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The introduction of minimum harmonisation in the leniency application procedure for stakeholders filing in multiple jurisdictions

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ABSTRACT

Despite the unchallenged success of leniency programmes in unveiling cartels with a Community dimension since 1996, a worrisome reluctance on the part of stakeholders to race to the regulator's door has emerged in recent years. The number of leniency applications has diminished due to the inevitable threat of costly private damages actions that appeared in 2014 with the Damages Directive, and the interlinked fear of confidentiality breaches of corporate statements.

*However, there is another disincentive that the EU regulator should have already acted upon. It is the elimination of parallel actions and multiple sanctions for stakeholders involved in cross-border cartels. This multiplicity of national actions leading to soft violations of the principle of *ne bis in idem*, combined with the lack of harmonisation of substantive rules in national leniency programmes, forces stakeholders to choose the certainty of sanction over the legal uncertainty of costly and time-consuming leniency applications.*

*Following a normative analysis based on a questioning of the current *modus operandi* of the EU leniency programme compared to the functioning of the one-stop-shop of the EU Merger Regulation, analysing both legal texts and case law, the aim of this paper is to determine if a one-stop-shop would introduce a higher level of judicial protection for stakeholders and which model of one-stop-shop would best achieve that objective.*

This paper takes a three-step approach. First, it identifies the current incentives and disincentives around which the leniency system revolves. The paper's second step is to look at the lessons learned from the EU Merger Regulation, which provides for the only example of a one-stop-shop created under competition law rules, in spite of the inherent differences between cartels and concentrations, i.e., the latter provides efficiencies that the former never could provide. Finally, this paper assesses the different available options to create an EU-wide leniency system and provides recommendations to the EU legislature for a Regulation, on the basis of Articles 103 and 352 TFEU, that would guarantee a higher level of legal certainty to stakeholders than the one made available to them under the current system.

This new system should also improve the efficiency of the EU leniency system, mainly by removing parallel applications of stakeholders and subsequent parallel investigations and actions of NCAs on the same cartel. Increased co-operation between national competition authorities and the Commission on the leniency chapter is also currently under review by the Commission, as seen through its proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market ('the ECN+ Directive').

TABLE OF ABBREVIATIONS

EUMR	Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) [2004] OJ L 24/1
EUMR 2009 Report	European Commission, ‘Communication to the Council: Report on the functioning of Regulation No 139/2004’, COM(2009) 281 final
Leniency Notice	Commission Notice on Immunity from fines and reduction of fines in cartel cases [2006] OJ C 298/17
NCA s	National Competition Authorities
Network Notice	Commission Notice on cooperation within the Network of Competition Authorities [2004] OJ C 101/43
Regulation 1/2003	Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1
TFEU	Consolidated Version of the Treaty on the Functioning of the European Union, [2012] OJ C 326/01
the Commission	The European Commission
the Court	The Court of Justice of the European Union
the ECN+ Directive	European Commission, Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, COM(2017) 142 final 2017/0063 (COD)
UK	United Kingdom

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1. Introduction

In the European Union, competition law rules are enforced by both the European Commission ('the Commission') and national competition authorities ('NCAs'). Council Regulation No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty ('Regulation 1/2003')¹ introduced a system of decentralisation of competition law enforcement requiring the co-operation of the Commission and NCAs. In this system, each competition authority is responsible independently for enforcement falling within the scope of its jurisdiction. In other words, the Commission and NCAs operate their enforcement according to a system of parallel competences.

The concept of leniency, as a form of competition enforcement, also falls under the system of parallel competence. Leniency can be defined as a prisoner's dilemma. A cartel participant is offered the opportunity of communicating evidence on a cartel to competition authorities, in exchange for immunity or reduction of fines otherwise imposed on the cartel participant, when a finding of an infringement of EU competition anti-cartel rules stipulated in Article 101 of the Treaty on the Functioning of the European Union ('TFEU') is made by these same authorities. Its goal is to break "*the conspiracy of silence*"² prevailing amongst cartelists. A number of commentators agree that its effectiveness relies on the protection of several cornerstones in cartel enforcement: sanctions for cartel participants, a genuine risk of detection of cartels (i.e., severity and probability of the sanction)³ as well as transparency, certainty and predictability throughout the enforcement program⁴.

The Court of Justice of the European Union ('the Court') ruled that all leniency applications are independent from each other⁵. Unlike for concentrations which satisfy the Community dimension thresholds of the EU Merger Regulation ('EUMR')⁶, there is no one-stop shop for leniency applicants. This makes the task of filing for leniency highly complex. Leniency applicants must determine the exact geographical scope of their infringement and

¹ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (*Regulation 1/2003*) [2003] OJ L1.

² Julian Joshua, 'The Criminalization of Antitrust Leniency and Enforcement: the Carrot and the Stick. A View from Europe' (2000) (International Bar Association speech delivered in Amsterdam).

³ Thomas Obersteiner, 'International Antitrust Litigation: How to Manage Multijurisdictional Leniency Applications' (2013) 4(1) *Journal of European Competition Law & Practice*, at 17; Evguenia Motchenkova, 'Effects of leniency on cartel stability' (2004) CentER Discussion Paper No. 2004-98.

⁴ Caron Beaton-Wells, 'Immunity Policy: Revolution or Religion? An Australian Case Study' (2013) University of Melbourne Legal Studies Research Paper No. 659.

⁵ Case C-428/14 *DHL Express (Italy) Srl et DHL Global Forwarding (Italy) SpA contre Autorità Garante della Concorrenza e del Mercato* (CJEU, 20 January 2016), para 55.

⁶ Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation) (Text with EEA relevance) (*EUMR*) [2004] OJ L24/1.

apply in all jurisdictions to which the case may be referred to. Due to a lack of substantive harmonisation of EU law in the area of leniency, national jurisdictions have different substantive (e.g. criminalisation of cartels in the United Kingdom) and procedural (e.g. time of withdrawal from the cartel as a leniency applicant) requirements for leniency. Moreover, the number of jurisdictions involved in the cartel investigation may be large, especially when an increasing number of cartels include a cross-border dimension. Finally, leniency applicants are reluctant to apply for leniency in numerous jurisdictions because it means increasing their overall exposure to sanctions in the different jurisdictions.

The Notice on Cooperation within the Network of Competition Authorities ('Network Notice')⁷ sets out which authority should be in charge of investigating the cartel, but this system is very flexible and re-allocations or ramifications of cases between the Commission and NCAs are frequent. Therefore, leniency applicants who file solely at the Commission or at the wrong NCA may lose the benefit of their leniency application if another applicant beats them to the appropriate jurisdiction. It is thus no longer just a "*race to the regulator*"⁸. It is a race to the "right" regulator, and at the receiving end stands the resulting legal uncertainty of the leniency procedure. Moreover, as seen in the *Laundry Detergent* case⁹ further explained below, different competition authorities each have their own approach to the object and scope of the cartel.

This leads to a situation where leniency applicants have no longer any legal transparency, certainty and predictability about the outcome of their leniency applications due to the non-coordination and excessive decentralisation of these authorities. Furthermore, their place in the leniency queue is not guaranteed as they may have applied to the wrong jurisdiction. Each of these applications comes at a cost for undertakings. This cost is both a financial one (each leniency application is an added expense for the undertaking) and a legal one (risk of follow-on damages actions or even criminal proceedings in certain jurisdictions).

For cartel participants, applying for leniency is a calculated risk. It consists in divulging information on the cartel with the goal of obtaining immunity. However, immunity plays the role of the carrot in this game-theoretical approach and, without a guarantee that the first

⁷ Commission Notice on cooperation within the Network of Competition Authorities (Text with EEA relevance) (*Network Notice*) [2004] OJ C101/43.

⁸ Peter Whelan, *The Criminalization of European Cartel Enforcement: Theoretical, Legal, and Practical Challenges* (2014), Oxford Studies in European Law, ch 5; Scott D. Hammond, 'Cornerstones of an effective leniency program' (2004) (speech at ICN workshop on leniency programs, Sydney), at 10 ("*race to be the first to the enforcer's door*"); Celine Gauer and Maria Jaspers, 'Designing a European solution for a "one stop leniency shop"' (2006) 27(12) European Competition Law Review, at 685-692 ("*race to the top*").

⁹ *Consumer detergents* (Case COMP/39.579) Commission Decision C(2011) 2528 final; Autorité de la concurrence, *Décision n°11-D-17 relative à des pratiques mises en oeuvre dans le secteur des lessives* [Decision n°11-D-17 relating to practices implemented in the laundry detergent sector] (2011).

applicant will actually benefit from this immunity, the leniency programme loses its attractiveness. In other words, benefits of immunity are overstepped by the risk for the leniency applicant of falling from even higher up.

This paper will examine whether the creation of a one-stop leniency shop at EU level, such as the one established in the area of EU merger control, could, through minimum harmonisation of certain procedural rules, increase the level of legal certainty of the leniency procedure, particularly for leniency applicants filing in multiple competition authorities in the framework of a cross-border cartel. The aim of this paper is therefore to assess how minimum harmonisation, aimed at strengthening central enforcement, could guarantee leniency applicants a higher level of judicial protection than the one currently made available to them, and which model of minimum harmonisation would best guarantee this legal certainty to leniency applicants.

