RIGA GRADUATE SCHOOL OF LAW

The Relationship between Leniency Statements and Disclosure of Evidence under EU Competition Law

BACHELOR THESIS

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DECLARATION OF HONOUR:

I declare that this thesis is my own work, and that all references to, or quotations from, the work of others are fully and correctly cited.

(Signed) .....

RIGA, 2018

Abstract

The Directive 2014/104/EU also called the Damage Directive 2014 is the first legally binding legislation harmonizing the rules of damage action brought against an undertaking that has infringed EU competition law. Considering the underdevelopment of private enforcement of EU competition law, the objective of the Directive is to improve the situation by ensuring legal certainty and equality for the claimants across the Union. At the centre of the paper is Article 6(6) of the Damage Directive 2014 that denies national courts the right to order competition authorities to disclose leniency statements – an immunity from a public fine to the first cartel participant who voluntarily gives competition authority the evidence on the existence of a cartel and other participants.

The previous practice established by the CJEU was to leave it up to the national courts to decide whether the access to leniency statements is necessary. The injured party has the right to receive a full compensation for the loss suffered due to an anti-competitive behaviour. But the claimant also faces the problem of information asymmetry and lack evidence to prove their case. Leniency statements contain useful information to the claimant and can help resolve this issue. However, the case-by-case approach to disclosability of leniency statements creates uncertainty for the leniency applicant of what will be the exact result after the self-incriminating statement is given. Thus, the attractiveness of leniency is undermined.

The author goes in depth of why the leniency programme is an effective and necessary tool for fighting cartels. Non-cooperative game theory presents the instability of the cartels and shows how the leniency programme can take advantage of that. Considering the secrecy and the difficulty to detect cartels, public authorities depend on the cooperation with a 'whistle-blower'. Because of this reason, the Damage Directive 2014 denied the claimant the possibility to use the evidence from a leniency statement in order to prove damages suffered.

The author in this paper answers the question: can the access to leniency statements be denied without undermining the right to full compensation under private enforcement of EU competition law? In order words, is the injured party able to prove damages suffered from EU competition law violation without the ability to access leniency statements obtained by the Commission or NCA?

In order to find an answer to the research question, the author conducts a doctrinal research on the functioning of a leniency programme and the current position of the claimant in a damage case. Research is further expanded by conducting an interview with an NCA to gain a better understanding on the amount and the content of evidence available to the claimant under the Damage Directive 2014.

The results show that, first, for a leniency programme to be successful, it must be kept confidential. Considering that the leniency applicants do not receive immunity from civil lawsuits, the uncertainty of who will be able to access the evidence voluntarily given by the 'whistle-blower' distorts the attractiveness of the programme. As a consequence, less cartel cases are detected. Second, lack of evidence, legal uncertainty and diversity across MS deems it necessary to harmonize the rules regulating damage actions in EU competition law. In the pass the position of the claimant in a damage action has been unfavourable and lead to underdevelopment of private enforcement. Third, author weights the interest of public and private enforcement of EU competition law in a proportionality test and concludes that the restriction of claimants right to access public materials is proportional and reasonable.

Additionally, pre-existing materials and the current privileged position of the claimant in private enforcement of EU competition law leads to a conclusion that claimant is able to prove the damages suffered. In fact, the lengthy civil procedure and other procedural issues are what discourage injured parties to claim the damages suffered. ADR and compliance programmes present a temporary solution for the parties involved.

Author comes to a conclusion that access to leniency statements can be denied without undermining the right to full compensation under private enforcement of EU competition law. The current situation, although prohibits claimants the access to leniency statements, still for the first time establish a clear and predictable distinction of the evidence that is accessible. Pre-existing materials contain relevant information for the claimant and can be accessed at all times in a damage claim. Thus, the current position of the claimant in terms of evidence disclosure can be considered favourable.

The final conclusion made by the author is that the Damage Directive 2014 establishes a base for the private enforcement of EU competition law to further build upon. Because the parties in damage claims still face several legal problems, the EU and MS must continue to develop the system of EU competition law private enforcement. That does not mean that public enforcement should be undermined or ADR and corporate compliance programmes no longer encouraged as they do provided some advantages for the injured parties, undertakings and the EU. However, the coexistence of public and private enforcement of competition law imposes a responsibility on the Commission and MS to seek out a balance between the two.

Table of Contents

Table of Abbreviations

ADR	Alternative Dispute Resolution
CJEU	Court of Justice of European Union
EU	European Union
EC	European Commission
ECN	European Competition Network
ECSC	European Coal and Steel Community
MS	Member State
NCA	National Competition Authority
OECD	Organisation for Economic Co-operation and Development
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

1. Introduction

Business behaviour aimed to distort the competition and all the benefits it brings is without doubt unethical. Therefore, laws regulating business conduct and penalizing those who breach such laws are arguably necessary. The competition promotes innovation and ensures lower prices, better quality and greater variety of products.[1] The treaty establishing the European Coal and Steel Community (ECSC) in 1951, as one of the founding European Union (EU) treaties, recognized such a need and included first provisions aimed to prohibit anti-competitive behaviour.[2] Currently competition law provisions are contained in the Treaty on the Functioning of the European Union (TFEU) Articles 101 and 102. Nowadays, EU competition law is directly applicable to the member states (MS) and applies to any company or individual doing business in the EU even if the company is registered in a non-EU country.[3] For infringement of EU competition law companies are facing serious fines.[4]

However, having an effective enforcement of competition law is just as important as the competition rules. The Organisation for Economic Cooperation and Development (OECD) has expressed that "ensuring effective compliance with rules and regulations is an important factor in creating a well-functioning society and trust in government."[5] In the modern economy cartels and other agreements limiting competition are found to be occurring regularly.[6] Yet detecting such business conduct is not easy.[7] Historically, public enforcement has been the main focus of the European Commission (EC).[8] Especially, the establishment of an effective leniency programmes for detecting cartels.[9]

However, one must understand the necessity of private enforcement as it is the right of an injured party to claim damages suffered.[10] Court of Justice of European Union (CJEU) in cases like *Courage*[11] and *Manfredi*[12] highlighted the importance of having an effective private enforcement of EU competition law. Directive 2014/104/EU, also known as Damage Directive, is the first directive governing private enforcement of EU competition law to come

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[1] Alison Jones and Brenda Sufrin, *EU Competition Law: Text, Cases, and Materials* 6th edition (Oxford: Oxford University Press, 2016), p. 2.

[2] Article 67, Treaty establishing the European Coal and Steel Community (Paris, 18 April 1951), available on: https://www.cvce.eu/content/publication/1997/10/13/11a21305-941e-49d7-a171-ed5be548cd58/publishable_en.pdf, accessed May 13, 2018.

[3] Supra note 1, p. 97.

[4] Berinde Mihai, "Cartels – Between Theory, Leniency Policy and Fines," *Annals of Faculty of Economics*, University of Oradea vol. 1(1) (2008): p. 550, accessed May 13, 2018, URL: https://ideas.repec.org/a/ora/journl/v1y2008i1p549-552.html

[5] OECD, "Public Consultation on Best Practice Principles for Improving Regulatory Enforcement and Inspections," Draft Report Submitted to the Public for Comments, 2013: p. 3, available on: http://webcache.googleusercontent.com/search?q=cache:JIEB7RDoK0IJ:www.oecd.org/gov/regulatory-policy/Best%2520practice%2520for%2520improving%2520Inspections%2520and%2520enforcement.docx+&cd=1&hl=lv&ct=clnk&gl=lv, accessed May 13, 2018.

[6] Peter Z. Grossman, *How Cartels Endure and how They Fail: Studies of Industrial Collusion* (Cheltenham: Edward Elgar Publishing, 2004), p. 1.

[7] Ibid.

[8] Richard Whish and David Bailey, *Competition Law* 8th edition (Oxford: Oxford University Press, 2015), p. 312.

[9] Ibid, p. 306

[10] C-453/99, *Courage Ltd v Bernard Crehan*, Court of Justice of the European Union, 20 September 2001, para 26

[11] Ibid.

[12] C-295-298/04, *Vincenzo Manfredi and Others v Lloyd Adriatico Assicurazioni*, Court of Justice of the European Union, 13 July 2006

into force.[13] In the past claimants in civil cases faced legal obstacles and contradictions between public and private enforcement mechanisms. More specifically, claimants often failed to bring a civil claim against undertakings for EU competition law infringements due to a lack of evidence.[14] A solution often proposed to the problem of information asymmetry is to allow claimants the access to self-incriminating leniency statement.[15] However, in order to keep leniency attractive, Directive 2014/104/EU prohibits claimants in civil cases the possibility to access it.[16]

Realizing the importance of leniency programmes for detecting cartels in public enforcement and the problem with lack of evidence for the claimants in private enforcement, the following research question can be proposed: **Can the access to leniency statements be denied without undermining the right to full compensation under private enforcement of EU competition law?**

Author researches the simultaneous necessity for an effective leniency programme and private enforcement. Therefore, a separate research will be conducted for both public and private enforcement. Special attention will be brought to leniency programmes under the public enforcement. Author aims to discover the role of leniency programmes in detecting cartels and the necessity of keeping them confidential. Moreover, the lack of evidence for claimants under the private enforcement is examined in detail. Research focuses on understanding the underdevelopment of private enforcement and the claimant's position in proving damages suffered before the Directive came into force. Finally, to answer the research question, the provisions under the Damage Directive 2014 will be evaluated by weighing the interests of both enforcement systems. Author aims to discover how realistic is it for the claimant to prove the case and receive full compensation with pre-existing materials. Additionally, alternative method will be proposed as temporary solutions for the problems faced by the litigators.

The aim of the research is to understand the main problem with each enforcement system, i.e. problem with detecting cartels and information asymmetry for claimants in damage cases. Author conducts a doctrinal research on these issues but, to gain a better understanding of the practical issues, author interviews two representatives from a national competition authority (NCA) and gathers the main findings in the paper.

The work will be structured in three parts. Each part will address different issues and include the necessary subchapters. The first part will examine public enforcement and explain the nature of cartels and the advantages of a leniency programme. The second part will address private enforcement, its underdevelopment in EU and information asymmetry. The third part addresses the relationship between the two enforcement levels and the problem identified in the research question as well as gathers the main finding from an interview with an NCA.

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[13] Supra note 1, p. 1044.

[14] Einer Elhauge, Damien Geradin, *Global Competition Law and Economics* 2nd edition (Oxford: Hart Publishing, 2011), chapter 1 introduction, section B, subsection 2, ii, (3).

[15] Caterins Migani, "Directive 2014/104/EU: In Search of a Balance between the Protection of Leniency Corporate Statements and an Effective Private Competition Law Enforcement," *Global Antitrust Review* (2014): p. 97, accessed May 13, 2018, URL: http://www.icc.qmul.ac.uk/gar/2014/

[16] Article 6(6), Directive 2014/104/EU of the European Parliament and of the Council of 26 November 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 Text with EEA relevance, *OJ L* 349, 5.12.2014, p. 1-19, available on: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.349.01.0001.01.ENG, accessed May 13, 2018.

Research will end with a conclusion that includes a summary of the main findings throughout all parts and an answer to the research questions.

2. Leniency for Effective Public Enforcement of EU Competition Law

A. Introduction

In this section an overview of public enforcement, cartels and leniency is given. First, subchapter gives an analysis of the objectives of EU competition law for adopting and enforcing competition law. Second, a closer look on public enforcement procedure is given by discussing different stages and methods in detail. Third, author examines the nature and characteristics of cartels in detail. Fourth, the instability of cartels is explained through non-cooperative game theory. Fifth, a section looks at the leniency programme as a tool for detecting cartels. The meaning of this part within the context of the whole paper is to gain an understanding of how public enforcement works in practice and to highlight the importance of cooperation with undertakings for better public enforcement.

B. Objectives

Before examining how competition law is enforced by the public authorities, it is important to first understand what the Union wants to achieve or maintain through competition rules. Without doubt, EU competition law has evolved over time, but the fundamental objectives remain. Three goals of EU competition law will be discussed in this subchapter: internal market, economic efficiency and consumer welfare.

