Competition Damages Actions and Leniency Programmes Irreconcilable Conflict, or Potential Harmony?

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The present study examines the relationship between the private enforcement of competition law and the most important legal instrument in the toolkit of public enforcement of competition law, the leniency policy, through the EU legal environment relevant to this legal instrument and the case law implementing it. The present paper will discuss the impact of Directive 2014/104/EU 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 (the Directive) on the relationship between private enforcement of competition law and leniency. I will assess the impact of the private enforcement of competition law on the application of leniency policy. The main aim of the study is to present and evaluate the solutions and their results that the Directive has sought to resolve the conflict between the private enforcement of competition law and the application of leniency.
Keywords: *public law, private law, competition law, damages, leniency, European Union law*

Introduction

Advanced societies operate a fundamentally capitalist economic system, based on private property, free enterprise and economic competition, making free economic competition one of the fundamental drivers of modern economies. Competition encourages businesses to offer high quality goods and services at the lowest possible prices in order to attract customers and increase their market share, i.e. their profits. In free market competition, businesses, by pursuing their own self-interest (i.e. profit orientation) in their economic relationships, ideally ultimately contribute to the welfare of the whole community. In the words of Adam Smith, "*It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest. We address ourselves, not to their humanity but to their self-love, and never talk to them of our own necessities*

but of their advantages."[1] Competition also encourages innovation, as businesses try to produce products that are more attractive to consumers in order to compete economically. Competition thus forces firms to be creative and innovative, for example in the design of their products or in the use of technology. Restrictive practices, on the other hand, prevent, distort or reduce economic competition in the market. Anti-competitive practices typically lead to market distortions, resulting in higher prices, lower quality products, poorer quality service and a deterioration in innovation.[2]

Action against restrictive practices is therefore central to competition law, and its positive economic effects have long been recognised.[3] So-called hardcore restrictive practices have a number of very negative effects on the economy (e.g. *deadweight-loss*, *welfare transfer*, *X-efficiency loss*, *rent-seeking*), and thus on society, innovation and ultimately consumer welfare.[4] Optimising action against anti-competitive behaviours is therefore a high public policy priority.

The main objective of competition policy, in the light of the above, is to maintain economic competition, including by combating restrictive agreements between undertakings. In continental jurisdictions, such as the European Union, competition rules are enforced through the instruments of public law.[5] The public interest is therefore a fundamental motive for the public enforcement of competition law, which in the case of competition law is the public interest in maintaining competition in the marketplace for eco-

1 Adam Smith, The Economy of Nations - An Examination of the Nature and Causes of this Economy, 1776, Translated by Rudolf Bilek, Budapest, Akadémiai Kiadó, 1959, p. 64.
2 There is an increasingly sophisticated toolbox of anti-competitive practices. A good example is the classification of certain relevant information as business secrets in public procurement procedures, which the legislator has eliminated by amending the law. See also in this respect: Arató Balázs: A titok fogalma a jogban; in: Balázs, Géza; Minya, Károly; Pölcz, Ádám (ed.): A titok szemiotikája; Budapest; Magyar Szemiotikai Társaság; 2019; p. 367; pp.29-39.; and BALÁZS Géza: A titok antropológiája és szemiotikája, in: Balázs, Géza; Minya, Károly; Pölcz, Ádám (ed.): A titok szemiotikája; Budapest; Magyar Szemiotikai Társaság; 2019; p. 367; pp. 15-28.
3 The competition law approach quickly took root in other areas of law. See for example: Arató, Balázs: A közbeszerzési jogorvoslat története a rendszerváltozástól; in: Jogelméleti Szemle 16:3; pp. 2-33.; 2015.
4 See more in Hal R. Varian: Microeconomics at the intermediate level. Budapest, Közgazdasági és Jogi Könyvkiadó, 5th edition, 2001, p. 443.
5 On the incorporation of public law into civil law, see for example: Arató, Balázs: A klasszikus polgári jogi szerződéses jogviszony és a közbeszerzési szerződéses jogviszony összehasonlítása, In: Boóc, Ádám; Csehi, Zoltán; Homicskó, Árpád Olivér; Szuchy, Róbert (szerk.) 70: Studia in Honorem Ferenc Fábián; Budapest, Magyarország: Károli Gáspár Református Egyetem, Állam- és Jogtudományi Kar (2019) 546 p. pp. 31-35., 5 p.

nomic efficiency and social advancement, and in protecting the interests of businesses and consumers who respect the requirements of business fairness.[6] Therefore, in a broad sense, the public enforcement of competition law should be understood as the public intervention in the public interest to maintain the smooth functioning of the market economy, to ensure the freedom and fairness of competition and to enforce competition law provisions in the interest of long-term consumer welfare and competitiveness.