In order to scrutinize minimum harmonisation of leniency, three angles of research will be explored throughout the paper. Firstly, why minimum harmonisation should be favoured over a system of full centralisation. Secondly, which lessons can be learned from the one-stop-shop of the EUMR in terms of judicial protection guarantees. Thirdly, the reasons for which a one-stop-shop is necessary in order to achieve minimum harmonisation, through central enforcement of the EU leniency programme, mainly stemming from the substantive differences in national leniency programmes (e.g. availability of immunity for ringleaders, criminal prosecution, time of departure from the cartel of the leniency applicant).

This Master Thesis will first apply a normative analysis based on a questioning of the current state of the leniency programme in the EU (examining case law, the Leniency Notice¹⁰, the Network Notice¹¹, as well as the ECN Model Leniency Programme¹²) evaluated in parallel with the current legal framework of the one-stop-shop established by the EUMR for concentrations (examining case law and the text of the EUMR¹³). Secondly, this paper will assess, in a normative approach, which harmonized application system identified and proposed by a number of scholars would best guarantee legal certainty for leniency applicants.

To answer the main research question, the following structure will be applied: the manner in which the leniency programme currently operates in the EU, which difficulties it faces and on which principles it relies, what is the system of the EUMR for concentrations with

¹⁰ Commission Notice on Immunity from fines and reduction of fines in cartel cases (Text with EEA Relevance) (*Leniency Notice*) [2006] OJ C298/17.

¹¹ *Supra* note 7 (*Network Notice*).

¹² European Competition Network, 'ECN Model Leniency Programme' (as revised in November 2012).

¹³ *Supra* note 6 (*EUMR*).

a Community dimension, and could a similar system be created in order to have an EU one-stop shop leniency programme.

2. Complexities of the current EU leniency application system

In order to conduct a full review of the current EU leniency application system, the benefits of the leniency programme from both the cartelists angle and the competition authorities angle must be scrutinized in order to determine what type of minimum harmonisation to establish. On the side of cartelists, the leniency system relies on a series of incentives and disincentives which must be weighted. For this enforcement system to be efficient, incentives must outweigh disincentives (i.e., this creates a win-win scenario). Finally, this system has also proven to be beneficial, not only to leniency applicants, but also to competition authorities who need an efficient leniency system.

2.1. Benefits of the leniency tool for businesses

Under Article 101(1) TFEU, competitors must restrain from co-operating and forming cartels that would distort competition but must instead compete on the merits¹⁴. Such co-operation can take the form of a cartel where an agreement between undertakings, decision by association of undertakings or concerted practice has as its object or effect the prevention, restriction or distortion of competition within the internal market, insofar as it may affect trade between Member States¹⁵. Cartels serve the mutual self-interest of competitors¹⁶, as they allow cartelists to artificially maintain a high level of prices. The leniency tool was specifically designed to destabilize these cartels. It has proven to be the most efficient tool to catch cartels, with over 60% of cartel infringements being discovered through leniency¹⁷.

2.1.1. Incentives for businesses to apply for leniency

Throughout the legal evolution of the leniency tool, regulators found that the effectiveness of leniency relies on a number of incentives established to convince cartelists to reveal the existence of their cartel. In other words, this investigatory tool's effectiveness relies on the sole cartel participants' willingness to admit their involvement in a cartel, to put an end to the infringement, and to co-operate with competition authorities¹⁸. These incentives or benefits are

¹⁴ Richard Whish and David Bailey, *Competition Law* (2015), Oxford University Press, 8th ed, at 546.

¹⁵ Consolidated Version of the Treaty on the Functioning of the European Union, [2012] OJ C 326/01, Article 101(1).

¹⁶ *Supra* note 14 (Richard Whish).

¹⁷ Tine Carmeliet, 'How lenient is the European leniency system? An overview of current (dis)incentives to blow the whistle' (2011-2012) *Jura Falconis* Jg. 48, nummer 3.

¹⁸ *Supra* note 10 (*Leniency Notice*), paras 8-13 ("*II. Immunity from fines*") and paras 23-26 ("*III. Reduction of a fine*").

the reason for the success story of the leniency tool and must therefore be considered when reviewing the legal framework of the leniency tool.

The basic scheme on which the leniency system relies is the following: in exchange for information on a cartel, competition authorities will offer cartelists reporting the cartel, either immunity from sanction or a reduction of fine. In other words, the leniency applicants will benefit from a security from sanction or a reduced sanction despite their involvement in a prohibited conduct. In consideration of the growing amounts of cartel fines imposed¹⁹, leniency has become an ever more attractive option for cartelists. Leniency offers a safe haven that no other authority can provide.

2.1.2. Disincentives for businesses to apply for leniency

As the number of leniency applications has been declining in recent years by almost 50%²⁰, disincentives to apply for leniency are currently under careful scrutiny.

Short-term difficulties for stakeholders will first be assessed. Indeed, when applying for leniency, applicants will bear a number of extra risks or extra costs. First of all, reporting the cartel leads to the end of cartel profits. Price-fixing can result in hundreds of millions of surplus profits for cartelists²¹. Furthermore, the reputation of the cartel member who defects will take a toll, and it is also unlikely to be trusted in the participation of any other future cartel²². Internal disruptions may also take place within the reporting cartelist's company such as the cost of time and resources spent in legal proceedings and/or the loss of certain employees due to the damaged reputation of the company²³.

Other factors are also considered by potential leniency applicants when deciding whether to apply for leniency or not. A majority of practitioners have indicated that their clients are losing interest in the leniency programme, mainly due to the risk of follow-on damages actions²⁴. Today, the two trending disincentives for businesses to apply for leniency are clearly

¹⁹ European Commission, *Cartel Statistics*, available at

<http://ec.europa.eu/competition/cartels/statistics/statistics.pdf>

²⁰ Johan Ysewyn and Siobhan Kahmann, 'The Decline and Fall of the Leniency Programme in Europe' (2018) *Concurrences Review* n° 1, Art. n° 86060, at 45; Stefan Thomas and Manuel Duenas, 'The draft provisions on antitrust fines in the Commission's ECN+ Proposal' (2018) *Zeitschrift für Wettbewerbsrecht (ZWeR - Journal of Competition Law)*.

²¹ Christopher R. Leslie, 'Antitrust Amnesty, Game Theory, and Cartel Stability' (2006), 31 *Journal of Corporation Law*, at 453-488.

²² *Ibid.*

²³ *Ibid.*

²⁴ Johan Ysewyn and Siobhan Kahmann, 'The Decline and Fall of the Leniency Programme in Europe' (2018), *Concurrences Review* n° 1-2018, art. N° 86060, at 45.

the risk of follow-on damages actions²⁵, and the interlinked concern of stakeholders for the disclosure of parts of leniency applications, despite the safeguards introduced in the Damages Directive to protect corporate statements²⁶.

Faced with these strong adverse consequences, it is essential to guarantee the benefit of immunity to the leniency applicant choosing to take the risk of reporting the cartel. In other words, the leniency procedure should be transparent and predictable in order to gain the confidence of potential leniency applicants in the leniency process²⁷. However, cases such as the *DHL* case²⁸ revealed that, due to the independence of each single leniency application, leniency applicants may lose the benefit of immunity in certain relevant jurisdictions if the leniency applicant does not apply first and simultaneously in all jurisdictions that may be dealing with the cartel, due to the acceptance of parallel proceedings²⁹.

2.2. Benefits of the leniency tool for competition authorities promoting whistleblowing

Leniency acts as a cartel deterrent by creating a state of constant threat of cartels being reported to the authorities. Since the establishment of the Anonymous Whistleblower Tool³⁰, allowing any individual to anonymously report a cartel, the threat of cartels being unveiled is present now more than ever. There is a direct link between the effectiveness of the leniency tool in unveiling cartels and the probability of cartel detection. As the probability of cartel detection increases, effectiveness of the leniency tool will also progress. Similarly, there is a direct correlation between the number of cartel decisions issued and the increase in cartel deterrence³¹.

The main benefit leniency programmes offer is that they allow competition authorities to be made aware of a cartel very early on, which will, in turn, speed up the information and evidence gathering process for competition authorities. In addition to obtaining these elements

²⁵ 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) (*Damages Directive*) [2014] OJ L349/1.

²⁶ Andreas Kafetzopoulos, 'European Commission policy on publication of cartel decisions: the latest victory of damage claimants against leniency applicants' (2015) 36(7) *European Competition Law Review*, at 295-297 (on the *Akzo Nobel* saga).

²⁷ Thomas Obersteiner, 'International Antitrust Litigation: How to Manage Multijurisdictional Leniency Applications' (2013) 4(1) *Journal of European Competition Law & Practice*, at 17.

²⁸ *Supra* note 5 (*DHL* case).

²⁹ *Supra* note 5 (*DHL* case), para 55.

³⁰ European Commission, Press release, *Antitrust: Commission introduces new anonymous whistleblower tool* (2017), available at http://europa.eu/rapid/press-release_IP-17-591_en.htm

³¹ Wouter P.J. Wils, 'The Use of Leniency in EU Cartel Enforcement: An Assessment after Twenty Years' (2016) 39(3) *World Competition: Law and Economics Review*, King's College London Law School Research Paper No. 2016-29, at 13.

more promptly, the investigation will also be less costly³². Indeed, leniency applications enable competition authorities to carry out precise targeted investigations and therefore allows them to reduce the time and resources necessary to sanction the cartel³³. In addition to these short-term practical benefits, the leniency tool also presents design-specific benefits.

