



BRUSSELS À JOUR

## A Bit of Hope for Cartel Leniency – 1st Advent

Markus Roehrig and  
Laura Stoicescu report on  
the latest developments  
from the European capital  
of competition law.

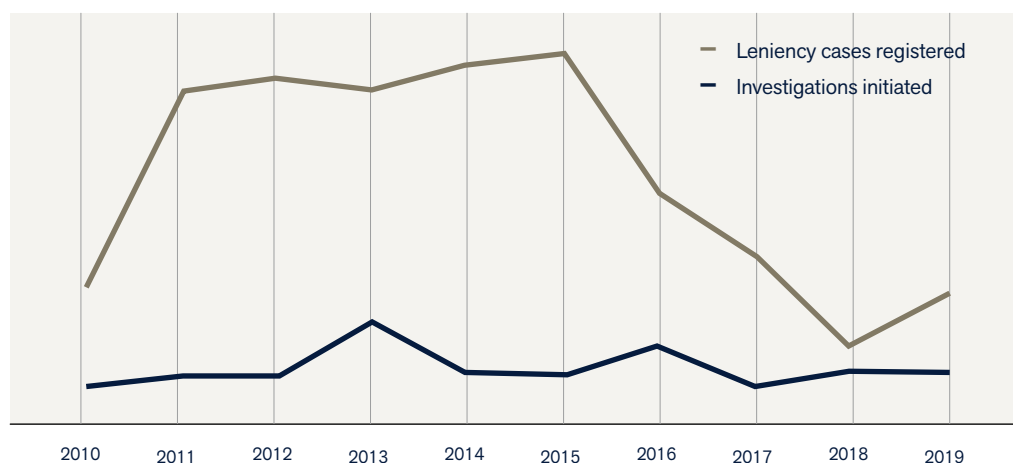
It's that time of the year again, folks! Looking for the perfect tree, dusting off those Christmas carols sheet music and wondering whether your old nutcracker is still in fashion this year (Apartment Therapy says yes). If you need a break from the holiday preparations, we've got you covered. In our four-part December issue, we will mark each Advent with a topic-specific article on: Cartels, State Aid, Merger Control and the Digital Markets Act. To kick-off the season, we'll be talking about Cartels this Monday, focusing on the most recent developments in the field of leniency.

Cartel leniency has long been the crown jewel of DG COMP – in 16 years, it resulted in over 50 cartel decisions, from more than 550 leniency applications. However, in recent years, the number of new leniency applications declined sharply. While people appear to disagree as to why that is, some say that the Commission's dedicated – and successful – efforts to promote private enforcement created a perfect storm that inadvertently undermined the EU's and Member States' leniency programmes. In an attempt to revive leniency and cartel enforcement the Commission has taken several counter-measures, with a modern twist on a few tools in its box. Most recently, the Commission released a new set of FAQs which offer updated guidance on how it handles practical issues that frequently arise in leniency cases, and the Commission has expanded its eLeniency platform to make the communication with leniency applicants less burdensome. However, there are not only "carrots" but also "sticks". Both the Commission's whistleblower tool and the increased number of dawn raids send a message that the risk of cartels being detected and investigated is real, even without leniency. Below is the state of play with respect to leniency and cartel enforcement in the EU.



## The Rise and Fall of Cartel Leniency

The Commission created the leniency programme in 1996 and it proved to be the silver bullet for detecting cartels. For example, between 2010 and 2017, 23 out of 25 cartels investigated were the result of leniency applications. By contrast, only 2 investigations resulted from the Commission's own detection work. We had a look at the figures concerning the evolution of leniency cases between 2010 and 2019, and compared them, here is the result:



Source: European Commission

The reason for the drop in leniency cases remains ambiguous, particular because we observe a similar trend in other jurisdictions around the globe. It may well be that the slump of leniency cases after 2015 has several reasons, including the wide-spread introduction of robust antitrust compliance programmes and the significant investment that companies have made to foster their compliance organizations. However, there are those who claim that the rise of private litigation in Europe played a – potentially significant – role. And indeed, the Damages Directive entered the scene in December 2014, just before the downturn in new leniency cases. And even before, the legal industry had worked to import private antitrust litigation from the U.S., with considerable success. We're not saying that the number of cartel leniency applications decreased as a direct effect of the damages directive. We're just looking at the graph, because we like numbers as much as your next antitrust lawyer. The question remains: Mere coincidence or is there causation?

