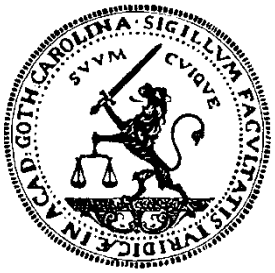

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Considerations in Connection to Leniency Applications in the EU, the UK, Sweden and the U.S.

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Contents

Summary

While the cartel prohibition of most countries is quite similar, the differences in the sanctions imposed on cartel participants and the leniency available to such participants under national leniency programs are noteworthy. This thesis presents the sanctions for competition law infringements and the applicable leniency programs of the EU, the UK, Sweden and the U.S. The purpose of the thesis is to analyze, with regard to the sanctions and leniency programs, what considerations a company or an individual, who has participated in a cartel and who wants to apply for leniency, should make before applying in any or all of the four jurisdictions. Through a presentation of the Fine Art Auction Houses cartel the thesis also exemplifies some considerations that might underlie a leniency application.

The main sanctions for cartel participation are fines, criminal sanctions for individuals and damages. While the fines can be expected to be of similar, high levels in the four jurisdictions, the differences are noteworthy when it comes to criminal sanctions for individuals and damages. Out of the four countries only the UK and the U.S. punish individuals separately by imprisonment and/or fines. While the U.S. has focused on using criminal sanctions for individuals the UK has, at the time of writing, only imposed such sanctions in one case. Damages are also a prominent and often used sanction in the U.S. but not an available sanction on EU level. The EU Member States are however required to provide effective remedies for parties who have suffered damages as a result of a cartel.

The leniency programs of the four jurisdictions are similar in that they all offer full immunity from sanctions to the applicant who is the first to apply. In the UK and the U.S., individuals can, under separate programs for individuals, apply for leniency on their own behalf but it is also possible for individuals to obtain immunity from imprisonment and fines under a company's immunity. Immunity is only granted to the first applicant and the leniency offered second-in or subsequent applicants differ in the four jurisdictions. In the EU, UK and Sweden subsequent applicants are offered a reduction of fines of up to 50 %. In the U.S., rewards for such applicants are given through plea agreements, which can be entered into at an early stage. The rewards under such agreements may be subject to some negotiation.

The level of significance the different national sanctions hold to you, the risk of, as an individual, exclusion from the company's leniency application, the role you have played in the cartel, whether you are able to provide sufficient evidence on a full and continuous basis and, if immunity is no longer available, whether the generous reduction of fines in the EU and/or the plea agreements, with their possibility to save time and negotiate on rewards in the U.S., could still make an application worthwhile, are the main considerations that a company or an individual needs to make before it, he or she, applies for leniency in any or all of the four jurisdictions.

Sammanfattning

Förbud mot karteller är likartade i de flesta länder. Om förbuden överträds är dock skillnaderna i de påföljder som kan utdömas, respektive i den eftergift som kan sökas och beviljas, värda att notera. Denna uppsats presenterar de påföljder för överträdelser av kartellförbud samt de eftergifter som erbjuds i EU, Storbritannien, Sverige och USA. Syftet med uppsatsen är att analysera vilka överväganden, kring sanktioner och eftergiftsprogram, som ett företag eller en enskild som har deltagit i en kartell och vill ansöka om eftergift bör göra innan ansökan lämnas i ett eller flera av de fyra länderna. Vidare exemplifieras de överväganden som kan ligga bakom en ansökan om eftergift genom en presentation av ”Fine Art Auction Houses” kartellen.

De viktigaste påföljderna för karteller är böter, straffrättsliga påföljder för enskilda samt skadestånd. Böter för företag kan generellt förväntas hamna på höga nivåer i samtliga fyra länder. Stora skillnader föreligger dock när det gäller straffrättsliga påföljder för enskilda samt skadestånd. Av de fyra länderna är det enbart Storbritannien och USA som valt att möjliggöra bestraffning av enskilda genom fängelse och/eller böter. USA har fokuserat på att använda dessa påföljder gentemot enskilda medan sådana påföljder bara utdömts en gång i Storbritannien. Även skadestånd är en viktig och välanvänd påföljd i USA. Jämförelsevis är skadestånd inte en tillgänglig påföljd på EU nivå. Medlemsstaterna är dock skyldiga att tillhandahålla effektiva rättsmedel för personer som lidit skada till följd av en kartell.

Samtliga fyra länders eftergiftsprogram erbjuder full immunitet från påföljder till den som är först att ansöka om eftergift. Storbritannien och USA ger individer möjlighet att antingen ansöka om eftergift för egen del, genom separata eftergiftsprogram, eller ansöka om immunitet från fängelse och böter som en del av företagets immunitet. Full immunitet erbjuds endast den första sökanden och den eftergift som eventuella efterkommande sökanden erbjuds ser något olika ut i de olika länderna. I EU, Storbritannien och Sverige kan efterkommande sökanden få sina böter nedsatta med upp till 50 %. I USA däremot sker eftergift för efterkommande sökanden utanför eftergiftsprogrammet genom så kallade ”plea agreements”. Dessa kan ingås i ett mycket tidigt skede och det finns viss möjlighet att förhandla fram vad eftergiften i ett sådant avtal ska bestå av.

De huvudsakliga överväganden ett företag eller en enskild bör göra innan eftergift söks i ett eller flera av de fyra länderna rör den betydelse som de olika påföljderna har för sökanden, vilken risk som föreligger att som enskild individ exkluderas från företagets ansökan, vilken roll sökanden haft i kartellen, huruvida sökanden har möjlighet att fullt ut tillhandahålla nödvändig information samt, om immunitet inte längre är tillgängligt, det intresse företaget har av nedsatta böter i EU och/eller av de möjligheter till tidsvinst och förhandling kring eftergift som ”plea agreements” erbjuder.

Preface

First and foremost I would like to thank my supervisor, *Henrik Norinder*, for providing inspiration and support from the very beginning and continuously throughout the process of writing this thesis.

Andre Fiebig, thank you for helping me figure out some details of the American rules on sanctions and leniency.

Hanna Rehn, thank you for taking time to proof-read the final version.

As this thesis marks the end of my studies in Lund I would also like to thank my family for their support and last but not least I would like to thank my friends for making my five years in Lund truly amazing.

Lund, May 2012

Josefin Backman

Abbreviations

CA 98	Competition Act 1998
CAT	Competition Appeal Tribunal
CDDA	Company Directors Disqualification Act 1986
DOJ	Department of Justice
EA 02	Enterprise Act 2002
ECJ	European Court of Justice
ECN	European Competition Network
EEA	European Economic Area
FAQ	Frequently Asked Questions
FTC	Federal Trade Commission
KL	Konkurrenslag
KKV	Konkurrensverket
OFT	Office of Fair Trading
TFEU	Treaty on the Functioning of the European Union

1 Introduction

1.1 Background

In today's increasingly globalized and somewhat borderless society it seems easier than ever for companies to expand their businesses by offering their products and services to people and companies all over the world. However, along with the possibilities that follow new markets there are also responsibilities. Knowing the content of, and acting in conformity with, the laws and regulations of each country a company conducts business in constitutes an important example of such a responsibility.

From a competition law perspective a company needs to be aware of not only the prohibitions of the different national competition laws but also the enforcement of the laws, for example in terms of sanctions for infringements. In close connection to enforcement and sanctions are the leniency programs that some countries have developed in order to be able to detect and punish certain infringements of competition law. The programs enable cartel participants to receive full or partial leniency in exchange for cooperation with the competition authorities. The requirements for the granting of leniency as well as the form of the actual leniency differ from program to program.

A company infringing competition law might be doing so in several countries at the same time, for example through a cartel applying to several or all of the countries that the companies involved in the cartel are doing business in. This makes it important for a company to know the content of the different programs under which the company might want to apply for leniency. The differences that appear in the laws of different countries might force companies to generally develop different business strategies and market plans for each country. This thesis will examine whether such different strategies should also be developed in connection to leniency applications.

1.2 Purpose

This thesis presents the sanctions for cartel participation and the cartel leniency programs of the EU, the UK, Sweden and the U.S. The purpose of the thesis is to analyze, with regard to the sanctions and leniency programs, what considerations a company or an individual should make when it, he or she, has participated in a cartel and wants to apply for leniency in the EU, the UK, Sweden and/or the U.S. Focus will be on features of the different leniency programs that could make an application in a certain country more, or less, important.

The question to be answered is what factors of the European, British, Swedish and American rules on sanctions and leniency a company or an individual should take into consideration in deciding whether and where to apply for leniency.

1.3 Method and Material

In writing this thesis I have applied a traditional method for legal research, a legal dogmatic method. This means that leniency notices and policies, national laws and regulations, case law, explanatory notes, preparatory work and other relevant legislative material have been of great importance. The material has been studied through established methods of judicial interpretation such as contextual interpretation, teleological approach and literal interpretation. In addition, a lot of the material that has been used, especially relating to the leniency programs, consists of FAQs, guidelines and recommendations from the different national competition authorities. As such documents are strong indicators of how the different rules will be interpreted I have, to a great extent, chosen to refer to such documents. It is however important to remember that there is a possibility of national courts ultimately ruling in ways contrary to the interpretation of the competition authorities.

In addition, elements of a comparative method have been applied as I have chosen to present, compare and analyze the rules on sanctions and leniency in four different jurisdictions. I have chosen the EU rules on cartels and leniency because the rules apply to many countries and because the EU is a big market where many companies operate. Another big market is the American one and this is one of the reasons why the American system will be presented. The American system is also chosen because the U.S. is a pioneer country for competition law in general and leniency programs in particular. The UK is one of the biggest markets within the EU and that is why I have chosen to present the British rules on cartels and leniency. Furthermore, the UK is one of the EU Member States that provide for criminal sanctions for individuals participating in a cartel and this makes for an interesting comparison with the American criminal sanctions for individuals. Finally, I have chosen the Swedish rules on cartels and leniency mainly because I am studying in Sweden.

To describe the Fine Art Auction Houses cartel I have, apart from the relevant legal material, used Christopher Mason's *"The Art of the Steal"*. It is important to note that this book is not used as a source of law and does not hold any legal value. Instead, the information deriving from the book is provided by way of illustrating what the considerations leading up to a leniency application might be.

For further information on the subject of leniency I recommend the reader to consult the webpages of the European Directorate General of Competition, the British Office of Fair Trading, the Swedish Konkurrensverket and the

American Department of Justice[1]. All of these webpages provide detailed information on leniency along with relevant decisions and legislative material as well as any recent development in the subject.

1.4 Delimitations

There are many interesting facts and aspects of cartels and leniency. To be able to present a clear and coherent thesis some of these interesting aspects have had to be left out.

As I expect the reader to have some basic knowledge of competition law I will not give a general introduction to the subject. Furthermore, I will only present a brief overview of the cartel prohibition, as the purpose of the thesis is to establish considerations to be made at a time when an applicant knows that it has infringed competition law. Hence, at a time when whether an infringement has occurred is not the issue but whether and where to apply for leniency is.

In international cases different matters of jurisdiction, such as for example the effects doctrine, comity and multilateral agreements, are of course always of importance as they ultimately determine whether or not the laws of different countries will be applied and enforced. For the purposes of this thesis I will assume that companies evaluating whether to apply for leniency in a certain jurisdiction is somehow subject to the laws of that country. Furthermore, all procedural aspects will not be presented in depth but some procedural aspects will be presented where relevant.

An interesting question in connection to sanctions is if parties to an agreement violating competition law can sue each other for damages. Leniency applicants will, as part of their application, have to terminate their participation in the cartel and thereby in a way breach a contract with their co-conspirators. This question is however outside the scope of this thesis.

As the thesis aims to establish how to make use of different leniency programs once an infringement has taken place I will not present any reflections on the actual phenomenon of leniency. This means that I will not reflect on the reasons for operating, or not operating, a leniency program although this makes for an interesting discussion.

With four different jurisdictions to present I will focus on what I find to be the most important features of each jurisdiction. Reference will sometimes be made to sources providing more details on certain aspects of the four systems. The focus will mainly be on the U.S. and EU as the legal framework of the latter to a great extent covers both the UK and Sweden.

[1] For EU see http://ec.europa.eu/competition , for the UK see http://www.oft.gov.uk, for Sweden see http://www.kkv.se, for the U.S. see http://www.justice.gov/atr .

1.5 Terminology

The term ’company’ will be used throughout the thesis rather than the European ’undertaking’ or the American ’corporation’. For the purposes of this thesis the three words have the same meaning. The term ’leniency’ will, unless otherwise stated, be used as a generic expression for all types of leniency that can be granted, whether in the form of total immunity or amnesty, reduction of fines or any other type of benefit. The terms ‘competition law’ and ‘antitrust’ will be used interchangeably and for the purposes of this thesis they will have the same meaning.

1.6 Disposition

Chapter 2 briefly describes the four different sets of rules on cartels that I have chosen to look at in this thesis. An overview of the available sanctions is then presented in Chapter 3. The division in Chapter 3 is by type of sanction rather than by country in order for the comparison to be made continuously throughout the Chapter.

Chapter 4 is devoted to the different leniency programs of the EU, the UK, Sweden and the U.S. To conclude Chapter 4 there is a brief comparison between the programs, which contains elements of analysis. The major part of the analysis is however found in Chapter 6.

Chapter 4 is followed by a case example in Chapter 5, namely that of the Fine Art Auction Houses cartel. The case is of high relevance for this thesis as it concerned an international cartel where leniency was sought and granted in both the EU and the U.S.

It is inevitable that some minor personal reflections may occur in different sections throughout the thesis. My final discussion and conclusions are however presented in Chapter 6.

2 Rules on Cartels

2.1 Introduction

Competition is a key ingredient in a well-functioning free market as it will help set the price at levels the market can bear and force market actors to be innovative and keep a high quality in their products and services. In the long run competition enhances not only innovation but also economic growth. Quite ironically, laws regulating competition has proven necessary in order to sustain and protect free competition in the free market.[2]

One of the key elements of competition law is to prohibit certain types of cooperation between competing companies. The type of cooperation prohibited may be defined as agreements which are designed to, or which end up, eliminating competition. Such agreements are generally referred to as *cartels*. There are several possible benefits for companies working together in a cartel; cartel cooperation for example eliminates the necessity for companies to improve the quality of their products as well as their productivity. The biggest benefit of working together in a cartel is possibly a financial one, as a successful cartel will afford its participants a higher profit than each company would have received individually in a competitive market.[3] A powerful cartel will maximize the profits of the cartel participants at the expense of consumers and free competition.[4] Furthermore, cartels help keep non-efficient companies in the market which inflicts great damage on the economy in general.[5]

Cartels are considered bilateral or multilateral restraints of competition, as there are always two or more companies involved. Furthermore, cartels are generally considered horizontal restraints on competition, as cartel participants are companies at the same level of the distribution chain, for example two manufacturers of the same product.[6] The anticompetitive conduct of a cartel can involve anything from price-fixing to bid-rigging to the sharing of markets.[7]

In this Chapter I will briefly describe the various cartel prohibitions of the EU, the UK, Sweden and the U.S.

[2] See Dabbah 2004, p. 1-2.
[3] Marco Colino 2011, p. 145.
[4] Dabbah 2004, p. 233.
[5] Marco Colino 2011, p. 145.
[6] See Dabbah 2004, p. 233.
[7] For more information on cartels in general see Whish & Bailey 2012, Chapter 13.

2.2 Cartels under EU Law

Cartels are prohibited under EU law through Article 101(1) TFEU. This provision prohibits agreements between companies, decisions by associations of companies and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market. Article 101(2) TFEU states that an agreement, or relevant parts of it, prohibited under Article 101(1) TFEU is automatically void.

As for the effect on trade between Member States almost all cartel arrangements, even national ones, will have such an effect. For example, in order to be successful, cartel participants will have to make it difficult for other companies, including companies from other Member States, to penetrate the market, thereby creating an effect on the common market.[8]

Article 101(1) TFEU also contains a non-exhaustive list of restrictions to which the Article is intended to apply in particular. This list includes the fixing of purchase or selling prices, the allocation of production or sales quotas and the sharing of markets, including bid-rigging. This type of conduct is referred to by the European Commission, hereafter the Commission, as 'hard core' cartels and is seen as particularly serious as the object of these types of agreements is to restrict competition.[9]

If there is any disparity between national competition law and the competition law of the EU the latter generally prevails.[10]

2.3 Cartels under UK Law

The UK Competition Act of 1998 was brought forward to align national UK competition law with that of the EU. As a result, the legal basis for the cartel prohibition in Section 2 of Chapter I corresponds closely with Article 101(1) TFEU. This so-called 'Chapter I prohibition' states that agreements between companies, decisions by associations of companies or concerted practices which may affect trade within the UK and which have as their object or effect the prevention, restriction or distortion of competition within the UK are prohibited. Any agreement prohibited under the provision is automatically void. The provision also includes a non-exhaustive list of conducts to which the prohibition is intended to apply in particular. The list mirrors that of Article 101(1) TFEU.