The EU is an economic and monetary union, meaning MS share an internal market and enjoy the free movement of goods, services, labour and capital.[17] The objective to have an internal market is one of the main reasons why the EU was created[18] and it can be argued that the competition rules were developed to help the EU reach this objective. Competition law was a necessary part of creating and maintaining a single market and the four freedoms. Angela Ortega Gonzales in her PhD conducts a detailed analysis on the enforcement of EU competition law and makes a large contribution to this legal field. She reasons that "in the earlier phases of integration, when the menace that private agreements could fragment the market into national and regional markets was still strongly present, the competition provisions were key to support the Treaties' goals and, more precisely, to promote European integration".[19] In other words, during the beginning stages of market integration in the EU, goal of the competition law was to ensure the successes of it.

However, the EU is no longer at the beginning stages of its development. Even though competition law is still necessary to maintain a fully functioning internal market, the system and its goals are not static and "[d]uring the 1990's the goals of competition law began to change in line with more modern economic considerations."[20] During the modernization

[17] Michelle Cini and Nieves Pérez-Solórzano Borragán, *European Union Politics* 5th edition (Oxford: Oxford University Press, 2016), p. 297.
[18] Article 3, Treaty on European Union (Consolidated version 2012), *OJ C* 326, 26.10.2012, available on: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012M%2FTXT, accessed May 13, 2018.
[19] Angela Ortega Gonzales, "The Enforcement of EU Competition Law in Cartel Cases: Seeking Effectives in Divergence," Dissertation submitted with a view to obtaining the degree of Doctor of Laws of the University of Antwerp, 2017, p. 77, available on: https://repository.uantwerpen.be/desktop/irua/core/index.phtml?language=E&euser=&session=&service=opaciruа&robot=&deskservice=desktop&desktop=irua&workstation=&extra=loi=c:irua:143909, accessed May 13, 2018.
[20] Ibid, p. 80.

process the European Commission emphasised the new focus of competition law – efficiency and consumer welfare.

The objective of having fair competition is "to deliver economic efficiency, lower prices, a wider range of products and innovation."[21] Competition in a market place creates an environment where companies, in order to increase profits, are forced to look for ways to win over the costumer. Often that can be done by selling for less or offering better quality products than the competitors.[22] In other words, less competition means less effort and more profit for the undertaking. Considering the negative aspect of limited competition and monopolies, one of the main goals for establishing and enforcing competition law is to ensure that the economy and society is not deprived of the benefits that competition brings.

Additionally, CJEU added to the changing role of competition law and "identified the 'well-being' or 'welfare' of consumers as the objective of competition law"[23] in judgements *Österreichische Postsparkasse*[24] and *GlaxoSmithKline*[25]. However, CJEU also clarified that "competition law should not be *exclusively* guided by the consumer welfare objective."[26] Instead of seeing efficiency of competition and welfare of consumers as two separate objective of competition law, it is more accurate to view them as one. Article 101 TFEU perfectly demonstrates the necessity of both by prohibiting anti-competitive agreements and yet allowing some distortion of competition "while allowing consumers a fair share of the resulting benefit."[27]

To sum up, goals and approaches of EU competition law are not static. They change according to the present political, economic and social environment in the Union. Evolution of EU Treaties has shaped the Union and the competition law within it. The original duty of EU competition law was to help with a further European integration through internal market and the four freedoms. The modern outlook of competition law enforcement is that it must be aimed at achieving the efficiency that competition gives while at the same time protecting consumer welfare. It is important to be clear on the objective of a law as it shapes the content of that law and the method of enforcement.

C. Stages of Public Enforcement

Like discussed, establishing a competition system in the EU was an important step towards the internal market, economic efficiency and consumer welfare but ineffective if not successfully enforced. How the law is enforced is just as important as the law itself.[28] Therefore, this subchapter will look at possible enforcement approaches used by the public authorities, enforcement methods and procedure as well as the public enforcement objectives.

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[21] Ibid, p. 12.
[22] Achilles C. Costales, Amelia L. Bello, Ma. Angeles O. Catelo, Agham C. Cuevas, Gregmar I. Galinato and U-Primo E. Rodriguez, *Economics: Principles and Applications* (Philippines: JMC Press, 2000), p. 117.
[23] Supra note 19, p. 81 – 82.
[24] Cases T-213/01 and T-214/01, *Österreichische Postsparkasse AG v. Commission and Bank für Arbeit und Wirtschaft AG v. Commission*, 7 June 2006, European Court of Justice
[25] Case T-168/01, *GlaxoSmithKlineServices Unlimited v. Commission*, 27 September 2006, European Court of Justice
[26] Supra note 19, p. 83.
[27] Article 101(3), Treaty on the Functioning of the European Union (Consolidated version 2012), *OJ C* 326, 26.10.2012, available on: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN, accessed May 13, 2018.
[28] Champe S. Andrews, "The Importance of the Enforcement of Law," *The Annals of the American Academy of Political and Social Science* Vol. 34 No. 1 (1909): p. 85, accessed May 13, 2018, URL: http://www.jstor.org/stable/1011347

In competition law public authorities have investigative powers and the right to make a decision based on evidence collected and this decision can be reviewed at CJEU.[29] Regulation 1/2003/EC, containing procedural rules, brought several changes to the public enforcement system of the competition law in the EU. One of the most significant changes was that EU competition law became directly applicable by the national courts and the national competition authorities.[30] Thus, after the modernization of competition law in the EU, public enforcement became decentralized and enforceable by two authorities – EC regionally and NCAs nationally. However, "[c]ompetition procedure is still very centralised, although substantial work has been outsourced to NCA's and courts."[31] The Commission has power to prohibit business conduct in a MS and act as a detective and a judge.[32] But regardless of who enforces the law, the structure of an enforcement procedure is the same. Work of competition law authorities can be divided into two parts - detection part and intervention part.[33]

During the part of detection, public authority must determine whether the suspicious business conduct is an actual breach of competition law or simply a "procompetitive business conduct".[34] In some cases, a specific business conduct is prohibited by law, for example, horizontal price fixing, but in some cases "the procompetitive effects of certain behaviour have to be weighed against the anticompetitive effects"[35], meaning every case is different and must be evaluated by the competition authorises or later by the CJEU. Competition authorities must also determine when to initiate the detection process - before or after the illegal conduct has occurred.[36] In other words, competition authorities can detect anti-competitive business conduct not only after it has happened but also before it has actually taken place.

However, just finding an infringement or possible infringement is not enough to successfully enforce the competition law. Therefore, the second part – intervention part – is needed. In Centre for Competition Policy's (CCP) Working Paper 13-5 on different approaches on enforcement it is said that "[f]rom the viewpoint of an antitrust authority, the intervention stage adds a third powerful decision variable to the already identified choices of the control strategy and the timing of control: the type of intervention."[37] In other words, depending on the method used during the detection part and in what time set it is used (before or after the infringement occurred), the intervention part will differ accordingly. Type of intervention most often used is a monetary fine because of the deterrent effect.[38] But in cases when the infringement has not yet taken place and, thus, no harm has occurred, imposing a fine is arguably unjustifiable. Thus, in such cases competition authorities can reach for other measures – behavioural and structural remedies.[39]

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[29] Supra note 8, p. 309.
[30] Piet Jan Slot and Martin Farley, *An Introduction to Competition Law* 2nd Edition (Oxford: Hart Publishing, 2017), p. 221.
[31] Valentine Korah, *An introduction Guide to EC Competition Law and Practice* 9th Edition (Oxford: Hart Publishing, 2007), p. 282.
[32] Ibid.
[33] Kai Hüschelrath and Sebastian Peyer, "Public and Private Enforcement of Competition Law a Differentiated Approach," *CCP Working Paper 13-5* (2013): p. 3, accessed May 13, 2018, URL: http://competitionpolicy.ac.uk/documents/8158338/8235394/CCP+Working+Paper+13-5.pdf/86d76261-eda5-4de7-af2a-51d9684e0c45
[34] Ibid.
[35] Ibid.
[36] Ibid.
[37] Ibid, p. 4.
[38] Supra note 8, p. 452.
[39] Supra note 33, p. 4.

To sum up, public enforcement of competition law is complex and crucial for EU objectives to be carried out. Currently public enforcement can be divided into national and regional sections as EU competition law is directly applicable in the Member States. The authorities are expected to detect breaches of competition law out of procompetitive business conducts and intervene by imposing, in most cases, a fine that must be calculated in a way that diminishes the desire to breach the law. Public enforcement no doubt has an effect on the overall competition law system, but "it remains difficult to establish casual links between different approaches to enforcement and the overall quality of the regulatory system."[40] In other words, there is not one correct enforcement approach to successful competition system. Additionally, "the pattern and style of enforcement is unlikely to remain stable over time since it is likely to adapt to changes in the entire regulatory system."[41] Therefore, the EU must constantly look for ways to improve competition law enforcement and fight serious violations of EU competition law. Arguably, the most serious type of anti-competitive business conduct is the formation of cartels and, at the same time, one of the most difficult to detect.[42] The following subchapter examines cartels in more detail.

D. A Closer Look at Cartels

Cartels are considered to be the most serious competition law offence "as the operators specifically attempt to eliminate or limit the free play of competition."[43] Cartels bring no benefit to the economy or society[44] and are prohibited by Article 101 of TFEU. Thus, it is not surprising that cartels are very secretive and it is difficult for competition authorities to detect them.[45] In this subchapter author discusses cartel definition and the effect on the economy.

A cartel can be defined as an explicit collusion by undertakings to take advantage of their joint market power and increase profits by fixing prices, restricting output, sharing markets or rigging bids.[46] In a tacit collision undertakings are operating in an oligopolistic market and set prices as if they were in an explicit collision.[47] Anti-competitive agreements that directly distort competition are also called 'hard core' cartels and are automatically void.[48] It must be noted that not all agreements limiting competition are considered 'hard core'. If the limitation to the competition contributes to "improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit"[49] it would not be considered a violation of EU competition law. However, there is a "widespread consensus" that companies are meant to compete with each other and anti-competitive agreements, especially 'hard core' cartels should be illegal.[50]

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[40] Iain MacNeil, "Enforcement and Sanctioning," in *The Oxford Handbook of Financial Regulation*, ed. Niamh Moloney et al. (Oxford: Oxford University Press, 2015), p. 12.
[41] Ibid.
[42] Irena Pekarskiene and Jurgita Bruneckiene, "The Relationship between Cartels and Economic Fluctuations," *Inžinerinė Ekonomika - Engineering Economics* Vol 26 No 3 (2015): p. 284, accessed May 13, 2018, DOI: http://dx.doi.org/10.5755/j01.ee.26.3.7331
[43] Supra note 8, p. 651.
[44] Supra note 4, p. 549.
[45] OECD, "Fighting Hard Core Cartels: harm, effective sanctions and leniency programmes," OECD Publishing, 2002, p. 67, available on: www.oecd.org/competition/cartels/fightinghard-corecartelsharmeffectivesanctionsandleniencyprogrammes.htm, accessed May 13, 2018.
[46] Supra note 1, p. 650.
[47] Ibid.
[48] Supra note 27, Article 101(2).
[49] Supra note 27, Article 101(3).
[50] Supra note 8, p. 546.

The objective of undertakings when forming a cartel is to maximize its profits and eliminate competition.[51] By forming cartels, undertakings gain market power which allows them to raise prices above the competitive level.[52] Cartel members act only for selfish reasons "undermining the welfare of both the consumers and other market participants, and in the end, it has a negative effect on the overall economy."[53] On average in Europe duration of cartels is around 6 – 7 years with an overcharge around 20%.[54] Considering the illegality and negative effects on competition caused by the cartels, undertakings keep such agreements very secretive and, with the help of modern technology, it becomes easier to hide communication and the content exchanged.[55] Consequently, it becomes more difficult of the competition authorities to detect cartels. Although there are several proactive detection methods that can be used by the competition authorities[56], still the best and most effective tool used to fight cartel is leniency as it exploits the instability of cartels.[57]

To sum up, cartels are the biggest threat to fair competition and they are widely considered illegal. However, undertakings still choose to form such collisions for profit maximizing reasons and make sure that such agreements stay secrets. In order to fight cartel public authorities take an advantage of cartel instability which is discussed further.

