



LW6502: LLB Dissertation

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The Effective Enforcement of EU Competition Law against Cartels in Consideration of German, French and Irish National Enforcement Methods

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Chapter 1: Introduction

Objective of Dissertation

This dissertation analyses the effective methods of enforcement of EU competition law against cartels. It describes national methods of competition law enforcement in Germany, France and Ireland. Based on the main findings, suggestions will be provided as to the improvements that the European Commission could adopt if it were to reform its current model of enforcement in the future.

Origins of Cartel Enforcement

Cartels have been denoted as the ‘supreme evil of antitrust’ (*Verizon Communications v Trinko*)¹. Following tensions in the United States in the steel and coal industries, the Sherman Act² was established in order to prohibit arrangements made by businesses in restraint of trade as well as monopolisation as per Section 1 and 2 respectively³. This, in turn, had an influence on the Treaty of Rome⁴ negotiations which have inspired the formation of competition laws in the European Commission and its Member States⁵. Commissioner Vestager stated⁶ that ‘cartels are the most fundamental threat to competition’ and in recent times, the investigation of cartels has been made a priority by the European Commission. Neelie Kroes announced that she did not merely want to ‘destabilise cartels’ but ‘to tear the ground from under them’⁷.

¹ *Verizon Communications v. Law Offices of Curtis v Trinko* 540 U.S. 398 (2004).

² Enrico Raffaelli, *Antitrust between EU Law and National Law / Antitrust Fra Diritto Nazionale e Diritto Dell’Unione Europea* (Bruylant 2013) n.p.

³ Donald Baker, ‘The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging’ (2000) 69 *George Washington Law Review* 693, 694.

⁴ Dominique Barjot, ‘Cartels et Cartellisation : Des Instruments Contre les Crises ?’ (2014) 76 *Entreprises et Histoire* (Paris) 5, 16.

⁵ Carlos Arrébola, ‘The Historical Foundations of EU Competition Law’, Edited by Kiran Klaus Patel and Heike Schweitzer (2014) 34 *Legal Studies* 745, 5.

⁶ Margrethe Vestager, EU Commissioner for Competition, ‘A New Era of Cartel Enforcement’ (Speech at the Italian Antitrust Association Annual Conference, Rome, 22 October 2021)

<https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/speech-evp-m-vestager-italian-antitrust-association-annual-conference-new-era-cartel-enforcement_en> accessed 12 August 2022.

⁷ Neelie Kroes, EU Commissioner for Competition Policy Tackling Cartels, ‘A Never-Ending Task Anti-Cartel Enforcement: Criminal and Administrative Policy’ (Speech at the Panel Session Brasilia, Sao Paulo, 8 October 2009) <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_09_454> accessed 14 July 2022.

Dissertation Structure

This dissertation will be subdivided into five chapters. Following this introductory chapter: Chapter 1, Chapter 2 will outline the current enforcement methods of EU competition law at EU level. Chapter 3 will provide a description of the current laws and procedures in relation to the national methods of competition law enforcement in three Member States – Germany, France and Ireland. These countries were selected seeing as the French, German and English languages are at the heart of the functioning of the European Commission. As noted by Legrand, by looking at how different legal systems tackle similar issues, one is awarded with ‘a new perspective, allowing one to critically illuminate a legal system’⁸.

Following this cross-cultural overview, Chapter 4 will consist of a reflection and analysis of the improvements that the European Commission could adopt if it were to reform its current methods of enforcement in the future. These suggestions will be made based on the main findings in Chapter 3, i.e., on the differences identified in the methods of enforcement in Germany, France and Ireland and the current methods of enforcement at EU level. Chapter 5 will then conclude this research project, summarising the main takeaways from the dissertation. In the final chapter, I will give my opinion as to the changes that the European Commission could adopt if reforms were to take place in the future.

⁸ Pierre Legrand, ‘Comparative Legal Studies and Commitment to Theory’ (1995) 58 *Modern Law Review* 262, 264.

Chapter 2: EU Competition Law Enforcement against Cartels

2.1. Forming Cartels

Undertakings enter into agreements with competitors to gain ‘supra-competitive profits’⁹ when it is, in their eyes, a more convenient option¹⁰. This is one of the reasons why cartels are formed. In relation to undertakings, neither Regulation 1/2003 nor the Treaty itself contains a definition of what undertakings entail. According to Wils, the European Commission is of the view that an undertaking ought to be interpreted as ‘designating an economic unit’¹¹. The meaning behind this statement is clarified in the case law. For example, in *UNITEL*¹², an opera singer was deemed to be an undertaking. In *Reuter/BASF*¹³, an inventor was held to be an undertaking¹⁴. Lorenz states that undertakings consider several factors when deciding whether it is worthwhile to form a cartel, such factors include the ‘level of market concentration’, ‘barriers to entry’, ‘cross-ownership’, ‘demand inelasticity’ and ‘demand stability’¹⁵. Nonetheless, despite such knowledge, cartelists tend to be dishonest among themselves by not selling at prices that were previously agreed upon¹⁶. Undertakings involved in cartel activity elicit the severest form of competition restrictions¹⁷.

2.2. Article 101 TFEU

The enforcement of EU competition law against cartels at EU level is governed by Article 101 TFEU which, as noted by Craig and De Búrca, provides protection for undistorted competition¹⁸ that arises in the domestic market¹⁹. In terms of EU competition law enforcement, the Commission strives to further the interests of consumers ensuring that the

⁹ Christopher Harding and Julian Joshua, *Regulating Cartels in Europe* (Oxford University Press 2010) 12.

¹¹ Wouter Wils, ‘Is Criminalization of EU Competition Law the Answer?’ (2005) 28 *Kluwer Law International* 117, 13.

¹² *UNITEL* 78/516/EEC (1978) OJ L157/39.

¹³ *Reuter/BASF* 76/743/EEC (1976) IV/28.996.

¹⁴ Sandra Marco Colino, *Competition Law of the EU and UK* (8th edn, Oxford University Press 2019) 28.

¹⁵ Moritz Lorenz, *An Introduction to EU Competition Law* (Cambridge University Press 2013) 310.

¹⁶ *ibid* 312.

¹⁷ *ibid*.

¹⁸ Paul Craig and Gráinne De Búrca, *Eu Law: Text, Cases, and Materials* (7th edn, Oxford University Press 2020) 1035.

¹⁹ Benedikt Schwarzkopf, *Externe Kartellunterstützer Im Europäischen Kartellrecht* (Nomos Verlag 2018) 23.

free movement of goods is protected in the competitive economy²⁰. In this way, the access that consumers have to markets is better protected as there is a more honest selection on the market and the seller is free from coercion. This was clarified in the *Cement*²¹ judgment where it was stated that ‘the effect of such agreements [...] is to restrict free competition and to prevent the attainment of the common market, in particular by hindering intra-Community trade’. Lorenz notes that the effects of these agreements are ultimately passed on to consumers in the form of ‘reduced diversity of supply’ and ‘increased prices’²². It is therefore necessary that the Commission fines cartels for their illegal activity so that this money can be put back into the pockets of its citizens and consumers for the greater good of society.

2.3. EC Fining Policy

The fining policy that the Commission adopts is modelled on Article 23 Regulation 1/2003 and the Fining Guidelines which were published in 2006 - the extent of the fine imposed by the Commission cannot exceed 10% of the total turnover that the undertaking obtained in the previous business year²³. When arriving at a decision on the extent of the fine that the Commission will impose, it will consider the duration of the infringement as well as the gravity of the situation as per Article 23(3) Regulation 1/2003²⁴. As per the case of *Groupe Danone v Commission*²⁵ the Commission has ‘a particularly wide discretion [...] for the purposes of determining the amount of the fines, [...] without the need to refer to a binding or exhaustive list of criteria.’ According to Article 23(2)(a), fines might be increased due to some aggravating factors and for ring leaders or repeat offenders. The minimum amount of the additional fine is set at 16% as per the *Carglass*²⁶ judgment. It is also possible for the fines to be reduced, for example if the undertaking played a limited role in the cartel or the conduct was encouraged by legislation. Lorenz notes that the Commission is nonetheless restricted by the principles of proportionality, which is applied as a ‘general principle’²⁷ and

²⁰ David Richardson and Edward Graham, *Global Competition Policy* (Institute for International Economics 1997) 339.

²¹ *Case T-282/02 Cementbouw Handel & Industrie BV v Commission* [2006] ECR I.

²² *ibid.*

²³ Lorenz (n 15) 332.

²⁴ Article 23(3) Regulation 1/2003.