In addition to the Chapter I prohibition there is a criminal cartel offence in Section 188 of the Enterprise Act of 2002. The provision applies to horizontal arrangements, between companies, which were brought about by

[8] Jones & Sufrin 2010, p. 800.
[9] See *Ibid*. p. 799.
[10] Whish & Bailey 2012, p. 75.

the dishonest conduct of two or more individuals. Section 188 states that an individual is guilty of a criminal offence if he dishonestly agrees with one or more persons to make or implement, or to cause to be made or implemented, arrangements between at least two companies involving any of the following conduct; price-fixing, the sharing of markets, bid-rigging and limitation of supply or production.

The OFT must apply Article 101 TFEU whenever there is an effect on the internal market.[11] In such a scenario national competition law may also be applied but such an application may not reach a result frustrating the application of EU law.[12] This means that the OFT must not prohibit any conduct under Section 2 of the CA 98 which is compatible with Article 101 TFEU. Furthermore, if the OFT or the national courts rule on agreements or practices which have already been subject to a decision by the Commission the OFT or the national court, cannot reach conclusions running counter to those of the Commission.[13] In the rare case of no effect on the internal market only national UK competition law is applicable but EU law will still be indicative.[14]

2.4 Cartels under Swedish Law

Equally to the UK rules, the Swedish rules on competition law are created in the light of the EU rules.[15] According to Chapter 2, Section 1 of the Swedish Competition Act[16] agreements between companies are prohibited if they have as their objective, or effect, to an appreciable extent, the prevention, restriction or distortion of competition. Just like the British Chapter I prohibition the Swedish provision corresponds closely with Article 101(1) of the TFEU.[17] Section 1 of Chapter 2 of the Swedish Competition Act includes the same illustrative list of particularly severe restraints as Article 101(1) TFEU does, including the hard core cases. Agreements prohibited under Chapter 2, Section 1 of the Swedish Competition Act are automatically void.[18]

If there is an effect on the internal market as well as the Swedish market, national Swedish competition law and EU competition law are applicable in parallel. When the two sets of rules are applied in parallel there shall be full convergence in the application.[19] If there is no effect on the internal market only Swedish national competition law is applicable. However, EU law

[11] Regulation 1/2003 art. 3(1). See also CA 98 section 60.
[12] Regulation 1/2003 art. 3(1) & (2). See also art. 16 and Marco Colino 2011, p. 46.
[13] Regulation 1/2003 art. 3(2) & art. 16.
[14] See CA 98 section 60.
[15] Bernitz 2011, p. 63.
[16] Konkurrenslag (2008:579), hereafter KL.
[17] The Swedish rule expressly states that the restraint has to be "appreciable". This so-called *de minimis* prerequisite applies to Article 101 TFEU as well as it has been developed through ECJ case law.
[18] KL Chapter 2 § 6.
[19] Prop. 2003/04:80 p. 48-51. See also Regulation 1/2003 art. 3 & 16.

shall still be indicative and the assessments shall be materially the same as they would have been had EU law been applied.[20]

2.5 Cartels under American Law

The American cartel prohibition can be found in Section 1 of the Sherman Act. This provision states that every contract or conspiracy, in restraint of trade or commerce, among the several States or with foreign nations, is declared illegal. Violations of this section constitute a felony that can be criminally prosecuted by the U.S. Department of Justice, hereafter the DOJ.

The U.S. Supreme Court has held that certain agreements between actual or potential competitors are condemned *per se.* A per se agreement is likely to be anticompetitive and unlikely to produce any pro-competitive effects. Therefore, such an agreement requires no further inquiry into the practice's actual effect on the market or the intentions of the individuals who engaged in the practice. Conduct considered per se unlawful includes price-fixing, market division, output restraints and boycotts.[21]

Section 2 of the Sherman Act prohibits any attempt to conspire to monopolize any part of the trade or commerce. The section is generally targeted at unilateral conduct but cartels that exercise monopoly powers have been held to violate Section 2 as well as Section 1.[22] Furthermore, cartels may fall under Section 5 of the Federal Trade Commission Act, which states that unfair methods of competition in, or affecting, commerce are unlawful. This provision authorizes the FTC to issue an order for a company to cease and desist the activity.[23]

In addition to the federal regulations many states have their own competition statutes. These statutes generally borrow federal competition law standards and are less vigorously enforced. I will not describe the varying competition laws of the different states but as a final remark it is worth noting that state competition laws are free to prohibit conduct that federal competition law allows. This can of course have important effects in the rare cases where federal law and state law differ.[24]

[20] Bernitz 2011, p. 71.
[21] Elhauge & Geradin 2011, p. 74-75.
[22] *Ibid*. p. 76-77.
[23] *Ibid.* p. 12-13.
[24] *Ibid.* p. 14-15.

3 Sanctions

3.1 Introduction

For a company or an individual who knows that it, he or she, has infringed competition law by participating in a cartel, the sanctions of the different systems has to be considered a crucial factor in deciding whether and where to apply for leniency. Both the European and the American rules on cartels are formed as prohibitions to which certain sanctions are directly linked.[25] While the cartel prohibitions are quite similar in the different jurisdictions, the differences between the European and the American sanctions for infringements of the prohibitions are noteworthy. These differences relate to the range of competition law offenders that can be fined as well as the type and magnitude of the sanctions.[26]

In this Chapter I will describe the main sanctions that cartel participants, companies as well as individuals, might face. I have chosen to look at three main sanctions that I have deemed to generally produce the most far-reaching effects. Apart from fines, criminal sanctions for individuals and damages, which are the three types of sanctions I have chosen to focus on, all four jurisdictions feature a wide range of measures that might be qualified as sanctions. I will make a brief overview of these at the end of the Chapter.

The division of the sections by type of sanction rather than by country is intended to enable a continuous comparison between the different national rules on the different sanctions.

3.2 Fines

The power to impose fines on companies infringing Article 101 TFEU lies with the Commission. The amount imposed may not exceed 10 % of the company's total turnover from the preceding business year.[27] The last full and active business year will be used in order to avoid a situation where the amount to base the fine on would be null due to a cessation of the company's activities years prior to the adoption of the decision.[28] The fines are imposed on companies and the Commission does not have the power to fine individuals, such as directors and employees, who have infringed competition law.[29]

[25] Bernitz 2011, p. 63.
[26] Van den Bergh & Camesasca 2006, p. 304.
[27] Regulation 1/2003 art. 23(2).
[28] *Britannia Alloys* para. 30.
[29] Van Bael & Bellis 2010, p. 1085.

The Commission has a wide discretion not only as to whether a fine should be imposed at all but also to the level of any such fine. In fixing the amount of the fine the Commission shall have regard to the gravity and duration of the infringement.[30] Furthermore, the Commission has published guidelines as to how the fines will be calculated. The guidelines clarifies that the fines are intended to have a deterrent effect on the companies concerned as well as on any other company which might engage in behavior contrary to Article 101 TFEU.[31] A decision to impose a fine is not considered to be of a criminal law nature.[32]

The fixing of the amount is a two-stage process in which the Commission starts by determining a 'basic amount'.[33] This amount will in short terms be set by reference to a proposition of up to 30 % of the value of sales of goods, depending on the degree of gravity of the infringement, multiplied by the number of years of infringement.[34] The value of sales to be used is the value of sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area within the EEA.[35] In cases of horizontal price-fixing, market sharing and output limitations, the proportion of sales figure will be at the higher end of the 30 % normal boundary.[36]

In the second stage, the basic amount may be adjusted upwards or downwards on the basis of aggravating and/or mitigating factors set out in the guidelines.[37] The aggravating factors include repeat infringements, obstruction or non-cooperation during the course of an investigation and acting as the instigator or leader of the infringement.[38] Limited involvement in the infringement and cooperation with the Commission outside the scope of the leniency program but beyond the legal obligation to cooperate constitute some of the mitigating circumstances listed in the guidelines.[39] Furthermore, the need to increase the fine in order to exceed the amount of gains made improperly as a result of the infringement will be taken into account where possible.[40] In exceptional cases a company's inability to pay may be considered and may result in a reduction of the fine.[41] The ECJ has held that there is no obligation for the Commission to take into account proceedings and penalties to which the infringer has been subject in non-Member States.[42]

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[30] Regulation 1/2003 art. 23(3).
[31] EU Fining Guidelines para. 4.
[32] Regulation 1/2003 art. 23(5). The meaning and accuracy of this provision makes for an interesting discussion, such a discussion is however outside the scope of this thesis.
[33] EU Fining Guidelines para. 9-11.
[34] *Ibid.* para. 13, 19 & 21.
[35] *Ibid.* para. 13. See also para. 18, which applies to situations where the geographic scope of an infringement extends beyond the EEA.
[36] *Ibid.* para. 25.
[37] *Ibid.* para. 11 & 27.
[38] *Ibid.* para. 28.
[39] *Ibid.* para. 29.
[40] *Ibid.* para. 31
[41] *Ibid.* para. 35.
[42] *Showa Denko* para 57.

The limitation period for imposing fines due to breaches of Article 101 TFEU is five years.[43] The time begins to run from the day on which the infringement is committed. However, in cases of continuing or repeated infringements the time instead begins to run on the day the infringement ceases.[44] The limitation period is interrupted by any action taken by the Commission or the competition authority of a Member State for the purpose of an investigation or proceedings in respect of an infringement. The interruption takes effect on the day on which at least one company who has participated in the infringement is notified of the action and each interruption starts the time running afresh for all companies that have participated in the cartel. The limitation period expires at the latest on the day on which a period equal to twice the limitation period, i.e. 10 years, has elapsed without the Commission having imposed a fine. The period is however always suspended when a Commission decision is the subject of proceedings pending before the ECJ.[45]

The British system of sanctions is similar to that of the EU. If there has been a Chapter I infringement the OFT may impose a fine which may not exceed 10 % of the turnover of the company.[46] The turnover to be used is that of the UK, not worldwide or EU. However, the turnover is not restricted to the turnover of the relevant product and geographic market.[47]

There are guidelines as for the approach the OFT will take in the fixing of fines. According to the guidelines the fine is set through five steps, similar to the Commission's two steps.[48] First off, there is a calculation of the starting point, determined by the seriousness of the infringement and the relevant turnover of the company.[49] Then there is adjustment for duration followed by adjustment for other factors such as any financial benefit made from the infringement.[50] The fourth step is adjustment for any aggravating or mitigating factors listed in the guidelines.[51] As a final step there is, if necessary, adjustment to avoid exceeding the maximum penalty of 10 % of the turnover and to avoid double jeopardy.[52] The guidelines clearly state that the penalties are to have a deterrent effect and that the intention is to impose severe penalties.[53] It is in the OFT's discretion to reduce the amount of the fines due to a company's financial hardship.[54]

If the condemned conduct has been subject to a fine by the Commission or by a court or other body in another Member State the OFT is to have regard

[43] Regulation 1/2003 art. 25(1)(b).
[44] *Ibid.* art. 25(2).
[45] *Ibid.* art. 25(3)-(6).
[46] CA 98 section 36(1) & (8).
[47] Marco Colino 2011, p. 117.
[48] OFT's Penalty Guidance para. 2.1.
[49] *Ibid.* para. 2.3.
[50] *Ibid.* para. 2.10 & 2.11.
[51] *Ibid.* para. 2.14-2.16.
[52] *Ibid.* para. 2.17-2.20.
[53] *Ibid.* para. 1.4
[54] *Ibid.* para. 2.11.

to that penalty in assessing the level of the fine under domestic UK law.[55] The fines are characterized in English law as 'civil debt'.[56] There is no limitation period for public enforcement action under the Chapter I prohibition of the Competition Act.[57]

In Sweden, the Stockholm City Court may, upon application by the Swedish Competition Authority, KKV, order a company to pay a fine of up to 10 % of the company's annual turnover for the preceding financial year.[58] Although the fine is characterized as a financial public law sanction it has been accepted that the fines are 'criminal' within the meaning of the European Convention on Human Rights. Hence, the characterization of the fines is not entirely clear.[59] Factors such as for what period of time the infringement took place and how severe the infringement was as well as certain aggravating and mitigating circumstances are considered when the amount is set.[60] Cartels for price-fixing, market sharing or production quotas constitute examples of what is normally considered severe infringements.[61]

If KKV is of the opinion that the facts of the infringement are clear it may, instead of a court action, propose a fine to the company. The KKV is then barred from initiating court action if the company accepts the proposal within the time limit set by KKV.[62]

A fine for infringements of Swedish competition law may only be imposed where KKV's application to commence court proceedings has been served on the infringing company within five years from termination of the infringement. However, if the company within this time period has been notified of a search order or has been given the opportunity to comment on a KKV draft application to commence proceedings the time is instead calculated from that day. In such cases a fine may only be imposed where KKV's application to commence court proceedings has been served on the party concerned within ten years from termination of the infringement.[63]

In the U.S., the maximum fine was increased in 2004 through the Antitrust Criminal Penalty Enhancement and Reform Act. A company infringing

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[55] OFT's Penalty Guidance para. 2.20. See also Marco Colino 2011, p. 118.
[56] Marco Colino 2011, p. 118. However, just like the EU fines the characterization can be discussed as it is generally accepted that the British fines are 'criminal' within the meaning of the European Convention of Human Rights. Such a discussion is however outside the scope of this thesis.
[57] See Anti-cartel Enforcement Template Cartels Working Group Subgroup 2: Enforcement Techniques, section 9 - Limitation periods and deadlines, available at http://www.oft.gov.uk/shared_oft/business_leaflets/general/United-Kingdom.pdf . There is no source of law for the fact that there is no limitation period.
[58] KL Chapter 3 §§ 5-6.
[59] SOU 2006:99 p. 246-248. A further discussion on this topic is outside the scope of this thesis.
[60] KL Chapter 3 §§ 8-11. The financial situation of the company shall be taken into consideration, see Chapter 3 § 11 subsection 3.
[61] Prop. 2007/08:135 p. 123.
[62] KL Chapter 3 §§ 16 & 18.
[63] *Ibid.* Chapter 3 § 20.

American competition law may now be imposed a criminal fine of up to $100 million or an amount equal to twice the gain from the illegal conduct or twice the loss to the victims.[64] The limitation period is the general five-year limit for criminal prosecutions.[65]

The Federal Sentencing Guidelines are used to calculate the appropriate fine. According to the guidelines, the base fine is generally 20 % of the company's volume of commerce.[66] Once the base fine is established it is multiplied by minimum and maximum multipliers to arrive at the fine range.[67] The minimum and maximum multipliers are determined by the company's culpability. This culpability is in turn based on factors such as the company's prior criminal history and the company's cooperation and acceptance of responsibility.[68] When the fine range is determined the court is to consider certain factors in order to establish where within this range the fine shall ultimately be. The factors to consider include the company's role in the cartel, the need for deterrence, the gain or loss caused by the conspiracy and the lack of an effective compliance program.[69] There is a possibility for the court to reduce fines on the basis of inability to pay but not more than to avoid the fine to cause a substantial risk of jeopardizing the continued viability of the company.[70]

3.3 Criminal Sanctions for Individuals

Criminal sanctions are a prominent part of the system of antitrust sanctions in the U.S. while such sanctions are not available at all at EU level. This is one of the crucial differences between the European and the American sanctions. However, the EU Member States are free to punish cartel participating individuals with criminal sanctions through national law and a few Member States have chosen to do so.[71]

Criminal sanctions for individuals may include not only imprisonment but also criminal fines. A difference between administrative or civil fines and criminal fines is that criminal fines can be said to carry a stigma, showing how society morally disapproves of the behavior causing the fine.[72] Criminal sanctions for an individual in the U.S. can be a fine of up to

[64] 18 U.S.C. § 3571(d) and § 1 Sherman Act, 15 U.S.C. § 1. See also Elhauge & Geradin 2011, p. 15.
[65] 18 U.S.C. § 3282(a).
[66] U.S.S.G. §§ 2R1.1(d)(1) & 8C2.4(a)-(b).
[67] See *Ibid.* § 8C2.7.
[68] *Ibid.* §§ 8C2.5 & 8C2.6. See also § 2R1.1(d)(2), which states that the minimum multiplier for cartels must be at least 0.75.
[69] *Ibid.* § 8C2.8. For more information on the calculation of fines see U.S.S.G. Chapter 2 Part R and Chapter 8.
[70] *Ibid.* § 8C3.3.
[71] Van den Bergh & Camesasca 2006, p. 306.
[72] *Ibid.* p. 304. It is worth noting that the fines imposed on companies under American competition law are also characterized as criminal.