In a narrow sense, the public enforcement of competition law is carried out through the intervention of a public authority with the necessary powers and competences, the most tangible form of which is the competition supervision procedure, whereby the competent authority, acting within its remit, applies public sanctions to protect the freedom and fairness of competition in the market, which is a prerequisite for economic efficiency, in a preventive and repressive manner, with the primary - and most resource-intensive - task of detecting infringements. The detection of restrictive agreements is a major challenge for public authorities due to the secretive nature of cartels, as the strict action of public authorities and the possibilities offered by technology make it all the more difficult for cartelists to find creative ways to create and maintain cartels, which makes it very difficult to trace them and thus to detect them,[7] and many cartels remain undetected.[8]

In the context of public enforcement of competition law, an effective tool for the authorities to detect cartels is the leniency policy based on the prisoner's dilemma[9], as known in game theory, whereby cartel undertakings are encouraged to disclose evidence of cartels in order to avoid full or partial immunity from competition fines for restrictive conduct or criminal prosecu-

6 See as an example the preamble to the Civil Code.

7 Combe, E., C. Monnier and R. Legal (2008), „Cartels: the Probability of Getting Caught in the European Union", Bruges European Economic Research papers. page 17.

8 Ormosi, P. (2014), „A tip of the iceberg? The probability of catching cartels", Journal of Applied Econometrics, Vol. 29/4, pp. 549-566.

9 A dilemma is a type of non-zero-sum game. At its heart is whether one of two prisoners suspected of a serious crime will confess against the other (i.e. defect, since in the materials dealing with the prisoner's dilemma, cooperation is not cooperation with the authorities but refusal to confess). As in the other non-cooperative game theory problems, it is assumed that each player is concerned with his own gain, regardless of the gain of the other participant. In the prisoner's dilemma, the Nash equilibrium does not lead to an optimal solution for both parties, because in this case it means that each prisoner testifies against the other, even if their gains would be greater with cooperation. Even though both prisoners would be better off if they cooperated and neither testified against the other, it is still in the personal interest of both to testify even if they had previously promised each other cooperation. This is the essence of the prisoner's dilemma.

tion. Leniency policy is an effective tool for competition authorities[10] , as it not only increases deterrence from engaging in restrictive conduct by breaking trust within the cartel and destabilising agreements, but also facilitates prosecution by the authorities, as leniency applicants are obliged to disclose the cartel and provide evidence to the authorities in order to obtain immunity from fines. Leniency was first used in the United States in 1978[11] , in the European Union in 1996 and in Hungary since 2003.

However, in addition to the wider public interest harm, cartels can also harm private interests, as the price increases, quality losses or market foreclosure caused by cartels can cause quantifiable harm to competitors, suppliers or other stakeholders, which can lead to victims bringing damages actions against cartel participants. The dominant motive for private enforcement of competition law is the coexistence of private interest and, by the very nature of competition law, public interest, the harm to which private enforcement seeks to remedy through the private law instrumentality, primarily reparation.[12] For the success of an action for damages under competition law, it is in the fundamental interest of the parties bringing the action to establish the details of the anti-competitive conduct, the fact and time of the infringement itself, the damage caused by the infringement and the extent of that damage, the identity of the infringing undertakings and the evidence necessary to prove the causal link between the infringement and the damage caused. The private enforcement of competition law can take place after the public enforcement of competition law (so-called follow-on actions) or in the absence of such enforcement (so-called stand-alone actions). There is a significant difference in terms of evidence between the two types of action, given that in follow-on actions the cartel has already been discovered by the authority and the claimant has the decision of the authority finding an infringement.