²⁵ *Case C-3/06 – Groupe Danone v Commission*.

²⁶ *Case COMP/39125 – Carglass*.

²⁷ Tor-Inge Harbo, ‘The Function of the Proportionality Principle in EU Law’ (2010) 16 *European Law Journal: Review of European Law in Context* 158, 159.

equal treatment²⁸ which asserts that the Commission ought to impose the same level of fines in similar cases²⁹. The principle of proportionality implies that the fines imposed by the Commission ought to be proportionate to both size of the cartel and the profits made. It is also important to note that although fines are imposed on undertakings for cartel activity, there are no criminal sanctions for such activity at EU level³⁰.

2.3.1. Examples of Fines Imposed by the Commission

The Commission imposes fines in order to deter ‘calculated companies’³¹ from breaching competition law and has increased the level of fines in recent years³². The *Carglass* cartel saw a record imposition of fines of €1,383 billion³³. In June 2022, the Commission imposed a €31.5 million fine on the metal packaging producers Crown and Siligan³⁴. In December 2021, the Commission fined Abengoa, the former ethanol producer €20 million in fines given the European ethanol market wholesale price formation mechanism³⁵. The AdBlue cartels including Daimler, Volkswagen Group and BMW were fined €875,189,000³⁶ in July 2021 having tampered with details in relation to the emission cleaning technology. A fine of €990 million was imposed on the Elevator and Escalator³⁷ cartel³⁸, and the Commission imposed fines of over €750 million on Mitsubishi and Toshiba for a gas insulated switchgear

²⁸ John Connor, ‘Has the European Commission Become More Severe in Punishing Cartels? Effects of the 2006 Guidelines’ (2011) 32 *European Competition Law Review* 27, 27.

²⁹ Lorenz (n 15) 332.

³⁰ Navpreet Singh, ‘The Detection of Bid-Rigging Cartels through the Leniency Arrangement’ (2021) 24 *Supremo Amicus* 768, 774.

³¹ Wouter Wils, ‘Optimal Antitrust Fines: Theory and Practice’ (2006) 29 *World Competition Law & Economics Review* 8.

³² Emmanuel Combe and Constance Monnier, ‘Fines against Hard Core Cartels in Europe: The Myth of Overenforcement’ (2011) 56 *The Antitrust Bulletin* 235, 5.

³³ Commission Decision of 12 November 2008 relating to a proceeding pursuant to Article 81 of the EC Treaty and Article 53 of the EEA Agreement (*COMP/39.125 – Carglass*) (Commission of the European Communities, 12 November 2008) <https://ec.europa.eu/competition/antitrust/cases/dec_docs/39125/39125_2726_3.pdf> accessed 02 August 2022.

³⁴ ‘Antitrust: Commission Fines the Metal Packaging Producers Crown and Siligan €31.5 million in Cartel Settlement’ (*European Commission Press Corner*, 12 July 2022) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_4483> accessed 18 August 2022.

³⁵ ‘Antitrust: Commission Fines Former Ethanol Producer Abengoa €20 million in cartel settlement’ (*European Commission Press Corner*, 10 December 2021) <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6769> accessed 19 August 2022.

³⁶ ‘Antitrust: Commission Fines Car Manufacturers €875 Million for Restricting Competition in Emission Cleaning for New Diesel Passenger Cars’ (*European Commission Press Corner*, 8 July 2021) <https://ec.europa.eu/commission/presscorner/detail/es/ip_21_3581> accessed 22 August 2022.

³⁷ *Case COMP/E-1/38.823 PO/Elevators and Escalators*.

³⁸ Paata Phutkaradze, ‘Cartel Agreements’ (2020) 2 *World Science* 22, 24.

cartel³⁹. The fact that these decisions are reported publicly and available on the European Commission Press Corner also creates a dissuasive effect. Nonetheless, these press releases do not contain any names of individuals involved in the cartels.

2.5. The Leniency Programme

Ginsburg and Wright note that there has been an increase of up to 60% in cartel detection since the introduction of the leniency notice in the US⁴⁰. The US Leniency programme influenced the system put in place by the European Commission in 1996⁴¹ and many Member States have adopted similar systems given its level of success⁴². As a result, more cartels are now being detected than ever before⁴³. On a similar note, Walsh states that more cartels are being detected by the Commission given the ‘persuasive effect of the leniency notice’⁴⁴. Kriszhan and Keidel are of the same view stating that the leniency programme ‘is an important tool to improve the effectiveness of its action to detect secret cartels’⁴⁵. Cartelists are usually fully aware that their behaviour is unlawful and they try everything possible to avoid detection and maintain secrecy⁴⁶. The Leniency Notice thus assists the Commission in identifying conduct that is contrary to EU law (*FLSmidth*)⁴⁷ as this is in the best interest of its consumers and citizens (*RWE*)⁴⁸.

2.5.1. The Current EC Leniency Programme

The current EC leniency programme is based on the 2006 Leniency Notice which is similar to the 2002 Leniency Notice, but now also includes the option of submitting oral corporate

³⁹ *Case COMP/F/38.99 Gas Insulated Switchgear*.

⁴⁰ Douglas Ginsburg and Joshua Wright, ‘Antitrust Sanctions’ (2010) 6 *Competition Policy International Journal* 8.

⁴¹ Caroline Cauffman, ‘The Interaction of Leniency Programmes and Actions for Damages’ (2011) 7 *Competition Law Review* 181, 181.

⁴² Joseph Harrington and Myong-Hun Chang, ‘When Can We Expect a Corporate Leniency Program to Result in Fewer Cartels?’ (2015) 58 *The Journal of Law & Economics* 417, 181.

⁴³ Ginsburg and Wright (n 40) 4.

⁴⁴ Declan Walsh, ‘Carrots and Sticks - Leniency and Fines in EC Cartel Cases’ (2008) *European Competition Law Review* 31.

⁴⁵ Krisztian Kecsmar and Andreas Keidel, ‘Shaping the EU Leniency Programme: The Recent Approach Adopted by EU Courts’ (2015) 6 *Journal of European Competition Law & Practice* 556, 556.

⁴⁶ Richard Whish and David Bailey, *Competition Law* (Oxford University Press 2015) 289.

⁴⁷ *C-238/12 P – FLSmidth v Commission*.

⁴⁸ *Case C-92/11 - RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV*.

statements⁴⁹. There are two types of leniencies: complete immunity from fines (for the first undertaking to alert the Commission) and secondly, a reduction in fines⁵⁰. As per Article 23(b), this means that there is a 100% discount for the first applicant, the next applicant will receive a 50% reduction, the third applicant will receive a 20-30% reduction and there will be a reduction of up to 20% for all other applicants⁵¹. The greater the leniency, the more likely the cartellists will admit to their wrongdoing⁵². Immunity from fines may be granted where ‘an individual makes a decisive contribution to the opening of an investigation or to the finding of an infringement’⁵³. Examples of cases where the leniency notice proved successful include *Synthetic Rubber*⁵⁴ and *Chloroprene Rubber*⁵⁵. The case of *Canned Vegetables*⁵⁶ was also a success seeing as Bonduelle received 100% immunity, Group CECAB obtained 30% immunity and Cooros were awarded 15% immunity. More recent successful examples of the leniency programme include *Occupant Safety Systems*⁵⁷ and *Forex*⁵⁸.

2.5.2. Restriction on the Reduction of Fines

There are instances where a reduction in fines will not always be possible. According to Section 8(a) of the Leniency Notice of 2002, a reduction in fines will not be possible where the Commission already has sufficient evidence to carry out its investigation. It is only evidence that offers ‘significant added value’ that is required⁵⁹. For immunity to be granted, the applicant must fully cooperate with the Commission as per Article 11(a), must no longer be involved in the cartel as per Article 11(b) and should not have coerced others to participate in the cartel as per Article 11(c)⁶⁰.

⁴⁹ Kecsma and Keidel (n 45) 556.

⁵⁰ Whish and Bailey (n 45) 290.

⁵¹ Antonio Caruso, ‘Leniency Programmes and Protection of Confidentiality: The Experience of the European Commission’ (2010) 1 *Journal of European Competition Law & Practice* 453, 453.

⁵² Nicolo Zingales, ‘European and American Leniency Programme: Two Models Towards Convergence’ 8.

⁵³ Whish and Bailey (n 45) 291.

⁵⁴ *Case COMP/F/38.638 Synthetic Rubber*.

⁵⁵ *Case COMP/38629 Chloroprene Rubber*.

⁵⁶ *Case COMP/AT.40127 Canned Vegetables*.

⁵⁷ *Case COMP/AT.40481 Occupant Safety Systems*.