$1 million or imprisonment of up to 10 years or both.[73] Alternatively, the fine may be set to an amount equal to twice the gain from the illegal conduct or twice the loss to the victims.[74] The limitation period is the general five-year statute of limitation.[75]

As has been mentioned the criminal sanctions for individuals are a vital part of the American system of sanctions for antitrust violations, for instance over 80 antitrust offenders, including 18 foreign nationals in international cartel cases, were imprisoned in the years 2000-2004 alone.[76] Both the size of the criminal sanctions and the number of criminal cases have increased over time and the cases are increasingly focused on foreign-based conspirators.[77] A sentence of imprisonment will likely be served in full as parole was abolished in federal criminal law through the Sentencing Reform Act of 1984.

The UK is one of the Member States that provide criminal sanctions for violations of competition law. The sanctions for a breach of the cartel offence in Section 188 EA 02 is imprisonment of up to five years or a fine or both.[78] The cartel offence is distinct from the CA 98 Chapter I prohibition and Article 101 TFEU, this means that if a cartel is being punished by an imposition of a fine on a company this does not preclude individuals from being criminally prosecuted under the cartel offence.[79] There is no limitation period for the criminal cartel offence.[80]

In 2007, three former executives of a company involved in a worldwide cartel were sentenced to imprisonment. That sentence is, at the time of writing, the only conviction under Section 188 EA 02 though other investigations have been launched but without success.[81]

There are no criminal sanctions against individuals in Sweden as the Swedish legislator has decided that criminalization of infringements of competition law is not an effective way to offset cartels.[82] However, there is a possibility to order an injunction against trading. This will be described below under section 3.5.

As a final remark it is worth noting that extradition treaties are of importance for the imposition and enforcement of criminal sanctions. With

[73] § 1 Sherman Act, 15 U.S.C. § 1.
[74] 15 U.S.C. § 3571(d). This option is however rarely chosen, the focus for sanctions on individuals is instead imprisonment.
[75] 18 U.S.C. § 3282(a).
[76] Van den Bergh & Camesasca 2006, p. 306.
[77] Elhauge & Geradin 2011, p. 15-16.
[78] EA 02 section 190.
[79] Whish & Bailey 2012, p. 425.
[80] See Anti-cartel Enforcement Template Cartels Working Group Subgroup 2: Enforcement Techniques, section 9 - Limitation periods and deadlines, available at http://www.oft.gov.uk/shared_oft/business_leaflets/general/United-Kingdom.pdf . There is no source of law for the fact that there is no limitation period.
[81] Marco Colino 2011, p. 241-242.
[82] Bernitz 2011, p. 212. For a full discussion see SOU 2006:99 Chapter 14.

no applicable extradition treaty between the UK and/or the U.S. and the country where the individual resides there is a possibility for that individual to avoid criminal sanctions in the UK and/or the U.S.[83]

3.4 Damages

Damages are a type of private enforcement where claimants take their disputes to domestic courts or arbitration to get compensation for damages suffered due to a competition law infringement.[84] While fines imposed on members of cartels are often of similar levels in the EU and the U.S., rules on civil damages are another crucial disparity between the American and the European systems. In the U.S., damages are a well-established sanction at both federal and state level while damages are a relatively recent phenomenon in the EU.[85] The civil damages in the U.S. tend to be of larger amounts than any equivalents in the EU Member States. The American damages are even held by some to be the 'true punishment' for participants in international cartels.[86]

In the U.S., any person who is directly injured in his business or property by a violation of competition law can sue the violator for so-called treble damages, that is, three times the claimant's damages plus litigation costs, including reasonable attorney fees.[87] This far-reaching rule makes for the fact that government enforcement in the U.S. is often supplemented by private suits.

To prove damages a party must show that the competition law violation was a material 'but-for' cause of its injury. This means that but-for the violation the probability or extent of the injury would have been significantly lower. The exact definition of what constitutes significantly lower is not clear. It is however clear that the violation does not have to be responsible for more than 50 % of the probability or extent of the injury.[88] Claimants can use certain final judgments entered against a defendant in a government criminal or civil antitrust proceeding as *prima facie* evidence of a violation.[89]

The claimant also needs to show that the injury flowed from the anticompetitive effects of the violation and that there is a sufficiently direct or proximate link between the violation and the injury. The requirement for proximate causation means that parties having indirectly suffered damages, such as consumers buying products from a retailer who bought the products from a manufacturer selling at a cartel-fixed price, cannot bring claims for

[83] See e.g. Whish & Bailey 2012, p. 433 for information on extradition in the UK.
[84] See *Ibid.* p. 295.
[85] Van den Bergh & Camesasca 2006, p. 306.
[86] Jones & Sufrin 2010, p. 1129.
[87] § 4 Clayton Act, 15 U.S.C. § 15 and Elhauge & Geradin 2011, p. 16.
[88] Elhauge & Geradin 2011, p. 17.
[89] § 5 Clayton Act, 15 U.S.C. § 16(a).

damages.[90] However, several states have enacted statutes that authorize indirect purchasers to bring suits under state competition law.[91] A passing-on defense is generally unavailable under federal law.[92]

As a final requirement the amount of damages suffered from the injury needs to be shown. Proving competition damages is inherently difficult, as it requires comparing what has actually happened to a but-for world that never happened. Therefore, claimants are excused from an unduly rigorous standard of proving competition law injury. In practice, the claimant first comes forward with evidence showing it suffered the type of injury that the proven competition law infringement tends to create and then provides some rough method of approximating the amount of damages suffered.[93]

A very important part of the American rules on civil damages is the fact that when multiple companies engage in an anticompetitive conspiracy such as a cartel their liability is joint and several. This means that the claimant has the option to sue all, some, or only one of the companies involved in a cartel for the entire amount of the injury suffered. A defendant cannot seek contribution from the other participants for their share of the damages caused but each defendant is entitled to a defense of payment for any other amount previously paid by the other cartel participants.[94]

A claim for damages in the U.S. must be brought within four years from when the claim accrued, in other words when the defendant committed the violation that injured the claimant.[95] There are several ways in which the limitation period can get suspended, one of the most important ones being the Continuing Conduct Doctrine. According to this doctrine each act of a continuing series of anticompetitive conduct restarts the period of limitations. However, the doctrine only allows for recovery for injuries suffered within the last four years. To give an example this means that if a price-fixing cartel was in force between 2000 and 2004, a claimant can bring a suit in 2006 as each sale at the fixed price restarts the limitation period. However, the claimant cannot recover for inflated prices it paid before 2002.[96]

In the U.S., it is quite common that claims for damages are brought through class actions, allowing the claimant to obtain damages not only for the harm he or she has suffered himself or herself but also for the harm suffered by others.[97] Contingency fees, where the lawyer only gets paid if he or she wins

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[90] Elhauge & Geradin 2011, p. 18-21. See e.g. *Illinois Brick*.
[91] Elhauge & Geradin 2011, p. 21.
[92] See *Hanover Shoe*.
[93] Elhauge & Geradin 2011, p. 21-23.
[94] *Ibid.* p. 25-26. See e.g. *Texas Industries*. However, a claimant cannot get double recovery by suing each defendant separately for the full amount of its injury.
[95] § 4B Clayton Act, 15 U.S.C. § 15b.
[96] Elhauge & Geradin 2011, p. 30-31. Other examples of suspension of the limitation period are pending a government suit and the doctrines of fraudulent concealment and speculative injury. For more information on these doctrines see Elhauge & Geradin 2011, p. 30-31.
[97] Class actions are made possible through the Federal Rules of Civil Procedure rule 23.

the case, are common in claims for damages, which mean that the claimant bears no risk in suing for damages.[98] Class actions and contingency fees are some of the explanations for the large number of damages claims for competition law infringements in the U.S. compared to the EU.[99]

As the ECJ have no jurisdiction to hear claims for antitrust damages third parties such as consumers and competitors having suffered loss as a result of cartel conduct may instead bring civil claims for damages before the national courts of one or several Member States.[100] The ECJ has confirmed that in order to give full effectiveness to, and strengthen the working of, the EU competition rules, the national courts must ensure that they provide effective remedies for redress concerning infringements of Article 101 TFEU.[101] Such actions will normally be brought once the Commission has adopted an infringement decision since the infringement will then not have to be re-established in the national proceedings.[102] The Member States however retain autonomy as to the procedural and substantive rules of damages, provided that such rules observe the principles of equivalence and effectiveness.[103]

As this retained autonomy might result in national rules inhibiting successful damages claims the Commission, in its 2008 White Paper on damages, set out to identify and reduce or eliminate any obstacles laying in the way of actions for damages. The Commission wanted to create an EU-wide framework with a minimum level of effective protection for parties who suffer harm as a result of breaches of EU competition law and who want to bring civil claims for compensation in their respective national courts across the EU. The approach suggested is for parties to be able to receive full compensation of the real value of the loss suffered.[104] The Commission is expected to follow up on the White Paper by proposing a directive on private damages for breach of antitrust rules.[105]

Even before the ECJ case law on damages, the UK courts established that damages were available in the UK for harm caused by infringements of

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[98] Van den Bergh & Camesasca 2006, p. 327.
[99] The DOJ and FTC will sometimes decline to pursue cases that are believed to be better punished through private litigation. Therefore, even if the government decides not to bring a suit against a suspected cartel this decision does not create an adverse inference about private litigation over the same matter. For more information see Elhauge & Geradin 2011, p. 29-30.
[100] See Whish & Bailey 2012, p. 297-298.
[101] *Courage* para. 26-30.
[102] See Regulation 1/2003 art. 16(1). See also *Masterfoods*.
[103] *Courage* para. 29 and *Manfredi* para. 62-64. The principle of equivalence means that the national rules may not be less favorable than those governing similar domestic actions and the principle of effectiveness means that the national rules may not render it practically impossible or excessively difficult to exercise rights conferred by Community law.
[104] See Commission's White Paper on Damages section 2.5.
[105] Elhauge & Geradin 2011, p. 54. The latest development in the area include two public consultations in 2011, one on a coherent European approach to collective redress and one on Quantification of harm caused by infringements of the EU antitrust rules. More information is available at http://ec.europa.eu/competition .

competition law.[106] A person seeking damages can go about it in two ways, either through a follow-on action or through a standalone action.

The most common way to seek damages is through a follow-on action, regulated under Section 47A CA 98. This section states that any person who has suffered loss or damage as a result of an infringement of UK or EU competition law may bring a claim for damages before the CAT in respect of that loss or damage.[107] Claims may generally only be brought before the CAT when the OFT, a sectoral regulator or the European Commission has reached a decision establishing that competition law has been infringed and any appeal from such a decision has been finally determined. In determining a claim for damages, the CAT is bound by the finding of facts and infringement in the decision of the relevant competition authority.[108] Therefore, the issue of liability is already settled and the CAT is left to determine causation and quantum. In other words, the claimant must demonstrate that the anti-competitive behavior of which it complains caused the loss it suffered as well as the calculation of the amount of damages to be paid.[109]

Alternatively, a claimant can bring a standalone action for damages in a civil court. The relevant cause of action is the tort of breach of statutory duty, the statute in question being the CA 98. As there is no prior infringement decision in a standalone action the claimant must establish the infringement itself before being able to claim damages.[110]

A claimant should be able to recover the difference between the price it actually paid and the price that would have prevailed in the absence of an infringement. The exact amount of the difference can be very difficult to establish in practice and is further complicated by the question of at which date the damages are to be calculated.[111] What is clear is however that UK law does not provide for punitive damages. Such damages have been deemed to violate the principle of *ne bis in idem* when the defendant has already been ordered by the OFT or the Commission to pay a substantial fine.[112]

There are several possibilities for class actions for damages under UK law, but these possibilities are rarely exercised. Actions for damages may be facilitated by a group litigation order or representative actions. The latter provide convenient means by which to avoid a large number of substantially similar actions while a group litigation order provides for the case

[106] See Whish & Bailey 2012, p. 306-307.
[107] Follow-on actions may also be, and some have been, commenced in the High Court rather than in the CAT. This has for example been done due to more preferable limitation periods in the High Court, see Whish & Bailey 2012, p. 319.
[108] See Whish & Bailey 2012, p. 317, CA 98 sections 58 & 58A and Regulation 1/2003 art. 16(1).
[109] Whish & Bailey 2012, p. 311.
[110] *Ibid.* p. 307-309.
[111] *Ibid.* p. 311. See also the Commission's White Paper on Damages.
[112] Whish & Bailey 2012, p. 312.

management of claims that give rise to related or common issues of fact or law.[113] Furthermore, there is a specific right for representative actions by specified bodies on behalf of named consumers in follow-on cases. There is no equivalent right for representative claims for businesses.[114] It is not clear if a passing-on defense would be accepted under UK law or if an indirect purchaser can sue for damages in the UK.[115]

The limitation period for standalone claims in the High Court is generally six years from the date on which the loss was suffered.[116] However, the period is postponed if the defendant deliberately conceals material facts.[117] This is the case for a secret cartel for which time will start to run from when the claimant knew or ought to have known of those material facts. This will often be the time at which the relevant competition authority publishes an infringement decision.[118] For follow-on actions before the CAT the proceedings must be commenced within two years of the 'relevant date', usually the date of the competition authority's decision plus any appeal period.[119] It is possible that a claim for damages will be stayed until a criminal trial has been held.[120]

Successful claims for damages have been fairly rare in the UK. It is however well known that many cases in which the claimant has received substantial damages have been settled out of court.[121]

Damages for infringements of competition law are an available sanction under Swedish law as well.[122] The liability and procedure for civil damages for loss suffered as a result of cartel conduct is the same as for other civil actions for damages. This means that the claimant needs to show intent or negligence as well as causation and quantum. It is possible for a group of victims to plead their cause together in a class action but it is not very common.[123]

The amount of damages is often difficult to calculate and there is no real clarifying judicial practice. The Swedish courts are instructed to make a financially realistic assessment, taking into account that damages shall have both a restorative and a preventive effect. The damages shall cover the actual damage suffered and only pure economic loss is reimbursed. This means that any amounts of damages rewarded under Swedish law will never

[113] Whish & Bailey 2012, p. 314.
[114] CA 98 section 47B.
[115] Whish & Bailey 2012, p. 310-311.
[116] Limitation Act 1980 section 2.
[117] *Ibid.* section 32(1)(b).
[118] Whish & Bailey 2012, p. 315.
[119] CAT Rules 2003, rule 31.
[120] Whish & Bailey 2012, p. 431.
[121] *Ibid.* p. 315-316.
[122] KL Chapter 3 § 25.
[123] See Bernitz 2011, p. 248-249. For more information on class actions see the Swedish Group Proceedings Act, Lag (2002:599) om grupprättegång.

be close to the American treble damages.[124] It is possible that parties having indirectly suffered damage can, under certain circumstances, bring claims for damages in Sweden.[125] As only the actual damage suffered is reimbursed a passing on defense is likely to be recognized under Swedish law.

The right to damages lapses if no action is brought within ten years from the date when the damage occurred.[126] There have been some cases where damages has been sought due to competition law infringements but there is no real tradition of seeking such damages in Sweden.[127]

3.5 Other Sanctions

Throughout the four jurisdictions I have chosen to focus on in this thesis there is, apart from fines, criminal sanctions for individuals and damages, a wide range of measures that might be qualified as sanctions. Some of these measures are not sanctions in a traditional sense but may well feel like sanctions for the company or individual towards which or whom such measures are aimed. In this section I will briefly describe some of these measures.