As the conflict between leniency policy and private enforcement can only be understood in relation to follow-on actions, I will refer to private enforcement of competition law as follow-on actions. The aim of my paper is therefore to describe the conflict and the relationship between private enforcement of competition law and leniency policy, as described above, and to analyse and assess the impact of private enforcement on leniency policy and the theories for resolving the conflict.

10 Combe, E., C. Monnier and R. Legal (2008), „Cartels: the Probability of Getting Caught in the European Union", Bruges European Economic Research papers. page 19.
11Scott D. Hammond, Antitrust Div. Deputy Assistant Attorney Gen., Address at the 24th Annual National Institute on White Collar Crime: The Evolution of Criminal Antitrust Enforcement over the Last Two Decades Feb. 25, 2010, page 2
12 Tóth, 2016. p. 191.

Steps taken to resolve the conflict in the Directive

It was suggested relatively early on that damages litigation could reduce the attractiveness of leniency programmes for cartel participants if their cooperation with the competition authority increases the chances of being sued by cartel victims.[13] This apparent conflict between public and private enforcement called for a legal compromise.

The usability of leniency statements and the liability of the leniency applicant for damages is one of the most critical issues for the private enforcement of competition law, given that both leniency and damages actions are preventive in nature against competition law infringements, at the same time, whereas leniency encourages cartel undertakings to disclose their infringing conduct by offering them the possibility of immunity from competition law sanctions, competition damages actions, by contrast, still hover over cartel undertakings as a private sanction for competition law infringements, despite the fact that they have made a leniency declaration, and the two instruments therefore necessarily affect each other's effectiveness.

The objective of the Directive includes the need to ensure that undertakings remain prepared to approach competition authorities voluntarily with leniency notices or settlement submissions. This is to avoid disproportionate exposure of immunity beneficiaries to the risk of being sued for damages under worse conditions than those applicable to other infringing undertakings not participating in the leniency programme. To this end, the authors of the Directive considered it necessary to exempt leniency documents from the obligation to disclose evidence[14] and to exempt undertakings benefiting from immunity from joint and several liability for all damages by limiting the contribution to be made to other infringers by the undertakings benefiting from immunity to the amount of the damage caused to the direct or indirect customers of the undertaking benefiting from immunity.[15]

This objective is based on the recognition that there may be a significant disincentive for undertakings to participate in leniency programmes and to cooperate with competition authorities if they are required to disclose self-incriminating settlement submissions made solely for the purpose of cooperating with competition authorities and if they become the primary target of damages actions as a result of the earlier entry into force of a decision of a

13 See for further details Wilsher, Dan: The public aspects of private enforcement in EC law: some constitutional and administrative challenges of damages culture, CLR, 2006, no. 3. p. 30; and

14 Directive 26, preamble paragraph.

15 Preamble paragraph38 of the Directive.

competition authority finding an infringement than is the case for undertakings not benefiting from immunity.[16]

It can be seen from the above that the harmonisation of the two legal instruments in the Directive has been reflected in the limitation of the extent of the liability of leniency undertakings and the exclusion of the use of leniency statements in competition damages actions. Under the Directive, national courts are precluded from considering the admissibility of leniency statements and are obliged to reject all applications for the disclosure of leniency statements.[17] The Directive thus gives priority to the protection of the leniency institution, which I consider to be the most important, over the enforcement of damages actions, although it seeks to maintain a balance between the two. It is noticeable that, on the basis of the Directive, the Commission has sought to establish a symbiosis between public and private interests.

The relationship between private enforcement and leniency

It is clear that the public interest leniency policy of promising immunity in exchange for cartel detection as an incentive to destabilise cartels is being countered by the - eminently "*fact intensive*" - competition law tort litigant, the private interests of the injured party, who is in a more disadvantaged position as a result of extreme information asymmetry, in obtaining evidence of infringement and thus in recovering his loss through a successful damages action, seem irreconcilably opposed.

Despite the Directive's efforts to resolve conflicts, while leniency applicants are granted full or partial immunity from competition fines, they remain vulnerable to subsequent damages actions.