2.2.1. Cartelists are “best placed” to report a cartel

Firstly, no one is better placed than cartel participants to expose the existence of a cartel. Indeed, due to their secretive nature and the complex ways in which they operate, cartels are difficult for competition authorities to detect without the help of a cartel participant³⁴. Leniency’s first function is thus to be a cartel detection tool. However, in most instances, cartelists file for leniency after the cartel has been detected by competition authorities in order to provide them with additional information on the cartel (i.e., in the EU about 54% of leniency applicants are filed after an investigation is opened³⁵). In this second configuration, leniency applications will enable competition authorities to obtain, in a fast and efficient way, strong and sufficient evidence in order to make a finding of an infringement of Article 101 TFEU. Whether the leniency application helps the Commission to carry out a targeted inspection or whether it allows it to find an infringement of Article 101 TFEU, in both cases, the first cartelist to apply for leniency will benefit from a full immunity if the leniency applicant provides sufficient information³⁶.

2.2.2. Exploiting the inherently unstable structure of cartels

Secondly, leniency exploits the inherently unstable nature of cartels by creating mistrust and tension amongst cartel members³⁷. Cartels are ruled by insecurity and a lack of trust amongst cartelists³⁸. Several economists analysed the potential of leniency on cartel destabilisation through a game theoretical approach, the result of which shows that the incentives associated

³² Basil Siddique, ‘Rationale and Benefits of Leniency Programs Under EU Competition Law and US Federal Anti-Trust Law’ (2016) Nottingham (Trent) Law School.

³³ Nicolo Zingales, ‘European and American Leniency Programmes: Two Models Towards Convergence’ (2008) 5(1) Competition Law Review, at 5-60.

³⁴ Peter Whelan, *The Criminalization of European Cartel Enforcement: Theoretical, Legal, and Practical Challenges* (2014), Oxford Studies in European Law, ch 5.

³⁵ Eric van Damme and Jun Zhou, ‘The Dynamics of Leniency Application and Cartel Enforcement Spillovers’ (2016) TILEC Discussion Paper No. 2016-006.

³⁶ *Supra* note 10 (*Leniency Notice*).

³⁷ *Supra* note 21 (Christopher R. Leslie).

³⁸ Scott D. Hammond, ‘Cornerstones of an effective leniency program’ (2004) (speech at ICN workshop on leniency programs, Sydney).

with leniency make defection likely³⁹. Cartel members fear that the cartel will be detected or reported, and the aim of leniency is to exploit this weakness further by offering a getaway door (i.e., full immunity) to the first cartel member who will report the said cartel. In addition to creating a potential for defection which reduces any trust that could exist between members of the cartel⁴⁰, leniency also only grants full immunity to the first cartel member to report the cartel⁴¹. This creates a so-called “*race to the regulator*”⁴². In other words, cartel members will “*rush to confess in order to outrun their co-conspirators*”⁴³. It is, to a certain extent, a ‘winner takes all’ approach⁴⁴. All cartelists applying for leniency after the first leniency applicant will be offered a reduction of fine set at a maximum of 50%. Despite the attractiveness of receiving a fine reduction rather than having to pay the full amount of the fine, full immunity is a unique safe harbour that cartelists desire a lot more than a mere fine reduction. The leniency mechanism grants this very favourable treatment only to the first leniency applicant as its goal is to obtain as much applications as possible⁴⁵.

2.3. Interim conclusion

The leniency tool presents the strong benefit of offering an exit door to cartel members that engaged in prohibited conduct. However, due to the rise of private follow-on damages actions, leniency applicants are currently unwilling to report cartels as they fear incurring enormous costs in civil damages actions. Competition authorities, on the other side, are aware that leniency is the most effective tool to report cartels and destabilise them. It is therefore crucial to guarantee the success of this enforcement instrument. The conditions due to which the applicants at present are not fully protected must thus be changed in order to guarantee a higher level of legal certainty.

³⁹ Daniel Sokol, ‘Cartels, Corporate Compliance, and What Practitioners Really Think About Enforcement’ (2012) 78(1) *Antitrust Law Journal*, at 205.

⁴⁰ *Ibid*, at 204.

⁴¹ *Supra* note 10 (*Leniency Notice*), paras 8-13 (“*II. Immunity from fines*”).

⁴² *Supra* note 34 (Peter Whelan).

⁴³ *Supra* note 38 (Scott D. Hammond).

⁴⁴ *Supra* note 17 (Tine Carmeliet).

⁴⁵ European Competition Network, ‘ECN Model Leniency Programme: Report on Assessment of the State of Convergence’ (*Report on Assessment of the State of Convergence*) (2009), para 32.

3. The condition due to which leniency applicants at present are not guaranteed full judicial protection

Due to the range of adverse consequences of applying for leniency listed above, it would be essential for competition authorities to offer maximum legal certainty to leniency applicants taking the risk of reporting a cartel. In other words, the leniency procedure should be transparent and predictable⁴⁶. This transparency should include the premise that the firm admitting participation in the cartel will not be subject to antitrust liability⁴⁷.

However, in situations of cross-border cartels, different competition authorities may intervene and due to both the substantive disparities in national competition laws and the mixture of inconsistently applied allocation rules included in both the legally binding Regulation 1/2003 and the non-legally binding Network Notice, it is very complex for leniency applicants to foresee the outcome of this procedure. Moreover, regulators have repeatedly failed in previous attempts to increase the level of legal certainty of the leniency procedure. This lack of legal certainty is directly responsible for deviations from the principle of *ne bis in idem*.

3.1. Lack of harmonisation of national substantive rules

The lack of harmonisation in national substantive rules is a great disincentive for a number of leniency applicants. Despite an on-going process of soft harmonisation of EU leniency rules within the ECN, leniency programmes across the EU are far from presenting uniform substantive rules. There are a number of problematic divergences in national leniency rules.

The lead example of national substantive discrepancies is the issue of criminal liability for cartel participation in certain jurisdictions such as the United Kingdom⁴⁸ or others⁴⁹. As a consequence of this policy choice, the United Kingdom ('UK') requires different elements of evidence from its leniency applicants. Criminal enforcement was not excluded by Regulation 1/2003⁵⁰ even though the Commission does not provide for criminal sanctions for cartel

⁴⁶ *Supra* note 27 (Thomas Obersteiner).

⁴⁷ Directorate for Financial and Enterprise Affairs Competition Committee: Working Party No. 3 on Co-operation and Enforcement, 'Use of Markers in Leniency Programmes' (2014), para 56, available at [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3\(2014\)9&doclanguage=en](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3(2014)9&doclanguage=en).

⁴⁸ "Dishonesty offence" of the Enterprise Act (2002), ss. 188A-188B as amended by the Enterprise and Regulatory Reform Act (2014). See also Christopher R. Leslie 'Antitrust Amnesty, Game Theory, and Cartel Stability' (2006), 31 Journal of Corporation Law, at 459.

⁴⁹ Wouter P.J. Wils, 'Is Criminalization of EU Competition Law the Answer?' (2005) 28(2) World Competition: Law and Economics Review, at 130 (list of other jurisdictions allowing criminal prosecution).

⁵⁰ *Supra* note 1 (Regulation 1/2003), Articles 5 and 12(3).

participants at EU level⁵¹. The EU legislature also chose, under its Leniency Notice⁵², to not offer protection to leniency applicants from criminal prosecution⁵³. Criminal liability, which can lead to heavy criminal fines or imprisonment for individuals that engaged in specific conducts, is a strong disincentive for potential leniency applicants involved in cross-border cartels. Indeed, such leniency applicants will need to file for leniency in each jurisdiction where the cartel operated, and if the UK is among these jurisdictions, potential leniency applicants are less likely to apply for leniency as they fear reporting the cartel will lead them to criminal sanctions in the UK. Furthermore, even if applicants choose to apply in all relevant jurisdictions except the UK, in order to shield themselves from UK criminal sanctions, due to the overall exposure of the cartel in other jurisdictions and the exchange of information between NCAs, the UK could well initiate proceedings against the cartel and this cartelist.

Secondly, while certain jurisdictions provide immunity to instigators of the cartel (also referred to as ‘ringleaders’) such as France does, other jurisdictions like Poland do not offer them protection⁵⁴. Similarly, certain legal systems require the leniency applicant to put an end to their participation in the cartel as soon as it reveals its existence (i.e., UK), while other jurisdictions, such as Germany, require leniency applicants to continue their participation in the cartel in order to not alert other cartelists that may be tempted, for instance, to destroy evidence⁵⁵.

3.2. Failed regulatory attempts to improve legal certainty of the leniency procedure

The leniency programme’s effectiveness as an enforcement tool has grown over the years throughout the Commission’s tutorage. Between the adoption of the first Leniency Notice in 1996 by the Commission and its first revision in 2002, sixteen formal decisions out of eighteen cartel decisions were the result of a leniency application⁵⁶. This exponential growth in the number of leniency applications received by the Commission continued with the adoption of the 2002 Leniency Notice⁵⁷. As another illustration, between 2002 and 2008, 46 statements of

⁵¹ *Supra* note 1 (*Regulation 1/2003*), Article 23(5).

⁵² *Supra* note 10 (*Leniency Notice*).

⁵³ Luke Danagher, ‘The criminalisation of cartels: a European and trans-Atlantic perspective’ (2012) 33(11) *European Competition Law review*, at 522-525.

⁵⁴ Andreas Schwab and Christian Steinle, ‘Pitfalls of the European Competition Network – why better protection of leniency applicants and legal regulation of case allocation is needed’ (2008) 29(9) *European Competition Law Review*, at 523-531.

⁵⁵ *Ibid.*

⁵⁶ Ivo Van Bael, *Due Process in EU Competition Proceedings* (2011) Kluwer Law International, ch 5, at 259.