The Commission has the power to require companies infringing Article 101 TFEU to bring the infringement to an end.[128] If a company does not follow such an order, the Commission may impose periodic penalty payments of up to 5 % of the average daily turnover of the company.[129] The Commission also has the power to order various structural remedies and behavioral orders but this power will only be employed in exceptional circumstances.[130]

When the OFT has made a decision that an agreement infringes the Chapter I prohibition or Article 101 TFEU the OFT may give directions to a person or persons to bring the infringement to an end.[131] Such directions may include other provisions such as reporting obligations and positive actions.[132] It is not clear whether the power to give directions include the right to impose structural remedies.[133] If a person subject to directions fails to comply with the directions the OFT may apply to the court for an order

[124] Bernitz 2011, p. 249-250.
[125] See Prop. 2004/05:117 p. 29-30.
[126] KL Chapter 3 § 25. The ten-year limitation period entered into force on 1 August 2005, a limitation period of five years applies to claims that arose before 1 August 2005.
[127] See Lidgard 2009, p. 34-41.
[128] Regulation 1/2003 art. 7.
[129] *Ibid.* art. 24(1). This provision also provides for a number of other situations in which the Commission may impose a penalty payment.
[130] *Ibid.* art. 7. See also art. 8-9 and Marco Colino 2011, p. 116-117.
[131] CA 98 section 32(1).
[132] See OFT's Enforcement Guidance para 2.3.
[133] Whish & Bailey 2012, p. 408.

requiring compliance. Breach of such an order would be contempt of court, which is punishable by fines or imprisonment.[134]

KKV can impose an injunction on a company to stop an infringement. Such an injunction can be combined with a penalty imposition if the company does not follow the injunction. The penalty imposition may however not be combined with a court-ordered fine.[135]

In the U.S., claims for injunctive relief to prevent a Sherman Act violation can be brought by the DOJ as well as by private parties.[136] Injunctive relief is not limited to prohibiting illegal conduct, it can include orders to e.g. modify contracts, divest or create companies or refrain from certain practices even though such practices are normally legal.[137]

Directors of companies infringing UK competition law can be disqualified, through a competition disqualification order, for up to 15 years.[138] During the time of disqualification it is a criminal offence to be a director of a company, to act as a receiver of a company's property, to promote, form or manage a company or to act as an insolvency practitioner.[139] The court must make a competition disqualification order against a person, following an application by the OFT, when the company of which the person is a director commits a breach of UK and/or EU competition law and the court considers the person's conduct as a director to make him or her unfit to be concerned in the management of a company.[140] In assessing whether the conduct of a director makes him or her unfit the court will have regard to whether the conduct contributed to the breach of competition law or, if this was not the case, whether he or she had reasonable grounds to suspect a breach and took no steps to prevent it, or, if he or she did not know of the breach but should have known of it.[141] If a director is convicted under the cartel offence the court has the power to make a disqualification as well. In such a case the OFT will not make use of its powers to apply for disqualification.[142]

Similar to the competition disqualification order there is a possibility under Swedish law to order a trade prohibition for a period of three to ten years for an individual who has been involved in price-fixing, market sharing or controlling of production.[143] The trade prohibition can be ordered against leading figures of cartel participating companies, e.g. board members and

[134] CA 98 section 34 and OFT's Enforcement Guidance, para 2.2. & para 2.9. See also Whish & Bailey 2012, p. 409.
[135] Bernitz 2011, p. 207-209.
[136] See §§ 15 & 16 Clayton Act, 15 U.S.C. §§ 25 & 26 and § 4 Sherman Act, 15 U.S.C. § 4.
[137] Elhauge & Geradin 2011, p. 27.
[138] CDDA 1986 section 9A(9) and EA 02 section 204.
[139] CDDA 1986 sections 1(1) & 13.
[140] *Ibid.* sections 9A(2) & 9A(3).
[141] *Ibid.* sections 9A(5)(a) & 9A(6).
[142] See Marco Colino 2011, p. 122.
[143] The Swedish Trading Prohibition Act, Lag (1986:436) om näringsförbud §§ 2 a, 4 & 5.

managing directors.[144] The injunction prohibits the individual from pursuing a trade or managing a company.[145]

As a final remark the different cost rules for proceedings must always be kept in mind as such rules may differ depending on the type of proceeding and the outcome of the case. Cost rules are of course not a sanction per se but ,as competition law proceedings are often complex matters, the costs for such proceedings, for example legal fees on both sides in civil claims for damages, tend to add up to large amounts. The risk of paying not only the company's own procedural costs but also those of the counterparty should therefore possibly be added to the equation of the sanctions a company engaging in cartel conduct might face.[146]

[144] The Swedish Trading Prohibition Act, Lag (1986:436) om näringsförbud § 4.
[145] *Ibid.* § 6. For more information see Bernitz 2011, p. 212 and KKVFS 2010:1.
[146] See Elhauge & Geradin 2011, p. 53-54.

4 Leniency

4.1 Introduction

Proving the existence of a cartel is rarely easy as the companies involved in cartels can be expected to be quite refined in their methods for hiding their illegal behavior. This makes finding physical, documentary proof of a cartel difficult and the best way to detect and prosecute a cartel is therefore through first hand information from one or more cartel participants. To be able to acquire such information, some countries have developed cartel leniency programs to enable national competition authorities to identify, break up and punish cartel participants.[147]

The type of leniency granted under the programs differs but many, if not all, programs offer full immunity to the first applicant. By only granting full immunity to the first applicant cartel participants are put in a race with each other of who will be the first to apply, or, in other words, the first 'in line'. Some countries, such as the U.S., offer separate leniency programs for individuals under which individuals can apply for leniency on their own behalf. Companies will then not only be in a race for leniency with its co-conspirators but also with its own directors and employees.[148]

In a world with increasingly globalized commerce it is not uncommon for cartels to apply to several or all of the countries that the companies involved in the cartel are doing business in. This means that special considerations may have to be made by a company or an individual who decides to leave the cartel and apply for leniency in all of those countries. In this Chapter I will describe and compare the leniency programs applicable in the EU, the UK, Sweden and the U.S. This will work as a background to Chapter 6 in which I will discuss what a leniency applicant should consider before applying in any or all of these four jurisdictions.

4.2 Applying for Leniency in the EU

The currently applicable leniency program under EU law, "*Commission Notice on Immunity from fines and reduction of fines in cartel cases"*, was adopted in 2006. In addition to this program, each Member State operates its own leniency program. It is worth noting that an application for leniency to the Commission or to the national competition authority of a Member State is not to be considered an application for leniency to another authority. This means that separate applications will have to be made to the respective

[147] See Dabbah 2004, p. 241-243.
[148] See FAQ 2008, p. 2.

competition authorities of all the Member States to which the cartel has applied.[149]

4.2.1 Immunity

Only one company can qualify for immunity from fines under the EU Leniency Notice. To qualify, the company reporting its participation in a cartel must be the first to submit information and evidence, which will enable the Commission to, in connection with the alleged cartel, either carry out a targeted inspection, so-called (8)(a) immunity, or find an infringement of Article 101 TFEU, so-called (8)(b) immunity.[150]

For the Commission to be able to carry out a targeted inspection within the meaning of point (8)(a) of the Leniency Notice, the applicant must provide the Commission with a corporate statement as well as any other evidence available to it relating to the alleged cartel. The corporate statement must include a detailed description of the alleged cartel, names of and information about all participating companies and involved individuals and information on any other competition authorities, inside or outside the EU, who have been approached or will be approached in relation to the alleged cartel.[151] If the Commission, at the time of the submission, already had sufficient evidence to adopt a decision to carry out, or already had carried out, an inspection in connection to the alleged cartel, immunity will not be granted.[152]

Immunity pursuant to point (8)(b) is available in cases where the Commission has started a cartel investigation on its own initiative but the Commission does not have sufficient evidence to find an infringement of Article 101 TFEU and no company has been granted immunity under point (8)(a). Furthermore, the company applying under point (8)(b) must be the first to provide contemporaneous, incriminating evidence of the alleged cartel as well as a corporate statement with the same content as described above for point (8)(a) immunity.[153]

In addition to the conditions described above there are some cumulative conditions that apply for both (8)(a) and (8)(b) immunity. First off, the company must cooperate genuinely, fully, expeditiously and on a continuous basis from the time of the application and throughout the Commission's administrative procedure.[154] Secondly, the company must terminate its involvement in the cartel immediately following its

[149] See Network Cooperation Notice para. 38. A complete list of the different Member States' programs is available at http://ec.europa.eu/competition .
[150] 2006 Leniency Notice point 8.
[151] *Ibid.* point 9.
[152] *Ibid.* point 10.
[153] *Ibid.* point 11.
[154] For a specification of what the cooperation condition includes see 2006 Leniency Notice point 12(a).

application. As a final condition the company must not, when contemplating to make an application, have destroyed, falsified or concealed any evidence of the alleged cartel. Furthermore, it must not have disclosed, except to other competition authorities, the fact or content of its contemplated application.[155] A company having coerced other companies to join or to remain in the cartel is not eligible for immunity from fines but may qualify for a reduction of fines.[156]

4.2.2 Reduction of Fines

A company that does not meet the conditions for immunity, which is not the first to come forward or which has coerced another company to participate in the cartel may still be eligible for a reduction of any fine that would otherwise be imposed. To qualify for a reduction the company must provide the Commission with evidence that represents significant added value with respect to the evidence already in the Commission's possession. Furthermore, the company must meet the same cumulative conditions that apply for both (8)(a) and (8)(b) immunity, except for the 'coercer condition'.[157]

In order to bring 'added value' the evidence provided must, by its very nature or its level of detail, strengthen the Commission's ability to prove the cartel. Written evidence from the period in time to which the facts pertain will have a greater value than subsequently established evidence. Likewise, evidence directly relevant to the facts in question will have a greater value than evidence with indirect relevance. Furthermore, the degree of corroboration from other sources required for the evidence to be relied upon will impact the value of the evidence.[158]

The first company to provide significant added value will receive a reduction of fines of 30-50 %. The second company will receive a reduction of 20-30 % and any subsequent company will receive a reduction of up to 20 %. To determine the level of reduction within each of these scales, the time at which the evidence was submitted and the extent to which it represents added value, will be taken into account. If the applicant for a reduction of fines is the first to submit compelling evidence, which is used to establish additional facts increasing the gravity or the duration of the infringement, such additional facts will not be taken into account when setting the fine for the company that provided this evidence.[159] This might in a way be considered a further reduction of a fine.

[155] 2006 Leniency Notice point 12.
[156] *Ibid.* point 13.
[157] *Ibid.* points 23 & 24.
[158] *Ibid.* point 25.
[159] *Ibid.* point 26.

4.2.3 Procedure

A company wishing to apply for immunity under the EU leniency program should contact the Commission's Directorate General for Competition. It is possible to either apply for a marker or to immediately proceed to make a formal application.[160] A marker grants the applicant its place in line for a period specified on a case-by-case basis. During this period the applicant can gather necessary information and evidence. If the marker is perfected within the set period, the information and evidence provided will be deemed to have been submitted on the date the marker was granted. To secure a marker the applicant must provide information of its name and address, parties to the alleged cartel, affected products and territories, the nature of and the estimated duration of the cartel conduct. The applicant should also justify its request for a marker and inform the Commission of any past or future leniency applications to other competition authorities in relation to the alleged cartel.[161]

A formal immunity application must include all the information and evidence on the alleged cartel available to the applicant.[162] Once the Commission has received this information and verified that the applicant meets the conditions for immunity it will grant the applicant conditional immunity from fines in writing.[163]

There is also a possibility for the applicant to present the information and evidence of the formal application in hypothetical terms. In that case the applicant must give a detailed descriptive list of evidence that it will disclose at a later agreed date. The product or service, geographic scope and estimated duration of the cartel must be clearly identified but the name of the applicant and the names of the co-conspirators need not be disclosed until the described evidence is submitted.[164] The Commission will verify that the evidence described meets the condition for immunity. Once the evidence is disclosed, no later than on the date agreed, and the Commission has verified that the evidence corresponds to the descriptive list, the applicant will be granted conditional immunity from fines in writing.[165] This possibility of making a formal application by presenting information in hypothetical terms cannot be used to perfect a marker.[166]

If, at the end of the administrative procedure, the company has met the conditions for immunity the Commission will grant it immunity from fines in the relevant decision.[167] If it becomes apparent that immunity is not available or if the applicant fails to meet the conditions of point (8)(a) or

[160] 2006 Leniency Notice point 14.
[161] *Ibid.* point 15.
[162] *Ibid.* point 16(a).
[163] *Ibid.* point 18.
[164] *Ibid.* point 16(b).
[165] *Ibid.* point 19.
[166] *Ibid.* point 15.
[167] *Ibid.* point 22.

point (8)(b) the Commission will inform the applicant who is then free to withdraw the evidence disclosed or request the Commission to consider the application for a reduction of fines instead.[168] However, if at the end of the administrative procedure it becomes clear that the applicant has failed to meet the conditions of cooperation, termination and destruction of evidence, described under 4.2.1, it will not benefit from any favorable treatment at all.[169]

The procedure for reduction of fines is slightly different as the marker system is only available to immunity applicants. An applicant for reduction of fines must make a formal application including sufficient evidence of the alleged cartel to the Commission.[170] The Commission will not make any decision regarding an application for a reduction of a fine before it has taken a position on any existing applications for immunity from fines for the same alleged cartel.[171]

If the Commission finds that the applicant meets the conditions for reduction of a fine, it will inform the applicant in writing of its intention to apply a reduction within a specified band.[172] The final determination of which company or companies have met the conditions for reduction of a fine and what the exact level of reduction will be is made through the Commission's final decision.[173]

An important factor in applying for leniency is of course whether or not the leniency application will be kept confidential. If not there is a risk that a company applying for leniency will have built itself a trap. If the leniency application is handed over to third parties suing for damages, or to the competition authorities of other countries, the leniency applicant will, by applying for leniency, have exposed itself to claims and proceedings from such parties.

Until the issuance of the statement of objection the fact that an application has been made must be held confidential by the applicant itself, unless otherwise agreed with the Commission. The identity of the leniency applicant will be disclosed to the other parties in the statement of objections. At the end of the administrative procedure the identity of the applicant as well as a description of its participation in the cartel will be disclosed publicly in the non-confidential version of any final infringement decision.[174]

Access to corporate statements made as part of leniency applications is only granted to the addresses of a statement of objections provided that they

[168] 2006 Leniency Notice para. 20.
[169] *Ibid.* point 22.
[170] *Ibid.* point 27.
[171] *Ibid.* point 28.
[172] *Ibid.* point 29.
[173] *Ibid.* point 30.
[174] *Ibid.* points 12(a) & 39 and Van Bael & Bellis 2010, p. 1138.

commit not to make any copy of any information in the files. Furthermore, the party being granted access must ensure that the information obtained from the corporate statement will only be used for the party to defend itself in the Commission's proceedings.[175] There are some cases regarding access to the Commission's files currently pending before the EU Courts.[176]

As for transmission to the Member States' national competition authorities, corporate statements made under the Leniency Notice will only be transmitted to such authorities if the conditions set out in the Network Cooperation Notice are met, see below under 4.2.4, and if the level of protection against disclosure awarded by the receiving competition authority is equivalent to the one conferred by the Commission.[177]

If a company is granted immunity from, or reduction of, fines this will not protect the company from any civil law consequences of its participation in a competition law infringement.[178]

4.2.4 The ECN and the ECN Model Leniency Programme

The Commission and all the national competition authorities of the Member States are members of, and cooperate with each other, through the European Competition Network, the ECN. To prevent the cooperation within the ECN from discouraging companies to apply for leniency there are special safeguards for leniency related information, ensuring that such information is only handed over between national competition authorities under certain circumstances.