Leniency applicants cannot appeal against the infringement decision, which makes the decision final against them first.[18] The Directive's provision protecting leniency applicants, i.e. exempting leniency statements from discovery, covers statements and verbatim quotations from them, but does not cover decisions which, although not citing leniency applications, refer to them. Furthermore, immunity does not extend to other evidence which must be offered together with the leniency application in the context of the cooperation obligation under the leniency programme, so that the protection

16 Directive, recitals 26 and 38.

17 Micklitz, Wechsler, 2016, p. 144.

18 They could theoretically do so, but a recent case, VJ/29/2021 Danube Passenger Carriers, is an excellent example, where the Hungarian Competition Authority considered the companies' action against the infringement decision as a breach of the duty of cooperation, as confirmed by EU competition case law, and as a result the Hungarian Competition Authority withdrew the leniency notice.

afforded by the Directive may not always be considered sufficient for leniency applicants.[19] The Directive also limits the extent of the joint and several liability of immunity recipients. Participants in the leniency programme are only vicariously liable, i.e. they are fully jointly and severally liable to the victims if full compensation cannot be recovered from other undertakings involved in the same infringement. In the latter case, the amount of the contribution of the immunity beneficiary cannot exceed the amount of the damage caused to its own direct or indirect customers or service providers. [20]

The Directive's rules on the universal liability of leniency applicants are seems to be a step backwards compared to Article 88/D of the Hungarian Competition before the implementation of the Directive. Prior to the implementation of the Directive, pursuant to the provisions of the Hungarian Competition Act under Article 88/D, immunity applicants were only liable for the damage caused if the other members of the cartel were unable to pay the damages awarded to the claimants in private enforcement actions. In Lena Hornkohl's view, the earlier Hungarian rule went beyond the Directive's rule on joint and several liability, since the Directive's provision limits the liability of the beneficiaries of the immunity by way of leniency to their entire liability for damages to their direct or indirect customers.[21]

However, there is a reason why the legal exclusion and limitation of civil liability is rare in continental legal systems and is linked to the injured person's own fault or special circumstances. In particular, the exclusion and limitation of liability in the private enforcement of competition law may have an unintended effect and limit the chances of obtaining full compensation for the damage caused by a breach of competition law.[22]

Article 101 of the TFEU, which governs EU antitrust law, does not contain a provision on private law claims, which have been repeatedly laid down by the Court of Justice of the European Union (**"CJEU"**) in its interpretative work. One of the fundamental prerequisites for the private enforcement of competition law is the direct application of the primary law of the European Union, in this case the provisions of the TFEU relevant to competition law, and the

19 Lena Hornkohl: A Solution To Europe's Leniency Problem: Combining Private Enforcement Leniency Exemptions With Fair Funds, University of Vienna, Austria, February 18, 2022, Kluwer Competition Law Blog.

20 Directive Article 11(5)

21 Lena Hornkohl: A Solution To Europe's Leniency Problem: Combining Private Enforcement Leniency Exemptions With Fair Funds, University of Vienna, Austria, February 18, 2022, Kluwer Competition Law Blog.

22 Lena Hornkohl: A Solution To Europe's Leniency Problem: Combining Private Enforcement Leniency Exemptions With Fair Funds, University of Vienna, Austria, February 18, 2022, Kluwer Competition Law Blog.

general principles developed by the CJEU. The principle of direct effect was established by the CJEU in the Van Gend en Loos judgment[23] , while the direct effect of EU competition law provisions, i.e. Articles 101 and 102 TFEU, was established by the CJEU in the SABAM judgment.[24] And the CJEU has established the right to sue for damages for breach of competition law in the Courage case.[25] Article 3 of the Directive also expressly mentions the right of victims to full compensation. The right of victims of a cartel to full compensation is therefore derived from primary law and permeates the private enforcement of competition law at a fundamental level.

Consequently, the exclusion of liability for leniency applicants must be carefully considered in order to ensure the effectiveness of the leniency policy and respect the general principles of primary law. In any event, any limitation of the liability of leniency applicants must comply with the principle of proportionality. It can therefore be seen from the above that the conflict between leniency and private enforcement has not yet been resolved.

The impact of CJEU case law on the relationship between leniency policy and private enforcement

In the European Union and the European Economic Area, since the Courage judgment, approximately 300 national competition damages actions have been brought in the European Union and the European Economic Area, of which 58 cases have resulted in damages awards, 93 in a finding of liability for competition law infringements and 134 in a dismissal of the action.[26][27] A number of these judgments have also been referred to the CJEU, which has given the CJEU the opportunity to further refine the details of the Directive's competition damages litigation, such as the question of leniency.