In 2016, the Commission decided to work on enhancing and diversifying its means of detecting potential cartel cases with high impact on the internal market. As part of this initiative, since 2017, the Commission has made available on its website a whistle-blowing tool to anonymously submit information on cartels and other anti-competitive practices. Information received has fed into the Commission's market monitoring activities.



However, as pointed out by the graph, the numbers did not improve significantly, an aspect flagged by the European Court of Auditors' report of 2020, which identified as the way forward a more appropriate detection of infringements. This was supported in parallel by the German Federal Cartel Office ("FCO"), which pointed out not only the worldwide and German decline in leniency applications (from 60 to around 10), but also the potential correlation with the sharp increase in private damage claims. Similarly to the European Court of Auditors, the FCO suggested as a solution the diversification of the investigation toolkit.

### **Update of the eLeniency Platform**

To make practicalities easier, in 2019 and just in time for the first lockdown, the Commission launched its eLeniency platform, an online tool to submit statements and documents in leniency and settlement proceedings in cartel and non-cartel cooperation cases. In September 2022, the Commission updated the platform, which is now working two-ways. The Commission can now also display documents online that were before only available at the Commission's premises (corporate statements, etc.). Companies and their representatives can be notified letters and decisions in the context of a cartel leniency procedure, including requests for information. However, there is a certain degree of reluctance in the legal community regarding eLeniency, particularly due to the lack of understanding of the safeguards it offers. For this reason, the Commission felt the need to clarify, in its *FAQs on Leniency*, that, as with the original version of the case file, eLeniency offers the same guarantees in terms of confidentiality and legal protection as the access or notification of such documents at the physical premises of the Commission. For the moment, the system is voluntary – companies and their legal representatives can continue to use the oral procedure to make statements or to receive access to information at the Commission's on-site premises, if they wish to do so. But we think this might (at some point in time) signal the phasing out of endless dictating and transcribing at DG COMP offices.

### **New FAQs for Old Dilemmas**

The Commission published in October 2022 its *FAQs on Leniency*, providing further transparency, predictability and accessibility to potential leniency applicants and encouraging them to use the procedure. The Commission itself has acknowledged that potential applicants are nowadays faced with "a more complex leniency landscape", in the context of which some additional guidance could be helpful.

In a nutshell, the guidance includes clarifications on the application of the Leniency Notice and details on the legal protections and benefits that the leniency programme offers. It also sets out new practical arrangements, such as clearly identified Leniency Officers that companies or their legal representatives can contact for informal advice on leniency or for guidance on submitting a leniency application. And last but not least, it signals the Commission's intention to discuss potential leniency applications on a "no-names" basis, without the need to disclose the sector, the parties involved or any other



details identifying the potential cartel. This will allow potential applicants to ascertain whether the conduct at stake is likely to be considered as a secret cartel and whether reporting it to the Commission would entitle them to benefit from the programme. This possibility will be particularly useful if the conduct is novel or if it is unclear whether it falls within the scope of the Leniency Notice. Also, as an additional practical tool, it is now possible to contact the Leniency Officer to ask whether immunity is available for the cartel that the potential applicants are involved in.

### **No Place to Hide – Stepping up Dawn Raids**

The Commission saw the silver lining in the pandemic and decided that it needed to shake things up if it was to still be taken seriously when it came to cartels. So it doubled down on dawn raids, sharpening one of the pencils in its toolbox. And we're not talking about your run-of-the-mill dawn raids. We are talking about raiding private homes of firms' executives, a practice rarely used in the past.

The Commission argued that due to the pandemic, work from home has become a mainstream practice. Which meant that sensitive documents would inevitably end up on people's kitchen tables. The first recent dawn raid of this type took place in April 2022, followed by a Commission press conference detailing the raid and "promising" more dawn raids at private premises to follow, in parallel to raids carried out at the business itself. Although dawn raids at the company's premises and at home are governed by different sets of procedural safeguards, the April raid signalled a more determined take on cartel detection from the Commission's side.<sup>1</sup> We understand that, going forward, for privacy reasons, the Commission will no longer make public the dawn raids carried out at private homes.