⁵⁸ *Case COMP/AT.40135 Forex*.

⁵⁹ Jarrett Arp and Christof Swaak, ‘A Tempting Offer: Immunity from Fines for Cartel Conduct under the European Commission’s New Leniency Notice’ (2003) 24 *European Competition Law Review* 9, 59.

⁶⁰ *ibid* 60.

2.6. The Link between EC Competition Law and National Competition Law

Whish and Bailey note that where Member States apply national laws against cartels, they should also apply Article 101 TFEU where necessary⁶¹. However, once the Commission starts its investigations on a case, Articles 3(1) and 11(6) of Regulation 1/2003 state that this initiation of proceedings means that NCAs should no longer apply Article 101 TFEU or national competition laws (*Toshiba Corporation*)⁶². This power will be restored again once the Commission finishes its proceedings. After that, NCAs can apply national competition laws again as long as they are in full compliance with EU law and in particular with Article 3 and Article 16(2) of Regulation 1/2003⁶³. Member States are given considerable leeway to adapt EC competition laws to their own system as they see fit⁶⁴. This level of cooperation is required as per Article 11 of Regulation 1/2003⁶⁵. Cseres notes that the European Competition Network (ECN) facilitates regular contact between Member States on how EC competition laws are being applied in national jurisdictions ‘to ensure consistent application of the rules’⁶⁶ across the board.

2.6.1. Direct Applicability of Article 101 TFEU

Article 101 TFEU is directly applicable in national Member States as per Article 3 of Regulation 1/2003 and can be enforced ‘without the need for notification and a prior administrative decision’⁶⁷ as per Article 101(3). When Article 101 TFEU is applied by NCAs, remedies and sanctions available in the national Member State as well as national procedural rules are imposed⁶⁸. Nonetheless, the Member States will be required to fulfil all obligations as per the Treaty⁶⁹ and cannot apply stricter rules in their own territory as per Article 3(2). This is better known as the ‘convergence rule’⁷⁰. Regulation 1/2003 has created a level playing field alongside the convergence of EU competition laws and national competition

⁶¹ Whish and Bailey (n 45) 76.

⁶² *Case C-373/19 P Toshiba Corporation v Commission*.

⁶³ Whish and Bailey (n 45) 77.

⁶⁴ Kati Cseres, ‘Comparing Laws in the Enforcement of EU and National Competition Laws’ (2010) 3 *European Journal of Legal Studies* 7, 10.

⁶⁵ *ibid* 11.

⁶⁶ *ibid*.

⁶⁷ *ibid* 14.

⁶⁸ *ibid* 13.

⁶⁹ *ibid* 14.

⁷⁰ Whish and Bailey (n 45) 67.

laws⁷¹. Nonetheless, the principle of convergence does not directly apply in terms of imposing and prohibiting sanctions on unilateral conduct⁷². In this way, the provisions of Regulation 1/2003 shall not prevent Member States from the application of national legislation ‘that protects legitimate interests other than the protection of competition on the market’ as long as the national legislation complies with other provisions and general principles of EU law⁷³.

On a final note, at national level, every individual affected by a breach of Article 101 TFEU is entitled to apply for damages⁷⁴ as per the case of *Courage*⁷⁵ and reinforced in *Manfredi*⁷⁶. The following chapter will now focus on national competition laws exercised by the National Competition Authorities who maintain competence over national antitrust rules⁷⁷ in three Member States - Germany, France and Ireland.

⁷¹ Cseres (n 65) 15.

⁷² *ibid* 16.

⁷³ Whish and Bailey (n 45) 79.

⁷⁴ Piotr Sitarek, ‘The Impact of EU Law on a National Competition Authority’s Leniency Programme: The Case of Poland’ (2014) 9 YARS 185, 193.

⁷⁵ *Case C-453/99 Courage Ltd v Crehan* [2001] ECR I-6297.

⁷⁶ *Case C-295-298/04 Manfredi v Lloyd Adriatico Assicurazione SpA et al* [2006] ECR I-6691.

⁷⁷ Thomas Obersteiner, ‘International Antitrust Litigation: How to Manage Multijurisdictional Leniency Applications’ (2013) 4 Journal of European Competition Law & Practice 16, 29.

Chapter 3: National Competition Law Enforcement against Cartels

Germany

1. Introduction

1.1. Overview

Section 1 of the *Gesetz gegen Wettbewerbsbeschränkungen (GWB)*, recently amended for the 10th time⁷⁸ on the 19th of January 2021, contains a prohibition on cartels⁷⁹. The *Bundeskartellamt (BKartA)*, an independent German authority, exercises its own powers to investigate breaches of Section 1⁸⁰, the chair of which ought to be a qualified judge; the system is therefore of a quasi-judicial nature⁸¹. The *BKartA* is the main office that enforces the laws outlined in the *GWB*, and it is subdivided into 12 units known as the *Beschlussabteilungen* (Decision Divisions). Nine of these divisions are given the task of applying general competition laws in specific sectors and the remaining three divisions deal with the prosecution of cartels in cross-sector settings as per Article 51(2) of the *GWB* and they prepare for and carry out dawn raids. The decisions made by the *BKartA* can be appealed to the *Oberlandesgericht Düsseldorf* (The Higher Regional Court of Düsseldorf) when it is possible to introduce fresh evidence.

1.2. No Criminalisation

There is no criminalisation in place for cartels under German national law. Instead, there is an administrative offence for cartels with the exception of bid rigging which elicits a criminal penalty as per Section 298 of the *Strafgesetzbuch (StGB)* – this can result in up to five years imprisonment. Directors cannot be criminally sanctioned, and it is not possible to disqualify directors either under the *GWB*. Nonetheless, successor companies can be held liable for breaches by their predecessors in order to avoid the *Wurstlücke* (sausage gap) loophole following *Böklunder Plumrose* and *Könecke Fleischwarenfabrik* whereby this group escaped

⁷⁸ Ingo Klauss and Carsten Grave, ‘Germany: Anti-Competitive Practices - Enforcement’ (2022) 43 European Competition Law Review 1.

⁷⁹ § 1 *GWB* <https://www.gesetze-im-internet.de/gwb/___1.html> accessed 05 August 2022.

⁸⁰ Bram Braat, *The Relation Between Leniency and Private Enforcement. Towards an Optimum of Overall Competition Law Enforcement?* (Zutphen: Paris Legal Publishers 2018) 50.

⁸¹ *ibid* 51.

finances amounting to €128 million by transferring their assets but nonetheless continued to operate their business.

2. Fines Imposed by the *Bundeskartellamt*

2.1. Fining Undertakings

According to Article 81 of the *GWB*, the *BKartA* can impose fines on undertakings that have been in violation of Article 1 of the *GWB* at national level (as well as Article 101 TFEU at EU level)⁸². According to Article 82(4) of the *GWB*, the fine that the *BKartA* can impose may reach up to 10% of the annual turnover of the group from the previous year. Not only does the *BKartA* impose fines on undertakings for the infringement of German national competition law under Article 1 of the *GWB* but fines may also be imposed on the individuals involved⁸³.

2.2. Fining Individuals

Under German Civil Law, individuals involved in the cartel are jointly and severally liable for the entire damage caused by the cartel⁸⁴. As per Article 34 of the *GWB*, fines imposed by the *BKartA* on individuals cannot exceed €1 million except for situations where the individual has breached the regulations negligently – in this case, fines will be capped at €500,000. The *BKartA* has restricted those who are susceptible to fines, i.e., senior employees, officers and directors⁸⁵. Additionally, if individuals outside of these categories were to infringe Section 1 of the *GWB*, the *BKartA* may also impose fines on officers or directors for being in breach of their supervisory duty⁸⁶.

3. German Leniency Programme

⁸² *ibid.*

⁸³ Ulrich Schnelle and Elisabeth Wyrembek, 'Cartel Law and Regulations 2022 - Germany' (*GLI - Global Legal Insights*) <<https://www.globallegalinsights.com/practice-areas/cartels-laws-and-regulations/germany>> accessed 19 July 2022.

⁸⁴ Cornelis Canenbley and Till Steinvorth, 'Effective Enforcement of Competition Law: Is there a Solution to the Conflict between Leniency Programmes and Private Damages Actions?' (2011) 2 *Journal of European Competition Law & Practice* 320.

⁸⁵ Schnelle and Wyrembek (n 83).