Even before the Directive was drafted, the CJEU was dealing with the highly controversial issue of the use of leniency statements in competition damages actions. In Pfleiderer, the CJEU still allowed access to leniency statements, but left it to national courts to weigh the conflict of interest between

23 Judgment of 5 February 1963 in Case C-26/62, Van Gend & Loos v Nederlandse administratie der belastingen.

24 Case C-127/73 BRT v SABAM [1974] ECR 51, paragraph 16.

25 Case C-453/99 Courage and Crehan [2001] ECR I-6297, paragraphs 26-27.

26 Laborde, 2021. pages 232-242.

27 In relation to the figures, it is important to point out that the research cited above - quite rightly - drew a distinction between actions brought and judgments handed down in relation to them, or counted judgments handed down in relation to the same infringement as one case.

public and private enforcement.[28] In Donau Chemie, the CJEU did not wish to establish a sharp hierarchy between private and public interest enforcement, but pointed out that to exclude access to leniency documents altogether would infringe the right to compensation itself.[29]

The CJEU has also given judgments on the use of leniency statements after the Directive was adopted. In the Axa and Degussa cases, the scope for victims to obtain information on leniency statements has been outlined. In the Axa case, it was held that while the substance of a leniency notice cannot be disclosed, the references contained in it can.[30] In the Degussa case, the CJEU ruled that knowledge of the European Commission's infringement decision does not result in the disclosure of leniency notices, so that the fact that an undertaking has participated in a leniency programme can be disclosed.[31]

While not solving all the problems, the interpretative work carried out by the CJEU has tangibly eased the uncertainties surrounding competition damages actions. This can be seen from the gradual increase in the number of actions for competition infringement compared to the period 2001-2009, when the Commission ordered a study on the quantification of damages in the context of private enforcement of EU competition law, which produced a total of 46 relevant judgments.[32] As the data are spread across Europe, there is a very significant variation in the number of judgments in competition damages actions from one country to another. This variation in activity may mean that the case-law of countries with more competition damages litigation and more judgments may provide a guide for judges in countries where the experience needed for future competition damages litigation is lacking. This phenomenon would, in my view, have a fundamentally positive effect on both damages actions themselves, which would be much more predictable in a country with relatively less case law, and would also bring about a convergence of national judicial practices in relation to competition damages actions, which would make them more universal. There are already indications of the above-mentioned trend, as there are an increasing number of judgments which explicitly refer to judgments handed down by courts in other Member States.[33] An

28 Judgment in Case C-360/09 Pfleiderer AG v Bundeskartellamt [ECLI:EU:C:2011:389], paragraph 32.

29 Judgment in Case C-536/11 Bundeswettbewerbsbehörde v Donau Chemie AG and Others, ECLI:EU:C:2013:366, paragraph 27

30 See Case T-677/13, first paragraph of the decision.

31 See Case C162/15, point 83 and answer to the first question.

32 See Oxera et al., 2009, pp. 150-153, and Laborde, 2021, p. 235.

33 See, for example, judgment of the Commercial Court of Valencia No 3, 7 May 2019, No 338/2018; judgment of the Rechtbank Amsterdam, 15 May 2019, ECLI:NL:RBAMS:2019:3574; judgment of the Regional Court of Valencia, 16 December 2019, No 1126/2019; judgment of

example is the judgment of the Amsterdam District Court[34] , which referred to the conditions of proof in the Dortmund Regional Court judgment, which imposed similar requirements on the parties to support their claims. In this context, it is also worth mentioning the judgment of the German Federal Court of Justice[35] , which referred to the judgment of the UK Supreme Court[36] on the interpretation of the Directive's effective application. Last, but not least, I consider it important to mention the judgment of the Commercial Court of Oviedo, in which the decision-making forum did not merely refer to a judgment of a court in another Member State in a similar case and on a similar point of law, but carried out a proper comparative analysis of the assessment of the level of damage, taking as a basis the relevant German, Italian, French, Belgian and, not least, Hungarian practice and, not least, the relevant national legislation.[37]I believe that these national court judgments outline a trend towards legal and jurisprudential unification at Member State level with regard to legal issues in competition damages actions.