E. Cartel Instability

Even though cartels can increase the profits of the undertakings involved if not discovered, such agreements are still doomed to end. For a cartel agreement to be maintained successfully undertakings involved "must be able to select an appropriate equilibrium and agree on complex collusive and mutually consistent strategies which allow the parties to jointly increase benefits and find an acceptable system to reallocate such benefits."[58] However, cartels suffer the problem of instability as there will be a natural tendency to deviate from the agreement.[59]

Instability of cartels can be explained through game theory, especially non-cooperative games.[60] Non-cooperative game mathematically demonstrates "strategic interaction" between the players.[61] The game includes information on "the players in the game […], the information they have […], actions they can choose, the timing of these actions, and the pay-offs for each player that result from those actions."[62] It is assumed that each player will choose the pay-off most favourable to them.[63] The specific of non-cooperative game is that

[51] Supra note 42, p. 286.
[52] Jonathan Faull and Ali Nikpay, *The EU Law of Competition* 3rd edition (Oxford: Oxford University Press, 2014), p. 10.
[53] Supra note 42, p. 284.
[54] Supra note 42, p. 285.
[55] Czech Republic Office for the Protection of Competition, "Leniency and Settlement Information Bulletin 3/2013", p. 4, available at: https://www.uohs.cz/en/informationcentre/publications.html, accessed May 13, 2018.
[56] Jr. Joseph E. Harrington, "Detecting Cartels," Department of Economics Johns Hopkins University (2004): p. 3, accessed May 13, 2018, URL: https://www.competitionpolicyinternational.com/assets/Uploads/Detecting-Cartels.pdf
[57] Supra note 55, p. 4.
[58] Supra note 19, p. 277.
[59] Supra note 19, p. 278.
[60] Supra note 52, p. 26.
[61] Ibid.
[62] Ibid.
[63] Ibid..

the players cannot make binding agreements just like cartel participants in real life as cartel agreements are illegal and cannot be enforced in a court.[64]

Moreover, an example of the Prisoner's Dilemma[65] will be given to demonstrate how non-cooperative game theory works. The situation presented in Prisoner's Dilemma involves two players that are the suspects for committing a murder. The police do not have enough evidence to prove the allegation. Therefore, the police place the players in separate rooms without the possibility to communicate with each other and offer them the following pay-offs. If one player betrays the other, the one who betrayed goes free, but the other player serves 3 years in jail. If both players keep silent, both serve 1 year for holding a gun without a licence. If both players betray one another, both serve 2 years in jail.

The outcomes can be presented as follows:

Undertaking A / Undertaking B	Withhold the sugar	Cheat the agreement
Withhold the sugar	1/1	0/3
Cheat the agreement	3/0	2/2

As it can be observed, the strategy for both of the prisoners would be to betray the other player because it is the best outcome regardless of what the other player chooses. Thus, if both players choose to betray, the outcome would be that both serve 2 years in jail. Instead, if both players kept silent, they would only have to serve 1 year in jail, which is a better outcome for both. However, without knowing what the other player is going to choose, an undertaking bear the risk of serving 3 years in jail if the other player chooses to betray.

Cartel participants in real life are in a similar situation. Meaning, undertakings are in a non-binding agreement, have to choose between two options (comply or cheat the agreement) and will make decisions based on having a better outcome for oneself. For example, two companies in the sugar production business form a cartel in which they agree to withhold the sugar from the market to raise the price of it.[66] According to microeconomic theory of supply, demand and market equilibrium, a decrease in supply results in an increase in price.[67] With the joint market power, undertakings can increase the price of the sugar by withholding the supply. However, by deviating from the agreements and dumping the sugar, it is more certain that an undertaking will make a profit.

In a cartel agreement complying with the agreement is equal to keeping silent in the Prisoner's Dilemma and cheating the agreement is equal to betrayal. So, if undertakings comply with the agreement and withhold the supply of sugar, both earn 10 million euros. If one complies, but the other dumps the sugar into the market, the one who complied earns 3

[64] The definition and detail explanation of Prisoner's Dilemma can be found on Stanford Encyclopedia of Philosophy webpage at: https://plato.stanford.edu/entries/prisoner-dilemma/, accessed May 13, 2018.
[65] Supra note 52, p. 26.
[66] Cento Veljanovski, "The Economics of Cartels," *Finnish Competition Law Year Book* (2006), p. 2, accessed May 13, 2018, URL: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=975612
[67] N. Gregory Mankiw, *Essentials of Economics* 7th edition (Stamford: Cengage Learning, 2015), p. 79-81

million euros but the cheating undertaking ears 15 million euros. If both cheat the agreement, both ear 7 million.

The outcomes can be presented as follows:

Undertaking A / Undertaking B	Withhold the sugar	Cheat the agreement
Withhold the sugar	10/10	15/3
Cheat the agreement	3/15	7/7

The reason why undertakings choose to form a cartel in the first place is to increase profits for oneself.[68] The firms in a sugar production business can raise the price of sugar and everyone's profit only if all cartel members stick to the agreement. But because of the self interest in maximizing the profits, undertakings are likely to cheat. By dumping the sugar undertaking will increase its sales and profit. Simultaneously the price of the sugar will drop. The undertaking complying with the agreement is selling less sugar at a lower price. Therefore, without the possibility to know whether or not other cartel member will comply, the strategy of an undertaking will be to cheat the agreement.

In reality cartels operate in a more dynamic setting and the stability of cartels depend on more factors.[69] For example, in an oligopolistic market, undertakings have a possibility to meet more often, to 'play the game' more than once and to make compliance a dominant strategy.[70] Additionally, to ensure stability of cartels "participants classically develop mechanisms to make cheating unappealing, including monitoring compliance, rewards and credible punishments for deviating firms."[71]

In conclusion, even though stability of a cartel in real life depends on many factors, non-cooperative game theory accurately presents the process for decision making of undertaking when deciding to comply or deviate from the agreement. The basic problem that all cartels face some level of instability gives competition authorities an opportunity to take advantage of it by introducing leniency as a variable during the decision process.

F. Leniency Programme

Public authorities offer full or partial immunity from fines in return for information and evidence of a cartel to the first leniency programme applicant.[72] This subchapter is dedicated to defining and explaining the leniency programme and its success in detecting cartels.

Leniency programme under EU competition law is a system offered by the public authorities to 'fight' harmful and secretive cartels. Leniency programme is designed to encourage undertakings involved in a cartel to be the first to step forward in return for obtaining partial

[68] Supra note 42, p. 286.
[69] Supra note 52, p. 29.
[70] Supra note 52, p. 30.
[71] Supra note 19, p. 279-280.
[72] Supra note 8, p. 440.

or total immunity from penalties.[73] The Commission and NCAs use leniency programmes as a tool for discovering cartels because "the uncovering issue can only be solved by offering cartel members incentives that are attractive enough for them to come forward and provide competition authorities information about the existence of the cartel."[74] Considering the amount of cartels that have been detected, leniency programmes have proven to be a very successful investigative tool.[75]

At the interview with the Latvian NCA (see Annex I) author discovers that in 2013 – 2017 Latvian NCA in total had 12 successful leniency applications.[76] Even though the Latvian market is small, the number of leniency applications has been increasing since the NCA started offering the programme. According to the opinion of the Latvian NCA, there is no better way to fight cartels than the leniency programme or, at least, nothing better has been proposed.[77]

The result of a leniency programme causing cartels to become unstable again and making it difficult to sustain them is also called the desistance effect.[78] Undertakings face the risk of not only other cartel participants cheating the agreement but also the risk that they will 'blow the whistle'. If cartel members are facing the risk of earning less profit of paying a large amount of fines to competition authority, it is likely that the cartel will not be sustained for long as all the members will act with self-interests in mind rather than the collective ones.

Moreover, the leniency programme adds to cartel formation another level of risk of being caught. That can lead to an outcome that the cartel is "less likely to form in the first place."[79] Meaning, a cartel might not even form if the risk of other cartel participants cheating the agreement or 'blowing the whistle' is higher than the benefits gained through the cartels. This is known as the deterrent effect.[80] Considering the previously discussed difficulty in detecting cartels, such effects caused by the leniency programme are welcomed by the public enforcement authorities.

Moreover, the reason why cartel members decide to apply for a leniency can be explained by once again modelling a non-cooperative game situation. Structure again resembles the scenario of Prisoner's Dilemma where cartel members have a non-binding agreement, have to choose between two options (to comply with the agreement or to apply for leniency) and the strategy again is to increase the pay-off for oneself. For example, members of the cartel agreement are now faced with competition authorities offering full immunity from a fine to the first cartel member to admit the existence of the cartel and provide the necessary evidence for the competition authority. The undertaking who complies with the cartel agreement gets fined for 80 million euros. If both undertakings comply with the cartel agreement and the Commission or an NCA discovers the illegal agreement, both cartel members will be charged 100 million. If both cartel members admit to the wrongdoing to the competition authority that

[73] Ibid.
[74] Supra note 19, p. 257.
[75] Supra note 19, p. 276.
[76] Interview with the Latvian NCA representatives Antis Apsītis and Dita Dzērviniece, conducted May 11, 2018, from 10:00 until 10:45, full text of the interview available in the Annex I on page 40.
[77] Ibid.
[78] Supra note 19, p. 280.
[79] Supra note 19, p. 281.
[80] Ibid.

has already initiated the investigation (applies for a settlement)[81], both cartel members get a reduced fine and are charged with 30 million euros.

The outcomes can be presented as follows:

Undertaking A / Undertaking B	Withhold the sugar	Cheat the agreement
Withhold the sugar	100/100	0/80
Cheat the agreement	80/0	30/30

It can be observed that the strategy of undertakings will be to apply for the leniency as it offers the best pay-offs. An undertaking will be either freed or fined 30 million euros depending on the actions of others. Although cartels can maximize the profits if all undertakings comply, it can also result in being fined 80 or 100 million euros if others decide to apply for leniency programme. The cartel member with self-interests in mind will opt for applying for the leniency as it result in the best pay-off regardless of what the other undertaking does.

For the reason presented above leniency is an effective way to force a cartel to end. Additionally, timing is of an importance in this situation because only the first undertaking receives full immunity from fines. Thus, without the possibility to know what other cartel members are planning on doing, the leniency programme places all cartel participants in an uncomfortable position where the best option is to apply for leniency but only the first one to do it will receive the benefit. Leniency programme successfully destabilises the existence of cartels by imposing a time constrain on the possibility to gain the benefits of the leniency programme. The OECD has spoken out on the leniency programmes introducing a reduced fine for subsequent applicant as competition authorities would be able to obtain new evidence and many jurisdictions in the EU do offer it.[82] But the main idea for a leniency programme to be effective in fighting cartel is that it must offer full immunity only to the first applicant.

In conclusion, leniency programmes so far have been the best tool available to the public authorities for catching cartels and ensuring successful enforcement of EU competition law. Thus, public enforcement is largely dependent on cooperation. Due to harmful and secretive nature of the cartel, it is important for the EU to continue developing and perfecting the current leniency programme and to look for more ways to take advantage of the instability of cartels and the tendency for undertakings to cheat.

G. Conclusion

[81] Additional information on settlement procedure in "EU Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases", Official Journal of the European Union, 2008, available on: http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52008XC0702(01), accessed May 13, 2018.

[82] OECD, "Leniency for Subsequent Applicants," OECD Publishing, 2012, p. 5, available on: http://www.oecd.org/competition/markers-in-leniency-programmes.htm, accessed May 13, 2018.

To sum up, EU's objectives and the goals of competition law play a crucial role in establishing the enforcement method and procedure. Since the modernization of competition system, efficiency and consumer welfare have become the core objectives of the system. However, the EU's goal of an integrated Europe and internal market is still present. When it comes to the methods of competition law enforcement, it becomes clear that public enforcement consists of many different stages that all depend on one another. EC and the NCAs enforcement procedure must have at least two parts – detection and intervention. Finally, a special attention is brought to cartels as they are considered to be the most destructive form of anti-competitive business conduct. After analysing the behaviour and decision making process of cartel members, it becomes clear that leniency is an effective way to take an advantage of unavoidable cartel instability.

A conclusion can be made that EU competition law public enforcement aims to solve problems with several interests involves. Finding the right 'recipe' that would ensure competition is a challenge as competition authorities have to continually balance between protecting competition and letting business run its course in a free market economy. Thus, it is unavoidable that contradictions and debates will arise about where the EU competition law enforcement is going and what it is trying to achieve. However, as long as public authorities are clear on the objectives the proper enforcement can be found. Even if the objectives change, the variety of different public enforcement methods and tools available to the EC and NCAs are a great advantage in supporting this evolution.

