

# The interplay between private and public enforcement

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*All views expressed are strictly personal*

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more specifically :

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the interplay

between

**follow-on actions for damages**

and

the use of **leniency**

in public anti-cartel enforcement

# Importance of leniency for public anti-cartel enforcement

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<b>Period</b>	<b>Total number of European Commission cartel decisions with fines</b>	<b>Number of decisions in which immunity was granted under the European Commission's leniency programme to the first undertaking cooperating</b>
<b>1986 - 1990</b>	<b>9</b>	
<b>1991 - 1995</b>	<b>8</b>	
<b>1996 - 2000</b>	<b>10</b>	<b>1</b>
<b>2001 - 2005</b>	<b>33</b>	<b>20</b>
<b>2006 - 2010</b>	<b>31</b>	<b>25</b>
<b>2011 - 2015</b>	<b>23</b>	<b>21</b>
<b>2016 - 2020</b>	<b>17</b>	<b>17</b>

# Follow-on actions for damages in cartel cases

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- marked increase in follow-on actions for damages in cartel cases in several EU Member States since 2005
- EU Competition Damages Directive 2014/104/EU:
  - prohibition of disclosure and use in evidence of leniency statements
  - limitation of immunity recipients' damages liability primarily to their own direct and indirect purchasers and providers

but non-retroactive application of substantive provisions

# OECD Competition Trends 2022

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for the period 2015 – 2020 :

**70.5 % decline in leniency applications in Europe**

68.5 % decline in Americas  
also decline in Asia-Pacific region

# German Federal Ministry for Economic Affairs (*BMWK*)

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## Competition Policy Agenda until 2025 (21 February 2022):

“ we want to strengthen cartel prosecution through an initiative to better protect immunity recipients and reform the EU Competition Damages Directive ”

# Review of EU Competition Damages Directive

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➤ Article 20(1):  
report, if appropriate accompanied by a legislative proposal, by 27 December 2020

➤ SWD(2020)338 of 14 December 2020:

Commission « plans to evaluate the Directive and report on such evaluation once more sufficient experience from the application of the rules of the Directive has accumulated »

# German Monopolies Commission (*Monopolkommission*)

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## **XXIV. Biennial Report (5 July 2022):**

the immunity recipient should be fully exempted from liability for damages

- unless full compensation cannot be obtained from the other infringers;
- unless the immunity recipient enjoys a dominant position; and
- on condition that the immunity recipient makes its leniency statements available to injured parties



# What is the optimal number of leniency applications ?

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- perspective of optimal antitrust enforcement  $\neq$  private interest of the antitrust industry
- full deterrence, while much beloved and often achieved in economic models, is neither achievable nor desirable in the real world (for economic and psychological reasons)
- leniency is not a substitute but a complement to other methods of collecting intelligence and evidence of cartel infringements

# More recent figures

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- OECD contribution by EU, 1 June 2023:  
European Commission has received in 2022 twice as many leniency applications as in 2021, and three times as many as in 2020
- OECD Competition Trends 2023:  
32 % more leniency applications in 2021 than in 2020 in Europe
- OECD Competition Trends 2024:  
further increase in 2022, but still well below 2015 level

# What explains the evolution of the number of leniency applications?

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## 1. Fewer cartels

- a) increase in public anti-cartel enforcement
- b) increase in follow-on actions for damages
- c) increased compliance efforts
- d) mergers and acquisitions of minority shareholdings used as alternatives to cartels

## 2. Evolution of the number of *ex officio* cartel investigations

↘ see statistics on next slide + OECD Competition Trends 2024 (increase in 2022, countering the steady decline from 2016 to 2021)

## 3. Uncertainty about follow-on actions for damages

- = transitional phase
- decisive element = threat of *ex officio* enforcement

# Evolution of number of *ex officio* investigations

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Period	Number of European Commission cartel decisions following <i>ex officio</i> cartel investigations
1986 - 1990	9
1991 - 1995	8
1996 - 2000	9
2001 - 2005	15
2006 - 2010	9
2011 - 2015	4
2016 - 2020	0

# Why immunity recipients should NOT receive immunity from damages

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## First reason: injustice

➤ Aristoteles, *Nicomachean Ethics*, Book V:

corrective justice requires not only that the injured party receives full compensation, but also that the party that caused the injury pays

↘ see also

C-724/17 *Skanska*, paras 28-32 (AG Wahl, paras 60-62)

# First reason: injustice

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➤ John Locke, *Second Treatise of Government* (1690):

« From these two distinct rights (the one of punishing the crime, for restraint and preventing the like offence, which right of punishing is in everybody, the other of taking reparation, which belongs only to the injured party) comes it to pass that the magistrate, who by being magistrate hath the common right of punishing put into his hands, can often, where the public good demands not the execution of the law, remit the punishment of criminal offences by his own authority, but yet cannot remit the satisfaction due to any private man for the damage he has received. That he who hath suffered the damage has a right to demand in his own name, and he alone can remit. »

# Second reason: harm to public anti-cartel enforcement

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- written evidence of cartels is increasingly rare, hence the importance of leniency statements as evidence
- **ECJ case law** (T-240/17, *Campine and Campine Recycling*, paras 119-121) :
  - « statements which run counter to the interests of the declarant must in principle be regarded as particularly reliable evidence. [...] a statement made by a company admitting the existence of an infringement by that company entails considerable legal and economic risks, including, inter alia, the risk of actions for damages being brought before the national courts, in the context of which the Commission's establishment of a company's infringement may be invoked. [...] Nonetheless, statements made by the undertakings concerned in the context of an application for leniency pursuant to the Leniency Notice must be assessed with caution and, in general, cannot be regarded as particularly reliable evidence if they have not been corroborated by other evidence. »

## **Second reason: harm to public anti-cartel enforcement**

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double negative effect of damages immunity:

- reduction of the evidentiary value of the leniency statements of the immunity recipient
- reduced willingness of potential second-in and further leniency applicants to come forward and provide corroborating evidence



# Third reason: increased market concentration

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AG Geelhoed (C-289/04 P, *Showa Denko*, para 61 and note 16) :

« in the event of a collective infringement like a cartel as opposed to an infringement by a single offender, the Commission must also consider the subsequent effects of the fines and take into account the size of a given company. [...] The example [...] is a cartel consisting of one big player and several small players. The big player cooperated with the Commission and receives immunity under the Leniency Notice. In such cases very high fines could have put the smaller players out of business, in which case the Commission's intervention would have resulted in a monopoly. »

# Third reason: increased market concentration

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immunity recipient often has the highest turnover in the market affected :

Period	2006 - 2015
Number of immunity recipients	46
Number of immunity recipients with the highest turnover in the market affected by the cartel	21 = 46 %
Total number of undertakings involved	316
Average number of undertakings per cartel	7

## Third reason: increased market concentration

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excluding dominant companies does not solve the problem, because

- ✓ cartels never include dominant companies
- ✓ the problem is about dominance emerging or, below the level of dominance, market structure becoming more concentrated **after** the imposition of fines and the payment of follow-on damages

# Paper

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**”Should the EU Competition Damages Directive be revised to grant companies that have received immunity from fines under the competition authorities’ leniency programmes also immunity from damages?”**

available at

<https://ssrn.com/abstract=4479776>