First off, when a network member is investigating a case as a result of a leniency application it must inform the other members of the network of its investigation. This information may however not be used by the other network members to start an investigation on their own behalf.[179]

Furthermore, information voluntarily submitted by a leniency applicant or collected on that basis may only be exchanged between two network members if the applicant consents to the exchange, if the applicant has applied for leniency with both members in the same case or if the receiving network member provides written commitment not to use the information

[175] 2006 Leniency Notice points 33 & 34.
[176] Whish & Bailey 2012, p. 305-306. See also *Pfleiderer AG* in which the claimant wanted access to the National German Competition Authority's files for the purposes of an action for damages. The ECJ stated that it is left to national courts to decide, on a case-by-case basis, under which conditions access to national leniency files will be granted.
[177] 2006 Leniency Notice point 35.
[178] *Ibid.* point 39.
[179] Network Cooperation Notice para. 39. See also Regulation 1/2003 art. 11-12.

transmitted to impose sanctions on the applicant, its subsidiaries or its employees.[180]

The ECN has also created a model leniency program which sets out the treatment an applicant should be able to anticipate in any ECN jurisdiction. It is important to note that the model program is not a legally binding document and it is not a program under which applicants can apply. Its purpose is instead to set out the principal elements that should be common to all leniency programs across the ECN, and the idea is that all network members should align their leniency programs with the model program.[181]

The model program introduces a model for a uniform summary application system in order to alleviate the burden of multiple filings in cases where the Commission is particularly well placed to deal with a case.[182] The Commission is thought to be so if the infringement has effect on competition in more than three Member States.[183] Summary applications can be made for applicants for immunity; a full application is then made to the Commission and summary ones to relevant national Competition Authorities. The summary application temporarily protects the applicant's place in the line. Should any of the national competition authorities want to act on the case it will grant the applicant an additional period of time to complete its application. National competition authorities having received summary applications are entitled to exchange information without the consent of the applicant.[184]

4.2.5 Settlement in Cartel Cases

With the aim to dispose more quickly of cartel cases in which companies are prepared to admit liability the Commission has introduced a possibility to settle in cartel cases.[185]

The Commission has a wide discretion in deciding which cases are, in its opinion, suitable for settlement as there is no right or duty to settle. If the Commission, at the end of its investigation but before the issuing of the statement of objections, decides that settlement is suitable it will invite the parties to reach an agreement with it. Once settlement proceedings have begun it is however still in the Commission's discretion whether to

[180] Network Cooperation Notice para. 40-41. Furthermore, consent is not required for the transmission of information collected by a competition authority on behalf of, and for the account of, another competition authority to which the leniency application was made.
[181] ECN Model Programme para. 1-3.
[182] See *Ibid.* para. 22-25 and ECN Explanatory Notes para. 39-46 for further details.
[183] Network Cooperation Notice para. 14.
[184] ECN Model Programme para. 22 & 25 and ECN Explanatory Note para. 41. A list of the national competition authorities accepting summary applications is available at http://ec.europa.eu/competition .
[185] See Settlement Notice 2008 para. 1. See also Regulation 622/2008 for more information.

definitely settle or to discontinue settlement discussions and revert to the normal proceeding.[186]

In settlement proceedings, the Commission does not negotiate with companies but rather offers them to agree with the Commission's assessment.[187] Settlement agreements can be reached with one, some or all of the parties to a cartel. An admission of guilt will always form part of any final settlement agreement, as companies will have to acknowledge the infringement and their liability.[188] For companies that reach a settlement with the Commission a fixed 10 % settlement discount is available and leniency and settlement can both be applied in the same case.[189] The benefits for the cartel participants are that less time and money is spent on the investigation and there may also be a reputational benefit in having investigations speedily concluded.[190]

4.3 Applying for Leniency in the UK

In the UK, the OFT operates a corporate leniency policy which can be found in the "*OFT's guidance as to the appropriate amount of a penalty"*. Under the policy companies can report infringements of the Chapter I prohibition and Article 101 TFEU. In parallel, the OFT also operates a 'no-action' policy which offers immunity from criminal prosecution for cooperating individuals.

A detailed description of the application of the leniency policies as well as any issues relating to such application can be found in the *"OFT's Leniency and no-action - Guidance note on the handling of applications"*.[191]

4.3.1 The Corporate Leniency Policy

There are four basic types of leniency for companies. First off, there is the so-called Type A immunity. Type A means total immunity from fines for an infringement of the Chapter I prohibition and/or Article 101 TFEU. This is granted to the applicant who is the first to come forward before the OFT has launched an investigation. The applicant must satisfy the following cumulative conditions; provide the OFT with all the information, documents and evidence available to it, maintain continuous cooperation throughout the investigation and refrain from further participation the cartel. Furthermore, the applicant must not have taken steps to coerce another company to join the cartel.[192] A coercer is defined as someone who has taken clear, positive and ultimately successful steps to pressurize an unwilling participant to take

[186] Settlement Notice 2008 para. 3, 5, 6 & 9.
[187] See *Ibid.* para. 2 & 20-22.
[188] *Ibid.* para. 20.
[189] *Ibid.* para. 1 & 32-33.
[190] Whish & Bailey 2012, p. 262-263.
[191] Attached to the Guidance are standard forms of leniency and no-action agreements.
[192] OFT's Penalty Guidance para 3.9. See also OFT's Leniency Guidance para. 1.6.

part in the cartel.[193] However, the OFT does not want to give a too detailed definition and points out that the coercer bar will most likely not lead to any larger numbers of refusals of immunity.[194]

Type A immunity ceases to be available when an individual has applied for individual leniency.[195] However, the possibility, in such a situation, to still grant the company, of which the individual is a current or former employee, immunity is in the discretion of the OFT. In considering whether to grant immunity in such a situation the OFT will take into account the stage of the investigation at which the company made its approach as well as by how much the evidence offered by the company might advance the investigation.[196]

If a company does not qualify for Type A immunity because there is a pre-existing investigation, it may still be able to benefit from Type B immunity. Such immunity means that the OFT may grant the company a reduction of fines of up to 100 %. The applicant must then be the first to come forward after an investigation has begun but before the OFT has issued a statement of objections. The applicant must furthermore satisfy the same cumulative conditions as for Type A immunity. Whilst Type A immunity is available as of right if the conditions are met, Type B immunity is discretionary.[197] However, Type B immunity can be expected to be the norm rather than the exception.[198]

If the company is the first to report the cartel but does not qualify for Type A immunity because there is already an investigation and the OFT exercises its discretion *not* to give Type B immunity the company may still qualify for Type B leniency. Under this type of leniency the OFT can grant any level of reduction of fines.[199] The grant can in theory be as high as 100 % although this is unlikely as the OFT would then have granted Type B immunity instead.[200] Furthermore, the grant of Type B leniency is not common.[201]

A company that is not the first to come forward or which does not qualify for total immunity may be granted a reduction of fines of up to 50 %, so-called Type C leniency. The company will also have to meet the conditions listed for Type A immunity except for the requirement regarding coercing. Several companies can receive Type C leniency for the same cartel.[202] Whether a reduction will be granted is in the OFT's discretion and when determining if that will be the case the OFT will take into account the stage

[193] OFT's Leniency Guidance para. 6.4. See Chapter 6 of the Guidance for more details.
[194] *Ibid.* para. 6.3 & 6.4.
[195] *Ibid.* para. 3.25.
[196] *Ibid.* para. 7.26.
[197] OFT's Penalty Guidance para. 3.11-3.12.
[198] OFT's Leniency Guidance para. 4.2.
[199] *Ibid.* para. 1.6 & 5.3. See OFT's Penalty Guidance para. 3.11 & 3.12.
[200] OFT's Leniency Guidance para. 5.6.
[201] *Ibid.* para. 5.3.
[202] OFT's Penalty Guidance para. 3.13.

at which the company comes forward as well as the evidence already in the OFT's possession and the evidence provided by the company.[203] These factors will also be taken into account in determining the level of reduction.[204] The reduction will be set on the basis of the added value that the applicant can provide which means that the applicant's position in line is generally not decisive.[205]

4.3.2 Procedure for Companies

If a company wants to apply for leniency, someone who has the power to represent the company should contact the Director of Cartel Investigation at the OFT.[206] Before making an application a prospective application can be discussed on an anonymous basis. This makes it possible for a company to get to know if Type A or Type B immunity is available before the company reveals its identity. The applicant's name must however be given before an application can be taken forward.[207]

Any information provided by a would-be applicant in connection to its anonymous request to establish whether any type of leniency is still available will not be used by the OFT for any other purpose. This also applies to a would-be applicant for individual immunity.[208]

A marker system is available to immunity applicants and to secure a Type A or Type B marker an applicant will have to specify the nature and emerging details of the suspected infringement and the form and substance of the evidence uncovered so far.[209] To perfect the marker for Type A immunity the company must provide all information, evidence and documents available to it regarding the existence and activities of the cartel.[210] The marker will not be considered perfected unless the information provided is at least sufficient to enable the OFT to exercise its formal powers of investigation.[211]

The OFT will allow no-name markers for Type A applicants where the company's legal counsel confirms that he or she also has instructions to make an application for immunity to the Commission. The counsel will then have to confirm the applicant's genuine intention to confess and provide his or her own name, firm and sufficient details of the affected sector to enable the OFT to exclude the existence of a pre-existing UK investigation or applicant. Once the marker has been given the counsel will, within a specified time, have to confirm that an application has been made to the

[203] OFT's Penalty Guidance para. 3.14 & 3.15.
[204] *Ibid.* para. 3.14.
[205] OFT's Leniency Guidance para. 5.5 & 5.7.
[206] OFT's Penalty Guidance para. 3.3.
[207] *Ibid.* para. 3.4. See also OFT's Leniency Guidance, e.g. para. 4.3 & 4.4.
[208] OFT's Leniency Guidance para. 8.32.
[209] *Ibid.* para. 3.9 & 4.9.
[210] *Ibid.* para. 3.11.
[211] *Ibid.* para. 3.14.

Commission and disclose the identity of the applicant as well as the nature, details and evidence of the infringement. If Commission immunity is no longer available the applicant can withdraw its no-name marker or turn it in to a named marker, which will then have to be perfected.[212]

For all types of immunity and leniency applications the applicant will need to ensure the OFT that there is a concrete basis for suspicion of participation in cartel activity and that the company has a genuine intention to confess.[213] In addition, the criteria of cooperation, refraining from further participation in the cartel and the applicant not having acted as a coercer will also have to have been and continue to be met. The coercer condition does however not apply for Type C leniency.[214]

To perfect the marker for Type B immunity, Type B leniency and Type C leniency the applicant must provide all relevant information available to it and that information must add *significant value* to the OFT's investigation.[215] Any evidence relating to the gravity or duration of the infringement submitted by an applicant for Type B or Type C leniency will not be taken into account to the detriment of such an applicant when assessing the appropriate amount of fines.[216]

If an applicant fails to fully cooperate or even takes positive steps to hinder an OFT investigation, for example by destroying evidence or tipping off another company about its leniency application, the OFT reserves the right to use information derived from the applicant's approach or application against that failed applicant and third parties.[217]

The OFT will endeavor to keep the identity of leniency applicants confidential throughout the course of its investigation up until the issuing of a statement of objections.[218] The identity of the applicant and the information it has submitted will be disclosed to the other parties to the case through the statement of objections. Furthermore, the identity and the information provided by the applicant will be revealed to the public through the non-confidential version of the OFT's final decision.[219]

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[212] OFT's Leniency Guidance para. 3.20. Short form 'summary applications' will be accepted when the Commission is particularly well-placed to deal with a case, the OFT is, in its opinion, also well-placed, the applicant has or is about to apply for immunity with the Commission and the applicant is in a Type A position in the UK, see OFT's Leniency Guidance para. 3.23 & 3.24 and the ECN Model Programme para. 22-25 for further details.
[213] OFT's Leniency Guidance para. 3.1, 4.1 & 5.1.
[214] *Ibid.* para. 3.15, 4.11 & 5.2.
[215] *Ibid.* para. 4.11 & 5.2.
[216] *Ibid.* para. 9.5.
[217] *Ibid.* para. 8.38. See also para. 8.11 for a definition of bad faith. In the very unlikely event that an applicant would withdraw its application of its own volition the OFT may use any information provided by the applicant against the applicant or a third party, see OFT's Leniency Guidance para. 8.36.
[218] OFT's Penalty Guidance para. 3.18.
[219] OFT's Leniency Guidance para. 8.46 & 8.47.

As a matter of policy the OFT will resist requests in connection with private civil proceedings in the UK or overseas for disclosure of leniency material or the fact that leniency has been sought.[220] Information that forms part of a company's application will furthermore, without consent, only be passed on to the Commission and/or any of the other Member States' national competition authorities in accordance with the provisions and safeguards in the Network Cooperation Notice, see 4.2.4.[221]

4.3.3 Leniency for Individuals

All current and former employees and directors of a company granted Type A or Type B immunity will automatically receive criminal immunity.[222] For companies granted Type B and Type C leniency, immunity for all cooperating current and former employees will generally not be granted.[223] The OFT will however, on an individual-by-individual basis, and depending on an assessment of the overall public interest, consider whether to grant immunity to one or more individuals of Type B or Type C leniency companies.[224]

Individuals may also independently be granted individual immunity from criminal prosecution, which is to say immunity that is not part of a corporate Type A or Type B immunity. This immunity will be in the form of a 'no-action' letter issued by the OFT under Section 190(4) EA 02.[225] The letter will be granted provided that the individual informs the OFT about the cartel activity before any other individual or company and that there is no pre-existing criminal or civil investigation of the cartel.[226]

If there is already a pre-existing investigation, but the individual reports to the OFT before any other individual or company, the individual may still be granted immunity if he or she adds significant value to the investigation. The OFT has a discretion in such cases but it is possible to approach the OFT on a no-names basis to find out what the OFT's approach will be in a certain case.[227]

To be granted a no-action letter the individual must admit participation in a criminal offence, provide the OFT with all available information regarding the cartel, cooperate completely and continuously throughout the investigation, not have coerced another company to participate in the cartel and cease participation in the cartel.[228] If there is enough information to

[220] OFT's Leniency Guidance para. 8.49.
[221] *Ibid.* para. 8.51.
[222] *Ibid.* para. 7.13 & 7.15.
[223] *Ibid.* para. 7.19.
[224] *Ibid.* para. 7.20.
[225] OFT's Guidance on No-action Letters para. 3.2.
[226] OFT's Leniency Guidance para. 7.24.
[227] *Ibid.* para. 7.25.
[228] OFT's Guidance on No-action Letters para. 3.3.

bring a successful prosecution against the applicant individual or if the OFT is in the process of gathering such information no letter will be granted.[229]

An individual who reports cartel conduct that he or she is aware of but only very remotely involved in may obtain a financial reward of up to £100,000 under the OFT's 'reward program'. An individual who has been directly involved in a cartel should ordinarily not gain a reward under the program. Such an individual should apply for leniency instead. The OFT has however left open the possibility of parallel applications for leniency and a financial reward in cases where, for example, the person concerned was involved in the cartel in only a very limited way.[230]

4.3.4 Procedure for Individuals

An approach for leniency must come from an individual or a lawyer representing that individual. Approaches may also be made on behalf of a named individual by a company seeking leniency from the OFT or the Commission.[231] It is possible to contact the OFT on an anonymous basis to inquire whether a given hypothetical scenario would, or would be likely to, lead to criminal enforcement. The OFT may then be able to assure that criminal enforcement would not be considered for that given scenario.[232]

If the OFT is prepared to issue a no-action letter the individual will be interviewed.[233] A no-action letter will be issued if the OFT considers that there is a likelihood of criminal prosecution without a no-action letter and the applicant confirms that he or she will meet the conditions for the letter.[234] This will usually be at the end of the investigation as the determination of whether such a letter should be granted can generally not be made until near the conclusion of the OFT's criminal investigation.[235] If, after the interview, the OFT establishes that prosecution is possible but that the individual does not meet the conditions to be issued a no-action letter the interview may not be used against the individual.[236]

A no-action letter may be revoked if the recipient ceases to satisfy the relevant conditions or has knowingly or recklessly provided false or misleading information.[237] Before any revocation is made the recipient will be notified and given a reasonable opportunity to make representations.[238] Revocation means that the immunity granted under the letter will cease to

[229] OFT's Guidance on No-action Letters para. 3.4.
[230] See http://www.oft.gov.uk/OFTwork/competition-act-and-cartels/cartels/rewards .
[231] OFT's Guidance on No-action Letters para. 3.5.
[232] OFT's Leniency Guidance para. 7.2.
[233] OFT's Guidance on No-action Letters para. 3.7.
[234] *Ibid.* para. 3.10.
[235] OFT's Leniency Guidance para. 7.7. Interim comfort letters may be issued upon request and where there is good reason, see OFT's Leniency Guidance para. 7.8.
[236] Marco Colino 2011, p. 246.
[237] OFT's Guidance on No-action Letters para. 3.11.
[238] *Ibid.* para. 3.13.

exist. The OFT may then rely on any information given by the applicant in a prosecution against him or her for the cartel offence.[239]

The coercer test is fully aligned with that of companies.[240] If the company is not deemed a coercer no individual within the company will be refused criminal immunity on the coercer ground.[241] If the company is found to be a coercer, individuals who themselves did not play a coercing role will however not be denied criminal immunity.[242]

The issue of immunity for individuals will only arise if the OFT undertakes a criminal investigation. If no such investigation is undertaken the OFT may, upon request, issue a comfort letter stating that a decision not to commence a criminal investigation has been taken. This letter will apply to all current and former employees of a company qualifying for immunity.[243]

In the rare case that a company qualifies for immunity under the Commission Leniency Notice but individual immunity is not available in the UK, the OFT will *normally* be prepared to grant no-action letters to individuals of such a company even if another company has already qualified for Type A immunity in the UK.[244] Furthermore, the OFT cannot use any leniency-derived information that it obtains from the Commission to further criminal enforcement functions. The OFT has put up a 'Chinese wall' between staff having access to information from the Commission and staff engaged in a criminal investigation on the same cartel activity. The former group of staff is not allowed to pass on any information directly or indirectly derived from the Commission to the latter group of staff.[245]

As for the information contained in an individual's application, such information will only be passed to the Commission and/or a Member State's national competition authority for the purpose of applying Article 101 TFEU. This transmission will however have to be in accordance with the Network Cooperation Notice, see 4.2.4.[246]

The OFT will not seek competition disqualification orders against individuals who benefit from no-action letters or who are directors of companies benefitting from leniency from the OFT or the Commission.[247]

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[239] OFT's Guidance on No-action Letters para. 3.12.
[240] OFT's Leniency Guidance para. 7.9.
[241] *Ibid.* para. 7.10.
[242] *Ibid.* para. 7.11.
[243] *Ibid.* para. 7.5.
[244] OFT's Guidance on No-action Letters para. 3.6. and OFT's Leniency Guidance para. 7.37. For more information see OFT's Leniency Guidance para. 7.34-7.46.
[245] OFT's Leniency Guidance para. 7.45.
[246] *Ibid.* para. 8.52.
[247] OFT's Guidance on No-action Letters para. 3.15.