Currently the emphasis of public enforcement is put on cartels and developing leniency programme that would help detect and decrease cartel cases. Public authorities must take into account every detail that could make a leniency programme unappealing to apply for. If the Commission wants the number of detected cartel cases to continue growing, it cannot afford to make any compromises when it comes to provisions related to the leniency programme. Moreover, leniency programmes and cartels do not operate in a 'vacuum'. Other legislative acts and decisions made by the EC and NCAs, especially private enforcement of EU competition law, will have an effect on how cartel members choose their strategy.

Public enforcement requires a well-established private enforcement as it not only protects the rights of individuals but also compliments the public enforcement.[83] Thus, the author continues with a discussion on private enforcement of EU competition law and researches the current legal problems faced by the claimants in civil suits.

[83] Alexander Italianer, "Public and private enforcement of competition law," *5th International Competition Conference* (2012): p. 3, URL: http://ec.europa.eu/competition/speeches/text/sp2012_02_en.pdf, accessed May 13, 2018.

3. Lack of Evidence for the Claimant under Private Enforcement of EU Competition Law

A. Introduction

In the following part of paper author looks deeper into the private enforcement of EU competition law. The Commission has been working towards a better private enforcement system by adopting several recommendations, practical guides and proposing for legislation.[84] The development of private enforcement of EU competition law has been slow and often time difficult to measure as "many actions may be settled out of court and details are rarely public, as secrecy is normally a condition of settlement, so that the small number of known cases may represent only the tip of a much bigger base of litigation."[85] But even in such a situation, public enforcement in still arguably underdeveloped.[86] Thus, the aim of this part of the paper is, first, to discover the goals of private enforcement of EU competition law, second, to discuss the necessity for developing the system, third, to consider the issues related to information asymmetry and, fourth, the current legislation regulating this problem – Damage Directive 2014.

B. Objectives and the Relationship to Public Enforcement

In this subchapter the author discusses whether private enforcement simply contributes to public goals or does private enforcement have separate goals that the national courts will carry out during the civil procedure. Thus, this subchapter will look in more detail at the relationship between the goals of two enforcement mechanisms.

It can be agreed that private enforcement is aimed at protecting the private interests of market participants by ensuring the possibility to claim damages or loss suffered due to anti-competitive practice. In the EU anyone who has suffered actual loss or loss of profit, has the right to be compensated accordingly.[87] While public enforcement is enforced with the aim to punish the undertaking for EU competition law violation, damage actions under private enforcement of EU competition, on the other hand, are concerned only with compensating the injured party.[88]

The principle of direct effect and the principle of supremacy is applicable to Article 101 and 102 of TFEU.[89] When it comes to the issue of determining the validity of a contract in cases of anti-competitive practice, the answer can be found directly in the Article 101 (2) TFEU that says: "[a]ny agreements or decisions prohibited pursuant to this Article shall be automatically void."[90] However, when it comes to damage actions and injunctions there are no direct rules

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[84] See the list on: http://ec.europa.eu/competition/antitrust/actionsdamages/index.html, accessed May 13, 2018.
[85] Donncadh Woods, Ailsa Sinclair and David Ashton, "Private enforcement of Community competition law: modernisation and the road ahead," *Competition Policy Newsletter* Number 2 (2004): p. 32, accessed May 13, 2018, URL: ec.europa.eu/competition/publications/cpn/2004_2_31.pdf
[86] Study on the conditions of claims for damages in case of infringement of EC competition rules, comparative report, 31 August 2004, available on: http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf, accessed May 13, 2018.
[87] Supra note 16, Article 1.
[88] Wouter P.J. Wils, "The Relationship between Public Antitrust Enforcement and Private Actions for Damages," *World Competition* Volume 32 No. 1 (2009): p.15, accessed May 13, 2018, URL: http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=456087
[89] Supra note 8, p. 314.
[90] Supra note 27, Article 101 (2).

contained in the TFEU. Nevertheless, CJEU in its 2001 judgment of the *Courage* case[91] pointed out the fact the Article 101 would be 'put at risk' if individuals were deprived of the right to file damage claims or other private actions concerning anti-competitive practices.[92] This determines that private individuals in MS have the right to claim damages from other individuals due to their anti-competitive practice and the duty to respect competition rules in order for a contract to be valid.[93]

The judgment of *Courage* case was the first significant step towards the development of damage actions in EU competition law.[94] The doctrine set out in the judgment was later expanded in the case of *Manfredi*[95] in 2006. The case introduced additional concepts that "set out conditions relating to the court competent to hear such actions, limitation periods and the availability of punitive damages and other aspects of damage quantification."[96]

Realization that individuals have a different interest when claiming damages due to anti-competitive practices has led to believe that there is a clear line between the public and private objective of competition law enforcement. The Commission itself has been "insisting on distinguishing between public authorities, whose acts are guided by the public interest, and national courts, which decide disputes pertaining to the private interest."[97]

However, it is a misunderstanding to believe that both enforcement systems through different actors and authorities are trying to reach different goals. Moreover, "courts do in fact have to consider economic public policy in their judgments when the dispute in question has a wider impact on the market"[98], meaning national courts while judging on private law matters still have to keep in mind the public objectives of economic policy, internal market objectives and competition law goals. Furthermore, in the EU there have been cases when a national court has ruled the contract invalid due to anti-competitive reason, even if none of the parties have raised this issue or a public authority has intervened in a civil proceeding due to public interest.[99] When looking at the private enforcement system from this point of view, it appears that "private interest play a complementary role to the public interest."[100]

However, it is also a mistake to believe that private enforcement is carried out simply for the reason of public interests or goals. The EU aims at protecting competition, internal market, consumer welfare, efficiency and all other public goals, but private enforcement, additionally, aims at protecting the economic freedom of individuals. Therefore, the goal of private enforcement of EU competition law is simply "a reflexive subsidiary aim of protecting competition."[101] In other words, in order for an agreement or a practice to be banned under EU competition law by the public authorities it does not require that there is harm done to an individual. In theory, public enforcement can exist without the private enforcement.

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[91] Supra note 10.
[92] Ibid.
[93] Fernando Pena Lopez, "Issues and Problems Regarding E.U. Competition Law Private Enforcement: Damages and Nullity Actions," *The USV Annals of Economics and Public Administration* Volume 13 Issue 1(17) (2013): p. 231, accessed May 13, 2018, URL: https://ideas.repec.org/a/scm/usvaep/v13y2013i1(17)p230-235.html
[94] Supra note 10.
[95] Supra note 12.
[96] David Ashton and David Henry, *Competition Damages Actions in the EU* (Cheltenham: Edward Elgar Publishing, 2013), p. 22-23.
[97] Assimakis P. Komninos, *EC Private Antitrust Enforcement: Decentralised Application of EC Competition Law by National Courts* (Oxford: Hart Publishing, 2008), p. 12.
[98] Ibid, p. 12-13.
[99] Ibid, p. 13.
[100] Ibid.
[101] Ibid.

Nevertheless, CJEU points out that the "actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community."[102]

It can be concluded that private enforcement while having its own objective does not "alter the basic goal of the competition rules, which is to safeguard the public interest in maintaining free and undistorted competition"[103] and it should also not be viewed as a mandatory part of the public enforcement. In reality, it is the opposite. Two enforcement systems operate with separate objectives in mind while complementing and strengthening each other. It is not surprising that the Commission has paid much of its attention to the development of private enforcement. On one hand, the EU recognizes individuals' economic freedom and the rights to be compensated for damages caused by an undertaking due to anti-competitive behaviour while, on the other hand, recognizing the benefit of even greater level of competition and additional help to the public enforcement of EU competition law.

C. Underdevelopment of Private Enforcement of EU Competition Law

This subchapter is aimed at defining private enforcement of EU competition law. By stressing the benefits of private enforcement of competition law, the author will highlight the necessity of the system. Focus is brought to the underdevelopment of competition law private enforcement and the reason behind it.

There are several elements that characterise private enforcement of EU competition law. The most obvious one being, the parties involved are both private persons (legal or natural) and disputes between them are settled by the national civil courts. In more detail, private enforcement of competition law can be defined as follows: "[t]he enterprises and the citizens who had suffered or had been victims of a breach of the antitrust prohibitions provoke the enforcement of competition law by the Courts by filing a civil action against the author of the unlawful conduct."[104]

Like once mentioned, private enforcement of competition law has three forms. More specifically, private enforcement of competition law includes nullity of contracts if Article 101 TFEU is infringed, injunctive relief and damage actions.[105] However, "damage claims are thought of as the most important limb of private antitrust enforcement"[106] as claiming a compensation is the direct way for an individual to exercise his/her rights of economic freedom. Moreover, a private action can be either follow-on or stand-alone action.[107] Meaning, the action is brought either on the finding for the competition authority (follow-on) or initiated independently before the competition authority has concluded the public proceeding (stand-alone). A follow-on action is more encouraged as the claimant bases the case on the work of competition authority instead of running the case "in parallel with public enforcement proceedings."[108]

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[102] Supra note 10, para. 27
[103] Supra note 96, p. 15.
[104] Supra note 92, p. 230.
[105] Supra note 95, p. 3.
[106] Supra note 96, p. 12.
[107] Supra note 19, p. 85.
[108] Wouter P.J. Wils, "Private Enforcement of EU Antitrust Law and its Relationship with Public Enforcement: Past, Present and Future," *World Competition* Volume 40 Issue 1, 2017, p. 36, accessed May 13, 2018, URL: http://ssrn.com/author=456087

Even though individuals are presented with a possibility to claim damages or other forms of private enforcement of EU competition law, the Commission after conducting a study on the conditions for damage claims in 2004 discovered "astonishing diversity and total underdevelopment" of damage action across MS.[109] The survey discovered that "there were apparently around 60 judgments as a result of damage actions […] only 28 resulted in a damage reward."[110] For a long time the Commission has wanted to improve the situation with damage claims and to see the rates of competition law private enforcement increase in EU countries.[111]

That is not surprising as a successful private enforcement system of competition law may bring great benefits. The beneficiary is not just the person in a position to claim compensation but also public enforcement system, other undertakings and the whole economy. Following list indicates the main advantages that can be gained by having an effective private enforcement.

First, private enforcement could lead to increase in compliance with the competition law.[112] In the public enforcement of competition law the deterrent effect is the reason for imposing a fine for law violations.[113] Meaning, undertakings will comply with the law because of the fear of having to pay the fine. Even though private enforcement of competition law only aims to compensate and not "overcompensate,"[114] an undertaking might still choose not to infringe the law so that damages do not need to be paid. Second, victims would be compensated for the loss suffered.[115] The right to compensation is the cornerstone of private enforcement of competition law and obviously and an effective system leads to greater opportunities to exercises this right. Third, courts can offer speedier interim relief to undertakings than public proceedings.[116] Undertaking through civil courts can declare contracts null and void or request injunctive relief before the public authorities have ended the public proceeding. Fourth, without the private enforcement "[t]he costs of the unlawful conducts are borne by the customers and law-abiding businesses, and not by the wrongdoers."[117] For EU competition law violation an undertaking might pay a fine to the public authority, but, without private enforcement, the innocent individuals do not get a direct benefit from this fine. Fifth, lack of an effective private enforcement of competition law leads to less competition law violation being detected.[118] If undertakings that comply with the law or consumers that have suffered a loss due EU competition law violation know that they have an actual chance at winning a civil case against the wrongdoer, it is more likely that more violation will be detected by private individuals. Sixth, in case of lack of private enforcement of EU competition law "greater prices and less innovation have to be expected."[119] Taking into account also the previously listed reasons, a conclusion can be made that underdeveloped private enforcement of EU competition law leads to less competition and, therefore, also to all the disadvantages and harm that comes with it.

[109] Supra note 19, p. 179.
[110] Ibid.
[111] Supra note 92, p. 232.
[112] Supra note 84, p. 32.
[113] Supra note 8, p. 452.
[114] Supra note 16, Article 3(3).
[115] Supra note 84, p. 32.
[116] Ibid.
[117] Supra note 92, p. 232.
[118] Ibid.
[119] Ibid.

The underdevelopment, "virtual non-existence"[120] and slow improvements of EU competition law private enforcement in the past can be explained by many factors, for example, institutional problems and uncertainties as to the calculation of damages.[121] However, the information asymmetry in particular placed the claimant in an unfavourable position when proving a case. The claimant often had "difficulties in proving causation and the extent of harm" and had to deal with "restrictive and antiquated evidence rules."[122] Thus, low rate of damage claims[123] can be explained with the problem that claimants often do not have enough evidence to prove a case.[124] The problem with information asymmetry will be researched in more detail in the following subchapter.