⁵⁷ *Ibid.*

objections out of 52 issued by the Commission were derived from evidence obtained through the leniency programme⁵⁸. As a result, leniency is a leading player in anti-cartel enforcement.

All of these regulatory changes aimed at increasing legal transparency and predictability of the leniency procedure in order to gain the confidence of an increasing amount of leniency applicants⁵⁹. The modified 2002 Leniency Notice's goal was to enhance legal certainty by making it a rule that full immunity would be granted to any first applicant submitting evidence to competition authorities. The Leniency Notice was again amended in 2006 to establish standardised evidence and information thresholds to be reached by leniency applicants and to create the marker system⁶⁰. Despite the Leniency Notice's non-binding nature⁶¹, it served as guidance for a number of Member States in the introduction of their national leniency programmes⁶². However, legal uncertainties remain in the substance of these rules as can be demonstrated through the example of the marker system and the threshold of information required to qualify for a reduction of fine.

The marker system introduced a system where cartelists are able to first provide limited information about the existence of a cartel to competition authorities, in order to guarantee their place in the leniency queue, before perfecting the market at a later stage with the provision of more detailed information. With the marker system, leniency applicants can also be informed whether they are the first to be approaching the Commission or whether other cartelists have already made a move⁶³. By making this information available, the overall transparency of the leniency procedure was supposed to be increased. The goal of the Commission by making this information available was also to give an incentive to cartelists to either guarantee themselves a sufficient fine reduction (i.e., if other members of the cartel have already applied) or to obtain full immunity while it is still available (i.e., when no member of the cartel has yet applied)⁶⁴. However, the grant of a marker is not automatic. The Commission reserved itself the discretionary power of determining whether or not to grant the marker. This discretionary power is a major disincentive for businesses to apply for a marker since the outcome of the procedure is unpredictable in more ways than one: the probability of the marker being granted

⁵⁸ Amit Kumar Singh, 'Pfleiderer: assessing its impact on the effectiveness of the European leniency programme' (2014), 35(3) *European Competition Law Review*, at 110-123; Ivo Van Bael, *Due Process in EU Competition Proceedings* (2011) Kluwer Law International, ch 5, at 259.

⁵⁹ *Supra* note 27 (Thomas Obersteiner).

⁶⁰ Ivo Van Bael, *Due Process in EU Competition Proceedings* (2011) Kluwer Law International, ch 5, at 259; Jatinder S. Sandhu, 'The European Commission's Leniency Policy: a success?' (2007), 28(3) *European Competition Law Review*, at 148-157.

⁶¹ *Supra* note 5 (*DHL case*), para 44.

⁶² *Supra* note 45 (*Report on Assessment of the State of Convergence*).

⁶³ *Supra* note 10 (*Leniency Notice*), para 15.

⁶⁴ *Supra* note 17 (Tine Carmeliet).

due to divergent marker policies (in terms of information requirements, timing and scope), the probability of the information provided being used in the event the marker is not provided, and the probability that the marker leads to a granting of leniency⁶⁵. Moreover, the time period within which the leniency applicant must perfect the market is also undetermined and left up to the free will of the Commission⁶⁶. All of these elements left up to the free determination of the Commission place the marker system, despite its goal of increasing transparency of the leniency procedure, at the heart of legal uncertainty and predictability.

As for fine reductions or partial immunity, it is granted to members of the cartel who report the cartel subsequently to the first applicant. This reduction will be gradual according to the order in which applicants come to the competition authority's door⁶⁷, and it will only be granted to cartel participants providing evidence of a “*significant added value*”⁶⁸. The assessment of whether the evidence provided is of significant added value, is also left up to the discretion of the Commission. Furthermore, the Commission will respond to the question of whether the information provided has significant added value only at the time of issuance of its final prohibition decision. Therefore, leniency applicants may well provide information to competition authorities without receiving any reward. This system is successful at creating additional tensions and a sense of panic among the cartel members but that is at the expense of legal certainty and thus of the effectiveness of the leniency application procedure.

3.3. The insufficiency of existing allocation rules in cross-border cartel settings

The great majority of cartels found in the EU nowadays go beyond national borders. As a result, competition law enforcement is increasingly complex and requires an ever-stronger level of co-operation between competition authorities. This globalisation of cartels has shed light on the need for the EU Community to adapt a number of competition law enforcement tools such as leniency in order to better reach cross-border cartels.

Leniency is now used across a majority of EU jurisdictions⁶⁹. As affirmed by the Court in the *DHL* case, each leniency filing is exclusive of the other, meaning that an application for leniency to one competition authority is not deemed to constitute an application to any other

⁶⁵ Directorate for Financial and Enterprise Affairs Competition Committee: Working Party No. 3 on Co-operation and Enforcement, ‘Use of Markers in Leniency Programmes’ (2014), para 57, available at [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3\(2014\)9&doclanguage=en](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3(2014)9&doclanguage=en).

⁶⁶ *Supra* note 10 (*Leniency Notice*), para 15.

⁶⁷ *Supra* note 10 (*Leniency Notice*), para 26.

⁶⁸ *Supra* note 10 (*Leniency Notice*), para 24.

⁶⁹ European Commission, ‘Authorities in EU Member States which operate a leniency programme’, available at http://ec.europa.eu/competition/ecn/leniency_programme_nca.pdf

competition authority⁷⁰. Therefore, cartelists that took part in a cartel spread out across different jurisdictions (i.e., cross-border cartels) will need to apply simultaneously at each NCA of the relevant jurisdictions in order to guarantee their place in the leniency queue in each jurisdiction⁷¹. Such an exercise is required of the leniency applicant due to the non-binding nature of the Network Notice which is the only document laying out case allocation rules within the ECN, and the limited number of legally binding rules on case allocation introduced in Regulation 1/2003.

3.3.1. Case allocation rules of the legally binding Regulation 1/2003

The only legally binding rules on case allocations are introduced in Regulation 1/2003, namely in Article 11(6). According to this article, the Commission can choose whether or not to initiate proceedings when an NCA is already “*acting on a case*” and NCAs are relieved of their competence if the Commission initiates proceedings for the adoption of a decision⁷². This is a first incoherence in case allocation as it consequently allows the Commission to pursue the same case as another NCA, while it forbids NCAs from initiating proceedings when proceedings on the same case have already been launched by the Commission.

A second incoherence can be found in Article 3(2) of Regulation 1/2003. This article prevents Member States from using their own national competition law to prohibit a conduct that does not match the requirements of Article 101(1) TFEU. However, in cases of cartel prohibitions, the Commission does find a violation of Article 101(1) TFEU even if it grants immunity from sanction to the leniency applicant involved. Thus, theoretically, NCAs could apply their own national laws to the same case and initiate parallel proceedings.

3.3.2. Case allocation rules of the non-legally binding Network Notice

To add even more confusion to the system, Article 12 of the Network Notice allows parallel proceedings when the antitrust infringement has “*substantial effects on competition*” in several territories and that the action of one NCA is insufficient⁷³. This is why in the Air Cargo case for example, Lufthansa approached 15 to 20 competition authorities to file for leniency⁷⁴.

⁷⁰ *Supra* note 5 (*DHL case*), para 55; European Competition Network, ‘ECN Model Leniency Programme’ (as revised in November 2012), para. 1.

⁷¹ *Supra* note 7 (*Network Notice*), para 38.

⁷² *Supra* note 1 (*Regulation 1/2003*), Article 11(6).

⁷³ *Supra* note 7 (*Network Notice*), Article 12.

⁷⁴ Virgilio Mouta Pereira, ‘The seven deadly sins: shortfalls of a “true European solution” for a “one-stop leniency shop”’ (2016) 37(5) *European Competition Law Review*, at 186-192.

However, there is no provision neither in Regulation 1/2003 nor in the Network Notice, providing for a prohibition on multiple sanctioning, although the Court has expressly affirmed that “any previous punitive decision must be taken into account in determining any sanction which is to be imposed”⁷⁵.

3.3.3. *The importance of the geographical scope in case allocation*

This system is overall highly flexible in terms of jurisdictional allocation. The Commission may refuse to initiate proceedings for a number of reasons and is, for example, free to determine the relevant geographical scope of the conduct⁷⁶. As was seen in the *Elevator* cartel, the Commission is free to decide whether the cartel was operated on an EEA-wide basis or on a country-by-country basis, and to eliminate any country it deems not to have been concerned by the conduct, even if that means allowing parallel proceedings in some countries (in this case by Austria in the same year).

The Commission argues that this system ensures the treatment of all infringements and avoids under-punishment⁷⁷. However, a counter-argument is made that this system allows the Commission to select the most high-profile cases, regardless of the number of jurisdictions the cartel took part in⁷⁸, and as a result, in the *Elevator* cartel, the title of first leniency applicant varied across countries (Kone in Belgium and Luxembourg, and ThyssenKrupp in Austria)⁷⁹.

3.3.4. *The issue of partial re-allocations*

In many cases, parts of the case are re-allocated by the Commission to NCAs⁸⁰. In such cases, the Commission grants conditional immunity to the leniency applicant, but this leniency applicant may not qualify for immunity in other jurisdictions due to a difference in substantive rules (such as in Ireland, if the undertaking was a ringleader of the cartel). In this situation, NCAs may apply a different outcome to the same case.

As a result, the leniency application system is neither efficient nor provides sufficient legal certainty for businesses as they observe that filing in the wrong authorities involves a waste of resources, time and the transmission of a vast quantity of confidential information to

⁷⁵ Case 14/68 *Walt Wilhelm and others v. Bundeskartellamt* [1969], para 11.