The impact of private enforcement on leniency policy

Despite the institutional protection mechanism established by the Directive and the CJEU's case-law-shaping activity, in recent years, the number of leniency applications in the European Union has fallen significantly. The increase in the number of antitrust damages actions for competition law infringements is widely seen as the main reason for the decrease in leniency applications.[38]

There is a broad consensus on the factors that ensure the success of leniency programmes, which some authors refer to *as the* "6C *criteria*"[39] ((i) clarity; (ii) commitment from both sides (i.e., authorities' limited discretion and firm's duty of full co-operation); (iii) credibility (in terms of credible threat of

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the Bundesgerichtshof, 2020. judgment of 23 September 2018, KZR 4/19; judgments of the Regional Court of Dortmund, 27 June 2018, 8 O 13/17, and 30 September 2020, 8 O 115/14; and judgment of the Commercial Court No 1 of Oviedo, 12 April 2021, 245/2019-B.

34 Case C/13/639718 / HA ZA 17-1255 [ECLI:NL:RBAMS:2019:3574], point 3.28.

35 Bundesgerichtshof, KZR 4/19, point 50

36 UK Supreme Court, [2020] UKSC 24 para 194 et seq - Sainsbury's Supermarkets Ltd v. Visa Europe Services LLC

37 Oviedo Commercial Court No 1, Case 245/2019-B, pages 5-6

38 Olivia Bodnar, Melinda Fremerey, Hans-Theo Normann, Jannika Schad, The Effects of Private Damage Claims on Cartel Activity: Experimental Evidence, Duesseldorf Institute for Competition Economics, June 2021, pp. 3 and 36.

39 Volpin, C. and P. Chokesuwattanaskul (2023), Leniency programmes, Edward Elgar Publishing Limited pages 305., 307. and 562.

detection irrespective of leniency); (iv) confidentiality; (v) co-operation and co-ordination between authorities; and (vi) context and culture).[40]

Despite the widely accepted consensus and the fact that legislators have implemented a number of reforms, including the Directive, the number of leniency applications has drastically decreased between 2015 and 2021. In OECD countries, the number of leniency applications fell by 58%.[41]

It is interesting to note that from 2016, the deadline for transposition of the Directive, the number of leniency applications started to decrease. The German competition authority mentions a drastic decrease in the number of leniency applications in its annual report 2019/2020.[42] The German Competition Authority's annual report clearly shows that the number of leniency applications submitted over the last ten years has been decreasing significantly since 2016/2017, for example, from 36 applications in 2016 to 11 in 2020 and 10 in 2021[43] . According to the assessment of the German Competition Authority, this trend is in particular due to the uncertainty of potential leniency applicants about future claims for damages. The Directive was transposed in Germany in June 2017. The annual report of the German competition authority also shows that this trend is also relevant for other ECN competition authorities, including the European Commission. In Hungary, 10 leniency applications have been submitted to the ECN in 2017, 5 in 2018, 4 in 2019, 5 in 2020 and 3 in[44] 2022.[45] The GCR Rating Enforcement statistics show a similar picture for other ECN competition authorities, including the European Commission. The overall decrease in the number of applications is a cause for concern given the prominence of leniency programmes in cartel detection, as prior to the decrease, the majority of competition enforcement proceedings were initiated on the basis of leniency applications.

A study carried out in cooperation with the Düsseldorf Institute for Competition Economics (DICE) at the Heinrich Heine University in Düsseldorf[46] shows that while the propensity to form cartels and the stability of cartels has decreased with the introduction of private litigation, infringing firms are less likely to seek leniency, i.e. the overall incidence of cartels is lower in the shadow of competition damages actions, which is positive, but competition damages claims have a negative impact on the success of leniency policy.

40 OECD: The Future of Effective Leniency Programmes: Advancing Detection and Deterrence of Cartels, 2023. page 6.
41 Lapenta et al, OECD, 2023. p. 6.
42 Tätigkeitsbericht des Bundeskartellamtes 2019/2020, page 39, point (c).
43 The Bundeskartellamt Annual Report 2021/22, 32nd page.
44 For 2021, no public data on the number of leniency applications submitted was available.
45 See annual reports of the GVH.
46 Bodnar et al, 2021. p. 36.

