

Panel IV: Modern cartel enforcement

Risks to the continued success of leniency- The private practitioner's perspective

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Leniency Statistics (1)

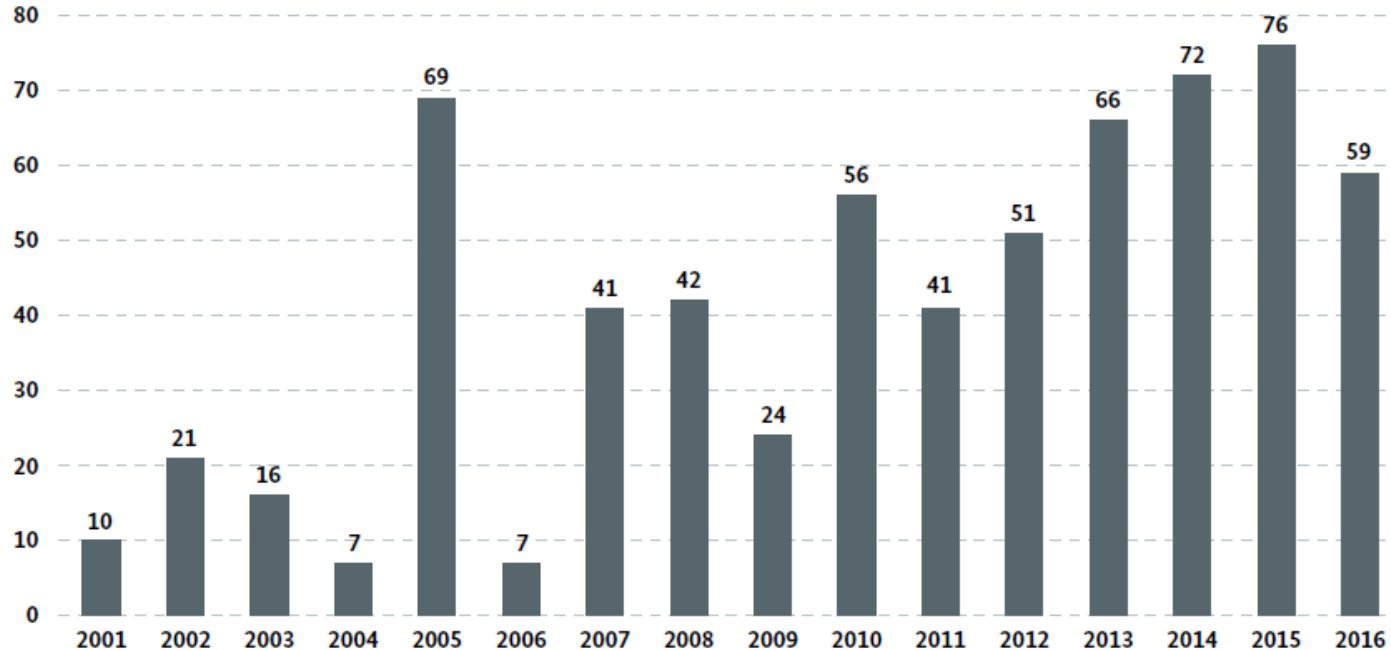
- European Commission's cartel statistics (2013-2017) does not disclose the number of leniency cases
- W. Wils, Kluwer Law International 2016 (Vol. 39 Issue 3), p. 327 et seq. finds high Commission dependence on leniency:

Period	Total Number of European Commission Cartel Decisions with Fines	Number of Decisions in Which Immunity Was Granted under the European Commission's Leniency Programme
1986-1990	9	
1991-1995	8	
1996-2000	10	1
2001-2005	33	20
2006-2010	31	25
2011-2015	23	21

Leniency Statistics (2)

- FCO publishes number of applications filed, but figures do not show percentage of leniency cases out of total cases (Brochure Successful Cartel Enforcement, 2017):

Anzahl der beim Bundeskartellamt gestellten Bonusanträge 2001 – 2016



- Slightly more than half of the cases initiated based on immunity (Quote from Brochure)

Conclusions from Leniency Statistics

- Number of leniency applications in Germany dropped in 2016, but too early to see waning success of leniency
- Leniency statistics are only indicative over a period of several years
- However, figures show high dependence of cartel enforcement on leniency
- This applies even more to the Commission than the FCO