To sum up, private enforcement of EU competition law can be defined as a private person bringing a civil claim (nullity of contracts, injunctive relief or damage action) to a national court for suffering a loss due to EU competition law infringement. For EU the establishment of a successful private enforcement system of competition law is important because it brings several advantages to the EU itself as well as the consumers and undertakings that follow the law. The problem, however, is that the current state of private enforcement of EU competition law is underdeveloped. One reason for that could be the lack of evidence for the claimants. Thus, paper continues with a deeper analysis of information asymmetry.

D. Information Asymmetry and Legal Uncertainty

The burden of proof in the damage claim of EU competition law is on the claimant.[125] The evidence necessary "typically require[s] a complex factual and economic analysis"[126] and includes "economic elements such as the definition of the relevant market and the market shares of the parties."[127] In most cases, the defendant or a third party obtains information and materials that are relevant for the claimant and it cannot be easily accessed.[128] Thus, the complexity of the evidence requested and the difficulty to obtain it places the claimant in unfavourable position. The lack of evidence and information available might discourage individuals who have suffered a loss due to anti-competitive behaviour to not claim compensation.

In order to successfully claim damages, claimants are usually requested to prove the following three points:

First, in a stand-alone case the claimant will need to establish an infringement of the competition rules.[129] The claimant will have to detect the infringement and gather the evidence to prove such a claim. The evidence in most cases will have to contain confidential materials from undertakings and third parties. However, in a follow-on action the claimant

[120] Supra note 96, p. 161.
[121] Ibid.
[122] Ibid.
[123] Supra note 15, p. 97.
[124] Supra note 14.
[125] Supra note 15, p. 97.
[126] Proposal for a Directive of The European Parliament and of the Council 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, COM(2013) 404, 11.6.2013, p. 13, available on: http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html, accessed May 13, 2018.
[127] Supra note 15, p. 97.
[128] Supra note 125.
[129] Ibid.

bases the claim on the findings of a competition authority[130] and no longer is under the obligation to prove the competition law infringement.

Second, the claimant will have to quantify the competition law damages.[131] Everyone has the right to be fully compensated for the harm suffered,[132] but the claimant faces a difficulty to measure the quantity of that harm. Quantification can be defined as "comparing the actual position of claimants with the position they would find themselves in had the infringement not occurred."[133] The problem is that it is a "hypothetical assessment" and "complex and specific economic and competition law issues often arise."[134]

Third, the claimant will have to establish causality between the infringement and the harm suffered.[135] Again the claimant will in most cases run into the problem of needing to access information obtained by the defendant or a third party.

Therefore, accessing self-incriminating leniency statements can be very helpful for the claimant to gather the necessary evidence as it contains evidence on the illegal conduct voluntarily provided by the leniency applicant or in a settlement proceeding.[136]

Furthermore, CJEU has also expressed that the injured party often is lacking evidence and eventually the Court "opened up the possibility of access to leniency corporate statements."[137] In the case of *Pfleiderer*[138]in 2011 the company "Pfleiderer" was refused the access to leniency statements by a national court of Germany. After appealing the judgment, the national court of Germany referred to the CJEU which ruled that it is up for the MS to determine and apply national rules related to accessing leniency statements by third parties.[139] The Court noted that national courts should "weigh the respective interests in favour of disclosure of the information and in favour of the protection of that information provided voluntarily by the applicant for leniency."[140] Meaning, CJEU established a practice where it was in the hand of a national judge to decide on a case-by-case basis whether to order access to public proceeding files including leniency. Additionally, in the preliminary ruling of 2013 in *Donau Chemie*[141] case it was established "that national law must not make it impossible for national courts to conduct the weighing exercise on a case-by case basis."[142] However, the case-by-case approach to evident disclosure "could lead to discrepancies between and even within Member States regarding the disclosure of evidence from the files of competition authorities."[143]

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[130] Supra note 96, p. 6-7.
[131] Supra note 125.
[132] Supra note 16, Article 1(1).
[133] Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union C 167/19 13.6.2013., para. 3, available on: http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html, accessed May 13, 2018.
[134] Ibid.
[135] Supra note 125.
[136] Supra note 8, p. 325.
[137] Supra note 15, p. 98.
[138] Case C-360/09, *Pfleiderer v Bundeskartellamt*, 14 June 2011, European Court of Justice.
[139] See the summary of the judgment on: http://eur-lex.europa.eu/legal-content/EN/SUM/?uri=CELEX:62009CJ0360, accessed May13, 2014.
[140] Supra note 15, p. 98.
[141] Supra note 137.
[142] Ingrid Vandenborre and Thorsten Goetz, "EU Competition Law Procedural Issues", *Journal of European Competition Law & Practice* Vol. 4 No. 6 (2013): p. 506, accessed May 13, 2018, DOI: https://doi.org/10.1093/jeclap/lpu091
[143] Supra note 125.

This lack of evidence and the legal uncertainly faced by the claimant and the defendant contributed to the underdevelopment of private enforcement of EU competition law and, therefore, the Commission proposed to adopt Directive 2014/104/EU, also called Damage Directive 2014.[144] It harmonizes the rules related to damage claims for violations of EU competition law, includes provision relates to obtaining evidence and denies national court the right to order the disclosure of leniency statements to be used in a damage case.[145]

The main issue that needs to be recognized in this subchapter is that the discovery of low rates of damage claims in EU competition law can be linked to the problem of information asymmetry. In the past, an individual was faced with the uncertainty that if the national court denies access to public proceeding materials, for example, leniency, the lack of evidence might lead to a situation where the claimant is not able to prove the damages suffered and claim the compensation. Damage Directive 2014 coming into force has resolved the issue of the uncertainty of what kind of evidence the national court can order to be disclosed. But the access to leniency statements is denied. Thus, the exact content of materials available for the claimant needs to be examined in order to understand how favourable the claimant's position under the Damage Directive 2014 is.

E. Damage Directive 2014 in Terms of Disclosure of Evidence

The aim of this subchapter is to examine what are the exact rights of the parties involved in a damage claim for violation of EU competition law in terms of disclosure of evidence. The subchapter discussed the development of the Damage Directive 2014 and the aims of it. Author gives an overview provision contained in the Damage Directive 2014 and looks in more detail at the provisions related to accessing self-incriminating statements and other public materials by third parties.

Damage Directive was adopted in November 2014 and came into force December 27, 2016.[146] It is the first legally binding act within the field of EU competition law private enforcement[147] and was created to harmonize the system and minimize the differences between MS so that everyone's right to be compensated is recognized equally.[148] Damage Directive 2014 is the result of the Commission initiative to develop private enforcement of EU competition law.[149] The Commission in the Green Paper 2005[150] and the White Paper 2008[151] "made proposals and specific policy measures focused on improving legal conditions."[152] After the judgements

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[144] Ibid.

[145] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 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 Text with EEA relevance, *OJ L* 349, 5.12.2014, p. 1-19, available on: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.349.01.0001.01.ENG, accessed May 13, 2018.

[146] Supra note 107, p. 24.

[147] Erdem Büyüksagis, "Standing and Passing-on in the New EU Directive on Antitrust Damages Actions," *Swiss Review of Business Law* Vol. 87 No. 1 (2015): p. 18, accessed May 13, 2018, URL: https://ssrn.com/abstract=2577898

[148] Supra note 15, p. 89.

[149] Supra note 125.

[150] Green Paper Damages actions for breach of the EC antitrust rules, Brussels, 19.12.2005, COM(2005) 672 final.

[151] White Paper on Damages actions for breach of the EC antitrust rules, Brussels, 2.4.2008, COM(2008) 165 final.

[152] Ana Pendeš, "Private enforcement of competition law in the EU: Actors behind its development," University of Zagreb, Faculty of Law, the Jean Monnet Chair of European Public Law, 2016, p. 24, available on: https://www.pravo.unizg.hr/_download/repository/Ana_Pendes_master_thesis.pdf, accessed May 13, 2018.

of *Pfleiderer* and *Donau Chemie,* the Commission took a stand that "'united in diversity' parole is not to be applied in case of damages actions within the EU"[153] as it obviously leads to uncertainty.

With the proposal to adopt Damage Directive 2014, the Commission wanted to ensure "a balance between the need for a public repression of cartels and the right of private citizens and companies to be compensated for the damages they suffered."[154] Damage Directive 2014 is aimed at ensuring full compensation to the claimants and a complementary relationship between the public and private enforcement.[155] With this directive the European Parliament has created "a sort of "micro-system" rules of law about civil liability that makes it easier for victims of antitrust violation to claim compensation."[156]

The Directive gives the right to anyone to be compensated for the harm suffered from EU competition law infringement as well as "similar provisions of national competition law."[157] Thus, the scope and subject matter of the Damage Directive 2014 covers the EU's objective of private enforcement to protect the economic freedom and recognize the fundamental right of an injured party to be compensated. The compensation includes actual loss and loss of profits and the payment of interest.[158] Additionally, the Directive harmonizes rules and defines legal concepts related to the effect of national decisions, limitation periods, joint and several liabilities,[159] the passing-on of overcharges[160] and the quantification of harm.[161]

For the purpose of this paper, the most important part of the Damage Directive 2014 is Chapter II that lays out articles related to the disclosure of evidence.[162] According to the Directive MS have the duty to ensure that national court can order the disclosure of evidence upon the request of the claimant as long as reasoned justification is given.[163] Article 6(5) lists three types of evidence that the national courts can order to be disclosed after the competition authority has closed public proceedings. The evidence must be "prepared by a natural or legal person specifically for the proceedings of a competition authority," "information that the competition authority has drawn up and sent to the parties in the course of its proceedings" and "settlement submissions that have been withdrawn."[164] In other words, claimants have access to any pre-existing information or evidence "that exists irrespective of the proceedings of a competition authority and whether or not such information is in the file of a competition authority."[165]

However, the Damage Directive 2014 also sets out limitations to the provisions related to disclosure of evidence. Firstly, it is stated in the Directive that national court's orders must be proportionate.[166] Meaning, the court cannot order competition authorities or third parties to

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[153] Ibid.
[154] Supra note 15, p. 81.
[155] Supra note 15, p. 90.
[156] Beniamino Caravita di Toritto, "Overview on the Directive 2014/104/EU," *Private Enforcement: Where Do We Stand? – An Update of the State of the Art* N. 2 (2015): p. 45, accessed May 13, 2018, DOI: 10.12870/iar-11574
[157] Supra note 107, p. 24.
[158] Supra note 16, Article 3(2).
[159] Supra note 16, Chapter III.
[160] Supra note 16, Chapter IV.
[161] Supra note 16, Chapter V.
[162] Supra note 16, Chapter 2.
[163] Supra note 16, Article 5(1).
[164] Supra note 16, Article 6(5).
[165] Supra note 16, para 28.
[166] Supra note 16, Article 5(3).

disclose materials that are not necessary or that claimants cannot give a reason for their necessity. Secondly, it is prohibited for a national court to order at any time disclosure of evidence contained in leniency statements or settlement submissions.[167] Thus, under the current legislation claimant is not able to gather the necessary evidence by accessing a self-incriminating leniency statement. Considering that materials obtained from leniency statements improve the position of the claimant greatly, such a provision constitutes a limitation of the right to be compensated and to have a fair trial.

In conclusion, Damage Directive 2014 was a necessary step that needed to be taken so private enforcement of EU competition law could develop. Harmonization and legal certainty across all MS possibility brings a sense of relief that claimants no longer have to forum shop for a jurisdiction that is most favourable at that moment. However, denied access to leniency statements might again place the claimant that situation where information asymmetry decrease the chance of proving a case.

F. Conclusion

To summarize, the main findings for this part of the paper includes the realisation that public and private enforcement, although aim to reach different objective, still are interconnected. A civil law case can be based of the decision of a public proceeding, thus an effective public enforcement system of EU competition law is favoured by individuals and law-abiding undertakings. Moreover, an effective private enforcement system of EU competition law leads to several benefits that all result in an overall greater level of competition. The reality, however, is that in the EU private enforcement of competition law is underdeveloped. One explanation is that before Damage Directive 2014 claimants were uncertain of the outcome of a civil action because of the diversity among MS. The Damage Directive 2014 as the first legally binding legislation regulating damages claims has harmonized the system. Another explanation of the underdevelopment of the private enforcement of EU competition law is the information asymmetry or lack of evidence for the claimant in a civil case.