A study by the OECD confirms this trend. That study examined the reasons for the decline in leniency applications, noting a global trend of a 58% decrease in the number of leniency applications in OECD countries between 2015 and 2021.[47] However, the study on the interaction between leniency and competition damages actions somewhat nuances the picture and examines the impact of follow-on and stand-alone damages actions on leniency. The study highlights that while follow-on actions clearly show a negative impact on leniency policy, stand-alone actions, where there is no conflict with leniency in the first place, may increase the efficiency of cartel detection by increasing the detection capacity of EU and national competition authorities, which may also lead to an increase in the number of leniency applications. However, in light of the predominance of follow-on actions compared to stand-alone actions, the negative impact of antitrust damages actions on leniency is clear.[48]

The use of leniency is still widespread throughout the European Union and relies heavily on leniency applicants to detect and investigate cartels, with a significant proportion of cartel cases being initiated on the basis of a leniency application.[49] For example, according to the report cited by the OECD study, leniency applicants were present in 100% of cartel cases brought under the jurisdiction of the European Commission and the United Kingdom, but also in the majority of cases in Spain and Hungary.[50][51] In light of this, the negative impact of competition damages litigation on leniency policy is a significant problem. However, it is important to underline that the study cited also recognises the importance of the fact that over-reliance on leniency by competition authorities at the expense of other investigative tools may reduce the overall deterrent effect, which in turn negatively affects the effectiveness of leniency,[52] and thus somewhat nuances the negative impact of antitrust damages actions on leniency.

47 Lapenta et al, OECD, 2023. pp. 6-8.
48 Lapenta et al, OECD, 2023. p. 18.
49 Lapenta et al, OECD, 2023. p. 9.
50 In Hungary, 3 leniency applications were received for 6 cases opened in 2022, 5 leniency applications were received for 6 cases opened in 2020, 4 leniency applications were received for 4 cases opened in 2019 (each of which was related to a separate procedure), and 11 leniency applications were received for 10 cases opened in 2018 (each of which was related to 5 cases).
51 Mansfield et al, Allen&Overy, 2020 London, p. 2.
52 Lapenta et al, OECD 2023. p. 15.

Theories for resolving the conflict between private enforcement and leniency

To counterbalance the trend described above, academics consider that the civil liability of leniency applicants should be limited by exempting them from further actions for damages, in large part or even in full.

The idea of Buccirossi, Marvao and Spagnolo in this respect is to minimise the amount of compensation to be paid to the undertaking benefiting from immunity by submitting a leniency application, while at the same time maximising the amount of information (including leniency statements) collected by the competition authority and made available to the applicants. Buccirossi, Marvao and Spagnolo thus propose a solution to resolve the conflict described above in which the cartelists are jointly and severally liable, except for the first successful leniency applicant, who is exempted from both the competition fine and civil liability,[53] irrespective of the latter, whether the other cartel members are able to pay the damages awarded[54] , but all documents, including the leniency notice, should be made available to the victims of the cartel[55] , as it may not be appropriate to continue to protect the leniency notice if the leniency applicant is not exposed to the damages action.[56] The solution proposed is currently quite different from the current EU framework, which already provides for a variety of protections for leniency applicants.[57]

However, Thomas G Funke rightly pointed out that the idea of Buccirossi, Marvao and Spagnolo is not feasible under EU law, because if the full amount of damages could not be recovered from the other cartel members, this would violate one of the most important principles of competition law damages actions, the principle of full compensation.[58] As the ECJ has held, it follows from the direct effect of EU primary law that any individual can claim compen-

53 Buccirossi, P, Marvão, C, and Spagnolo, G, „Leniency and Damages: Where Is the Confl ict?", The Journal of Legal Studies , 2020 49:2, at 335-379.

54 Paolo Buccirossi, P, Marvão, C and Spagnolo, G, „Leniency and Damages: Where Is the Confl ict?", The Journal of Legal Studies , 2020 49:2, at 335-379.

55 Buccirossi, P, Marvão, C, and Spagnolo, G, „Leniency and Damages: Where Is the Confl ict?", The Journal of Legal Studies , 2020 49:2, at 335-379.