4.3.5 Additional Reduction

When a company applies for leniency the application is often preceded or followed by an internal investigation. In this investigation a company might discover that there has been participation in another, unrelated cartel, for example regarding a completely different product or service. Leniency programs are sometimes designed to make companies report such subsequently discovered cartels as well. This can be done through so-called 'leniency plus' rules, 'penalty plus' rules or a combination of both. Leniency plus usually means that a company will be given further favorable treatment in the first cartel case if it reports its activity in the second cartel case. Penalty plus means, vice versa, that the company's penalty will be increased if it does not report its activity in the second cartel case.[248]

As for the UK, the OFT operates a leniency plus policy by offering so-called additional reduction. Such reduction is given to an applicant who already benefits from a reduction of fines in relation to one cartel and who makes a subsequent leniency application for a different cartel and obtains immunity from that application. The reduction is then offered in the first case.[249] The OFT does not operate a penalty plus policy.

4.4 Applying for Leniency in Sweden

The general framework for the Swedish leniency program is found in the Swedish Competition Act. A company can receive immunity or reduction of a fine if it discloses its participation in an infringement of the Swedish cartel prohibition and/or of Article 101 TFEU.[250] Information on how KKV interprets and applies the leniency provisions can be found in *KKVFS 2009:2*.

4.4.1 The Swedish Leniency Provisions

The Swedish leniency program resembles the EU program.[251] Only the first company applying for leniency can get full immunity from sanctions and any subsequent applicants can get a reduction of fines.[252] The decision to grant leniency is taken by KKV and is binding on both the court and KKV in any subsequent court proceedings.[253]

If KKV does not have sufficient evidence to take action against an infringement a company may be granted immunity if it is the first to report the infringement and provide KKV with enough information and evidence

[248] See FAQ 2008, p. 8-9 and Masoudi 2007, p. 8.
[249] OFT's Penalty Guidance para. 3.17.
[250] KL Chapter 3 §§ 12 & 13.
[251] Bernitz 2011, p. 211.
[252] KL Chapter 3 §§ 12 & 13.
[253] *Ibid.* Chapter 3 § 15.

for KKV to take action against the cartel. If KKV already has sufficient evidence to take action against the infringement a company can still be granted immunity if it is the first to submit evidence that enables the finding of the infringement or if the company provides highly significant assistance to an investigation of the infringement.[254] This last possibility for immunity will be applied in a very restrictive way making it difficult to qualify for leniency under that condition.[255] Immunity cannot be granted to a company that has coerced another company to participate in the infringement.[256]

A company that does not qualify for immunity may still be granted a reduction of fines if it can offer evidence that gives significant added value to the investigation.[257] The first company fulfilling the conditions for leniency receives a reduction of 30 %-50 %, the second a reduction of 20 %-30 %, and the following companies receive a reduction of up to 20 % each.[258] In setting the level of reduction, the time at which the evidence was presented, the extent to which the evidence offers an added value as well as whether any other company has provided value-adding information will be considered.[259]

To receive immunity or reduction of fines the company must provide KKV with all information and evidence available to it, actively cooperate with KKV during the entire investigation, not destroy evidence or obstruct the investigation and cease its participation in the infringement.[260]

KKV can grant leniency from trading prohibitions to individuals of a company that is granted immunity or leniency or to individuals who independently from a company substantially contribute to the investigation of KKV, the Commission or any other Member State's competition authority.[261]

4.4.2 Procedure

The leniency application should include basic information about the cartel as well as copies of any evidence available to the company. The applicant should also disclose information on any other European competition

[254] KL Chapter 3 § 12.
[255] KKVFS 2009:2 para. 33.
[256] KL Chapter 3 § 12. This rule does not say anything about instigators or leaders. However, according to KL Chapter 3 § 9 such roles will be considered an aggravating factor in determining the severity of an infringement.
[257] *Ibid.* Chapter 3 § 13.
[258] KKVFS 2009:2 para. 53.
[259] KL Chapter 3 § 13 and KKVFS 2009:2 para. 54.
[260] KL Chapter 3 § 14.
[261] The Swedish Trading Prohibition Act, Lag (1986:436) om näringsförbud, § 3 subsection 3. See also KKVFS 2010:1 para. 16.

authorities to which it has applied for leniency.[262] Someone who has the power to represent the company must make the application.[263]

There is no marker system but a company, which considers applying for leniency, can contact KKV on a no-names basis and describe the cartel in hypothetical terms. KKV will then let the company know whether the information is enough to qualify for immunity. This information is however not binding in any way and the anonymous request does not guarantee the company a place in line.[264]

If court proceedings are initiated, KKV will submit an application to the Stockholm District Court and in connection to this also decide on whether immunity or leniency will be granted.[265]

Any information relating to KKV's investigation is kept confidential throughout the investigation.[266] The application to commence court proceedings, submitted by KKV, will contain information on the leniency applicants and the reasons for the granting of immunity or reduction of fines. The application will generally be public, as will the proceedings and any subsequent judgment by the court. There is however some limited possibilities to request limitation of access to a hearing as well as possibilities for certain information of an application or a judgment to be kept confidential.[267]

A decision to grant immunity or leniency does not protect the recipient from civil damages.[268]

4.5 Applying for Leniency in the U.S.

In 1978 the U.S. was the first country ever to introduce a leniency program.[269] The currently applicable American leniency policy for companies was adopted in 1993 and was followed by a leniency policy for individuals in 1994. In 2008 the DOJ issued public guidance and substantial clarifications in the form of an FAQ and two model leniency letters to make the leniency program more transparent.[270]

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[262] KKVFS 2009:2 para. 25. See para. 9-10 for detailed information on what information to include in the application.
[263] *Ibid.* para. 24.
[264] *Ibid.* para. 18-22.
[265] *Ibid.* para. 29.
[266] The Swedish Public Access to Information and Secrecy Act, Offentlighets- och sekretesslag (2009:400), Chapter 17 § 3 & Chapter 30 §§ 1 & 3.
[267] See *Ibid.* Chapter 36 § 2 & Chapter 43 § 8. See also the Swedish Code of Judicial Procedure, Rättegångsbalk (1942:740), Chapter 5 § 1.
[268] KKVFS 2009:2 para. 60.
[269] Harding & Joshua 2010, p. 232.
[270] These documents are available at http://www.justice.gov/atr .

4.5.1 The Corporate Leniency Policy

Leniency under the *"Corporate Leniency Policy"* means not charging a company criminally for the reported cartel conduct and there are two types of leniency, Type A and Type B. Type A is only available before an investigation has begun while Type B is available even after an investigation has begun. Only the first company to apply may be granted full immunity for a particular cartel. The policy is also known as the 'corporate amnesty' or 'corporate immunity policy'. [271]

In order to be granted Type A leniency, six conditions will have to be met. First off, the DOJ's Antitrust Division, hereafter the Division, must not have received information about the illegal activity at the time the company comes forward to report. Secondly, the company must have taken prompt and effective action to terminate its part in the cartel upon its discovery of the illegal activity. Thirdly, the company must report the wrongdoing with candor and completeness and provide full, continuing and complete cooperation with the Division throughout the investigation. The fourth condition to be met is that the confession of wrongdoing must be a truly corporate act as opposed to isolated confessions of individual executives or officials. As a fifth condition the company must, if possible, make restitution to injured parties. As a final condition the company may not have been the leader in, or originator of, the activity and it must not have coerced another party to participate in the illegal activity.[272]

If a company does not meet all of the six conditions for Type A leniency it can still be granted Type B leniency if it comes forward, before or after an investigation has begun, and meets seven cumulative conditions. First off, the company must be the first to come forward and qualify for leniency with respect to the illegal activity being reported. Secondly the Division must, at the time the company comes in, not yet have evidence against the company that is likely to result in a sustainable conviction. Furthermore, just like for Type A leniency, the company must terminate its participation in the activity, fully cooperate with the Division, make the confession through a truly corporate act and make restitution to third parties.[273]

As a seventh condition the Division must determine that granting leniency would not be unfair to others, considering the nature of the illegal activity, the confessing company's role in it and the time at which the company comes forward. In applying this condition the primary considerations will be how early the company comes forward and whether it coerced another party to participate or was clearly the leader in, or originator of, the activity.[274]

The Division will interpret the time of discovery of a cartel to be at the earliest date on which either the board of directors or the counsel for the

[271] FAQ 2008, p. 4-5.
[272] The Corporate Leniency Policy section A.
[273] *Ibid.* section B.
[274] *Ibid.*

company, in-house or outside, was informed of the cartel conduct. This means that a company whose top-position employees, such as board members and directors, have participated in a cartel is not bared from leniency. As soon as the authoritative representatives of the company for legal matters are advised of the illegal activity they need to take action. If all board members are conspirators the company might still qualify for leniency if the activity is terminated promptly after legal counsel is first informed of the activity.[275]

The company is only disqualified from leniency if it was clearly the *single* organizer or *single* ringleader of a conspiracy. This means that if there are several ringleaders in a cartel all participating companies are eligible for leniency.[276]

In order to satisfy the conditions of the confession being a truly corporate act and the company providing full, continuing and complete cooperation the company must make sure that its employees will cooperate with the Division. If one or more individuals refuse to cooperate it will not necessarily prevent the Division from granting leniency but it might result in the individual losing the protection that is otherwise given to cooperating employees.[277]

The condition of making restitution to injured parties is a particularly strong one and will normally be resolved through civil actions with private claimants.[278] In 2004 the Antitrust Criminal Penalty Enhancement and Reform Act was launched, introducing a possibility for a leniency applicant who cooperates with claimants in civil actions to qualify for detrebling of damages. The company will then only have to pay compensatory *single* damages and will only be liable for such damages with respect to its own sales as opposed to the joint and several liability which will still apply to the applicant's former co-conspirators.[279]

The Division will only make exemptions from the demand for restitution when restitution is not practically possible. Examples of situations in which an applicant may be excused from making restitution includes situations where the applicant is in bankruptcy or where the company's continued viability would be substantially jeopardized if it were to make restitution.[280] Furthermore, the applicant is not required to pay restitution to foreign

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[275] FAQ 2008, p. 12.
[276] *Ibid.* p. 15-16. The company bears the burden of proving that it was not the leader in, or originator of, the activity.
[277] *Ibid.* p. 17.
[278] *Ibid.* p. 18.
[279] *Public Law 108-237*, Title II, Antitrust Criminal Penalty Enhancement and Reform Act of 2004, sections 211-214. See also FAQ 2008, p. 18. Sections 211-214 of the Act were originally intended to be in force for only five years. The sections were however extended for another year in 2009 and then for another 10 years in 2010, see *Public Law 111-190* - H.R. 5330, signed into law on 9 June, 2010.
[280] FAQ 2008, p. 18.

parties whose antitrust injuries are independent of any effects on United States domestic commerce.[281]

4.5.2 The Leniency Policy for Individuals

If a company qualifies for Type A leniency all directors and employees of that company, who admit their involvement in the illegal antitrust activity as part of the corporate confession, will receive leniency by not being charged criminally for their cartel participation. In order to receive leniency such individuals will have to admit their wrongdoing with candor and completeness and assist the Division throughout the investigation.[282]

All individuals who come forward with a company qualifying for Type B leniency will be considered for immunity on the same basis as if they had approached the Division individually. However, in practice, the Division will ordinarily provide all qualifying current directors and employees of Type B applicants with leniency in the same manner as for Type A applicants.[283] Any individual who comes forward to confess with a company under the "*Corporate Leniency Policy"* will be considered for leniency *solely* under the provisions of the "*Corporate Leniency Policy"*.[284]

There is however also a possibility for an individual to approach the Division on his or her own behalf to seek leniency for an antitrust violation of which the Division has not previously been made aware. This possibility is enabled by, and regulated in, the "*Leniency Policy For Individuals"*. If granted leniency under the policy, the individual can avoid criminal conviction, prison terms and fines as leniency under the policy means not charging an individual criminally for the activity being reported.[285]

Leniency under the policy will be granted an individual who, before an investigation has begun, reports illegal antitrust activity. Furthermore, three cumulative conditions have to be met. Firstly, the Division must not, at the time the individual reports the illegal activity, have received information about the illegal activity from any other source. Secondly, the individual must, throughout the investigation, report the wrongdoing with candor and completeness and provide full, continuing and complete cooperation to the Division. As a last condition the individual must not have coerced another party to participate in the illegal activity and must clearly not have been the leader in, or originator of, the activity.[286]

Any individual who does not qualify for leniency under the above mentioned rule will still be considered for statutory or informal immunity

[281] FAQ 2008, p. 20.
[282] The Corporate Leniency Policy section C.
[283] FAQ 2008, p. 20.
[284] The Leniency Policy for Individuals section B.
[285] FAQ 2008, p. 1.
[286] The Leniency Policy for Individuals section A.

from criminal prosecution. The Division will, in the exercise of its prosecutorial discretion, make such immunity decisions on a case-by-case basis.[287]

The individual must admit his or her participation in the cartel and must not have approached the Division previously, as part of a corporate approach, to seek leniency for the same conduct. The individual must prove that he or she was not the leader in, or originator of, the cartel and that he or she did not coerce any other party to participate in the cartel. Disqualification based on a leadership role will only happen if the applicant is clearly the single organizer or single ringleader.[288]

4.5.3 Procedure for Companies and Individuals

A potential applicant may contact any of the DOJ's seven Antitrust Division field offices to initiate an application. A marker system is used, under which a marker is given for a finite period of time during which the applicant's place at the front of the line is secured. During the time period the counsel can gather additional information through an internal investigation in order to perfect the client's leniency application. The length of time an applicant is given to perfect its leniency application is based on factors such as the location and number of employees the counsel needs to interview, amounts and location of documents the counsel needs to review and whether the Division already has an ongoing investigation at the time the marker is requested. A 30-day period is common but the marker may be extended at the Division's discretion.[289]

To obtain a marker, the counsel must report that he or she has uncovered information or evidence indicating that his or her client has engaged in cartel conduct. The counsel must disclose the general nature of the conduct discovered and identify the industry, product or service involved. This identification must be specific enough for the Division to be able to determine whether leniency is still available and to protect the marker for the applicant. The counsel must generally identify the client but there is a possibility to, under limited circumstances, secure a very short-term, 2-3 days, anonymous marker in which an identification of the client is not necessary. The evidentiary standard for obtaining a marker is relatively low, especially if the Division has not yet started to investigate the wrongdoing. The burden is higher when the Division is already in possession of information about the illegal activity, e.g. if the company has already received a subpoena or has been searched during a Division investigation.[290]

The applicant must admit its participation in the cartel in order to be granted immunity and an applicant that is not willing or able to admit to such