⁷⁶ *Supra* note 27 (Thomas Obersteiner), page 29.

⁷⁷ Andreas Schwab and Christian Steinle, ‘Pitfalls of the European Competition Network – why better protection of leniency applicants and legal regulation of case allocation is needed’ (2008) 29(9) *European Competition Law Review*, at 523-531.

⁷⁸ *Ibid.*

⁷⁹ Vassili Moussis, ‘Patchwork or framework?’ (2008) *Global Competition Review*, at 33.

⁸⁰ *Supra* note 5 (*DHL* case).

a large range of competition authorities which may lead to information leaks. As a consequence of this opaque jurisdictional system, it is increasingly difficult, especially at the very first stages of the investigation, to identify which competition authority will be dealing with the case⁸¹. Furthermore, at such time, it may be difficult for the leniency applicant to determine the exact scope of the alleged conduct⁸².

3.4. Deviations from the principle of “no double jeopardy”

In accordance with the principle of *ne bis in idem*, recognised as a general principle of European Union law applicable in competition law cases⁸³, a case based on the same facts cannot be prosecuted more than once. In a preliminary ruling of 1969, the Court was asked whether an NCA had the right to apply its provisions of national law to the same facts according to which the Commission had already initiated proceedings under Article 101 TFEU⁸⁴. The Court affirmed that “*in principle the national cartel authorities may take proceedings also with regard to situations likely to be the subject of a decision by the Commission*”⁸⁵ and that “*one and the same agreement may, in principle, be the object of two sets of parallel proceedings*”⁸⁶. Therefore, the Court allowed in this case for parallel proceedings to take place.

Although this decision was taken under the past regulatory regime of Regulation No. 17/62⁸⁷ and not the current one of Regulation 1/2003, Regulation 1/2003 aims at increasing decentralisation and thus, the autonomy of national cartel authorities. Therefore, this new regime cannot be seen as being in conflict with such a decision. NCAs are still competent to apply national competition laws and Regulation 1/2003 only provides that “*Where a competition authority of a Member State or the Commission has received a complaint against an agreement, decision of an association or practice which has already been dealt with by another competition authority, it may reject it [emphasis added]*”⁸⁸. Therefore, there is no

⁸¹ Stefan Thomas and Manuel Duenas, ‘The draft provisions on antitrust fines in the Commission’s ECN+ Proposal’ (2018) *Zeitschrift für Wettbewerbsrecht (ZWeR - Journal of Competition Law)*; Cornelis Canenbley and Michael Rosenthal, ‘Co-operation between antitrust authorities in - and outside the EU: what does it mean for multinational corporations’ (2005) 26(2) *European Competition Law Review*, at 106-114.

⁸² *Supra* note 74 (Virgílio Mouta Pereira).

⁸³ Case C-238/99 P *Limburgse Vinyl Maatschappij NV (LVM) v Commission* [2002] ECR I-8375; Case C-244/99 *DSM Kunststoffen BV v Commission* [2002] ECR I-8375, para 59. See also Bas van Bockel, ‘The “ne bis in idem” principle in the European Union legal order: between scope and substance’ (2012) 13(3) *ERA Forum*, at 325-347.

⁸⁴ Case 14-68 *Walt Wilhelm and others v. Bundeskartellamt* [1969].

⁸⁵ *Ibid*, para 4.

⁸⁶ *Ibid*, para 3.

⁸⁷ EEC Council, ‘Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty’ [1962], OJ 204/62.

⁸⁸ *Supra* note 1 (Regulation 1/2003), Article 1, para 2.

obligation on behalf of any competition authority to reject a case that has already been dealt with by another authority.

However, in practice, competition authorities do not deliver exactly identical decisions, particularly since under Article 11(6) of Regulation 1/2003, NCAs are not allowed to initiate proceedings once the Commission already has. Therefore, competition authorities have a tendency to differentiate practices under criteria such as scope of the conduct or scope of the product, in order to justify the issuance of a decision on similar facts.

An illustration of this practice can be seen in the *Laundry Detergent* cartel. In this case, two separate decisions were issued a few months apart regarding the same cartel. One was from the Commission⁸⁹ and the other one from the French NCA⁹⁰. The first applicant to benefit from full immunity were different in these two cases (i.e., Henkel benefited from full immunity in the Commission's decision while Unilever did under the French NCA's decision). The French NCA stated that the object, products, geographical scope, periods of the cartel and relevant undertakings (i.e., with Colgate-Palmolive appearing as an addition in the French proceedings) were different⁹¹. Despite the justification of the French NCA, it seems that the principle of *ne bis in idem* is very close from being infringed and legal certainty was not guaranteed as Henkel benefitted from immunity in one of the proceedings and not in the other.

Having different first-ins in different jurisdictions creates inefficiencies and divergences of enforcement which should not take place in the framework of a co-operative ECN. Henkel announced it would appeal the French decision, stating that "*these practices [in France] cannot be distinguished from the rest of the practices*"⁹². However, both the Commission and the French NCA found that the cases were sufficiently different to justify separate treatment⁹³.

3.5. Interim conclusion

At present, leniency applicants are not guaranteed full judicial protection due to a number of reasons. At the top of the list appears the lack of harmonisation of national substantive rules rendering multiple leniency filings quasi impossible. The EU legislature has failed a number of times in its regulatory attempts to improve legal certainty of the leniency procedure in general, and case allocation rules are insufficiently clear to be understood by leniency applicants who

⁸⁹ *Consumer detergents* (Case COMP/39.579) Commission Decision C(2011) 2528 final.

⁹⁰ Autorité de la concurrence, Décision n°11-D-17 *relative à des pratiques mises en oeuvre dans le secteur des lessives* [Decision n°11-D-17 relating to practices implemented in the laundry detergent sector] (2011).

⁹¹ *Ibid*, para 47.

⁹² *Supra* note 74 (Virgílio Mouta Pereira).

⁹³ *Supra* note 27 (Thomas Obersteiner).

took part in a cross-border cartel. This leads to a situation where the outcome of leniency applications is unpredictable both substantively and procedurally, and where certain deviations from the principle of “no double jeopardy” can occur. A one-stop leniency shop would not resolve all of these issues at once, but it would, through the establishment of minimum central enforcement, make parallel proceedings less likely. It could also introduce a system of case allocation rules that is more transparent and understandable for leniency applicants, as was introduced in the EUMR with respect to concentrations.

4. Learning from the one-stop-shop of the EUMR system

The one-stop-shop of the EUMR system is the only example of minimum harmonisation through central enforcement previously established under competition law rules. This is why this system must be examined, taking it account the jurisdiction allocation rules it set out, and both the efficiencies and inefficiencies of this central enforcement system.

4.1. Jurisdiction allocation

The EUMR was established in 2004 with two aims: its first objective was to make sure that competition within the internal market would not be disrupted by large-scale mergers, acquisitions and joint ventures; its second goal was to increase judicial protection of the parties to a concentration. Indeed, the EUMR set out jurisdictional thresholds above which the Commission will have jurisdiction. Judicial protection of stakeholders is deemed to be guaranteed insofar as the same rules will apply to all of the concerned concentrations with a Community dimension⁹⁴.

4.1.1. *General jurisdictional allocation rules of the EUMR*

Unlike for leniency, the European Commission and the Member States do not exercise concurrent powers in merger control proceedings⁹⁵. The EUMR system is organised as a one-stop-shop system where the Commission reviews only concentrations (i.e., lasting change of control occurring through a merger, acquisition or joint venture as defined by Article 2 of the EUMR) reaching sufficient Community and worldwide turnover thresholds, which can be found in Article 1 of the EUMR. Consequently, concentrations which do not reach these thresholds will not fall under the Commission's jurisdiction and will be reviewed by NCAs only. There is however a number of derogatory mechanisms to this general rule, including pre-notification or post-notification referrals, and the two-thirds rule.

4.1.2. *Exceptions to the “one-stop-shop” system of the EUMR: the two-thirds rule and the system of referrals*

The two-thirds rule excludes from the Commission's scope of jurisdiction all mergers with a strong national dimension. In the event, each of the undertakings parties to the concentration

⁹⁴ *Supra* note 6 (EUMR), Article 1.

⁹⁵ Laura McCaskill, 'The EU Merger Regulation: A One-Stop Shop or a Procedural Minefield?' (2013), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2818469.

achieves more than two-thirds of their aggregate Community-wide turnover within one single Member State, then the competition authority of that Member State will have jurisdiction over the concentration instead of the Commission⁹⁶.

In its 2009 Report on the functioning of the EUMR⁹⁷, the Commission evaluated that progress would have to be made regarding referrals. The system of pre-notification and post-notification referrals introduced in the EUMR hands out to both the notifying parties and the NCAs respectively, a certain degree of flexibility with regard to the allocation of jurisdictions.

Article 4 of the EUMR provides the merging parties with a power of initiative to request a pre-notification referral. Under Article 4(4) of the EUMR, the parties to a transaction with a Community dimension, may request to the Commission that the case be referred to a Member State if it “*may significantly affect competition*” in a distinct market within that Member State. Under the condition that the Member State to whom the case would be referred does not disagree with this referral, the Commission may grant a full or partial referral to the parties. By contrast, Article 4(5) of the EUMR allows the parties to a transaction, which would have to be notified and reviewed by at least three Member States, to refer their case to the Commission. In this case, the transaction will be automatically referred to the Commission if no NCA, that would have otherwise been competent to review the case, disagrees with this referral. Both Article 4(4) and 4(5) of the EUMR place the merging parties as key players in the referral process⁹⁸.