⁸⁶ *ibid.*

3.1. Immunity from Fines

In German national law, the leniency programme has been implemented by statute⁸⁷ as per the 10th amendment of the *GWB*, meaning that it is not only present in the form of administrative rules but also as a legislative framework⁸⁸. The aim of the leniency programme is to make cartels more unstable⁸⁹. The first person to come forward with evidence will be given full immunity provided that this evidence would enable the *BKartA* to carry out a search warrant thereafter⁹⁰. The second person to come forward will receive a 50% reduction in fines where the information ‘contributes to a material degree’⁹¹ to the case. It is not possible under German National law to grant full immunity to the ringleaders of the cartels. Full immunity requires the applicant to cooperate fully and continually and to supply the names of those involved in the cartel⁹². The majority of cartels that are detected in Germany are identified through the leniency programme⁹³.

3.2. The Marker System

There is a marker system in place in Germany where the first person (type-1 marker) or the second person (type-2 marker) to come forward can be given priority under the leniency programme⁹⁴. The *BKartA* will provide the type-1 or type-2 marker with written confirmation in receipt of the application stating both the date and time of receipt⁹⁵. The *BKartA* will allow up to 8 weeks for the leniency application to be completed⁹⁶. A marker can be given orally or in writing. If an oral English marker is given, a German translation ought to be provided in writing⁹⁷. If the requirements of the leniency programme are not fulfilled, either the type-1 marker or type-2 marker will no longer hold their position and other undertakings can move up to the next rank⁹⁸.

⁸⁷ *ibid.*

⁸⁸ *ibid.*

⁸⁹ Christian Kersting, ‘Reform of Cartel Damages Law’ [2022] *Neue Zeitschrift für Kartellrecht (NZKart)* 5.

⁹⁰ Ulrich Blum, Nicole Steinat and Michael Veltins, ‘On the Rationale of Leniency Programs: A Game-Theoretical Analysis’ (2008) 25 *European Journal of Law and Economics* 209, 215.

⁹¹ *ibid.*

⁹² Dirk Schroeder, *Kronzeugenregelungen Im Kartellrecht in Recht Und Wettbewerb* (Rainer Bechtold 2006) 441.

⁹³ Canenbley and Steinvorth (n 84) 317.

⁹⁴ Blum, Steinat and Veltins (n 89) 215.

⁹⁵ Braat (n 80) 53.

⁹⁶ Obersteiner (n 77) 21.

⁹⁷ Schnelle and Wyrembek (n 83).

⁹⁸ Braat (n 80) 54.

4. Private Actions

4.1. The Supply of Leniency Information for Private Actions

In the *Pfleiderer* case, bearing in mind that the same leniency programme is applicable to both EU and national law, the *Amtsgericht Bonn* (Bonn District Court) decided against giving Mr Pfleiderer access to leniency documents. In this case, the court relied on the right of informational self-determination of the leniency applicant who supplied information on a voluntary basis with the expectation that his confidentiality would be protected⁹⁹. The German system was wary that the disclosure of such information may affect future leniency applicants from coming forward¹⁰⁰. This was confirmed in the Coffee Roaster cartel decision in 2012¹⁰¹ - the disclosure of such documents would not affect Mr Pfleiderer's ability to claim damages¹⁰².

4.2. The Damages Directive

As evidenced by the *Stadtwerke Uelzen* cartel, the German Supreme Court ordered that customers ought to be reimbursed for overly expensive gas bills¹⁰³. Since June 2017, the rebuttable presumption of damages contained within Article 17(2) of the Antitrust Damages Directive is implemented into German National Law as per Article 33(a)(2) of the *GWB* - the burden of proof being on the parties affected by the infringement¹⁰⁴. According to Article 33(a)(3), Section 287 of the *Zivilprozessordnung* (German Code of Civil Procedure) will be used to quantify the harm caused by the infringement¹⁰⁵.

France

1. Introduction

1.1. Overview

⁹⁹ Kiran Desai, Gillian Sproul, Nathalie Jalabert Doury and Jens Peter Schmidt, 'Leniency Applications Protected: German Court Denies Private Plaintiffs Access to File' (*Mayer Brown: European Antitrust & Competition*, 01 February 2012) <<https://www.mayerbrown.com/en/perspectives-events/publications/2012/02/leniency-applications-protected-german-court-denie>> accessed 23 August 2022.

¹⁰⁰ Obersteiner (n 77) 25.

¹⁰¹ Sitarek (n 74) 197.

¹⁰² *ibid.*

¹⁰³ Canenbley and Steinvorth (n 84) 325.

¹⁰⁴ Kersting (n 88) 5.

¹⁰⁵ Art. 33(a)(3), *GWB* <https://www.gesetze-im-internet.de/gwb/___33a.html> accessed 29 July 2022.

The prohibition of cartels in France is governed by Art. L.420-1 of the *Code de Commerce* (*CDC*) and can be applied alongside Article 101 TFEU where trade between Member States is affected but does not apply where such agreements have been authorised by legislation¹⁰⁶. Contractual agreements to form cartels will be made void by Art. L. 420-3 of the *CDC*. The *Autorité de la Commerce* ('*Autorité*') independently enforces competition rules in France¹⁰⁷. The specific department within the *Autorité* known as the *rapporteur general* investigates cases; the *Collège d'Autorité*, of which there are 17 members, decides on the outcome of the case and the *Direction de la Commerce, de la Consommation et de la repression des Fraudes* (*DGCCRF*) can also investigate infringements of competition law and issue injunctions¹⁰⁸.

1.2. Consequences of Investigations

The *Autorité* cannot judge civil consequences of anti-competitive agreements, for example, any claims for damages¹⁰⁹. As per Article L.464-8, commercial courts and trial courts have this jurisdiction in France and these decisions can be appealed to the *Cour d'Appel de Paris* (Paris Court of Appeal). The *Autorité* also submits an annual report to the *Parlement Français* (French Parliament) for discussion where it can make recommendations on how competition could be improved in the relevant markets¹¹⁰. Two types of investigations can be carried out – simple investigations where no suspicion of anti-competitive activity is required and substantial investigations where a presumption of anti-competitive activity is required. If the *rapporteur général* makes the decision that it is necessary to enter the premises of the infringement, and even if only one suspicious email is found, the *Autorité* has the authority to seize the entire email inbox; documents may also be placed under seal and reviewed at a later date¹¹¹.

2. Fines

2.1. New Criteria for Fines

¹⁰⁶ Aurélien Condomines, Pierre Galmiche and Elisa Saez, 'Cartel Laws and Regulations 2022 - France (*Global Legal Insights*)' <<https://www.globallegalinsights.com/practice-areas/cartels-laws-and-regulations/france>> accessed 20 August 2022.

¹⁰⁷ *ibid.*

¹⁰⁸ *ibid.*

¹⁰⁹ *ibid.*

¹¹⁰ *ibid.*

¹¹¹ *ibid.*

The *Autorité* imposes one of the highest levels of fines in Europe – since 2011, more than 11 billion in fines have been collected and put back into the economy - fines have ranged from 200 million to 1 billion every year¹¹². L. 464-2 of the *CDC* provides the criteria for the establishment of fines. The *Autorité* revised its notice on the method for setting fines and the ECN+ Directive has been implemented into French national law by Ordinance No. 2021-649¹¹³. The basic fine consists of 10% of the total turnover from the previous year in contrast to the €3 million cap that used to be applied¹¹⁴. In addition, the gravity and duration of the cartel will now be taken into account as opposed to the impact on the French economy alone¹¹⁵. The *Autorité* may increase the fine if the basic amount calculated is less than the expected profits that will be made by the infringement¹¹⁶. The *Autorité* will also take recidivism into account when determining the extent of the fines¹¹⁷. Recidivism can be defined as a ‘tendency towards chronic criminal behaviour leading to numerous arrests and re-imprisonment’¹¹⁸.

3. French Leniency Programme

3.1. Type 1 Cases

The French leniency programme was introduced by Law 2001- 420 of the *Loi sur les Nouvelles Régulations Économiques* (Law on New Economic Revelations) on 15 May 2001 and codified by Art. L.464-2, IV and R 464-5 of the *CDC*¹¹⁹. An undertaking may avail of full or partial immunity, if in breach of Art. L.420-1, where the *Autorité* was provided with information that it did not already have. The Decree 2021-568 was implemented on the 12th of June 2021 in order to bring the French national leniency programme on par with European

¹¹² Isabelle de Silva, ‘10 Years of the French Autorité de La Concurrence: Looking Back and Looking Ahead’ (2019) 7 *Journal of Antitrust Enforcement* 129, 132.