[287] The Leniency Policy for Individuals section B.
[288] FAQ 2008, p. 21-22.
[289] *Ibid.* p. 2-4.
[290] *Ibid.* p. 3-4.

participation is not eligible for immunity. A company needs to produce employees who will admit that the company entered into an agreement to for example fix prices to be considered eligible for leniency.[291]

If an applicant learns that the scope of the anticompetitive activity is broader than originally reported, the leniency coverage will expand to include such conduct as long as the applicant has not tried to conceal the conduct and as long as the applicant can meet the criteria for leniency on the newly discovered conduct.[292]

The applicant is initially given a conditional leniency letter. A final grant of leniency will be given once the applicant has performed certain obligations such as payment of restitution to victims and continuing cooperation with the Division.[293] The Division may revoke the conditional letter if the applicant is found not eligible for leniency or if the applicant does not cooperate as required. The applicant's counsel will be notified of the recommendation to revoke and there will always be an opportunity to meet with the Division before a final decision of revocation is taken. If the Division revokes the conditional leniency, the Division may still use any evidence provided at any time by the applicant against the applicant.[294] Similar rules on revocation apply to the conditional non-prosecution protection for individuals.[295]

When all of the obligations of the applicant have been satisfied and the Division has verified the applicant's representations regarding eligibility, the Division will issue a final leniency letter confirming that the leniency application has been granted. This will in practice be done after the investigation and any resulting prosecutions of the applicant's co-conspirators are completed.[296]

The identity of the leniency applicants and the information the applicants provide is held by the Division in strict confidence, unless the Division is, by a court order, required to disclose such information in connection with court proceedings. Furthermore, the Division has a policy of not disclosing information obtained from a leniency applicant to foreign competition authorities unless the applicant agrees to the disclosure first.[297]

4.5.4 Plea Agreements

For companies and individuals who are not 'the first through the door' in the U.S. there is another possibility to receive certain benefits in exchange for

[291] FAQ 2008, p. 6.
[292] *Ibid.* p. 8.
[293] *Ibid.* p. 23.
[294] Model Corporate Letter para. 3 and FAQ 2008, p. 24-27.
[295] Model Individual Letter para. 3.
[296] FAQ 2008, p. 24.
[297] *Ibid.* p. 27-28.

cooperation. This is done outside the leniency policy through negotiated plea agreements.[298]

Plea agreements are agreements where the defendant in a criminal case agrees to plead guilty in exchange for benefits from the prosecution. Such agreements are a prominent part of the U.S. legal system and are often made in criminal cases. The benefit for the defendant is typically in the form of concessions on the charges, on the punishment or on both. Concessions on the charges can be granted either by a reduced charge or, if the defendant is facing several charges, by dismissal of one or more of those charges. Concessions on the punishment are made through a reduced sentence, either by the prosecutor promising or recommending such a sentence or by the prosecutor not opposing the sentence recommended by the defense counsel. The agreement is between the prosecutor and the defendant.[299]

For plea agreements in cartel cases the benefit in exchange for cooperation is usually in the form of the government committing to making a specific sentencing recommendation to the court. The court is not bound by the plea agreement and the judge, guided by the Federal Sentencing Guidelines, will ultimately determine the sentence. It is however very likely that the judge will follow the recommendation.[300]

A cartel participant may immediately initiate plea negotiations with the Division to resolve its culpability and be rewarded for its cooperation. A plea agreement can be reached between the cooperating company and the Division at any time and sentencing can take place immediately.[301] The specific types of cooperation a pleading company is required to provide are specified in the plea agreement and usually include providing documents and witnesses to assist the Division in its investigation.[302] Plea negotiations are confidential, but once an agreement is reached, the plea agreement is filed with the court and made public.[303]

Unlike for example the EU rules on reduction of fines for second-in or subsequent applicants the DOJ has not wanted to establish an absolute and fixed discount for such applicants. The rationale for this is the fact that the value of cooperation of such subsequent applicants can vary substantially. The benefits afforded a company through a plea agreement are therefore set on a case-by-case basis.[304]

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[298] See Hammond 2006, p. 1. Plea agreements are also known as plea bargaining, see Cammack & Garland 2006, p. 269-272.
[299] Cammack & Garland 2006, p. 270-272 and Federal Rules of Criminal Procedure rule 11(c).
[300] Cammack & Garland 2006, p. 271-272 and O'Brien 2008, p. 10.
[301] O'Brien 2008, p. 6.
[302] See Model Corporate Plea Agreement para. 14.
[303] O'Brien 2008, p. 8. See Federal Rules of Criminal Procedure rule 11.
[304] Hammond 2006, p. 2.

There are a number of papers issued by the DOJ discussing and exemplifying what the rewards might be.[305] Potential rewards include a cooperation discount, reduction of the scope of affected commerce used to calculate the company's guidelines fine range, a low starting point for application of the discount and more favorable treatment for culpable executives.[306]

A cooperation discount is basically a fine reduction measured as a percentage that reflects the overall value of the cooperation provided. This is also available to cooperators subsequent to the second-in company who provide substantial assistance. For second-in companies the discount is on average 30 % to 35 % off of the bottom of the Guidelines fine range, for any subsequent companies the discount will often be substantially lower.[307] In addition, the calculation of fines for second-in companies will start in the minimum Guidelines fine range, which can be extremely valuable. In comparison, companies that come forward after the second-in company may face a starting point as high as the middle to the top of the Guidelines fine range. The starting point will however not be in the minimum if the second-in company had a significant leadership role in the conspiracy or if the company fails to report of its involvement in a separate cartel, regardless of whether or not it, at the time, had discovered the separate cartel.[308]

The timing of the cooperation and the value and significance of the information provided as well as whether the company brings forward evidence of other infringements, thereby receiving an Amnesty Plus discount, are factors that largely determine the size of the cooperation discount. The cooperation must come at a time when it will substantially advance the investigation.[309]

If a company's cooperation reveals that the cartel was in any sense broader, for example in terms of the length of scheme or the products involved, the Division's practice is to not use that self-incriminating information in determining the applicable fines and this is also considered one of the benefits available under a plea agreement.[310]

Most corporate plea agreements provide a non-prosecution agreement for employees who cooperate in the investigation. Some employees do however not receive protection under the company plea agreement; such employees are referred to as 'carve outs' as they are excluded from the company deal. Culpable carve outs must negotiate separate plea agreements or they might face indictment. The Division will typically carve out only the highest-level culpable individuals as well as employees who refuse to cooperate. For

[305] The DOJ has also issued several papers on issues for plea agreements in international cartel prosecutions, see http://www.justice.gov/atr/ for more information.
[306] See Hammond 2006, p. 3-11.
[307] *Ibid.* p. 5.
[308] *Ibid.* p. 6-7.
[309] *Ibid.* p. 11-12.
[310] *Ibid.* p. 3-4. See also U.S.S.G. § 1B1.8.

companies subsequent to the second-in company there is a strong likelihood of a high number of carve outs.[311]

The DOJ lists an increase of the likelihood that the company will qualify for amnesty plus credit as well as affirmative amnesty as possible rewards for a second-in company. The main beneficiaries of the Amnesty Plus program have been second-in companies that are quick to make thorough internal investigations of actual antitrust compliance.[312] As the Amnesty Plus program and second-in or subsequent applicants are however not always directly linked and as the Amnesty Plus program requires a separate cartel which not all second-in or subsequent applicants might be involved in I have chosen to present the program in a separate section, see below 4.5.5.

4.5.5 Amnesty Plus, Affirmative Amnesty and Penalty Plus

If a company is under investigation for one cartel but is too late to qualify for full immunity from sanctions for that cartel there is still a possibility for the company to receive benefits for that same cartel by reporting of its involvement in a separate cartel. The company will then, assuming it fulfills the conditions for Type A leniency, receive full immunity in the separate cartel and at the same time, due to the Amnesty Plus policy, receive a discount in the fine for its participation in the original cartel. The discount is not afforded by the Division itself but the Division will recommend to the sentencing court that the company receive a substantial discount. The size of the discount depends on the strength of the evidence provided by the cooperating company, the likelihood that the Division would have uncovered the additional cartel without the self-reporting and the potential significance of the cartel reported in the leniency application. The significance is measured in terms of volume of commerce involved, the number of co-conspirator companies and individuals as well as the geographic scope of the cartel.[313]

When the Division investigates cartel conduct in one market it will often lead to the Division opening up an investigation into cartel conduct in a second, unrelated market. The Division may then elect to approach one of the companies participating in the cartel in the first market with information about the suspected cartel in the second market and provide the company with an opportunity to cooperate in the investigation of the second cartel in return for amnesty. This is known as ’affirmative amnesty’ and is normally only exercised towards companies that already have obtained amnesty, amnesty plus or that are second-in cooperators.[314]

[311] Hammond 2006, p. 7-8.
[312] *Ibid.* p. 9-11.
[313] FAQ 2008, p. 8-10.
[314] Hammond 2006, p. 11.

Companies who choose not to make use of the Amnesty Plus policy are at risk of the consequences of the Penalty Plus policy. If the separate cartel the company took part in, but chose not to report, is later discovered and successfully prosecuted the Division will, as part of the Penalty Plus policy, encourage a sentencing court to consider the failure to report as an aggravating factor.[315]

4.6 A Brief Comparison of the Leniency Programs

In this section I will make a brief comparison of the four programs to point out the differences and similarities I find most noteworthy. As the analysis in Chapter 6 also compares the programs to some extent the comparison in this section is kept short in order to avoid too much recurrence.

First off, it is worth noting that immunity is, under all four programs, only available to one applicant, namely the first applicant. Furthermore, the procedure to be followed before immunity is granted is quite similar in all four jurisdictions and all four systems allow for some type of inquiry on a no-names basis as to whether there is still a possibility to apply for immunity. The marker system used in the EU, the UK and the U.S. enhances the possibilities for applicants to be able to act fast and secure the first place in line even when an applicant does not yet have all the information needed in order for it to be granted immunity. The possibility to obtain a no-names marker in the UK for a company that intends to make an application to the Commission as well is noteworthy.

In the UK and the U.S., the separate provisions for an individual who is the first to apply means that companies might have to worry about individuals applying on their own behalf, thereby barring the company from immunity. In this context it is worth remembering the very incentive for individuals to make such an application, namely the fact that the UK and the U.S. are able to impose criminal sanctions on individuals in the form of fines and imprisonment. However, there seems to be a small possibility in the UK for a company to be granted immunity even when an individual has won the race for immunity as it is in the OFT's discretion to grant such 'double immunity'. However, the OFT has emphasized that this possibility is far from guaranteed.

Another incentive for individuals to inform the OFT of an on-going cartel in the UK is the reward system for individuals who have only been remotely involved in the cartel. There is a possibility for an individual to apply for immunity *and* seek a reward although the reward system is mainly intended for individuals who, due to their limited involvement in the cartel, do not need to apply for leniency. Even though companies are not in a race for

[315] Masoudi 2007, p. 8.

immunity with such remotely involved individuals it is worth noting that the reward system creates an incentive for a whole new group of people to inform the OFT of the cartel. There is no equivalent to this in the other systems.

Perhaps the most crucial difference for immunity applicants is the handling of damages. In the U.S., an applicant will in fact have to pay damages as part of the conditions for receiving immunity although such damages will possibly be substantially lower than for the other cartel participants as a result of detrebling. While the EU rules clearly state that immunity does not cover claims for damages, making restitution is not one of the conditions that have to be fulfilled in order for a company to be granted immunity in the EU.

While the immunity provisions of the leniency programs are very similar the main differences between the programs are instead the rewards offered to any second-in and subsequent leniency applicants. In connection to this is the very interpretation of the term 'leniency' in the different jurisdictions. The European interpretation is that leniency means reduction of fines whereas in the U.S., leniency generally means full immunity.[316] This is further illustrated by the fact that any rewards to second-in or subsequent applicants in the U.S. are granted outside the leniency program, through plea agreements. Any rewards for such applicants are therefore not fixed in the U.S. as they are in the EU where the leniency offered to applicants subsequent to the first in the door is part of the leniency programs. The leniency provided under the American Amnesty Plus program only offers rewards to companies who participate in several separate cartels and it cannot be assumed that all companies are in fact doing so.

The procedure to apply for a reduction of fines in the EU very much follows the procedure of applying for immunity. In comparison it is difficult to say anything on any procedure for entering into plea agreements other than the fact that such agreements can be negotiated and entered into at any time during the investigation. This means that plea agreements possibly offer security at an earlier stage in the process than the European reduction of fines does. A company that cooperates but has lost the race for full immunity in the EU must wait until the conclusion of the Commission's investigation to learn what the amount of the final fine will be.

Furthermore, plea agreements are essentially a way for cartel participants to settle, as is the EU settlement procedure. However, I do not find the few similarities of the plea agreements and the EU settlement procedure enough to make a comparison between the two relevant.

The EU, Sweden and the U.S. are similar in that they will generally use a sliding scale when rewarding subsequent applicants, rewarding the second-in company more than the third and so on. This means that time is still a

[316] See Hammond 2004, p. 5-6.

crucial factor even when full immunity is no longer available. In comparison, the applicant's position in line will not be decisive when the level of Type C leniency reduction in the UK is set, the key criteria is instead the overall added value of the information provided by the applicant. It is however likely that the second-in applicant will be able to add more value than the third-in applicant and so on.

All four systems have rules that enable an applicant to reveal information that widens the scope of the cartel without this information affecting the sanctions for that company. This is of course favorable and useful for a company in possession of such information.

As a final remark it is worth noting that all four systems have rules to safeguard the information obtained from leniency applicants. The DOJ gives a strict promise of confidentiality, as do the rules on confidentiality found in the EU Leniency Program and the Network Cooperation Notice.

5 The Fine Art Auction Houses Cartel

5.1 Background

The Fine Art Auction Houses cartel was a price-fixing cartel between two of the world's largest auction houses, Christie's and Sotheby's. Throughout the second half of the 1990's these two companies colluded on the commissions they charged sellers of art who placed their goods with the companies for auction. In addition to agreeing on the actual rates the companies also agreed to limit or eliminate other inducements to sellers. The agreement was implemented by a series of secret meetings, held in Europe and the U.S., between top officials of the two houses.[317]

At the end of 1999 Christie's approached the DOJ and applied for leniency in exchange for evidence of the illegal agreement between itself and Sotheby's. This application became the starting point of several legal proceedings in the U.S. as well as in the EU.[318]

5.2 The Events Leading up to the Leniency Application

The views differ on how and by whom the cartel was initiated and carried out. I will present the series of events suggested by Christopher Mason in his book *"The Art of the Steal"*. It is, once again, worth noting that this book is not used as a source of law but rather to exemplify different considerations that might underlie leniency applications.

In April 1993, Sir Anthony Tennant, chairman of Christie's, and Mr Anthony Taubman, owner and chairman of Sotheby's, held a private meeting, allegedly upon the initiative of Sir Tennant. During this meeting they allegedly agreed to instruct their respective CEOs to meet and discuss commission rates.[319] Mr Christopher Davidge, CEO of Christie's, and Mrs Diana Brooks, CEO of Sotheby's, then met on several occasions to discuss rates and terms. They ultimately agreed to fix the sellers' commission and to limit or eliminate other inducements sometimes offered to sellers, such as interest-free loans and charitable donations. Christie's announced their new commission rates in March 1995.[320] In April 1995,

[317] Ashenfelter & Graddy 2005, p. 5-7.
[318] See Mason 2004, p. 246-247.
[319] *Ibid.* p. 97 & 119-128.
[320] *Ibid.* p. 133, 138-142 & 157-161.