As for the post-notification referral powers of NCAs, Article 9 and Article 22 of the EUMR come in play. Article 9 of the EUMR, referred to as the “German clause”, permits a transaction reaching the Community dimension thresholds, to be referred to an NCA, if so approved by the Commission. Again, by contrast, Article 22 of the EUMR, referred to as the “Dutch clause” allows the NCA reviewing a transaction to refer such transaction to the Commission, even if the transaction does not reach the Community thresholds. The latter clause was initially introduced in the 1989 Merger Regulation for a single Member State without national merger control laws to be able to refer the case to the Commission⁹⁹.

⁹⁶ *Supra* note 6 (EUMR), Article 1.

⁹⁷ European Commission, ‘Communication to the Council: Report on the functioning of Regulation No 139/2004’, COM(2009) 281 final (EUMR 2009 Report).

⁹⁸ Ulrich von Koppenfels, ‘A Fresh Look at the EU Merger Regulation? The European Commission’s White Paper “Towards More Effective EU Merger Control”’ (2015) 36(1) Liverpool Law Review, at 7-31.

⁹⁹ *Ibid.*

4.2. Efficiencies of the EUMR one-stop-shop system

As enunciated in the Commission Notice on Case Referral in respect of concentrations¹⁰⁰, the one-stop-shop rule established in the EUMR is consistent with the principle of subsidiarity. This Notice also sets out several aspects of the principle of subsidiarity, namely “*which is the authority more appropriate for carrying out the investigation, the benefits inherent in a ‘one-stop-shop’ system, and the importance of legal certainty with regard to jurisdiction*”¹⁰¹. Legal certainty is therefore one of the clear objectives of the EUMR.

Two other objectives are also achieved by the one-stop-shop of the EUMR according to the Commission. First, in the 2009 Report on the functioning of the EUMR¹⁰², the Commission states that its exclusive jurisdiction to deal with concentrations with a Community dimension provides “*a ‘one-stop-shop’ advantage, which is widely regarded as an essential part of keeping the regulatory costs associated with cross-border transactions at a reasonable level [emphasis added]*”¹⁰³. Therefore, the one-stop-shop system aims at limiting costs both for competition authorities (i.e., by avoiding parallel merger proceedings in different countries by different competition authorities) and the parties to the concentration who only have to file at the Commission. The Commission also adds that this exclusive jurisdiction of the Commission with regards to concentrations with a Community dimension is the “*most efficient way of ensuring that all mergers with a significant cross-border impact are subject to a uniform set of rules [emphasis added]*”¹⁰⁴. This means that the Commission believes that the one-stop-shop contributes to the convergence of substantive rules with regards to merger control and at the very least, the EUMR ensures that the largest mergers affecting the internal market are applied the same set of rules.

4.3. Inefficiencies of the EUMR one-stop-shop system

Although the EUMR one-stop-shop system presents a number of efficiencies, it is also source of inefficiencies. These are mainly traced back to Article 22 of the EUMR allowing merging parties to refer a national case to the Commission, and partial referrals which divide cases and thus lead to unpredictable multi-jurisdictional results.

¹⁰⁰ Commission Notice on Case Referral in respect of concentrations (*Notice on Case Referral*) [2005], OJ C56/2.

¹⁰¹ *Ibid.*, para 8.

¹⁰² *Supra* note 97 (*EUMR 2009 Report*).

¹⁰³ *Ibid.*, para 2.

¹⁰⁴ *Ibid.*

4.3.1. *The tradeoff between procedural flexibility and legal certainty*

As stated previously, Article 22 of the EUMR offers to NCAs the possibility of referring a case to the Commission. Once the Commission has received such a request, it will inform all Member States as well as the merging parties that it received such a request. From that day, other Member States are provided with a period of 15 working days to decide whether or not to join the request. Despite the apparent overall transparency of this procedure, it however presents a few holes in terms of legal certainty and conflicting outcomes. First, it is important to note that the Commission will only be able to look at the effects of the transaction in the Member States that joined the referral¹⁰⁵. As a consequence, the Member States which chose not to be a part of the case referral will be competent to conduct their own review of the merger in parallel with the one lead by the Commission under the case referral. By allowing parallel review procedures by several competition authorities, Article 22 endangers legal certainty by allowing the issuance of conflicting decisions by different competition authorities. As stated by Juan Rodriguez, head of Sullivan & Cromwell's EU competition group, "[t]he use of [A]rticle 22 by member state authorities to refer transactions that fall below their own domestic jurisdictional thresholds could be seen as an unwelcome erosion of legal certainty for mergers that do not meet the EUMR jurisdictional thresholds."¹⁰⁶ Therefore, Article 22 is perceived as a source of legal uncertainty as it allows NCAs to refer cases that should be dealt with at national level, to be transferred to the Commission.

Furthermore, Article 22 referrals can hurt businesses by causing significant delays in merger clearance proceedings. For example, in the case of *ABF/GBI Business*¹⁰⁷ where an Article 22 referral was made, the Commission took nearly eleven months to approve the transaction.

For all these reasons, the Commission's White Paper "*Towards more effective EU merger control*" of July 2014¹⁰⁸, proposes a stricter jurisdictional allocation system. Indeed, the system in which Member States must choose whether or not to join a referral would be deleted. It would be replaced by one where competent Member States would have 15 working days in order to express their disagreement with the referral and if only one of these Member

¹⁰⁵ *Supra* note 98 (Ulrich von Koppenfels).

¹⁰⁶ Juan Rodriguez, 'Merger Referrals under the EU Merger Regulation' (2011), *Global Competition Review*, at 11, available at https://www.sullcrom.com/siteFiles/Publications/Rodriguez_EAR_Merger_Referrals_2012.pdf

¹⁰⁷ *ABF/GBI Business* (Case COMP/M.4980) Commission Decision C(2008) 5273. For further information see: Juan Rodriguez, 'Merger Referrals under the EU Merger Regulation' (2011), at 2, available at https://www.sullcrom.com/siteFiles/Publications/Rodriguez_EAR_Merger_Referrals3.pdf

¹⁰⁸ European Commission, 'White Paper: Towards more effective EU merger control' (Text with EEA Relevance) COM(2014) 449 final.

States disagrees with the referral, the Commission would not be given jurisdiction over the case. Therefore, the case would have to be dealt with solely by NCAs, without any intervention of the Commission. A system of early information exchange between NCAs would also be on the agenda in order to avoid the situation in which an NCA clears a merger before the Commission is able to assess it¹⁰⁹. This paper is thus moving towards stricter jurisdictional allocation rules and an enhanced central enforcement of merger control rules.

4.3.2. *The issue of partial referrals*

Partial referrals are a form of fragmented review of transactions. They consist in the division of a transaction according to its “*severable markets*”¹¹⁰. Therefore, transactions can be divided in different sectors in the same way that cartel prosecution can be divided into different product sectors which will be dealt with by different competition authorities. In the *DHL* case¹¹¹, the Commission dealt with the air freight forwarding services while the Italian NCA was in charge of the road freight forwarding sector. This division of sectors caused a disruption in the leniency outcomes, with DHL only being granted leniency under the Commission’s procedure and not under the Italian NCA’s procedure.

In the case of mergers, partial referrals create a “*threat of inconsistent and irreconcilable decisions being handed down by the European Commission and the Member States. This legal uncertainty, combined with added delay and expense, place a significant hardship on merging companies.*”¹¹² The inefficiency of parallel proceedings and inconsistent enforcement is clearly highlighted by the Commission as well¹¹³.

An example of a case of disruption in the field of merger regulation is the case of *Interbrew SA/Bass*¹¹⁴ where the Commission cleared most of the deal and referred parts of the transaction clearance to the UK for review. The UK subsequently issued a decision stopping the entire deal which forced Interbrew to sell Bass. The failure of this deal cost Interbrew a huge amount of money and demonstrated the power that partial referrals confer to NCAs, sometimes to the expense of legal coherence¹¹⁵.

¹⁰⁹ *Supra* note 98 (Ulrich von Koppenfels), referring to European Commission, ‘Commission Staff Working Document accompanying the White Paper “Towards more effective EU merger control”’ (2014), SWD(2014) 221 final, paras 153-159.

¹¹⁰ *Supra* note 95 (Laura McCaskill).

¹¹¹ *Supra* note 5 (*DHL* case).

¹¹² *Supra* note 95 (Laura McCaskill).

¹¹³ *Supra* note 97 (*EUMR 2009 Report*), para 18.

¹¹⁴ *Interbrew/Bass* (Case COMP/M.2044) Commission Decision SG(2000)D/106331.

¹¹⁵ *Supra* note 95 (Laura McCaskill).

On this issue, the Court of First Instance goes as far as stating that the risk of “*inconsistent, or even irreconcilable*” decisions is “*inherent in the referral system*”¹¹⁶. The court states that it cannot provide any remedy as there is no obligation on Member States to avoid the adoption of decisions conflicting with decisions of the Commission¹¹⁷. Despite the Commission’s policy of trying to avoid referrals, the number of referrals is not decreasing¹¹⁸. This system of flexibility is undoubtedly adversely affecting businesses and the benefits of the one-stop-shop as well as its aim to enhance legal certainty and judicial protection.