¹¹³ Marie Florent, ‘The French Competition Authority Revises Its Notice on the Method for Setting Fines’ (*Competition Law Newsletter - France*, 16 September 2021) <<https://www.ashurst.com/en/news-and-insights/legal-updates/competition-law-newsletter-september-2021/cn06---the-french-competition-authority-revises-its-notice-on-the-method-for-setting-fines/>> accessed 20 August 2022.

¹¹⁴ *ibid.*

¹¹⁵ *ibid.*

¹¹⁶ *ibid.*

¹¹⁷ *ibid.*

¹¹⁸ Encyclopaedia Britannica - ‘Recidivism’ <<https://www.britannica.com/topic/recidivism>> accessed 19 August 2022.

¹¹⁹ Sergio Sorinas and Marie Louvet, ‘Cartel Leniency in France: Overview’ (*Thomson Reuters Practical Law*, 01 May 2022) <[http://uk.practicallaw.thomsonreuters.com/8-501-0962?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](http://uk.practicallaw.thomsonreuters.com/8-501-0962?transitionType=Default&contextData=(sc.Default)&firstPage=true)> accessed 19 August 2022.

standards, thereby adhering to the European Community Notice¹²⁰. The *Rapporteur Générale* of the *Autorité* is in charge of the investigation of cartel cases and is helped by the *Conseiller Clémence* (the leniency officer)¹²¹. The *Direction Générale de la Concurrence, de la Consommation et de la Répression des Fraudes (DGCCRF)* and the *Ministère de l'Économie* (Minister for the Economy) can also exercise their investigative powers¹²². By the end of 2021, the *Autorité* recorded 87 leniency applications since its entry into law in 2001¹²³.

3.2. Type 2 Cases

If these requirements are not met by the applicants, they can avail of partial immunity if the information that they provided has '*une valeur ajoutée significative*' (a significant added value). These are the type 2 cases. The first undertaking to come forward will receive a reduction of 25% to 50%, the next between 15% and 40% and for every other undertaking, there will be a maximum reduction of 25%¹²⁴. There is no leniency programme for individuals in France and the ringleader will not be stopped from applying for full immunity¹²⁵. Leniency applications can be made in both written and oral form. There is also a marker system in place to protect applicants' ranking which will be judged on a case-by-case basis¹²⁶.

3.3. Disclosure of Documents

As per Article L.483-5, the judge cannot order the *Autorité* to disclose documents regarding the leniency application¹²⁷ since the implementation of the Antitrust Damages Directive provided that the jurisdictions concerned are EU Member States¹²⁸. The disclosure of

¹²⁰ Condomines, Galmiche and Saez (n 106).

¹²¹ *ibid.*

¹²² Marc Lévy and Natasha Assadi, 'France: Cartel Regulation Under French Law: A Pragmatic Approach (Mondaq, 08 October 2007) <<https://www.mondaq.com/france/antitrust-eu-competition-/53054/cartel-regulation-under-french-law-a-pragmatic-approach>> accessed 20 August 2022.

¹²³ Condomines, Galmiche and Saez (n 106).

¹²⁴ *ibid.*

¹²⁵ *ibid.*

¹²⁶ 'Cartel Leniency in France: Overview' (n 119).

¹²⁷ *ibid.*

¹²⁸ 'Antitrust: Commission Publishes Report: Damages Directive' (*European Commission Press Release*, 14 December 2020) <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2413> accessed 16 August 2022.

documents to non-Member States will depend on international cooperation agreements¹²⁹.

France has also established the *Réseau International de Concurrence* (International Competition Network) to promote the effectiveness of competition regulation at an international level¹³⁰.

4. Criminal Sanctions

4.1. Individual Sanctions

According to Article L.420-6 of the *CDC* there is a fine of €75,000 and a prison sentence of up to four years where an individual has taken part in the organisation, design or execution of anti-competitive practices¹³¹. When such practices are carried out with a fraudulent intention, breaches of Article 420-6 are enforced by the *Procureur de la République* (public prosecutor); the *Autorité* cannot impose such sanctions¹³². No prison sentences have been issued against individuals in France so far but it is said that criminal sanctions tend to be limited to bid rigging cases¹³³. There is no disqualification sanction for a breach of Article L.420-1 in French law¹³⁴. Nonetheless, as an alternative to disqualification, Article L 2141-9, Lesur and Sacco note that ‘a public purchaser may exclude individuals and companies from public procurement procedures if the purchaser has sufficient evidence that an individual has implemented coordination practices with a view to distorting competition’¹³⁵.

4.1. Exemptions

In Article 420-6-1 of the *CDC*, in cases where full immunity from fines has been granted to an undertaking, the individuals who participated in the cartel may be exempt from criminal sanctions where they have actively cooperated with the *Parquet* (Public Prosecutor’s Office) and the *Autorité*¹³⁶. This is where the individual is fully available and answers any questions posed by the *Autorité* and has not destroyed or concealed any evidence or information

¹²⁹ Sorinas and Louvet (n 119).

¹³⁰ Condomines, Galmiche and Saez (n 106).

¹³¹ Sorinas and Louvet (n 119).

¹³² Condomines, Galmiche and Saez (n 106).

¹³³ Lionel Lesur and Anna Sacco, ‘Cartel Regulation in France’ (Lexology, 10 December 2020) <<https://www.franklin-paris.com/wp-content/uploads/2020/12/Cartel-Regulation.pdf>> accessed 17 August 2022.

¹³⁴ *ibid.*

¹³⁵ *ibid.*

¹³⁶ Condomines, Galmiche and Saez (n 106).

required by the authorities. Employees who were hired by the undertaking will also be protected from liability¹³⁷.

Ireland

1. Introduction

1.1. Overview

The Coimisiún um Iomaíocht agus Cosaint Tomhaltóirí or Competition and Consumer Protection Commission (CCPC) is responsible for encouraging compliance and enforcing competition law in Ireland¹³⁸. Cartels are ‘the most serious breach of competition law’ and in this regard, the CCPC carries out investigations of any breaches that are alleged and then recommends such prosecutions to the DPP¹³⁹. In the Competition (Amendment) Act 2022, the CCPC will be given more powers to impose fines at a maximum of €10 million or 10% of the previous year turnover¹⁴⁰ but such fines ought to be approved by the High Court in advance¹⁴¹. The Statement of Objections will enable cartels to submit a response in writing to the Adjudication Officer in their defence before any fines will be issued¹⁴².

1.2. Investigative Powers

Section 45 of An t-Acht Iomaíochta 2002 (arna leasú) or The Competition Act, 2002 as amended (‘2002 Act’) gives authorised officers the powers to carry out investigations and dawn raids¹⁴³. The enforcement of the 2002 Act can either be public or private¹⁴⁴. The competition authority investigates through interviews, correspondence, research and dawn raids¹⁴⁵. The purpose of the officer is to obtain any information necessary for the

¹³⁷ Sorinas and Louvet (n 119).

¹³⁸ David McFadden, *The Private Enforcement of Competition Law in Ireland* (Bloomsbury Publishing 2014) n.p.

¹³⁹ ‘Competition and Consumer Protection Law’ (*Competition and Consumer Protection Commission*) <<https://www.ccpic.ie/business/enforcement/competition-consumer-protection-act/>> accessed 22 August 2022.

¹⁴⁰ ‘Government Approves Law Giving More Powers to Competition Authorities to Protect Consumers’ (*Department of Enterprise, Trade and Employment*, 30 January 2022) <<https://enterprise.gov.ie/en/News-And-Events/Department-News/2022/January/30012022.html>> accessed 14 August 2022.

¹⁴¹ Richard Ryan, Patrick Horan and Ronan Scanlan, ‘The Competition (Amendment) Act 2022’ (*Arthur Cox*, 10 August 2022) <<https://www.arthurcox.com/knowledge/the-competition-amendment-act-2022-competition-law-in-ireland/>> accessed 13 August 2022.

¹⁴² *ibid.*

¹⁴³ Patrick Massey and Paula O’Hare, *Competition Law and Policy in Ireland* (Oak Tree Press 1996) 135.

¹⁴⁴ *ibid* 133.

¹⁴⁵ *ibid.*

performance by the authority of any of its functions under this act. In advance of carrying out such searches, the authorised officer must obtain a s.45(4) warrant by requesting this from a District Court judge¹⁴⁶. The judge will do so provided that it ‘is satisfied from information on oath that it is appropriate to do so’¹⁴⁷. The powers ought to be exercised within one month from the time when they are issued¹⁴⁸.