### **The Intelligence Unit**

Another tool in the Commission's toolbox is its open-source intelligence unit, a rather under-the-radar team which uses IT forensics and data processing methods to detect cartel behaviour clues in the public sphere, starting with the Internet. It has already helped track down cartels in more than 30 cases.

The unit is part of the *ex officio* means of cartel detection and for understandable reasons Commission officials are reluctant to provide more details on its functioning, but it does seem to have already made a difference since its establishment in 2017.

### **Don't Shoot the Messenger**

Since 2017, DG COMP has had a platform to make it easier for individuals (i.e., employees, customers, etc.) to alert the Commission about secret cartels and other antitrust violations while maintaining their anonymity. The tool protects whistle-blowers' anonymity through a specifically-designed encrypted messaging system that allows two-way

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<sup>1</sup> If you want to read more about it, check our April 2022 issue: <https://www.hengeler.com/en/service/newsletter/brussels-a-jour-2022-04>.



communications, so that the Commission can ask for additional information or clarifications, in order to increase the likelihood that it can take action based on the information. The service is run by a specialised external service provider that acts as an intermediary, and which relays only the content of received messages without forwarding any metadata that could be used to identify the individual providing the information.

But apparently that did not yield the desired results from the start – according to the European Court of Auditors’ report of 2020, the information received was indeed fed into the Commission’s market monitoring activities, but by 2020, it had resulted only in one on-site inspection and this did not lead to the opening of formal proceedings. By the end of 2021, the Commission was receiving approximately 100 relevant messages yearly.

Cartel whistle-blowers have been a sticky topic in the European antitrust world for a while. Germany has been insisting on enhanced protection for whistle-blowers, but their appeal was not heard in Brussels. Even the European Court of Auditors chimed in in its 2020 report, criticizing the Commission’s lack of initiatives regarding other incentives to encourage the reporting of infringements, such as financially rewarding whistle-blowers. For example, by 2020, reward schemes for whistle-blowers existed in Hungary, Lithuania, Slovakia and the (now departed) UK. Somewhat foreshadowing the late October 2022 publishing of the *FAQs on Leniency*, the Commission’s Olivier Guersent addressed the elephant in the room in early October, admitting that cartel whistle-blowers may need greater protection from civil damages claims in order to boost the number of EU leniency applications.

And with the publishing of *FAQs on Leniency*, the Commission took the opportunity to clarify the legal protections and benefits that whistle-blowers receive under the Leniency Notice, but also outside of it. For example, whistle-blowers who report breaches of EU competition rules are guaranteed a high level of protection against various forms of retaliation (such as dismissal, demotion, etc.) by their employers under the Whistle-blower Directive. Furthermore, under the same directive, employers may not prevent an employee from contacting the relevant public authorities.

The Commission also clarified the dynamic between leniency and whistle-blowing: undertakings that choose not to report cartel conduct that they have uncovered forego the opportunity to seek immunity and may subsequently face significant fines if the conduct is reported by a whistle-blower, who faces (under EU competition law) no sanctions, enjoys significant protection and may contact the Commission anonymously.

### **The Elephant in the Room – Additional Protection for Immunity Applicants**

The *FAQs on Leniency* shed additional light on another sticky point – further protection for leniency applicants outside the leniency programme itself - in an effort to encourage applications. Here, the Commission elaborates on the fact that the Damages Directive provides protection to leniency applicants against exposure to civil damages, in particular the prohibition to disclose leniency statements submitted to the Commission or an NCA in follow-on cases before national courts of Member States. Going one step further, the Commission itself assists in the protection of such statements in non-EU jurisdictions.





Also based on the Damages Directive, immunity recipients are only jointly and severally liable to their direct and indirect customers and to other cartel victims only if full compensation cannot be obtained from the other cartelists. In fact, this is a derogation from the rule that co-infringers can be held jointly and severally liable for the entire harm caused by the infringement. Each of them can be requested to compensate the harm in full and any injured party has the right to require full compensation from any of them until it has been fully compensated. This derogation granted to immunity recipients is safeguarded by a corresponding protection against claims by other co-cartelists.

*We hope you enjoyed our short dip into the world of cartel leniency.  
Make sure to come back next Monday, for our second December instalment,  
discussing State Aid.*

*In the meantime, don't forget to write your letter to Santa!*

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