4.4. Interim conclusion

To sum up, the EUMR increased the level of legal certainty of stakeholders with regard to jurisdiction by setting up EU-wide jurisdictional rules with jurisdictional thresholds, above which the Commission is competent. The EUMR also introduced a minimum level of central enforcement for larger concentrations, more likely to affect the internal market. Finally, the EUMR also contributed to the reduction of costs for cross-border transactions.

However, a number of inefficiencies associated with the system of the EUMR have also been observed and are the reason for the Commission’s White Paper “*Towards more effective EU merger control*” of July 2014. Among these inefficiencies, Article 22 of the EUMR is perceived as a source of legal uncertainty as it allows the Commission to take over part of the NCAs’ jurisdictional powers. Furthermore, the use of Article 22 of the EUMR can cause significant delays and lead to parallel proceedings with different outcomes. Partial referrals are another risk which the Court accepts, despite the correlated lack of judicial protection for businesses and the resulting incoherent decisions.

¹¹⁶ Case T-199/02 *Royal Philipps Electronic* [2003] ECR II-1433, paras 379-381.

¹¹⁷ *Supra* note 95 (Laura McCaskill).

¹¹⁸ *Supra* note 100 (*Notice on Case Referral*) (“*referral should normally only be made when there is a compelling reason for departing from ‘original jurisdiction’ over the case in question, particularly at the post-notification stage*”).

5. Designing a one-stop-shop for leniency

As for the EUMR, minimum harmonisation for leniency could be made under Articles 103 and 352 TFEU¹¹⁹. Several options are available in order to establish minimum harmonisation of the EU leniency procedure, but not all of these options guarantee a higher level of legal certainty to stakeholders than the one made available to them under the current system. These options will be confronted with the experience of the EUMR, as well as the principle of legal certainty, in order to determine which ones are not viable, which ones are, and finally, in order to assess the alternative option of creating binding rules on case allocation and certain procedural requirements (as illustrated with the ECN+ Directive¹²⁰).

5.1. Legal basis for the EU legislature to take action

According to Recital 7 of the EUMR, the one-stop-shop set up for concentrations with a Community dimension was established according to, not only Article 103 TFEU (ex-Article 83 TEC) which allows the Council, after consultation of the European Parliament, to adopt any appropriate regulations and directives giving effect to Articles 101 and 102 TFEU, but also Article 352 TFEU (ex-Article 308 TEC) “*under which the Community may give itself the additional powers of action necessary for the attainment of its objectives [set out in the Treaties]*”¹²¹. One of the Treaties’ objectives is the prohibition of cartels under Article 101(1) TFEU, which leniency aims at achieving. Therefore, the Community is entitled to give itself the powers to adopt a regulation or directive aimed at achieving minimum harmonisation of the EU leniency application procedure.

Furthermore, Article 101 TFEU expressly provides under its section 2(c) that a regulation or directive can be taken in order to define “*the scope of the provisions of Articles 101 and 102*”, and under its section 2(e) it also allows regulations or directives aimed at determining the relationship between “*national laws and the provisions contained in this Section or adopted pursuant to this Article*”¹²². Therefore, action under Article 103 TFEU that would give effect to Article 101 TFEU is also possible.

¹¹⁹ Consolidated Version of the Treaty on the Functioning of the European Union, [2012] OJ C 326/01, Articles 103 and 352.

¹²⁰ European Commission, ‘Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market’ (*ECN+ Directive*), COM(2017) 142 final 2017/0063 (COD).

¹²¹ *Supra* note 6 (*EUMR*), Recital 7.

¹²² Consolidated Version of the Treaty on the Functioning of the European Union, [2012] OJ C 326/01, Article 101(1).

Although the application of Article 352 TFEU, the ‘flexibility clause’, is subject to obtaining unanimity in the Council, it is reasonable to believe that what was achieved by the EU legislature in the area of merger control could be replicated in the area of anti-cartel enforcement (i.e. a one-stop leniency shop). Finally, insofar as a regulation is binding and directly applicable in all Member States, while directives are only binding as to the result achieved and leave it up to the Member States the choice of form and methods to achieve that aim¹²³, using a regulation to set up this one-stop leniency shop should be favoured by the EU legislature in order to guarantee a maximum level of legal certainty for leniency applicants.

5.2. Non-viable options

5.2.1. *A fully centralised one-stop shop*

In a system of full centralisation, the Commission would directly receive and process all leniency applications. The benefit of this system is that all of the information provided by leniency applicants would be presented to a single entity. However, such a system would be contrary to Regulation 1/2003 and most likely inefficient.

Indeed, Regulation 1/2003 introduced a system of decentralisation aimed at empowering NCAs by granting them the possibility to directly enforce Article 101(3) TFEU and it also abolished the previous notification system of Regulation 17/62. Regulation 17/62 was replaced for several reasons. First, due to both administrative and financial inefficiencies of having a centralised system at a time where the Community was growing and thus needed for some powers to be delegated to national authorities accordingly with the principle of subsidiarity¹²⁴. In other words, the resources of the Commission were insufficient and the administrative workload too massive for a single authority. Second, the system had to be changed due to the imbalance centralisation created as it placed the Commission at the roles of “*law-maker, policeman, investigator, prosecutor, judge and jury*” in the same proceedings¹²⁵.

This is why Regulation 1/2003 allocated parts of the Commission’s tasks such as the collection and processing of leniency applications, to NCAs. The goal of Regulation 1/2003 was to make sure that, in the future, the same competition law rules would be applied uniformly throughout the EU due to the NCAs’ increased enforcement powers.

¹²³ Consolidated Version of the Treaty on the Functioning of the European Union, [2012] OJ C 326/01, Article 288.

¹²⁴ Lijun Jiang, ‘Decentralisation of EC Competition Law: Reform of Regulation No. 17’ (2011), 1(4) International Journal of Humanities and Social Science.

¹²⁵ Alison Jones and Brenda Sufrin, *Texts, Cases and Materials on EC Competition Law* [2008], Oxford University, 3rd ed., at 1147.

In particular, a novelty of this system is that undertakings need to conduct self-assessments and determine themselves whether their practices are in violation of Article 101 TFEU. Indeed, undertakings no longer need to notify their agreement to the Commission in order to make them legally valid. This also means that they are no longer informed ex ante of the legality of their conduct. Due to the disappearance of this guidance that the Commission used to provide, it is reasonably expected that Regulation 1/2003 should come with a requirement of a higher level of legal certainty for stakeholders as they should be able to know themselves what is allowed and what is prohibited¹²⁶. This is why, under Regulation 1/2003, the expectations of stakeholders regarding their judicial protection are higher than under the previous system of full centralisation.

In terms of inefficiencies that a system of full centralisation would be creating, it is obvious that it would first be too time-consuming for the Commission as well as too financially burdensome. Moreover, it would lead to less enforcement as some leniency applicants would be discouraged by the fact of having to refer to Brussels instead of their local competition authority that they are able to contact more easily¹²⁷. Furthermore, at the early stages of the discovery of a cartel, the work achieved by NCAs at local level will not be best achieved by the Commission who is not on the ground when, for instance, the scope of the inspection must be determined after submission of the leniency application, i.e., which evidence needs to be found¹²⁸.

5.2.2. *Mutual recognition system*

In a system of mutual recognition, any immunity or reduction of fine granted under the leniency programme of one Member State would be recognised by the competition authorities of other Member States.

This system would lead to situations where one competition authority would impose on all other competition authorities, its decision to grant or not to grant leniency, with binding effect¹²⁹. In terms of national sovereignty, such a system will not be acclaimed by Member States as it would allow one jurisdiction to be the decision-maker for all others. It would therefore no longer only be about centralising procedures, it would impact the substantive

¹²⁶ Frank Montag, 'The Case for a Reform of Regulation 17/62: Problems and Possible Solutions from a Practitioner's Point of View' (2008) 22(3) Fordham International Law Journal.

¹²⁷ Celine Gauer and Maria Jaspers, 'Designing a European solution for a "one stop leniency shop"' (2006) 27(12) European Competition Law Review, at 685-692.

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*

competition law rules of each Member State. It can also be assumed that such a system would be time-consuming and burdensome as all authorities would be conducting parallel investigations with no central actor at the table deciding on case allocations. Therefore, investigations would have to be carried out on the basis of multilateral contacts between NCAs which would, in turn, delay proceedings¹³⁰.

5.3. Viable options

5.3.1. Harmonisation of the summary application system

The *DHL* decision appears at first sight to be contradictory with the desire of EU institutions to increase the level of co-operation within the ECN and to break down walls between competition authorities. As an example of this will to increase co-operation between competition authorities, summary applications were introduced in 2012 in the revised Model Leniency Programme ('MLP') of the ECN. The ECN composed of both the Commission and NCAs, developed through the MLP, a basis for soft harmonisation of all EU leniency programmes. The goal of the MLP is "*to ensure that potential applicants are not discouraged from applying as a result of the discrepancies between the existing leniency programmes*"¹³¹.

In substance, the MLP introduced the system of summary applications allowing leniency applicants filing at the Commission to file, in parallel with their leniency application at the Commission, short applications containing limited information with any other NCA concerned with the cartel. This system allows leniency applicants to guarantee their place in the leniency queue in spite of potential full or partial re-allocation of cases to other jurisdictions. Its aim is to facilitate procedures for leniency applicants applying in multiple jurisdictions by allowing them to deliver a full leniency application to the Commission, and only shortened submissions to all other potentially relevant jurisdictions.