2. Penalties for Cartel Activity

2.1. Fines and Private Actions

The Competition (Amendment) Act 2022, signed into law on the 29th of June 2022, transposes the ECN+ Directive into Irish law¹⁴⁹. According to Section 8(1)(b), of the 2002 Act as amended, on indictment, an undertaking or an individual involved in cartel activity will be fined an amount not exceeding €50,000,000 or 20% of the turnover from the previous fiscal year¹⁵⁰. For an individual, the maximum fine for an individual guilty of a summary offence is €5,000, an increase from €3,000¹⁵¹. Section 2(b)(i) has raised the fine for an indictable offence from €4,000,000 to €5,000,000¹⁵². For individuals convicted of an indictable offence, they now face a higher prison sentence of 10 years as opposed to 5 years under the 2002 Act before it was amended in 2022¹⁵³. In addition, private actions are being better facilitated by Irish law given the Representative Actions Directive which is due to come into full effect in Ireland on the 25th of June 2023 after being approved by the European

¹⁴⁶ ‘Powers of Search’ (Citizens Information, 24 December 2019)

<https://www.citizensinformation.ie/en/justice/arrests/powers_of_search.html> accessed 17 August 2022.

¹⁴⁷ Massey and O’Hare (n 143) 135.

¹⁴⁸ ‘Government Approves Law Giving More Powers to Competition Authorities to Protect Consumers’ (n 137).

¹⁴⁹ ‘Minister Troy Welcomes the Enactment of the Competition (Amendment) Bill 2022’ (*Department of Enterprise, Trade and Employment*, 1 July 2022) <<https://www.gov.ie/en/press-release/ecbea-minister-troy-welcomes-the-enactment-of-the-competition-amendment-bill-2022/>> accessed 18 August 2022.

¹⁵⁰ ‘Amendment of Section 8 of Principal Act’ (Electronic Statute Book, July 2022)

<<http://www.legislation.ie/eli/2022/act/12/section/9/enacted/en/html#sec9>> accessed 13 August 2022.

¹⁵¹ Peter Whelan, ‘Strengthening Competition Law Enforcement in Ireland: The Competition (Amendment) Act 2012’ (2013) 4 *Journal of European Competition Law & Practice* 175, 175.

¹⁵² *ibid.*

¹⁵³ *ibid.*

Parliament on the 24th of November 2020¹⁵⁴, allowing for collective redress where multiple private claims can be dealt with through a single court action¹⁵⁵.

2.2. Disqualification

A disqualification order can be made under Section 4 or 5 of the 2002 Act as amended regardless of whether it is a summary offence or an offence on indictment¹⁵⁶. There is automatic disqualification for a company director who is convicted of a cartel offence for a period of 5 years according to Section 839(1)¹⁵⁷ of the *Acht na Cuideachtaí, 2014* or The Companies Act 2014 ('2014 Act'). An example of an Irish director being automatically disqualified from having engaged in cartel activity in breach of Section 6 of the 2002 Act as amended can be seen in the case of *DPP v Aston Carpets and Flooring Limited and Brendan Smith*¹⁵⁸ where the company director, Mr Brendan Smith, was automatically disqualified before the Central Criminal Court for the offence of bid-rigging after procuring flooring contracts for international companies¹⁵⁹. There was a personal fine of €45,000 ordered against him¹⁶⁰. Likewise, in 2012, Mr Pat Hegarty was convicted of a two-year suspended jail sentence by a jury. He was fined €30,000 for fixing kerosene and gas oil prices¹⁶¹.

3. Cartel Leniency Programme

¹⁵⁴ Julie Murphy-O'Connor and Michael Byrne, 'EU-Wide Representative Actions in Consumer Litigation – a level playing field?' (*Matheson*, 05 May 2021) <<https://www.matheson.com/insights/detail/eu-wide-representative-actions-in-consumer-litigation-a-level-playing-field>> accessed 15 August 2022.

¹⁵⁵ 'Frequently Asked Questions: European Commission Recommends Collective Redress Principles to Member States' (European Commission Press Release, 11 June 2013) <https://ec.europa.eu/commission/presscorner/detail/fr/MEMO_13_530> accessed 29 July 2022.

¹⁵⁶ Whelan, 'Strengthening Competition Law Enforcement in Ireland: The Competition (Amendment) Act 2012' (n 151) 178.

¹⁵⁷ Vincent Power, 'Competition Law Offence - Disqualification from Acting as a Director of an Irish Company (*A&L Goodbody*, April 2016) <<https://www.algoodbody.com/insights-publications/competition-law-offence-disqualification-from-acting-as-a-director-of-an-ir>> accessed 16 August 2022.

¹⁵⁸ *DPP v Aston Carpets and Flooring Limited and Brendan Smith* [2018] IECA 194.

¹⁵⁹ Kate McKenna, 'Competition Law Risks and Priorities for Directors in Ireland' (*Matheson Insights*, 2 September 2019) <<https://www.matheson.com/insights/detail/competition-law-risks-and-priorities-for-directors-in-ireland>> accessed 18 August 2022.

¹⁶⁰ *ibid.*

¹⁶¹ Cormac Little and Claire Waterson, 'Conviction Arising from Heating Oil Cartel' (*William Fry News & Insights*, 30 May 2012) <https://www.williamfry.com/newsandinsights/news-article/2012/05/30/conviction_arising_from_heating_oil_cartel> accessed 27 August 2022.

Applications for immunity are submitted to the CCPC but only the DPP can grant immunity¹⁶². For the individual to qualify for immunity, he or she must be the first person to come forward; any individual can apply for immunity - this includes instances where the undertaking or individual has facilitated the operation or formation of a cartel, even if they have not been directly involved in the cartel. Section 3(1) of the 2002 Act defines an undertaking as ‘a person being an individual, a body corporate or an incorporated body of persons engaged for gain in the production, supply or distribution of goods or the provision of a service’¹⁶³. The only way that an individual can make an application to the leniency programme is by ringing the Cartel Immunity Phone Line¹⁶⁴. The CCPC will not make a recommendation to the DPP if the CCPC already has sufficient evidence to refer the case to the DPP on its own¹⁶⁵.

¹⁶² ‘Cartel Immunity Programme’ (*Competition and Consumer Protection Commission*, 22 January 2015) <<https://www.ccpc.ie/business/enforcement/criminal-enforcement/cartel-immunity-programme/>> accessed 17 August 2022.

¹⁶³ Office of the Attorney General, ‘Competition Act, 2002’ (Electronic Irish Statute Book, August 2022) <<https://www.irishstatutebook.ie/eli/2002/act/14/section/3/enacted/en/html#>> accessed 16 August 2022.

¹⁶⁴ ‘Cartel Immunity Programme’ (n 162).

¹⁶⁵ *ibid.*

Chapter 4: Reflection and Analysis

1. The Leniency Programme

1.1. Possible Ways of Making an Application

As we have seen, the European Commission allows for leniency applications to be made electronically, orally or in written form; France also allows leniency applications to be made in both oral and written form as does Germany. In Ireland, applications are mainly made through the CCPC phone line – this is a ‘pick-up the phone’ attitude – a rapid approach¹⁶⁶. It can be argued that the more means of applying for leniency, the better, thereby encouraging increased compliance with competition rules¹⁶⁷. It is a reasonable approach for the Commission to take applications in both written and oral form unlike the CCPC who encourages applicants to apply by phone.

1.2. Regulating Translations

It is interesting that Germany has special rules in relation to providing a written German translation of leniency applications made orally in English. In fact, it is an excellent addition that Germany requires a written German translation for oral English submissions. This ensures that if any mistranslations were to occur in the submission, this would be the responsibility of the applicant and not the NCA. Given the high standard of translations in the European Commission, where a policy based on multilingualism is adopted¹⁶⁸, there is no need to introduce new laws on translations at EU level. However, it would be a good idea if the European Commission could issue certain guidelines to Member States to place the responsibility on applicants to translate leniency applications where required. In this way, any mistranslations or even minute mistranslations that lead to misunderstandings would not be the responsibility of the NCA investigating the case but rather the applicant who is applying for leniency. It is my contention that a proper regulation of translations allows for a smoother and more clearly defined application process.

¹⁶⁶ Obersteiner (n 77) 27.

¹⁶⁷ Caroline Cauffman, ‘The Interaction of Leniency Programmes and Actions for Damages’ [2011] Maastricht Faculty of Law Working Paper 181, 181.

¹⁶⁸ Vilelmini Sosoni, ‘Language and Translation in EU Competition Law: Insights from English, Greek, Italian and Spanish Versions of Legislative Texts’ (Springer 2018) 179.

