicants. The period of three weeks for an applicant to submit a complete leniency application will generally be too short to comprehensively clarify the facts. Although the Commission has the discretion to extend this period, it is generally advisable for the applicant to have clarified almost all the facts before applying for a marker.

In comparison, e.g. the German FCO's leniency program demonstrates that there are other, more practicable ways to implement a marker system. The German FCO regularly grants a period of eight weeks to the marker applicant before the complete leniency application must be submitted. In addition, the FCO does not have the discretion to decide whether it grants the marker or not. From a practitioner's perspective, these two points already make the German leniency program more transparent, practical and thus also more effective with regards to markers.

C. ECN+ is only a First Step; Further Leniency Carrots must be Provided to Potential Applicants

The European Commission aims to provide further incentives for undertakings to apply for leniency. On March 22, 2017, the Commission published a proposal for the ECN+ Directive which seeks "to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market."[21] The ECN+ Directive adopted by the Council on December 4, 2018 and is intended to replace the non-binding "ECN Model Leniency Programme."

Chapter VI of the ECN+ Directive focuses on "Leniency programmes for secret cartels." In particular, Article 17(1) stipulates that all Member States shall ensure that NCAs have in place leniency programs which enable them to grant immunity from fines to undertakings which fulfil the conditions in subsequent provisions. This should provide cross-border legal certainty and should put an end to the different outcomes of leniency applications caused by current national divergences.[22] In order to provide a level playing field, the leniency provisions now provide a greater level of detail and leave the Member States less leeway for implementation.[23]

19 See ECN Model Leniency Programme as revised in November 2012, available at http://ec.europa.eu/competition/ecn/mlp_revised_2012_en.pdf.

20 See Daniel Mandrescu, "One Stop Shop Leniency: The case of DHL Express v Autorità Garante della Concorrenza e del Mercato (C-428/14)," (2016) 37 E.C.L.R., Issue 10, p. 397 (400).

21 See ECN+ Directive, available at http://data.consilium.europa.eu/doc/document/PE-42-2018-INIT/en/pdf.

22 See ECN+ Directive, p. 6.

23 See ECN+ Directive, recital 10.

The ECN+ Directive in Article 21 provides for the harmonization of marker rules. However, the proposal still seeks to give NCAs discretion as to whether they should grant a marker or not and provides them with the flexibility to set deadlines on a case-by-case basis.[24] In order to achieve the envisaged harmonization, it would be preferable to have uniform standards throughout the European Union. This would simplify the application of the law and further increase the effectiveness of leniency programs.

The new ECN+ Directive is heading in the right direction insofar as it standardizes the marker system throughout Europe. This is a step forward as so far not all EU Member States have such a system in place. However, if discretionary deadlines continue to be set on a case-by-case basis, there will continue to be significant differences in the application of the various marker systems. The ECN+ Directive has been adopted by the Council on December 4, 2018. Following its entry into force, EU Member States will have two years to incorporate the new provisions into their domestic law.

IV. PRACTICAL CONCLUSIONS AND FUTURE OUTLOOK

Leniency programs are a very important tool in the competition enforcers' fight to uncover cartels. Their key to success over the past two decades has been the significant financial incentives they offer to cartelists who blow the whistle on their co-cartelists at the right moment (in particular full immunity from fines and specific privileges in possible follow-on damages claims). However, as these incentives have been somewhat diminished by the increase in potential deterring consequences for leniency applicants (especially in the context of the rise of private cartel enforcement) the decision to apply for leniency has, in many cases, become a complex balancing exercise taken under immense time pressure.

Orchestrating leniency applications to the European Commission and different NCAs, as well as managing the onerous cooperation process with competition authorities around the globe, is key if a company intends to benefit from a leniency application. However, given the current global rise of competition litigation, there are several risks that have to be considered when deciding whether to apply for leniency. An incorrect or incomplete leniency application can easily ruin an applicant's chances of obtaining the privileges offered by such an application and may tip off authorities who were not previously aware of the existence of the cartel.

It should also be noted that the first applicant alone gains benefits from both full immunity in the public cartel proceeding as well as certain privileges in civil damages proceedings. There is also no guarantee that information provided in leniency applications will not, in certain circumstances, become public (even if such applications benefit from a high level of protection). In addition, leniency applicants are popular first targets of cartel damages claims. These risks should not be underestimated, but should be carefully balanced, on a case-by-case basis, against the potential advantages that may result from the leniency application.

Leniency applications are essential in uncovering secret cartels and much has already been done to protect them. The new ECN+ Directive aims to ensure a uniform application of leniency programs in Europe and represents a further step in this direction. As leniency programs benefit from simplicity and transparency, they will be strengthened by such unification. However, a true EU-wide one-stop-shop system remains a long-term objective at best, which is unsatisfactory from a practitioner's perspective.

Companies faced with the decision of choosing whether or not to file should above all remain calm, despite the significant pressure they are likely under. The decision whether to apply for leniency or not is a crucial one and may in some circumstances lead to a bet-the-company situation. Such a decision must be made following an in-depth analysis of the advantages and disadvantages for the company, taking into account the specific facts of the case, the general strategy of the company in such situations, and will usually require the unanimous approval and firm commitment of the company's board of directors.

24 See ECN+ Directive, Art. 20.

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