Benefits of Leniency

- Competition authorities uniformly praise the success of leniency, e.g. see **FCO's Brochure "Successful cartel enforcement" (2017)**
 - Leniency facilitates detection of cartels
 - Leniency allows competition authorities to finish more cases with less resources
- **W. Wils (June 2016)** finds that the number of cartel decisions tripled following the introduction of the leniency programme and that this has increased deterrence.
- **Borell/Jiménez/Garcia (2013)**: "... LPs have had a significant positive impact on the perception of a company's policy among the business community, especially in those countries whose antitrust enforcement is less credible. ... LPs have become weapons of mass dissuasion in the hands of antitrust enforcement against the more damaging forms of explicit collusion among rival firms in the marketplace."

Detrimental Effects of Leniency

- **W. Wils (June 2016):** Ethical concerns in particular with regard to recidivists
- **Marvao/Spagnolo (2015):**
 - Overuse of leniency reduces deterrence effect because fines are too low (see divergent view of W. Wils, 2016, who finds increase of general level of fines)
 - Only first applicant should be rewarded to keep incentive up to go in first
 - Self-serving antitrust community takes number of convictions as performance indicator, but less cases with higher fines would be more deterrent
 - High probability of detection in the absence of leniency is necessary complement to leniency
 - Further limiting immunity applicant's liability better than restricting plaintiffs' access to documents
- **Marx/Mezzetti (2014):** Leniency increases concealment effects and creates incentives to outsource cartel
- **Martyniszyn (2015):** Leniency/Amnesty plus 2015 may have pro-collusive effects

Inherent Risks of Leniency

Certain risks have always been associated with LPs, but have so far not discouraged companies from applications:

- Missing relevant conduct in the investigation for lack of cooperation by certain individuals leading to loss or reduction of leniency discount
- Further investigations in other territories/product groups where other party takes immunity position
- No acknowledgment of value add because competition authority already has enough evidence
- Higher exposure of immunity applicant in private damages actions

More Recent Risks To Leniency

Several more recent risks to the success of LPs have developed:

- Handling of leniency applicants by the competition authorities
- Disincentives to apply for leniency in the sphere of the companies
- External factors increasing the risks of leniency

Risks to Leniency Arising from Competition Authorities

- Multi-jurisdictional cartel investigations including countries with little domestic impact increase unpredictability for applicants
 - Unknown financial exposure
 - Double jeopardy risk
 - Protection of confidential information not guaranteed
 - Conflicts in LPs and differences in evidence standards
 - Rights of defense at risk
- Enlargement of notion of hardcore cartel risks has created uncertainty and clogs the system
 - Information exchanges, hub & spoke
 - Inconsistent application of secrecy requirement
- More generous publication/disclosure of evidence to third parties
- Extensive interpretation of duty to cooperate

Disincentives to Leniency in the Sphere of the Companies

- Lack of evidence after years of compliance programs and increased concealment efforts by individuals engaged in relevant conduct supported by digital technology
- Increasing formalism in internal investigations, e.g. due to data protection law, counsel to individuals, information requirements, etc.
- Companies' lack of willingness to indemnify individuals from fines
- Companies' tendency to report borderline conduct to get protection
- Increased cost of investigations because of growing data volumes and increasing number of jurisdictions becoming active in cartel enforcement

External Threats to Leniency

- Increased follow-on damages activity to be further fostered by Damages Directive implementation constitutes growing threat to LPs
 - Immunity applicant still more exposed than others despite limitation of liability and contribution claims (Article 11 Damages Directive)
 - Disclosure of incriminating documents to private plaintiffs by CAs (Article 6 Damages Directive)
- Criminalization of cartel conduct creates disincentive to make use of LPs
 - In several jurisdictions criminal liability and LPs are not finetuned
 - Makes internal investigations more difficult for lack of cooperation by individuals
 - Deters companies from making leniency applications because they cannot protect their employees

Possible Remedies

- Restraint on the part of the CAs in opening multiple investigations
- More coordination between experienced authorities and new enforcers in ROW countries
- Soft harmonization on scope of hardcore cartel and LPs
- Proportional interpretation of applicant's cooperation duty by CAs
- Consider to further extend privilege for immunity applicants in private damages actions after experiences with new DD regime
- Finetune criminal liability with LPs
- Increase of CA's own detection activity, e.g. screening and other techniques