1.3. Restricting Ringleaders

One significant difference between the French, Irish and German leniency programmes is that ring leaders in Germany cannot apply for full immunity; the ringleader being the one who is usually accountable for ensuring the functioning and stability of the cartel¹⁶⁹. Bos and Wandschneider outline the characteristics of a ringleader - they organise meetings and play a determinative role in the formation of a cartel¹⁷⁰. Examples of situations where German ringleaders ensured the coordination of cartels include the ‘Alloy Cartel’ and the ‘Amino Acid (lysine) cartel’¹⁷¹.

Hesch argues that preventing ringleaders from applying for full immunity would prevent more ringleaders from coming forward thereby leading to significantly higher market prices¹⁷². However, seeing as ringleaders can still be granted some form of immunity in the German system, it is my contention that this would not prevent ringleaders from coming forward given the success of the leniency programme in Germany as well as the United States where ringleaders have nonetheless still come forward¹⁷³.

More importantly, the fact that ringleaders are excluded from full immunity might also encourage other members of the cartel to make an application for immunity seeing as there is more for them to gain out of being honest, thereby heightening the probability of distrust between the ringleader and other cartel members¹⁷⁴. The European Commission could therefore consider preventing ringleaders from obtaining full immunity as an additional form of punishment.

2. Disqualification

2.1. Disqualification and Debarment

¹⁶⁹ Jesko Herre and Alexander Rasch, ‘The Deterrence Effect of Excluding Ringleaders from Leniency Programs’ [2009] Research Paper, University of Cologne 2.

¹⁷⁰ Iwan Bos and Frederick Wandschneider, ‘A Note on Cartel Ringleaders and the Corporate Leniency Programme’ (2013) 20 Applied Economics Letters 1100, 1100.

¹⁷¹ Herre and Rasch (n 163) 2.

¹⁷² Michael Hesch, ‘The Effects of Ringleader Discrimination on Cartel Stability and Deterrence-Experimental Insights’ (2012) 3 Journal of Advanced Research in Law & Economics 26, 26.

¹⁷³ Andreas Stephan, ‘An Empirical Assessment of the European Leniency Notice’ (2009) 5 Journal of Competition Law and Economics 537, 538.

¹⁷⁴ John Davies, ‘Truth or Dare: Leniency and the Fight Against Cartels’ (2009) 8 Competition Law Journal 136, 140.

As discussed above, directors in Ireland are automatically disqualified for a period of five years having committed an indictable offence in relation to the company¹⁷⁵. On the other hand, in Germany, it is not possible to disqualify directors. There is also no disqualification for directors under French law, but the director can be excluded from participating in public procurement. Stephan notes that disqualification would be an important additional consideration to be made by the Commission seeing as there is no criminalisation for breaches of competition law at EU level¹⁷⁶. Wils even argues that director disqualification could be a more effective method of preventing cartel activity than imposing fines on individuals¹⁷⁷.

Harrington notes that debarment could be an effective way of enforcing EU competition law as a form of punishment for the cartelist who participated in price fixing¹⁷⁸. Debarment would ensure ‘a lack of continued employment’ for those who participated in the cartel¹⁷⁹. This method would avoid the financial burden that criminalisation places on the taxpayer. It would also signal to the private sector that compliance with such laws is necessary in order to maintain access to public procurement markets¹⁸⁰.

2.2. Primacy of National Law

In many areas of the law, following on from the decisions of *Simmenthal*¹⁸¹, *Internationale Handelsgesellschaft*¹⁸² and *Costa*¹⁸³, EU law takes precedence over national law¹⁸⁴. However, Beck states that the supremacy of EU law is confined to subsidiarity, conferral, and proportionality¹⁸⁵ - it is not clear what the outer limits of these restrictions are and there is no one to decide this either¹⁸⁶. Seeing as the disqualification of directors for participating in

¹⁷⁵ Catherine McConville, *Company Law* (4th edn, Round Hall, Thomson Reuters 2018) 102.

¹⁷⁶ Andreas Stephan, ‘Disqualification Orders for Directors Involved in Cartels’ (2011) 2 *Journal of European Competition Law & Practice* 529, 529.

¹⁷⁷ Wouter Wils, ‘Is Criminalization of EU Competition Law the Answer?’ (2005) 28 *World Competition* 38.

¹⁷⁸ Joseph Harrington, ‘Comment on Antitrust Sanctions’ (2010) 6 *Competition Policy International* 45.

¹⁷⁹ *ibid* 46.

¹⁸⁰ Emmanuelle Auriol and Tina Søreide, ‘An Economic Analysis of Debarment’ (2017) 50 *International review of law and economics* 36, 37.

¹⁸¹ *Case 92/78 Simmenthal SpA v Commission* [1979] ECR 777.

¹⁸² *Case 11/70 Internationale Handelsgesellschaft mbH v Einfuhr und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

¹⁸³ *Case 6/64 Costa v ENEL* [1964] ECR 585.

¹⁸⁴ Gunnar Beck, ‘The Lisbon Judgment of the German Constitutional Court, the Primacy of EU Law and the Problem of Kompetenz-Kompetenz: A Conflict between Right and Right in which there is no *Praetor*’ (2011) 17 *European Law Journal* 470, 472.

¹⁸⁵ *ibid*.

¹⁸⁶ *ibid* 172.

cartel activity is not legislated for in France and Germany, in contrast to Ireland where it is legislated for, there could be constitutional issues if disqualification were to become a method of enforcement at EU level in particular in Germany under Article 12 of the *Grundgesetz für die Bundesrepublik Deutschland* (German constitution) where all inhabitants have the right to choose their profession or occupation and where they work and train¹⁸⁷. This is following on from the *Weiss*¹⁸⁸ judgment in 2020 where if fundamental rights enter the picture, i.e., Articles 1-19 of the German constitution, it is likely that German law will take precedence over EU law on such matters¹⁸⁹. Nonetheless, it would still be worthwhile for the Commission to consider the possibility of introducing disqualification and debarment as an alternative to criminalisation after considering the constitutional consequences of such measures.

3. Criminalisation

3.1. Highlighting the Seriousness of the Offence

It is clear, as Whelan states, that at present, the European Commission can only impose sanctions of a non-criminal nature on undertakings for breaches of Article 101 TFEU¹⁹⁰. *Beaton-Wells* and *Parker* imply that if cartelists were aware that criminal sanctions are possible, this would pose a higher threat to them thereby making it less likely that they would form a cartel in the first place¹⁹¹. In Ireland, under the 2002 Act as amended, there will now be an increased prison sentence for an indictable offence of 10 years, previously 5 years; Ireland is among one of the few states that provide criminal liability for both individuals and enterprises¹⁹². The extent of the criminal sanctions imposed in Ireland in this regard sends out the right message that cartel activity is not to be tolerated by society¹⁹³. Therefore, if the

¹⁸⁷ Art. 12 GG <https://www.gesetze-im-internet.de/gg/art_12.html> accessed 15 August 2022.

¹⁸⁸ *C-493/17 Weiss and Others*.

¹⁸⁹ Jorge Martinez and Miguel Toledano, 'Primacy of German Law over European Union Law' *The Conservative* (London, 30 May 2022) <<https://www.theconservative.online/primacy-of-german-law-over-european-union-law-i>> accessed 08 August 2022.

¹⁹⁰ Peter Whelan, 'Legal Certainty and Cartel Criminalisation within the EU Member States' (2012) 71 *Cambridge Law Journal* 677, 678.

¹⁹¹ Caron Beaton-Wells and Christine Parker, 'Justifying Criminal Sanctions for Cartel Conduct: A Hard Case' (2012) 1 *Journal of Antitrust Enforcement* 198, 8.

¹⁹² Donald Baker, 'The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging' (2000) 69 *George Washington Law Review* 693, 693.

¹⁹³ Peter Whelan, 'Antitrust Criminalization as a Legitimate Deterrent' [2022] *The Cambridge Handbook of Competition Law Sanctions* 101, 101.

European Commission were to introduce criminalisation, it would be made clearer to cartelists that their behaviour consists of a serious moral offence¹⁹⁴.

3.2. Human Rights Implications

Although the criminalisation of individuals involved in cartels sends out the right message that cartel activity is not to be tolerated, there could be human rights implications for the imposition of such stringent criminal sanctions¹⁹⁵ in particular in the form of a breach of Article 7 ECHR¹⁹⁶. This is emphasised in Germany where there is a heightened sensitivity in terms of the imposition of overly strict criminal sanctions for cartel offences¹⁹⁷. It is therefore my contention that it would be too extreme to adopt a system akin to that in Ireland without allowing for some degree of flexibility first, especially seeing as criminalisation of cartel offences that is harmful to the public interest¹⁹⁸ could lead to human rights implications.