As observed in previous sections, the problem with lack of evidence for the claimant in a damage action could be balanced out by allowing them to access leniency files. Leniency statements usually contain information about cartel participants, market they operated in, cartel duration, overcharge, effect on the economy and other materials that the claimants would have a hard time collecting it not allowed to access leniency statements.[168] Therefore, the denied access to leniency statement constitutes a restriction on an individual's right to compensation and fair trial. At the same time, the effectiveness of enforcing Article 101 largely depends on the willingness of cartel members to cooperate. The result of granting leniency applicant immunity from public fines, but disclosing the evidence voluntarily given by the applicant could be negative and destructive for the public enforcement of EU competition law.

Lack of evidence, legal uncertainty and diversity across MS deem it necessary to harmonize the rules regulating damage actions in EU competition law. After making the first steps with the Directive 2014/104/EU, the Union and competition authorities must continue to observe the reality and look for ways to improve the coexistence of private and public enforcement of

[167] Supra note 16, Article 6(6).
[168] Commission Notice on Immunity from fines and reduction of fines in cartel cases, *OJ C* 298, 8.12.2006, para. 8-9, available on: http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52006XC1208(04), accessed May 13, 2018.

competition law. Especially, if the EU wants to improve the private enforcement system and, at the same time, deny the access to leniency statements, special attention should be brought to issue of proving damages suffered in a civil trial. Because both enforcement systems are so dependent on another, it would be a mistake to neglect one in favour of the other. Seeking balance for now seems to be the only solution for effective dual enforcement.

The following section will analyse whether the restriction on the right to be compensated by denying access to leniency is justified and proportional.

4. Evaluation of Denied Access to Leniency Statements under Damage Directive 2014

A. Introduction

So far the author has examined the necessity for leniency statements for effective functioning of both public and private enforcement of EU competition law. The Damage Directive 2014 came into force at the end of 2016 and harmonized the rules regulating damage action for EU competition law violation. While the Directive presents several benefits and improvements to the private enforcement system of EU competition law, Article 6(6) clearly states that "national courts cannot at any time order a party or a third party to disclose"[169] leniency statements. Therefore, within this section of the paper the denied access to leniency statements by the claimant will be analysed. First, the justification given by the EU will be examined. Second, the author will evaluate the provision applying the proportionality test. Third, alternative dispute resolution and corporate compliance programmes will be presented as a temporary solution for avoiding procedural problems.

B. Justification

Obviously problems can arise when there is more than one interest involved. When looking at dual enforcement of EU competition law, first, the claimant's rights to defence must be considered and, second, the need for certainty of the law for the leniency applicant must be viewed just as important. Further, in this subchapter the clash of these fundamental rights within private and public enforcement of EU competition law as well as the favouring of leniency statement protection will be discussed in more detail.

General assessment of the decision to deny leniency documents to claimants brings forward both positive and negative aspects. A positive outcome can be highlighted for the public enforcement and leniency applicants. Previously mentioned problem of uncertainty and unpredictability is resolved as now leniency applicants can be sure of what the national courts can and cannot order public authorities to disclose. Consequently leniency as an effective public enforcement tool for the Commission or NCAs is no longer at risk. Thus, at the public enforcement level this decision is welcomed. However, private enforcement faces a negative effect. The problem of information asymmetry is not resolved and claimants are left with a less of a chance of proving the damages suffered. The objective of the Directive 2014/104/EU is that it "seeks a balance between the need for a public repression of cartels and the right of private citizens and companies to be compensated for the damages they suffered."[170] Many provisions in the Damage Directive 2014 harmonize the rules of private enforcement of EU competition law and make it easier for private individuals to claim damages and other civil suits. For example, Directive 2014/104/EU harmonizes rules related to limitation periods,[171] joint and several liability,[172] passing-on of overcharges and the right to full compensation[173] and more. Nevertheless, in this directive "some of the adopted provisions still appear to

[169] Supra note 16, Article 6(6).
[170] Supra note 15, p. 81.
[171] Supra note 16, Article 10.
[172] Supra note 16, Article 11.
[173] Supra note 16, Article 12.

prioritise the public system"[174] including Article 6(6) that prohibits national courts to order disclosure of leniency statements.

The attractiveness of leniency programme is that the undertaking applying for it is granted some level of protection and immunity. As observed in the first part of the paper private enforcement of cartels is largely dependent on cooperation between the Commission/NCAs and undertakings. By allowing third parties to access leniency files, this programme and cooperation are put at risk.[175] Before Directive 2014/104/EU there was a great uncertainty whether or not self-incriminating statements will be available to claimants due to the above discussed right for a judge to grant access to leniency documents on case-by-case approach. Continuing with the line of thought of Prisoner's Dilemma when explaining how cartel fall apart, it can also be observed that "since no reduction in any subsequent civil damages is granted to the immunity beneficiaries, the strengthening of the private enforcement system can represent a hurdle to the functioning of public enforcement, thus discouraging application for leniency."[176] Undertakings having to bear the risk of national actions against them might opt to keep silent in cases when they would have applied for leniency. Thus, it is clear that "the resulting uncertainty as to the disclosability of leniency-related information is likely to influence an undertaking's choice whether to cooperate with the competition authorities under their leniency programme."[177]

The EU in the Damage Directive 2014 acknowledges that it is every person's fundamental right to be compensated for loss suffered due to anti-competitive business conduct, as well as that information asymmetry faced by the claimants is a real problem that limits this right. Thus, EU states that, "as competition law litigation is characterised by an information asymmetry, it is appropriate to ensure that claimants are afforded the right to obtain the disclosure of evidence relevant to their claim."[178] However, the need to ensure certainty for the leniency applicants of the outcomes after they have stepped forward and to protect the information is, in eyes of the EU, something that even private enforcement cannot interfere with.[179] The main reason for it being that leniency programmes and settlement procedures "contribute to the detection and efficient prosecution."[180] Furthermore, EU in the Directive 2014/104/EU explains:

> "[A]s many decisions of competition authorities in cartel cases are based on a leniency application, and damages actions in cartel cases generally follow on from those decisions, leniency programmes are also important for the effectiveness of actions for damages in cartel cases. Undertakings might be deterred from cooperating with competition authorities under leniency programmes and settlement procedures if self-incriminating statements such as leniency statements and settlement submissions, which are produced for the sole purpose of cooperating with the competition authorities, were to be disclosed."

Moreover, the EU, after protecting leniency and considering the information asymmetry, still tries to find a compromise. Even though Article 6(6) of the Directive 2014/104/EU denies access to leniency and settlement statements it does, however, list other forms of information available to the claimant. For example, undertakings have a right to access "documents that

[174] Supra note 15, p. 81.
[175] Supra note 15, p. 97.
[176] Ibid.
[177] Supra note 125, p. 3.
[178] Supra note 16, para 15, p. 3.
[179] Supra note 16, para 24, p. 5.
[180] Supra note 16, para 26, p. 5.

the parties prepared specifically for competition authority proceedings […] or that the authority has drawn up and sent to the parties in the course of its proceedings […] as well as withdrawn settlement submissions can be disclosed for the purposes of civil actions after the authority closed the proceedings."[181] The first to suggest similar idea was Advocate General Ján Mazák in his opinion on case *Pfleiderer* in 2011. He stated that "parties adversely affected by a cartel may not, for the purpose of bringing civil-law claims, be given access to self-incriminating statements voluntarily provided by leniency applicants"[182] but it would also "run counter to the fundamental right to an effective remedy and a fair trial […] if access to other pre-existing documents submitted by a leniency applicant in the course of a leniency procedure […] were denied by the national competition authority."[183] In other words, denied access to leniency can be acceptable as it is a necessary and effective tool for fighting the cartels. But there is no reason to deny claimant the access to other materials that existed regardless of the public proceeding. Thus, civil action claimants under the Damage Directive 2014 have the right to access to any pre-existing file submitted during the leniency programme.

At the moment it is too soon to see the effects of the Directive on the damages claims as it has been in force for less than two years. The Directive is up for a review by the Commission until 2020 when a report will be submitted including a legislative proposal if needed.[184] Therefore, if found that current provision are harming or have no effect on the private enforcement of EU competition law the relationship with leniency and damage claims could change.

To sum up, claimants accessing leniency statements, according to the EU line of reasoning, poses a threat to the public enforcement, especially, destabilization of cartels. Considering that "[t]he leniency statement would not have existed but for the cartel participant's voluntary act of making a leniency application, thereby facilitating the discovery and punishment of the cartel by the competition authority, as well as subsequent follow-on actions for damages."[185] To make up for the denied access to leniency, under the Damage Directive 2014 claimants have the right to access other materials falling out of this limitation. Naturally, a question arises whether the prohibition to access in leniency statements and the restriction of the claimant's right to full compensation is appropriate.

C. Proportionality Test

Article 6(6) of the Damage Directive 2014 prohibits the national court to order public authorities to disclose leniency statements. The EU by denying claimant the access to leniency statements imposed a restriction on a person's right to be fully compensated and to have a fair trial. For such a restriction to be deemed appropriate, it needs to satisfy the proportionality test. The methodological steps of a proportionality test include "the identification of a legitimate aim, the rational connection between the aim and the measure restricting the right, and the necessity of that measure."[186] The author will reason how each step is or is not justified.

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[181] Supra note 15, p. 99-100.
[182] Supra note 137, para 48.
[183] Ibid.
[184] Supra note 16, Article 20.
[185] Supra note 107, p. 33-34.
[186] Gloria Gonzalez Fuster, Serge Gutwirth, Bernadette Somody, Iv´an Sz´ekely, "Consolidated legal report on the relationship between security, privacy and personal data protection in EU law," Seventh Framework

First, the legitimate aim for restricting disclosure of evidence in a damage action is to ensure that the leniency statements attractiveness is not undermined. There is a greater chance that cartel participant will choose not to apply for leniency if that brings a negative or uncertain outcome. Therefore, by denying the possibility for the national court to order the competition authority to disclose leniency statements, the attractiveness of a leniency programme is kept and legitimate aim is reached.

Second, the provision restricting the claimant's right to access evidence is connected to the legitimate aim as it ensures predictability and legal certainty for the leniency applicant. If the case-by-case approach, where the national court must evaluate whether leniency statements should be disclosed, is applied leniency applicants will be faced with an uncertainty of what the nation court will do. Additionally, in the eyes of cartel participants, the incentive to apply is that they will receive full immunity and the self-incriminating statements will stay confidential. If claimants are granted the access to leniency statements, this benefit for the leniency applicant is lost. So, the connection between the provision for denying access to leniency statements in damage action and the legitimate aim is justified.

Third, the necessity for the provision is also justified as, throughout the paper, it has been identified that without effective and attractive leniency programme in place the public enforcement system of EU competition law and competition itself is at risk. Formation of a cartel is the most serious competition law violation as the undertakings directly agree not to compete. Additional element characterizing cartels is the obvious strategy of the cartel participants is to keep the agreement secret making it difficult for the competition authority or the Commission to detect them. The leniency programme must be kept confidential in order for it to effectively fight the seriousness and secrecy of cartels. Therefore, the necessity for a provision that ensures that leniency statements are kept confidential is also justified.

Finally, the proportionality test must also be applied in a narrow sense, meaning the restriction of a right must result in a greater amount of advantages than disadvantages.[187] Referring back to the justification given by the EU, damage actions are often follow-on and without the public proceeding many individuals who have suffered a loss due to competition law violation would not be able to claim the compensation. Moreover, the Damage Directive 2014 lays out the provision that determines that nation courts can order the disclosure of pre-existing materials and ensures that claimants are granted some amount of evidence. Considering these reasons and the benefits that leniency programmes and effective public enforcement bring to the economy and the consumer, it can be argued that by keeping leniency statements confidential society gains more than an individual loses by not having the possibility to use leniency files in a damage action.

In conclusion, the restriction on the amount of evidence that can be disclosed during a damage action does propose some disadvantage and hardship on the claimant. However, in this subchapter author reasoned that the restriction on accessing leniency statements is justified and proportional as it brings great benefits and claimants are able to access all pre-existing evidence.