The argument could be made however that the summary application system does not sufficiently reduce the burden of potential leniency applicants due to the quantity of information it still requires. Indeed, for example in a situation where a dawn raid has just taken place, cartelists will panic and rush to the regulator in order to file for leniency. It is often difficult for them to determine at this early stage the geographical scope of their conduct, i.e., which territories were affected by the cartel and so on. Therefore, summary applications do not

¹³⁰ *Ibid.*

¹³¹ European Competition Network, 'ECN Model Leniency Programme' (as revised in November 2012), para 2.

alleviate the burden of filing in multiple jurisdictions, they merely reduce the substance of these applications and therefore represent a form of lesser evil.

However, the major issue with the system of summary applications, is that it does not yet benefit from sufficient harmonisation at EU level. For example, certain leniency programmes do not provide for a summary application system (i.e., Cyprus and Estonia) while others do not expressly provide for one but still accept them in practice (i.e., Sweden and Austria)¹³². To complicate things even further, some NCAs only accept summary applications for type 1A immunity¹³³, i.e., for leniency applicants who provide information prior to an inspection, and not type 1B immunity, i.e., for leniency applicants providing information following an inspection.

5.3.2. Creation of an EU-wide leniency marker

Leniency markers are presented in the 2012 revised Model Leniency Programme of the ECN¹³⁴. They allow leniency applicants to notify to a competition authority that they will submit an application, which guarantees their place in the leniency queue and, in exchange, this authority will grant the leniency applicant a certain period of extra time to provide the required information.

The current leniency system is known to operate a trade-off between “*time*” and “*accuracy*”¹³⁵ as it forces leniency applicants to rush to the regulator, with often not enough elements of information in their hands. The leniency marker effectively reduces this risk of inaccuracy by offering to stakeholders the chance of being granted full immunity in exchange for a complete set of information.

However, not all competition authorities have a leniency marker and many are reluctant to grant it. Many authors therefore suggest that an EU-wide leniency marker should be created. With a Community marker, the Commission would be the default agency in charge of receiving all leniency applications and it would, at the same time, be in charge of deciding whether case referrals should be made to NCAs. This would create a similar system to the one of the EUMR, i.e. Article 9 of the EU Merger Regulation allowing the Commission to refer a case to a competent NCA. Therefore, only the Commission would refer cases to NCAs and not vice

¹³² *Supra* note 74 (Virgílio Mouta Pereira).

¹³³ European Competition Network, ‘ECN Model Leniency Programme’ (as revised in November 2012).

¹³⁴ *Ibid*, paras 16-18.

¹³⁵ Directorate for Financial and Enterprise Affairs Competition Committee: Working Party No. 3 on Co-operation and Enforcement, ‘Use of Markers in Leniency Programmes’ (2014), para 56, available at [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3\(2014\)9&doclanguage=en](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3(2014)9&doclanguage=en); John M. Taladay, ‘Time for a Global One-Stop Shop for Leniency Marker’ (2012), 27 *Antitrust* 43.

versa, thus excluding the legal uncertainties of having NCAs refer national cases to the Commission as illustrated by Article 22 of the EU Merger Regulation¹³⁶. The main positive difference with the EUMR is that, for leniency, no jurisdictional threshold would exist which would free leniency applicants from the difficulties of determining the scope of their allegedly illegal conduct. Furthermore, in this system, leniency applicants of cross-border cartels would no longer be required to apply simultaneously to different authorities. Their place in the leniency queue would be guaranteed across all relevant jurisdictions.

This system operates a so-called “*convergence of process*”¹³⁷. This means that substantive national laws would not be affected and as a result, no sovereignty authority to prosecute cartels would be lost¹³⁸ (unlike for a system of mutual recognition).

The International Chamber of Commerce also proposed to create a standardized form for the filing of an EU-wide marker which would provide all competition authorities with the same standardized level of information. The information to provide would overall be equivalent to that requested for summary applications (i.e., name of the applicant, type of conduct, product concerned, geographical scope, duration, other parties and other competition authorities involved). However, the advantage of this system is that leniency applicants would not need to provide the Commission with additional information, as opposed to the system of summary applications where a full leniency application must be provided to the Commission in parallel with the summary applications made to NCAs. In other words, leniency applicants would provide the same elements of information as for summary applications, but the advantage with an EU-wide marker is that leniency applicants would not need to file in more than one competition authority.

As for the administration of this system, it is suggested that it would work only with participating jurisdictions¹³⁹. In other words, agencies would be offered the possibility to opt-in the EU-wide marker system. Jurisdictions which would choose to do so would then qualify as a jurisdiction forming part of this partially centralised system¹⁴⁰. If such a system is put in place, it could be combined with a harmonisation of the summary application system that leniency applicants could use for those jurisdictions that do not participate in the EU-wide marker system. Therefore, the EU legislature could combine both the harmonisation of the

¹³⁶ See section 4.3.1.

¹³⁷ John M. Taladay, ‘Time for a Global One-Stop Shop for Leniency Marker’ (2012), 27 *Antitrust* 43.

¹³⁸ *Ibid.*

¹³⁹ International Chamber of Commerce: The World Business Organization, ‘Proposal to the International Competition Network for a one-stop-shop for leniency markers’ (2016) An issues paper prepared by the ICC Commission on Competition 225/752.

¹⁴⁰ John M. Taladay, ‘Time for a Global One-Stop Shop for Leniency Marker’ (2012), 27 *Antitrust* 43.

summary application system and the creation of an EU-wide marker system in order to guarantee a maximum level of legal certainty and minimum harmonisation of the leniency application procedure.

5.4. An alternative to central enforcement: minimum harmonisation of procedural requirements as proposed in the ECN+ Directive

Despite appearances, regulators seem very much aware of the lack of legal certainty associated with the current EU leniency application procedure, as is reflected in one of the first statements of the Commission's recent proposal for a Directive that would empower competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market ('The ECN+ Directive'): "*cross-border legal certainty cannot be sufficiently achieved by Member States individually [...] EU action is needed to ensure that a leniency system is available and applied in a similar way in all Member States*"¹⁴¹.

The ECN+ Directive marks the beginning of hard harmonisation of the EU leniency application procedure, and one of its aims is to improve the co-operation between NCAs and the Commission. In its Chapter VI regarding Leniency, the ECN+ Directive proposes the harmonisation of basic principles on leniency applications. For example, in its Article 18, the Directive introduces general procedural conditions for qualifying as a leniency applicant such as the simultaneous withdrawal from the cartel, following the filing of a leniency application, which would remedy the current substantive national discrepancies on this issue. National discrepancies as to whether or not the leniency applicant should remain in the cartel particularly complicated the task of applicants applying in multiple jurisdictions in the situation where national competition rules could be directly opposed on the time of withdrawal from the cartel. The proposal also aims at making sure that all Member States adopt a marker system and the summary application system, with specific substantive requirements for the latter while the functioning of the marker system will be mostly left up to the discretion of Member States¹⁴².

The Committee on Economic and Monetary Affairs proposed in its draft report on the ECN+ Directive to add in Article 19, on the form of leniency applications, the requirement that "*applications for leniency may be submitted in one of the respective official languages of the*

¹⁴¹ European Commission, Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (*ECN+ Directive*), COM(2017) 142 final 2017/0063 (COD).

¹⁴² *Ibid.*, Articles 20 and 21.

relevant NCA or in one of the working languages of the Union”¹⁴³. Offering such a choice to leniency applicants would allow all leniency applications to be submitted in English, which would both save time and resources for businesses that would no longer necessarily need to seek local counsel in multiple jurisdictions¹⁴⁴. Such a technical procedural change would in fact be very welcomed by businesses and it would support their incentives to apply for leniency as it would be costing them less to do so.

However, the ECN+ Directive does not propose any binding rules on case allocations and merely transforms the rules of the ECN Model Leniency Programme in a binding Directive. It will however harmonise the summary application system and force NCAs to all adopt one.

6. Conclusion

As a conclusion, the current system of the EU leniency programme does not guarantee sufficient legal certainty to stakeholders for three reasons. The first one is that discrepancies in national leniency programmes subsist. The second is the mixture of non-binding and binding allocation procedural rules which are anything but predictable for stakeholders. The third is the inevitable consequence of this system, i.e., the risk of parallel proceedings and multiple sanctions for stakeholders. The creation of a one-stop leniency shop, through minimum harmonisation, would resolve part of this issue by guaranteeing a higher level of legal certainty to stakeholders.

The main issue identified in the EUMR one-stop-shop is the issue of referrals made by NCAs and partial referrals (or more generally, the division of cases). Therefore, firstly, the Commission should be the only entity in charge of making referrals (as proposed under the EU-wide leniency marker) and, secondly, division of cartel cases, whether they concern the geographical scope of the cartel as in the *Elevator* cartel or its product scope as in the *DHL* case, should be ruled out based on binding legislation regarding case allocation.

On the basis of Articles 103 and 352 TFEU, a regulation on the EU leniency programme could be made by the EU legislature. The aim of this regulation would be both to create an EU-wide marker system and binding case allocation rules, guaranteeing an efficient system of minimum central enforcement, and to harmonise the summary application system. The ECN+ Directive, whose aim is to harmonise both the marker system and summary application system, is currently under review by the EU legislature but is only a small step towards achieving

¹⁴³ Committee on Economic and Monetary Affairs, ‘Draft report on the proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market’, COM(2017) 142 final.

¹⁴⁴ John M. Taladay, ‘Time for a Global One-Stop Shop for Leniency Marker’ (2012), 27 *Antitrust* 43.

minimum harmonisation of the EU leniency application procedure, as it will not establish an EU-wide marker system. It will, however, harmonise the summary application system.

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