3.3. Potential for Flexibility

No prison sentences have been imposed in France so far; one significant difference between the Irish and French system is that France allows for exemptions from criminal sanctions where individuals have been granted full immunity from fines and where they have fully cooperated with the *parquet*. As we have seen already, in Germany, there is no criminalisation for breaches of Section 1 of the *GWB* except for bid-rigging where the prison sentence can reach up to five years. According to Tóth, this has now become a more widespread criminal offence¹⁹⁹. It can be argued therefore that the French system appears to find a good middle-ground by legalising criminalisation but at the same time allowing for exemptions, and consequently allowing for more flexibility as opposed to a one-size-fits-all system.

¹⁹⁴ David King, 'Criminalisation of Cartel Behaviour' (2010) 10 Occasional Paper from Minister of Economic Development, New Zealand 1, 1.

¹⁹⁵ Peter Whelan, 'Legal Certainty and Cartel Criminalisation within the EU Member States' (2012) 71 The Cambridge Law Journal 677, 677.

¹⁹⁶ *ibid.*

¹⁹⁷ John O Haley, 'Antitrust Sanctions and Remedies: A Comparative Study of German and Japanese Law' (1983) 59 Washington Law Review 471, 474.

¹⁹⁸ Arianna Andreangeli, *EU Competition Enforcement and Human Rights* (Edward Elgar Publishing, Incorporated 2008) 28.

¹⁹⁹ Tihamer Tóth, 'The Quest to Create an Effective Set of Competition Law Sanctions' [2022] The Cambridge Handbook of Competition Law Sanctions 1, 4.

4. Naming Individuals

4.1. A Step too Far?

When cartelists are sanctioned in Ireland, their identity is revealed in the media and widely referred²⁰⁰ to in the academic literature²⁰¹. This could be a reason to deter individuals for participating in cartels but, at the same time, it is a form of humiliation for those involved and could carry constitutional implications. The naming of criminals is a more sensitive issue in France and Germany where it is rare to come across names of individuals who have been sanctioned for participating in cartel activity in the media.

4.2. A Sensitive Issue in Germany

Section 8.1. of the *Deutscher Presserkodex* (German Press Code)²⁰² recommends that the names of criminals not be published in the media except for certain circumstances where the public interest outweighs the need to protect the privacy of the individuals concerned. As per Section 8.3. of the *Deutscher Presserkodex*, the longer the time between the crime and the present moment, the greater the responsibility on the media not to publish the name of the individuals convicted of the cartel activity. This contrasts with the Irish system where even today, news publishers such as *The Irish Times* and *The Irish Independent* not only publish the names of those previously convicted of cartel involvement, but also their home addresses²⁰³. Therefore, given the sensitivity surrounding the naming of criminals in some jurisdictions, in particular in Germany, it would not be acceptable for the Commission to start naming the individuals involved in its press releases. In fact, the Commission could perhaps consider issuing guidelines to Member States, in particular to Ireland, to encourage a more respectful safeguarding of the identity of individuals convicted of cartel activity, especially if the offence is a fact of the past, as already respected by German law and similar to the

²⁰⁰ Paul Gorecki, 'Cartel Sentencing in Ireland: Criminal Standards of Proof but Civil Sanctions' (2008) Munich Personal RePEc Archive 2.

²⁰¹ Paul Gorecki, 'Sentencing in Ireland's First Bid-Rigging Cartel Case: An Appraisal' (2017) Munich Personal RePEc Archive 2.

²⁰² Ethische Standards für den Journalismus (*Presserat - Presserkodex*, 12 August 2022 <<https://www.presserat.de/pressekodex.html>> accessed 12 August 2022.

²⁰³ 'Manager of Galway Heating Oil Company Sentenced for Price-Fixing' (*The Irish Times*, 04 May 2012) <<https://www.irishtimes.com/news/manager-of-galway-heating-oil-company-sentenced-for-price-fixing-1.514050>> accessed 14 August 2022.

protection of naming children in the media in Irish law under Acht na Leanai 2001 or The Children Act, 2001²⁰⁴.

5. Fining Individuals

5.1. The Level of Fines

One of the interesting differences identified between France, Germany and Ireland in the system of fining individuals is that Germany places a limitation on the people who are susceptible to fines, i.e., senior employees, officers and directors. These limitations do not exist in Ireland or France. Nonetheless, France places an emphasis on recidivism when calculating fines. The more serious the crime and importantly, the more often the breach, the more likely it is that higher fines will be imposed. This is a sophisticated system which sends out the message that a repeat of such cartel activity is not tolerated by the law. The maximum fines imposed in Ireland on individuals are far greater than in France and Germany, especially since the 2022 amendment of the 2002 act. However, Whelan argues that the focus should be on the enforcement of competition law against cartels rather than the level of fines imposed²⁰⁵.

5.2. Human Rights Implications

Schroeder argues that an effective system requires that one should not only take recidivism into account but also the length of time that has passed since the infringement occurred²⁰⁶. The European Commission already takes the length of time into account. Nonetheless, the Commission could now perhaps consider restricting the individuals who are susceptible to fines especially where more attention is now being drawn to the human rights implications of competition law enforcement in the literature. This would be another way of ensuring greater protection for the fundamental rights of individuals just as the Commission is wary of the

²⁰⁴ Children Act, 2001 < <https://www.irishstatutebook.ie/eli/2001/act/24/enacted/en/html>> accessed 15 August 2022.

²⁰⁵ Whelan, 'Strengthening Competition Law Enforcement in Ireland: The Competition (Amendment) Act 2012' (n 151) 148.

²⁰⁶ Dirk Schroeder, 'Squaring the Circle in Cartel Cases: Compliance, Fines, Leniency and Settlement from a Private Practitioner's Perspective' (2008) 4 Competition Law International 39, 39.

rights of defence²⁰⁷ in administrative proceedings leading up to the imposition of sanctions as evident in the *Hoffmann-la Roche*²⁰⁸ case.

6. Limiting Case Timeframes

One final point is not necessarily limited to any jurisdiction in particular, but nonetheless still relevant overall, is the number of years it takes for each case to be heard. If the Commission were to reform its methods of enforcement against cartels in the future, it would be worth considering which method is most cost-effective. For example, criminalisation is not cost-effective as the taxpayer has to pay for prison maintenance, but debarment might be a good alternative where, weighing up both sides, it would cost less for the taxpayer.

The Commission could also introduce a cap on the number of years it would take for each case to be heard as the appeal procedure can entail significant costs. For example, the *Flüssiggas*²⁰⁹ judgment consisted of over 130 sessions and lasted approximately 3 years. This case was appealed to the *Bundesgerichtshof der Bundesrepublik Deutschland* (Federal Court of Justice) which is the highest court of civil and criminal jurisdiction in Germany but was overturned given that proper evidence had not been given to the court. If such appeals were avoided, many costs could be saved.

²⁰⁷ Tamar Khuchua, ‘Corporate Human Rights Protection in EU Competition Law Enforcement-The Standard of Protection of Companies’ Rights in the Light of ECHR’ (2016) 1 European Business Law 19.

²⁰⁸ *Case 107/76 Hoffmann-La Roche v Centrafarm*.

²⁰⁹ *Condomines, Galmiche and Saez* (n 106).

Chapter 5: Conclusion

This dissertation provided an overview of the main points concerning the enforcement of competition law against cartels at EU level. This included how cartels are formed, the fundamentals of Article 101 TFEU, the EC fining policy, the leniency programme and the link between EU law and national methods of enforcement. The chapter on national competition law contained a description of the fundamentals of national competition law enforcement in three different Member States – Germany, France and Ireland.

The chapter on reflection and analysis provided suggestions as to what the Commission could focus on when considering future reforms of the current enforcement methods of EU competition law against cartels. These considerations could include discussions surrounding the possible ways of applying through the leniency programme, the regulation of translations of leniency applications, the restriction of ringleaders from full immunity, the disqualification of directors and the debarment of employees of undertakings who participated in cartel activity. When considering disqualification and debarment, discussions ought to be held regarding constitutional implications, in particular in relation to fundamental rights and where national laws may take precedence.

The Commission might also consider a flexible approach towards the criminalisation of cartelists. There are specific areas where the Commission might consider issuing further guidelines to encourage uniform fairness across the board, for example, in relation to the naming of convicted cartelists in the media. The focus of the Commission should always be on the enforcement of competition law against cartels as opposed to the level of fines imposed. The Commission would benefit from considering how it could reduce the timeframe to hear such cases – the aim being to achieve more cost-effective methods of enforcement of EU competition law against cartels in the future.

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