Programme for research and technological development, PRISMS Deliverable 5.2, (2014): p. 34, accessed May 13, 2018, URL: https://www.researchgate.net/publication/289539808_Consolidated_legal_report_on_the_relationship_between_security_privacy_and_personal_data_protection_in_EU_law_PRISMS_Deliverable_52

[187] Mattias Kumm, "What Do You Have in Virtue of Having a Constitutional Right? On the Place and Limits of the Proportionality Requirement," New York University Law School, Public Law Research Paper No. 06-41 (2006): p.10-11, accessed May 13,2018, URL: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=952034##

D. A Closer Look on Pre-Existing Materials

After analysing the provision to deny claimant the access to leniency statements and coming to a conclusion that such a restriction on claimant's rights justified and proportional, further research goes into examining the evidence available. Thus, in this subchapter author looks closer at the pre-existing materials and whether the information contain in them is enough for the claimants to prove damages suffered.

The Damage Directive 2014 clearly states that it is the right of the parties to access pre-existing materials obtained by the competition authority.[188] In particular, Article 5 and 6 states that national courts can order third parties and competition authorities to disclose evidence upon a reasonable request from the claimant or the defendant.[189] Pre-existing materials can be defined as "evidence that exists irrespective of the proceedings of a competition authority, whether or not such information is in the file of a competition authority."[190] The definition indicates that pre-existing materials can be disclosed "even if they were produced to a competition authority in the context of leniency or settlement discussions."[191]

Such rules certainly improve the position of the claimant and the whole system of private enforcement of EU competition law for two reasons. First, harmonization of rules regulating disclosure of evidence and all other issues increases the predictability and certainty for both the claimant and the defendant. Comparing to the previous practice where the evidence disclosed depended on the case and MS national rules, such harmonized rules improve the claimant's position in the court as he/she now knows what evidence is available. Second, in practice injured parties "have wider access to relevant evidence" than it was the case previously.[192] While the Directive in all cases denies disclosure of leniency statements and settlement submissions, the evidence available to the parties during litigation is greater than ever.

In fact, author discovers that, according to the opinion of the Latvian NCA, the claimants are quite privileged in terms of accessing evidence.[193] As discovered in an interview with a NCA, pre-existing materials in content do not differ much from the information contained in the leniency statement. For example, pre-existing materials include e-mails and economic calculations, while leniency statements provide a more detailed and subjective description of the cartel agreement.[194] The Latvian NCA indicates that the reasons for low rates of damages claims and underdevelopment of EU competition law are actually different. Private enforcement of EU competition law is inconvenient. The court system, at least in the jurisdiction of the NCA interviewed, is overloaded and the priority is given to family and criminal law cases.[195] Additionally, the judges in the civil courts lack specialization in

[188] Supra note 16, para 28.
[189] Supra note 16, Article 5 and Article 6.
[190] Supra note 16, para 17.
[191] Jonathan Kelly, Sunil Gadhia, Maurits Dolmans, Paul Gilbert and Paul Stuart, Alert Memorandum, The UK implements the EU Antitrust Damages Directive January 10, 2017, p. 1, accessed May13, 2018. URL: https://www.clearygottlieb.com/-/media/organize-archive/cgsh/files/publication-pdfs/alert-memos/alert-memo-20173.pdf
[192] Competition policy brief, The Damages Directive – Towards more effective enforcement of the EU competition rules, Issue 2015-1, January 2015, p. 4, accessed May 13,2018, URL: http://ec.europa.eu/competition/publications/cpb/2015/001_en.pdf
[193] Supra note 76.
[194] Ibid.
[195] Ibid.

competition law.[196] However, the major issue with private enforcement of EU competition law is the fact that damage claims are time consuming.[197] The Latvian NCA in the interview mentions that in Latvia it can take 7 years to finalize the damage claim and receive the full compensation.[198]

Private enforcement of EU competition law could be improved by not only the Commission proposing harmonization of the rules regulating the damage claims but also by MS addressing the issues within their civil court system. The Latvian NCA points to the necessity to educated the civil court judges, so that, instead of being an observer of the case, they are able to be more active during litigation and help the parties quantify the harm.[199] EU competition law private enforcement could be further developed by making the process of litigation more convenient for the parties.[200]

It can be concluded that the current rules granting parties in a damage case access the pre-existing materials place the claimant in a favourable position. In theory, the claimant no longer faces uncertainty and unavailability of relevant evidence. Those are practical issues that are slowing down further development of private enforcement, but, if the claimant is willing to face certain inconveniences during litigation, full compensation can be obtained. Alternatively, litigation can be avoided by claiming full compensation through alternative dispute resolution (ADR) or simply complying with the competition rules.

E. Alternative Solution: ADR and Compliance Programme

Thus far the focus of the paper has been on the problem with disclosure of evidence in court litigation and the relation to leniency statements. While the Damage Directive 2014 grants the claimants the right to use all pre-existing materials, the Union has also proposed for the claimant and the defendant to avoid litigation by encouraging the parties to settle the dispute using alternative dispute resolution (ADR).[201] Additionally, the Commission has, in the recent years, presented corporate compliance programmes as an effective tool for preventing law infringements.[202] In this subchapter author evaluates the two proposed solutions for problems arising from dual enforcement of EU competition law.

Consensual dispute resolution is mentioned in the Directive as a tool for "[a]chieving a 'once-and-for-all' settlement."[203] In particular, chapter VI of the Directive lays out rules on the suspension of limitation periods,[204] protection of settling co-infringers against having to pay contribution to non-settling co-infringers[205] and the possibility to recognize consensual settlement as compensation paid.[206]Advantages of ADR include speed, informality, flexibility, privacy, economy, finality and many others.[207] Settling a dispute outside the court

[196] Ibid.
[197] Ibid.
[198] Ibid.
[199] Ibid.
[200] Ibid.
[201] Supra note 16, para 48.
[202] See the European Commission homepage on compliance: ec.europa.eu/competition/antitrust/compliance/, accessed, May 13, 2018.
[203] Supra note 16, para 48.
[204] Supra note 16, Article 18(1) and (2).
[205] Supra note 16, Article 19(2) and (3).
[206] Supra note 16, Article 18(3).
[207] Albert Fiadjoe, *Alternative Dispute Resolution: A Developing World Perspective* (London: Cavendish Publishing, 2004), p. 1

is considered to be more favourable than litigation as there is a greater chance of satisfying both parties, especially when the parties, instead of presenting their position like in the court, present their interest. Interests can be satisfied in more than one way and compromise can be reached.[208]

The experts from the Latvian NCA in the interview believe that ADR is a useful component of the legal system.[209] ADR focuses more on compromising and strategizing than in litigation, in order to reach an outcome that is wanted by both parties. The claimant in a damage claim for competition law violation is interested in receiving compensation, while avoiding lengthy litigation. The Latvian NCA gives an example where the injured party can offer the undertaking a discount on the amount that needs to be compensated, to incentivise the undertaking to settle the dispute trough ADR. [210] The undertaking, knowing that litigation is inconvenient for the injured party, might decline the offer hoping the injured party will not raise a claim. However, the company that has violated EU competition law is interested in keeping such disputes quiet from the public. [211] An undertaking might wish to pay out the compensation through ADR, so that other injured parties would not join in on the damage claim that might be started otherwise. The rules in the Damage Directive 2014 make it easier for both parties to choose consensual dispute resolution and avoid the problems related to litigation within competition law.

Moreover, the EU has highlighted the importance of compliance and the necessity for companies to be proactive in infringement prevention. Joaquín Almunia, former European Commissioner for Competition, illustrated the situation by saying "prevention when possible, repression when necessary."[212] The EU has been encouraging companies to implement corporate compliance programmes as a way to avoid facing public and private proceedings. A corporate compliance programme can be defined as a programme developed by a company to ensure compliance with the laws from within.[213] They are considered to be an "essential element of good corporate governance."[214]

The Commission in its informative material "Compliance matters"[215] has set out a list of basic steps that could ensure compliance. First, a company must have a clear strategy. Preferably the strategy is written down in a clear language and communicated to every employee and manager. Second, everyone in a company should sign to accept a written compliance agreement and be positively incentivised to follow it. Third, compliance should be regularly reviewed and updated. Fourth, regular monitoring for anti-competitive behaviour is needed if a company wants to detect infringements and prevent them. Even if compliance programme

[208] Ibid, p. 40.
[209] Supra note 76.
[210] Ibid.
[211] Ibid.
[212] Joaquín Almunia, "Cartels: the priority in competition enforcement", speech from the 15th International Conference on Competition: A Spotlight on Cartel Prosecution, Berlin, 14 April 2011, available on: europa.eu/rapid/press-release_SPEECH-11-268_en.pdf, accessed May 13, 2018.
[213] Mihail Busu and Bogdan Cimpan*, "Undertakings' compliance programs in European Union," Proceedings of the 8th International Management Conference "Management Challenges for Sustainable Development"* (2014): p. 1011, accessed May 13, 2018, URL: http://conferinta.management.ase.ro/archives/2014/pdf/99.pdf
[214] Ibid.
[215] European Commission, *"*Compliance matters: What companies can do better to respect EU competition rules,*"* Luxembourg: Publications Office of the European Union, 2012, p. 16-21, available on: https://publications.europa.eu/en/publication-detail/-/publication/78f46c48-e03e-4c36-bbbe-aa08c2514d7a/language-en, accessed May 13, 2018.

fails to ensure the compliance it still can limit the exposure, respond quickly and end the illegal conduct.

A successful compliance programme is certainly a helpful tool for minimizing the costs. Currently a fine for EU competition law infringement can be up to 10% of the company's turnover at the global level, even if the anti-competitive practice has no effect.[216] Beside the fine, the efforts to harmonize and improve the private enforcement could lead to more injured parties claiming compensation and adding to the undertaking's expenses. Additionally, the investigation during the public proceedings and private law litigation can be time consuming and costly.[217] Thus, an undertaking will have to face a high cost for non-compliance.

However, not just the company's money is at risk for non-compliance. Compliance programme can also help avoid ruining the company's reputation. Considering that "[t]he Commission issues a press release whenever it finds an illegal behavior"[218] the public image of a company can be harmed. Both clients and employees could feel betrayed and choose to go to another company. Alternatively, the opposite, if the company invests in establishing a compliance programme the trust and satisfaction of company's costumer and employees could grow.

Public authorities are interested in undertakings being proactive and establishing a compliance programme in good time for the obvious reason that it promotes competition. The Latvian NCA, during the interview conducted for this paper, reveals that in practice compliance programmes work the best for catching a single employee who decides to act anti-competitively. In cases when boards of several companies come together to form a cartel agreement the compliance programme is useless.[219] In addition, some compliance programmes are developed to ensure compliance while others are implemented simply as a formality that is not followed in practice, so that the company, in case it is caught breaching the law, can use an argument that the compliance programme was implemented and it is not the company's fault that an employee decided not to follow it. [220]

It only benefits the Union if undertakings choose to adopt an *ex ante* approach to competition law infringements. The interviewees from Latvian NCA stress that, although public authorities keep neutral in company's internal affairs, it is important for the NCA to inform and educate undertakings of the laws and consequences for non-compliance.[221] In practice, it has been discovered that sometime an undertaking does not even know that competition law is being violated. Additionally, the Latvian NCA's experience, revealed in the interview with the author, shows that many companies do not realize that they are responsible for their employees' violation of the competition law.[222] Thus, public information about the ongoing investigations and final decisions can encourage undertakings to start complying and implanting compliance programmes before they themselves have breached the law.[223]

In summary, the Commission, while largely focusing on improving damage claims and other civil actions within competition law, also sees the value in parties settling their dispute through consensual dispute resolution as it gives the parties a possibility to reach an outcome

[216] Supra note 208, p. 1014.
[217] Supra note 208, p. 1015.
[218] Supra note 208, p. 1014.
[219] Supra note 76.
[220] Ibid.
[221] Ibid.
[222] Ibid.
[223] Ibid.

acceptable to both. Additionally, the Commission has pointed out the importance in preventing non-compliance before any kind of infringement has taken place through compliance programmes. Such programmes can help companies avoid high costs, ruined reputation and help the Commission to establish a greater level of competition.

