

Enforcement of cartel arrangements within EU competition law

- With emphasis on leniency in its interaction with fines and damages actions

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Agenda

- Introductory remarks on the topic
 - Briefly explain leniency
- Research question
- Underlying questions
 - Outline of the thesis
- Conflicts under scrutiny
 - The rights and interests at stake
- Enforcement objectives and channels
 - The overall perspective
- Theories of enforcement
 - Deterrence
 - Corrective justice

General explanation

- A public enforcement instrument, based on theories of rational choice and deterrence, which entails that the competition authorities remove or reduce sanctions towards participants of anti-competitive agreements in return for their collaboration.
- Who is eligible for leniency and from which types of anti-competitive agreements and sanctions vary according to different jurisdictions.

The Commission's leniency programme

“Commission notice on immunity from fines and reduction of fines in cartel cases”, (2006):

- Targets (secret) cartel arrangements
- Includes only undertakings and not individuals
- Provides immunity from or reduction of administrative fines (article 23 of regulation 1/2003)
 - Immunity if the evidence delivered enables a dawn raid or an infringement of article 101 TFEU
 - Reduction if providing evidence of *significant added value*
- + several other requirements..
- Point 39 of the leniency notice: *“The fact that immunity or reduction in respect of fines is granted cannot protect an undertaking from the civil law consequences of its participation in an infringement of Article 81 EC.”*

Research question

Can the effectiveness of the EU Commission's leniency notice be improved while promoting a good balance between public and private enforcement?

The core issue is what the scope of leniency can and should be to allow a leniency applicant to self-report with confidence without compromising or undermining the rights of the co-infringers and the third parties having suffered loss due to the cartel arrangement to an extent which cannot be justified, in addition to assuring the interests of society at large of a strong competition (the rationale behind the cartel prohibition of article 101 TFEU).

Underlying questions

- How has the US and EU antitrust enforcement systems developed differently, with emphasis on leniency, and why?
- How is the leniency notice of 2006 performed and why?
- How does fines, as the only sanction included in the leniency notice, handle the sole enforcement responsibility of punishment, disgorgement and deterrence?
- Private enforcement as “the missing link” within EU competition law – how has private enforcement developed and why? How has it affected leniency?
- What is the Damages directive about, which objective(s) are pursued, and how much does it tie the hands of the member states in their private enforcement of cartel arrangements?
 - How are the rules on disclosure of the directive performed, and why?
 - How are the rules on liability of an immunity recipient performed according to the directive, and why?
 - Does the rules on disclosure and liability allow a leniency applicant to self-report with confidence, at the same time as the right to compensation is assured?
 - Does the Damages directive pass the balancing test between leniency and the right to compensation? Is there a satisfactory balance between deterrence and corrective justice?
- Connecting the dots: How to handle the overall and more specific shortcomings found in the analyses above?

Central laws

- The Treaty on the functioning of the European Union (TFEU)
 - Article 101 and the prohibition of cartel arrangements
- Commission notice on immunity from fines and reduction of fines in cartel cases from 2006, (the leniency notice)
- Council regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in articles [101] and [102] of the Treaty (regulation 1/2003)
 - Articles 7, 15, 16, 17, 18, 23 +++
 - Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 from 2006
- The directive 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 from 2014, (the damages directive)
 - Articles 6 and 7 on disclosure of evidence, article 11 on liability +++
 - C-128/92 *Banks*, C-453/99 *Crehan*, C-298/04 *Manfredi*+++
 - C-360/09 *Pfleiderer*, C-536/11 *Donau Chemie*, C-365/12 P *EnBW*++
 - The Commission's rules: Regulation 1049/2001, regulation 773/2004, the notice on access to file, the leniency notice, the notice on cooperation with national courts, to bring its procedures in line with the Damages directive.
- 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 from 2017, (the enforcement directive)
 - Chapter VI, articles 16-22 on leniency +++
- US laws: Sherman Act, Clayton Act..

Conflicts under scrutiny

The cartel arrangement as the point of reference:

External conflicts:

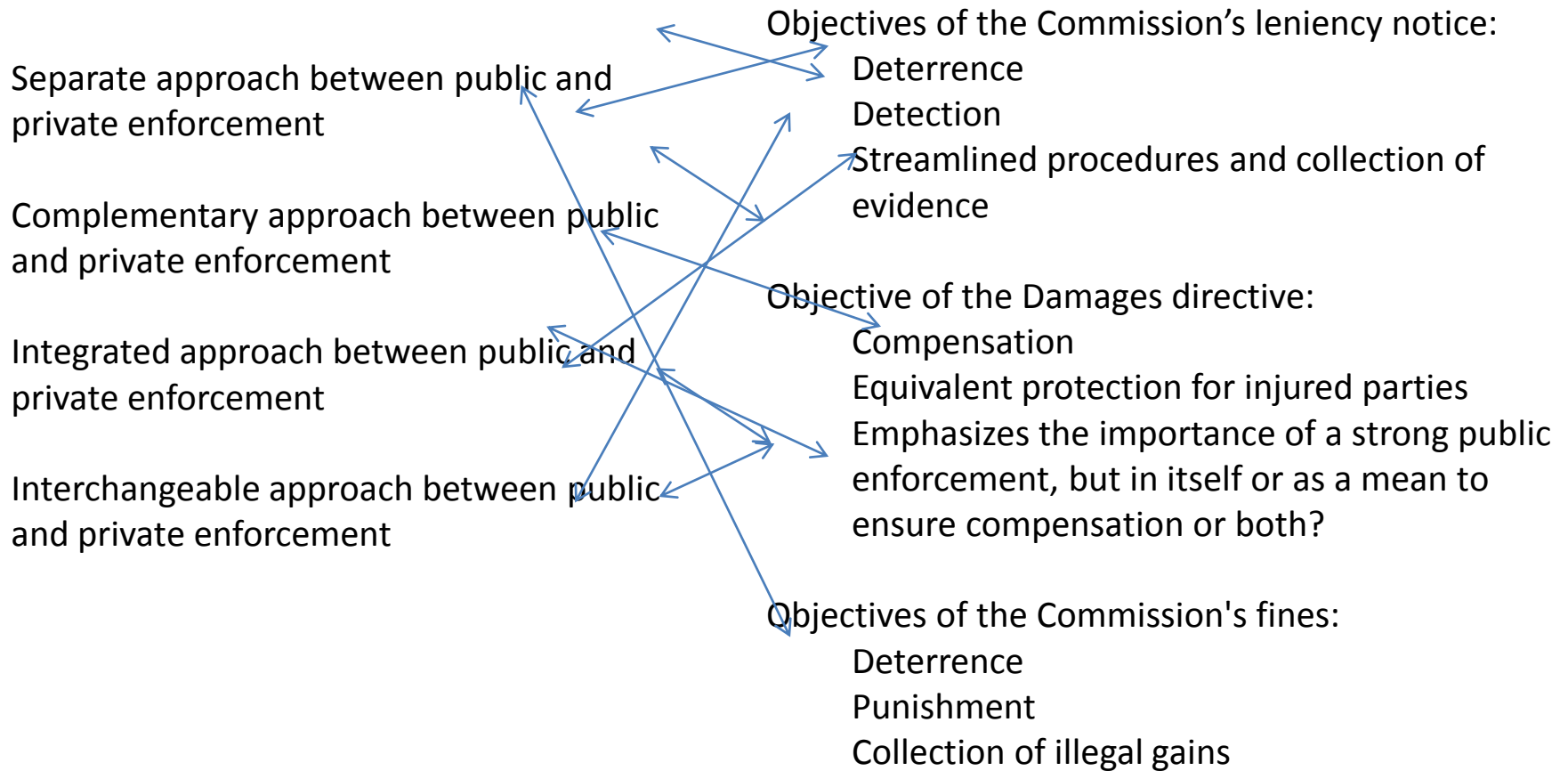
- Cartel infringer vs. the investigative authorities
 - To what extent should the Commission rely on leniency?
 - Scope
 - Compromising with principles of equality and corrective justice
- Leniency applicant vs. victims of cartel activity
 - To what extent should leniency-related evidence be available for claimants?
 - What should the liability of an immunity recipient be?

Internal conflicts:

- Leniency applicant vs. other cartel members
 - Procedural conflicts
 - How to handle the risk of weaker competition in oligopoly markets?
- Role as ringleader, coercer, instigator or external facilitator
 - How should these positions be regulated?
 - Which of these roles should qualify for leniency?

Objectives under scrutiny

How and through which channels should the enforcement instruments pursue the enforcement objectives?



Theories of enforcement

- Seeing as the mechanisms of leniency are based on enforcement theories of rational choice and deterrence, this is a question of how the law should be performed to achieve a sufficient level of deterrence at the same time as theories of justice are withheld.
- Whereas the private enforcement through damages seeks to compensate and accordingly sets out from the principle of corrective justice, the public enforcement, including leniency, stems from theories of deterrence and punishment.

To sum up some of the main points of the thesis:

1. Private enforcement relies on public enforcement.
2. Promoting private enforcement at the expense of public enforcement is self-defeating within the current EU regulatory framework.
3. Protecting leniency itself is not enough. Leniency is not a replacement of more traditional public investigative measures, such as market monitoring and surveillance.
4. Enforcement instruments, such as leniency, depend on a strong, independent public enforcement.
5. Within the current cartel enforcement regime, it is deterrence which ensures that players and consumers are not harmed in the first place.
7. There should be more emphasis on individual non-monetary sanctions such as imprisonment.
8. Should there be more emphasis on collection of illegal gains?

Thank you for your attention!

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