56 Monopolies Commission, Competition 2022, XXIV Main Opinion, https://www.monopolkommission.de/images/HG24/HGXXIV_ Gesamt.pdf, para 322.

57 For an overview of incentives and legislative options that were considered in the EU and in the UK prior to the Damages Actions Directive, see Cauffmann, C, https://papers.ssrn. com/sol3/papers.cfm?abstract_id=1941692.

58 Thomas G Funke: The leniency comeback A view from Germany, Competition Law Insight - Lloyd's List Intelligence, https://www.competitionlawinsight.com/

sation for the damage suffered if there is a causal link between the damage and the infringement of EU competition rules· [59]

Another theory is that the problem could be solved by closer involvement of competition authorities. In Lena Hornkohl's view, a solution to the problem would be to exempt leniency applicants from liability by distributing the fines collected through the Fair Funds[60] - from which the immunity recipient is also naturally exempted - to the victims of the competition law infringement to compensate the claimant-to-be for the loss of a defendant in the upcoming potential follow-on action.[61] While in my view the idea is not at all unacceptable, it may be severely limited by the fact that under EU and Hungarian competition law there is a cap on the amount of the fine that can be imposed, which may not be sufficient - especially in a class action - to satisfy all the injured parties for example in case of an action for damages for a single and continuous infringement that has caused a large amount of damage to many participants over a long period of time, in addition the loss of the fine as government revenue itself may not be welcomed by any public administration.

Conclusion

In the light of the interaction between leniency policy and private enforcement, it is essential that competition authorities guarantee the attractiveness of leniency programmes and maintain the dilemma it creates. At the same time, the public interest in the success of leniency programmes should not disproportionately hinder the right to full compensation. As can be seen from the above, the European interpretation of private enforcement of competition law is not yet complete, and the negative effects on leniency policy have created new problems to be solved. The EU legislator has not yet managed to resolve the tension between public and private enforcement of competition law.

While leniency programmes and damages actions serve the same purpose, at least to some extent, of increasing compliance with competition rules, as we have seen above, the increasing number of damages actions may under-

59 See for example judgments in C-453/99 Courage; C-295/04 Manfredi; C-557/12 Kone; C-435/18 Otis; C-724/17 Skanska; and C-882/19 Sumal.

60 The Fair Funds for Investors provision was introduced in 2002 under Section 308(a) of the Sarbanes-Oxley Act (SOX). The Fair Funds for Investors provision was put into place to benefit investors who have lost money because of the illegal or unethical activities of individuals or companies that violate securities regulations. The provision returns wrongful profits, penalties, and fines to defrauded investors.

61 Lena Hornkohl: A Solution To Europe's Leniency Problem: Combining Private Enforcement Leniency Exemptions With Fair Funds, University of Vienna, Austria, February 18, 2022, Kluwer Competition Law Blog.

mine national and EU leniency programmes, as the risk of further damages actions may deter potential leniency applicants from coming forward. In order to enhance the successful coexistence of leniency programmes and damages actions, the law can intervene in two steps: it can prevent public disclosure of leniency applications and it can reduce the risk or amount of compensation to be paid by the beneficiaries of leniency applications.

Leniency programmes are a useful tool for competition authorities, as they enhance cartel deterrence, by destabilising cartels, and also ease their prosecution by competition authorities. Therefore, some jurisdictions have over reliance on leniency applicants to detect and investigate cartels and a significant number of their cases benefited from this tool. Therefore, in my view, the decline in the number of leniency applications is a serious problem that needs to be addressed as soon as possible. A deeper involvement of competition authorities in compensating injured parties may, in my view, be a workable concept, but I also do not consider it inconceivable that the destabilisation of cartels could be achieved by a shift of focus to other detection tools.

Other detection tools and legal instruments and measures from competition authorities – such as facilitating complaints, whistleblowing, fast track sector inquiry, formal notice, improvement of cartel screening methods, strengthening authorities' internal skills on the digital economy, Close international co-operation to enhance cartel detection – could be strong enough to complement leniency, the sharp decline the number of leniency applications may constitute a serious threat for the public enforcement of competition law, therefore the situation may require investments in other detection tools as well as possible reforms of leniency programmes and/ or competition damages actions, in order to counter this declining trend and ensure their continuous effectiveness.