To conclude, ADR and compliance programmes are two ways to avoid legal uncertainty in the courtroom either from the claim's or the defendant's side. The claimant can avoid the problems with gathering evidence for the claim. The defendant wanting to operate in an ethical and legal way can avoid infringement by establishing a corporate compliance programme. But those are only temporary solutions that can help the parties to avoid the legal problem arising from the dual enforcement of EU competition law. Without doubt, ADR and compliance programmes offer the benefits for the EU and at times the encouragement to use them should be the concern of the competition authority. However, the priority still must lay with resolving the issues related to public and private enforcement as it is the basis of the competition system. Not all disputes can be resolved by consensual dispute resolution and not all infringement can be caught and stopped by the compliance programme.

F. Conclusion

In the previous sections author highlighted the problem with claimants lacking evidence to prove the damages suffered and CJEU rulings to grant the access to leniency statement when deemed necessary. However, considering the importance of leniency in public enforcement of EU competition law the Damage Directive 2014 denied such a right to the claimants. The EU clearly explains why it is both private and public interest to protect leniency documents and tries to balance out the information asymmetry by giving claimants the right to other forms of evidence. However, the Directive is still under a review and it is too soon to tell the effects of the Directive. Furthermore, author by examining the Article 6(6) of the Damage Directive 2018 through the proportionality test finds a similar conclusion: the restriction on the claimant's right to access information is justified. Additionally, when examining the content of pre-existing materials, it becomes clear the information available to claimants in practice is useful and relevant. Another problem within civil litigation might be responsible for the underdevelopment of EU competition law. The Directive proposes the parties to opt for a consensual dispute resolution and the Commission has spoken out on the importance of corporate compliance programmes.

The conclusion and the main finding of this subchapter is that private enforcement of EU competition law has undergone many changes and, possibly, if the Commission finds it necessary, the system will face more reforms in the future. The denied access to leniency statements for the claimant in a damage action is justified and reasonable. Nevertheless, the Commission still should examine how successful are damage claims across all MS that are based on pre-existing materials. If found that such information is not enough to prove damages suffered, a solution should be proposed to improve the information asymmetry. Considering the ongoing transformation of the private enforcement of EU competition law, ADR and corporate compliance programmes play an important role to the parties seeking stability and predictability.

5. Conclusion

The purpose of this paper was to answer the following question: can the access to leniency statements be denied without undermining the right to full compensation under private enforcement of EU competition law? The attempt to find the answer included a research on the leniency as the an effective tool to fight cartels, the unfavourable position of the claimant in damage cases due to lack of evidence and the evaluation of the Damage Directive 2014 provisions regulating disclosure of evidence and denying claimants the access to leniency statements.

The results reveal that that leniency is currently the best tool available for the public authorities for fighting cartels and it must be kept confidential in civil lawsuits for it to be successful. Public enforcement is aimed at ensuring that the economy and consumers gain the benefits of a fair competition. Author discusses the seriousness of vertical anti-competitive agreements as the cartel members directly agree not to compete. The consequences include higher prices, less innovation, lower product diversity and an overall decrease in the economic efficiency, resulting in other market participants bearing a loss. Realizing the negative effects, illegality and high fines of cartels, undertakings operate in secrecy. The detection of such agreements becomes a difficult task. Fortunately, cartels face the problem of instability and leniency programmes take advantage of this. By offering immunity only to the first applicant, competition authority ensures that eventually someone will apply for leniency in order to end the cartel with the best possible outcome for oneself.

While the public enforcement of EU competition law is developed and successful, private enforcement is lacking behind. The objective of the private enforcement system is to make sure that the injured party is fully compensated for the damages suffered and additionally discourage undertaking to breach the competition law. Reasons for the underdevelopment include lack of evidence, legal uncertainty and diversity across MS. Disclosure of leniency statements could improve the position of a claimant in a damage action. A previous CJEU practice established a case-by-case approach whether the national courts had to evaluate each situation and decide whether the access to public materials is necessary. However, the uncertainty for both the claimant and the applicant on what will be the outcome can lead to leniency programme losing its value in the eyes of potential cartel applicants. The Commission realised the necessity to harmonize the rules regulating damage claims and proposed a directive that included a provision denying claimants the access to leniency statements.

Further evaluation of the said provision includes weighing the interest of public and private enforcement of EU competition law in a proportionality test. Author concludes that the restriction on the claimant’s right to access leniency statements is proportional, reasonable and in line with the EU reasoning in favour of the Damage Directive 2014. The benefits gained from the leniency programme are greater than the disadvantages faced by the claimant in a damage action. Moreover, realising that leniency programmes can and must be denied as a source of evidence leads the author to further research the pre-existing public materials that can be used in damage cases by the claimant. In an interview with the Latvian NCA it becomes clear that pre-existing materials are enough to prove the damages suffered as information contained in them is similar to a leniency statement and that the current legislation place the injured party in a favourable position in litigation. But other factors, like lengthy proceedings, are what discourage injured parties to raise a claim. Thus, ADR and

compliance programmes present valuable attribute that could temporary help the parties involved avoid the hardship of a court proceeding.

Author comes to a conclusion that access to leniency statements can be denied without undermining the right to full compensation under private enforcement of EU competition law. Leniency programmes, while containing relevant information for the injured party claiming damages, must be kept confidential to ensure the success of it in fighting the cartels. The current situation, although prohibits claimants the access to these statements, still for the first time establish a clear and predictable distinction of the materials that are accessible i.e. pre-existing materials. Access to all materials falling outside the leniency statements and settlement submissions together with other harmonized rules regulating damage claims improve the position of the claimant in litigation. The Damage Directive 2014 ensures certainty and offers a wider scope of public materials available to the claimants across all MS. Additionally, ADR proposes a faster and easier route to being fully compensated, but compliance programmes, if implemented with the purpose of ensuring actual compliance, could minimize the number of injured parties. Thus, the overall assessment of the disclosure of evidence in competition law damage actions under the current legislation leads to believe that claimants have access to the necessary information and can be fully compensated for the damages suffered. If the Commission after reviewing the Directive in 2020 concludes that still claimants are not fully compensated, the proposed solution still should not (and probably will not) include the possibility for the claimants to access leniency statements.

6. Annex I: Interview with the Latvian NCA

Date of the interview: 11.05.2018

Time of the interview: 10:00 – 10:45

Interviewees: Antis Apsītis and Dita Dzērviniece

Methodology: Author expands the doctrinal research by conducting an interview with the Latvian National Competition Authority. This institution is selected for an interview because Latvia as a Member State of the European Union has successfully implemented Directive 2014/104/EU in the domestic rules and can accurately present the situation of both public and private enforcement of EU competition law. The Latvian NCA was represented by two experts: Antis Apsītis and Dita Dzērviniece. The interviewees were provided with the planned interview questions before hand but the author was able to ask additional questions during the interview. Questions focused on several issues discussed in the paper, i.e. leniency statements as a tool for cartel detection, underdevelopment of private enforcement of EU competition law, claimant's current position in damage claims and the role of ADR and compliance programmes within EU competition law. The interview was conducted because the Directive 2014/104/EU is being reviewed by the Commission until 2020 and currently there is no empirical data or information available on the effects of the Directive on the claimant's position in proving damages suffered. The opinion and experience of the NCA helps the author to make reasonable conclusion and prediction of the further development of private enforcement of EU competition law.

Question 1: Does the Latvian NCA leniency programme differ from the EC's leniency programme?

No. Some MS that did not have a leniency programme simply copied the one used by the Commission. Some MS had established their own. However, the EU currently is working on harmonizing all the leniency programmes, so that forum shopping is no longer possible.

Question 2: How has the number of leniency applicants changed in Latvia since NCA started offering it? Is there a positive trend?

There is a positive trend. However, in general Latvian market is so small that leniency applications are not many. In 2013 - 2017 in total NCA had 12 leniency applications and in most cases they had already started an investigation.

Question 3: In your opinion, is there a better way to fight cartels than the leniency programme?

No, nothing better has been proposed.

Question 4: How successful is the implementation of the Directive 2014/104/EU in Latvia? What are the major challenges in Latvia?

The Directive has been implemented successfully. The challenge was that Latvian civil procedure differs greatly from the requirements of the Directive. Thus, it took a long time to implement the Directive. It was necessary to explain and educate the Parliament, courts, and ministries. Also Latvia is lacking judges specializing in competition law. That can be explained by the low activity in the field of damage claims for EU competition law violation.

Question 5: Before the Directive 2014/104/EU came into force, had the Latvian NCA given access to leniency programme materials to third parties?

No, no one has ever requested that.

Question 6: How would you evaluate the private enforcement of competition law in Latvia and in Europe? Do you think that it is undeveloped? Why?

It is underdeveloped because the private enforcement system is inconvenient. At least in Latvia court system in overloaded and priority is given to other issues like family law and criminal law.

Question 7: What factors do you think have a bearing on a successful damages claim for breach of competition law in Latvia?

Time factor is of importance. It can take 7 years before the claimant receives the compensation. Also quantification of the harm is a problem. In other damage cases claimant knows exactly how much he/she has lost. The judge simply acts an observer and makes a decision based on the fact presented by the parties. It is different with competition law. The claimant often does not know the exact amount of damages suffered and he/she tries to discover this during the trial. The judge in these cases should play an active role and help the parties in calculating the damages.

Question 8: How realistic is it for a person to receive damages for competition law violation in Latvia? Do you think that in the current situation, claimants' lack evidence to prove the case?

It is realistic for the claimant to prove the case.

Question 9: What kind of information is contained in the pre-existing materials? Does pre-existing materials provide enough evidence for the claimants to prove the damages suffered?

Pre-existing materials include information from e-mails and economic calculations. In practice pre-existing materials are not too different from leniency statements. Leniency statements just describe the agreement in more detail and give leniency applicant's subjective interpretation of what happened.

Question 10: What factors, in your opinion, have an effect on the attractiveness of the leniency programme?

The objective factors include charging higher fines. Also, informing the market participants of the large fines imposed could lead to a cartel member realizing the risk and costs of non-compliance. Moreover, undertaking could choose not to apply for leniency because they have received funding from the EU as after the discovery of the cartel the money will have to be returned. The subjective factors include cartel members, for example, realising that they operate in a small market with not many undertakings, meaning the one who applies for leniency will have to face the people he/she betrayed.

Question 11: Should third parties be allowed to access to leniency programme materials after the investigation has been closed in order to improve the position of the claimant in a civil case?

It is not necessary to offer the claimant the access to leniency statements. The position of a claimant in a civil law suit is quite privileged.

Question 12: If not, what alternative methods, in your opinion, could improve the claimant's position in a civil case?

Educating judges in dealing with competition law damage claims could improve the claimant's position in the litigation. Also involving NCAs in the court system could be helpful, meaning NCA decision should be binding in civil law suits. It could ease the claimant's position.

Question 13: In your opinion, how can ADR help the claimant be compensated for the damages suffered?

ADR can be kept quiet from the public. Undertakings might be interested in paying out compensations in silence so that others injured parties would not join in on damage claim that would be started otherwise. Also ADR certainly takes less time than litigation, so the parties wanting to end the dispute might choose it. Especially, the injured party is interested in avoiding lengthy litigation and could offer the undertaking a discount on the amount loss if he/she agrees to settle the dispute through ADR. But if the litigation is really long and difficult, the law-breaching undertaking might decline ADR hoping that the injured party will not raise a claim.

Question 14: In your experience, how effective are corporate compliance programmes in preventing EU competition law infringements in Latvia?

Of course, compliance programmes could prevent EU competition law violation but not always. Compliance programmes work the best for catching a single employee who decides to act anti-competitive. In cases when boards of several companies come together to form a cartel agreement the compliance programme is useless. Also some compliance programmes are developed to ensure compliance while others are implemented simply as a formality that is not followed in practice. Companies, in case they are caught breaching the law, can use an argument that the compliance programme was implemented and it is not the company's fault that an employee decided not to follow it.

Question 15: Are they widely used by companies in Latvia/Europe?

We are not sure. They are certainly developing.

Question 16: How can Latvian NCA influence the decision of a company to implement corporate compliance programmes?

It is important for the NCA to inform and educate undertakings of the laws and consequences for non-compliance. In practice, it has been discovered that sometime an undertaking does not even know that competition law is being violated. Also companies should realize that they are responsible for their employees and compliance programmes could help with regular auditing of the work and agreements made by managers or other employees. But decision to implement compliance is the company's internal decision. NCA should keep a neutral attitude.

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Interviews

109) Interview with the Latvian NCA representatives Antis Apsītis and Dita Dzērviniece. Conducted May 11, 2018, from 10:00 until 10:45. Full text of the interview available in the Annex I on page 40.