Sotheby's announced their new rates, almost identical to those of Christie's.[321]

When the world's two largest auction houses start applying the same commission rates it is bound to give rise to some suspicion. For example, the OFT, in 1996, sent letters to Sotheby's and Christie's making informal enquiries into any anticompetitive conduct the companies might have engaged in.[322] In 1997, the DOJ subpoenaed both Sotheby's and Christie's, demanding production of all documents relating to any communication with any other auctioneer.[323]

The competition authorities were however not able to prove anything and years went by during which the fixed rates applied. As a response to the measures taken by the DOJ several internal investigations took place. During an investigation at Christie's in 1999 several of the company's directors and employees started to give information that strongly indicated the existence of the cartel. The person who had engaged actively in the cartel and who therefore could confirm it, Mr Davidge, did however avoid meeting with Christie's lawyers at this point of time. Mr Davidge was instead, for reasons unconnected to the cartel, preparing to step down as CEO and leave the company altogether. Before doing so he got himself lawyers in both the UK and the U.S. Before leaving the company Mr Davidge then informed the owner of Christie's of his involvement in the cartel and negotiated a financial settlement in lieu of terminating his contract.[324]

Mr Davidge had kept extensive records of the cartel and his meetings with Mrs Brooks. These documents had been kept at his London home and had therefore not been subject to the American subpoena. A clause in Mr Davidge's severance contract however required him to, by the termination of his contract on 31 December 1999, hand over, to Christie's, all of his documents relating to Christie's. Mr Davidge's American lawyer, Mr Linklater, suspected that Christie's wanted to use Mr Davidge's documents to apply for leniency, put the blame on Mr Davidge and make him a carve out. If the documents remained in the UK, Christie's would have no obligation to hand them over to the federal prosecutors in the U.S. which meant that Mr Davidge and Mr Linklater could risk never seeing the documents again. They would thereby lose valuable evidence that could otherwise be used for Mr Davidge to seek leniency or to defend himself in legal proceedings. To avoid such a situation Mr Linklater brought the documents with him to the U.S. where he handed them over to Christie's lawyers.[325]

[321] Mason 2004, p. 168.
[322] *Ibid.* p. 205-206.
[323] U.S. District Court Subpoena 4/25/97. See also Mason, p. 213-215.
[324] Mason 2004, p. 235-240.
[325] *Ibid.* p. 241-246.

Once the documents were in the possession of Christie's, it was up to them to turn them in to the DOJ. With the fear of Sotheby's or Mr Davidge applying for leniency before Christie's, the company felt it had no choice but to hand over the documents immediately. On 29 December 1999 nearly six hundred pages, including Mr Davidge's original documents, were handed over to the DOJ as part of an application for leniency.[326]

The DOJ were initially skeptical as to a granting of immunity for Christie's, much due to the fact that the confession was made over two years after the subpoena. Furthermore, Mr Davidge's documents contained abbreviations, obscure references and few dates, which meant that Mr Davidge himself would be needed to interpret the documents. Thus, to grant the leniency application the DOJ wanted Christie's to produce Mr Davidge. In exchange for Mr Davidge's cooperation Christie's had to waive certain provisions in his severance contract, which meant that the large financial settlement agreed upon in the contract had to be paid. In addition, Christie's agreed to pay all of Mr Davidge's legal fees as well as any fines imposed on him personally.[327]

The DOJ granted Christie's conditional amnesty in the U.S. on 24 January 2000.[328] A few days later, on 28 January 2000, Sotheby's found out about Christie's cooperation with the DOJ.[329]

Christie's approached the Commission seeking leniency under the 1996 Leniency Notice on 24 January 2000 and on 28 January 2000 Christie's provided the Commission with a short corporate statement regarding its participation in the cartel.[330] At the time of Christie's application the Commission had not started an investigation and it did not have sufficient information to establish the existence of the cartel.[331]

Sotheby's first contacted the Commission on 4 February 2000 and indicated its willingness to cooperate.[332] Sotheby's did however not make a leniency application until the fall of 2000, seemingly due to the fact that Sotheby's initially lacked sufficient evidence.[333]

The Fine Art Auction Houses cartel exemplifies the important role that leniency programs play in cartel detection and punishment. The case also shows how important it is, as an applicant, to be able to provide sufficient information and evidence and how this often means making sure certain employees or directors will cooperate. Mr Davidge's extensive notes and memos along with his testimony in court were the main reasons Christie's

[326] Mason 2004, p. 245-247.
[327] *Ibid.* p. 248-250.
[328] *Ibid.* p. 250.
[329] *Ibid.* p. 253.
[330] Commission Decision Fine Art Auction Houses para. 51 & 52.
[331] *Ibid.* para. 228.
[332] *Ibid.* para. 58.
[333] *Ibid.* para. 59 & 60.

was granted full immunity. It is also worth noting that Christie's had to pay Mr Davidge substantial sums to guarantee this cooperation.

Although the DOJ suspected a cartel long before the application was made the DOJ would most likely not have been able to prove it without the cooperation of Christie's and, in particular, Mr Davidge. It is however likely that the DOJ's ongoing investigation was an instrumental factor for Christie's in applying for leniency in the U.S. before doing so in the EU.

As for Mr Davidge, Mr Linklater wanted to bring Mr Davidge's documents to the U.S. to make sure Christie's handed the documents over to the DOJ. Mr Linklater assumed that Christie's would need Mr Davidge to successfully file a leniency application and this was Mr Davidge's best chance of getting immunity from criminal sanctions as well as to get his severance payment.[334]

5.3 The Cartel under American Law

In the fall of 2000 Sotheby's agreed to plead guilty and pay, over a five-year period, a criminal fine of $45 million. In February 2001 the plea agreement was formally accepted in court. Mrs Brooks also entered into a plea agreement in the fall of 2000. She was then required to cooperate fully in the government's investigation. In April 2002 Mrs Brooks was ultimately sentenced to three years probation, including six months of home detention, 1000 hours of community service and a fine of $350 000. Mr Taubman was found guilty of price-fixing and was ultimately sentenced in April 2002 to imprisonment for one year and a day. He was also sentenced to pay a criminal fine of $7.5 million, a sum equal to 5 % of the estimated $150 million volume of commerce affected by the conspiracy.[335]

Pursuant to the American leniency program, Christie's was not subject to any sanctions. Mr Davidge testified for the U.S. government and was therefore granted immunity along with Christie's. The former Christie's chairman and UK citizen Sir Tennant was indicted in the U.S. However, as price-fixing was at the time not a criminal offence in the UK Sir Tennant could not be extradited and tried in a U.S. court. He had to resign from his position as deputy chairman in a company with extensive American holdings as he could, in order to avoid a conviction, no longer travel to the U.S.[336]

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[334] Mason 2004, p. 243-244.

[335] Press release 5 October 2000 and Ashenfelter & Graddy 2005, p. 7-9. See also Mason 2004, p. 308 & 360. For technical reasons I have not been able to get a hold of the actual plea agreements and judgments. Information on the verdicts is however widespread and easy to find. I believe the article by Ashenfelter & Graddy as well as Mason's book credible enough to be used as sources for information on the plea agreements and verdicts. More information on the legal proceedings in the U.S. can also be found in the Commission's decision, para. 66-73.

[336] Ashenfelter & Graddy 2005, p. 6-9 & 13.

In September 2000 Sotheby's and Christie's both settled in a civil suit for damages in the U.S. The companies agreed to pay $256 million each to the claimants. This civil class action suit alleged that the conspiracy had involved fixing the buyers' premium in addition to fixing the sellers' commission. The suit therefore comprised anyone who had bought or sold items through Christie's or Sotheby's in the U.S. between a certain period of time. However, the fixing of buyers' commission was never admitted or proved in any of the subsequent cases in the U.S. or EU.[337] The possibility for immunity applicants to avoid treble damages was introduced in 2004, hence the equal amount for Sotheby's and Christie's.

5.4 The Cartel under EU Law

In a decision adopted on 30 October 2002 the European Commission found that Christie's and Sotheby's had breached Article 81(1) of the EC Treaty, today Article 101(1) TFEU. Both companies benefitted from the leniency program applicable at the time, the 1996 Leniency Notice.[338]

Sotheby's cooperation with the Commission led to the company receiving a reduction of 40 % of its fine. This meant that Sotheby's final penalty was €20.4 million, which corresponded to 6 % of Sotheby's worldwide turnover at the time. As Christie's was the first company to provide crucial evidence of the cartel, Christie's escaped a fine altogether. At the time the evidence was provided the Commission had not opened any investigation.[339]

[337] See *In Re Auction Houses.* See also Ashenfelter & Graddy 2005, p. 4 & 9. The time period for buyers was between 1 January 1993 and 7 February 2000, and the time period for sellers was between 1 September 1995 and 7 February 2000.
[338] At the time of the decision the 2002 Leniency Notice had entered into force. Leniency was however granted under the 1996 Leniency Notice as the requests for leniency were made in 2000.
[339] Commission Decision Fine Art Auction Houses para. 228-231 & art. 3.

6 Analysis

6.1 Introduction

A company or an individual who have participated in a cartel and who wants to apply for leniency will most likely want to do so in all countries where the cartel conduct, for example the fixed prices, has applied. However, after my review of the leniency programs of the EU, the UK, Sweden and the U.S., I am of the opinion that there are some considerations that could, and sometimes should, be made before applications are filed in all four jurisdictions. In this Chapter I will discuss features of the programs that could possibly make application in one or more of the four jurisdictions more, or less, important.

Apart from the actual leniency programs, an applicant should also consider what sanctions the applicant might face if an application is not made or granted. Therefore, before I get into the considerations to be made in connection to the different leniency programs I will discuss how the sanctions might come into play in the consideration of whether and where to apply for leniency.

6.2 Considerations Relating to the Sanctions

The fines for hard core cartels or per se conduct can always be expected to be at the higher end of the scale. It is for example expressly stated in the fining guidelines of the EU and the UK that the fines are intended to have a deterrent effect and this can be expected to apply to all four jurisdictions. While the exact level of any fine is difficult to calculate beforehand for all four jurisdictions, looking at the respective guidelines will enable the calculation of a very rough estimate. The factors, such as starting point and aggravating and mitigating circumstances, to take into account when deciding the amount of fines are similar in all four jurisdictions, the differences lie in the details. It is difficult to say whether the fines under one jurisdiction will be higher than under another one. Hence, it is difficult to choose a program on the basis of possible future fines.

Instead, pre-application considerations in relation to sanctions are easier to make when it comes to the damages and criminal sanctions for individuals. The impact of these two sanctions is clearly exemplified in the Fine Art Auction Houses cartel. The damages Christie's and Sotheby's paid in the U.S. greatly exceeded both the American and the European fines. Furthermore, although the fines surely put a strain on the economy for Sotheby's, the criminal sanctions imposed on Mr Taubman and Mrs Brooks possibly had a bigger impact on the company as two powerful persons of the

company had to resign, leaving an antitrust mess and a lot of negative publicity behind them.

The use of both criminal sanctions and damages are more prominent in the U.S. than in the EU, which possibly makes it more important to apply for leniency in the U.S. It seems as if enforcement of these sanctions is generally more likely in the U.S. than in the EU.

As for damages, the well-established practice of rewarding damages to victims of competition law infringements in the U.S. is enabled and enhanced by the rules on damages being favorable to a claimant in many aspects, for example through the simplified method for calculating the loss suffered. The rules on class actions, contingency fees and the fact that damages are treble further make sure that damages will have to be paid by cartel participants. Finally, restitution is a condition to receive immunity under the American leniency policies. This means that as an immunity applicant, damages will most definitely have to be paid. It is however more favorable to pay damages as an immunity applicant as damages for an applicant may only be single and excluded from joint and several liability.

The fact that damages are not an available sanction on EU level weakens the European damages regime. Even though ECJ case law clearly states that the Member States shall provide effective remedies for damages, judging by the role of competition law damages in the UK and Sweden, there does not seem to be any real tradition of damages for competition law infringements in the EU. Furthermore, the fact that the Member States retain autonomy in procedural and substantive rules for damages risks to weaken the European damages regime further. Some developments in recent years such as the Commission's White Paper on damages however indicate that damages is a prioritized subject for the Commission and that this might lead to damages becoming a more frequent and prominent part of the European system of sanctions for competition law infringements. Even so, the indications that the amounts afforded in the EU are never likely to be near the American treble damages are strong. In the UK for example, punitive damages are deemed to violate the principle of *ne bis in idem* when the defendant has already been imposed a fine due to its cartel participation. The respective European rules clearly state that a decision to grant immunity or leniency does not protect the recipient from civil damages. Hence, a leniency application does not have any effect on potential damages. The point is however that the European damages regime does not create an incentive to apply for leniency but the American damages regime does.

As for criminal sanctions for individuals, the U.S. is serious about using such sanctions, especially in international cartel cases. This is confirmed by the verdicts in the Fine Art Auction Houses cartel. For a company that wishes to rescue certain culpable individuals from criminal sanctions this is an incentive to apply for leniency in the U.S. In contrast, criminal sanctions for individuals in the UK has to this date only been used in one case,

although it is important to remember that such sanctions are fairly new in the UK.

Another aspect of criminal sanctions for individuals is that such sanctions create a huge incentive for individuals to approach relevant competition authorities and apply for leniency on their own behalf. The possibility to do so should be considered by culpable individuals and the risk of individuals doing so should be considered by companies. Further incentives for individuals include the British competition disqualification order, and its Swedish equivalent, with their far-reaching impacts for individuals. Furthermore, the fact that an individual might be at risk of criminal sanctions possibly makes the same individual less willing to cooperate in order to grant the company leniency as the individual do not want to risk incriminating itself. Hence, if a company needs the cooperation of an individual to make a successful leniency application the company will need to make sure that it can guarantee the individual immunity from criminal sanctions.

The delimitation periods of the EU, the U.S. and Sweden may seem short-term but it is important to remember that all systems have rules or doctrines that quite easily enable the period to start afresh. The lack of a limitation period for the cartel prohibition and the cartel offense in the UK is noteworthy. However, in my opinion, the chances of the limitation period running out in those jurisdictions that have limitation periods seem quite slim, mainly due to the rules that keep the period starting afresh.

6.3 Considerations Relating to the Leniency Programs

A possible leniency applicant needs to start by evaluating if it can meet the conditions of the respective leniency programs. Does it hold enough information and evidence to meet the required standard? Cartel participants are likely to get rid of all kinds of documentation that prove the existence of the cartel but such things will to some extent be necessary to qualify for leniency. It is explicitly stated in the EU program, but possibly true for all leniency programs, that evidence originating from a time when the cartel was running, for example notes from a meeting where prices were fixed, will always be worth more than subsequently established evidence. It is however possible that an applicant is not in the possession of such evidence for fear of it being discovered through dawn raids or subpoenas.

The problem of holding and providing sufficient information and evidence possibly poses a bigger problem for second-in or subsequent applicants as the evidence such applicants provide has to pass through a somewhat higher threshold, for example that of adding significant value. As a second-in or subsequent applicant the gathering of information, for example through an

internal investigation, will also have had to be done before the application is made as there is no marker system for such applicants.

Whether you are an individual or a company will of course also affect where and how you should apply for leniency. As an individual you have the possibility to apply on your own behalf. In my opinion it does however seem better, for reasons of time and effort, for an individual to be part of a company's application, at least if immunity is still available. If immunity is not available, an individual needs to be aware of the risk of becoming a carve out. Even though the competition authorities seem willing to, to a great extent, include employees and directors in a company's leniency it is important to remember the case of for example Mr Taubman who could not be included in Sotheby's plea agreement. The situation might also be the opposite, as it was for Christie's, namely that a company needs a certain employee or director and the information he or she possesses in order to qualify for leniency. An individual in such a situation might, once again for reasons of time and effort, find it better to apply with the company instead of by itself.

Another crucial issue is the role the company or individual has played in the cartel. If it was the leader, originator or coercer this will have different effects under the four programs. The role the applicant has played does not seem to generally pose a big problem in any of the jurisdictions, as the authorities seem quite lenient in their interpretation of the terms leader, instigator and coercer. However, the European rules prohibit a coercer from receiving immunity while the American rules prohibit an instigator, leader or coercer. It is, in my opinion, possible to be a leader or instigator without having coerced another party. This means that immunity can possibly be obtained in the EU but not in the U.S. for a leader or an instigator.

In connection to a leniency application it is in a company's best interest to make a thorough internal investigation to find out whether it is involved in any separate cartels. This is so not just because such a discovery could make it eligible for Amnesty Plus in the U.S. or an additional reduction in the UK, but also because of the Penalty Plus system in the U.S. Furthermore, even though there is no Penalty Plus system in the UK, Sweden or the EU all these jurisdictions see previous competition law infringements as an aggravating factor when calculating the amount of fines.

In considering where to apply for leniency a company or an individual seems to have nothing to lose by making use of the possibility offered by all four jurisdictions to make an anonymous inquiry as to whether immunity is still available. The marker systems enable an applicant to secure its place as the first in the door while gathering sufficient information and evidence to perfect the marker. The ECN rules on summary applications further enable an applicant to save time and effort when applying to all relevant national competition authorities. It is however worth noting that the summary applications and marker systems are only available for immunity applicants. Furthermore, a company still needs to make sure that it will be able to

provide enough information and evidence. The marker is usually given under a short period of time meaning that even if the evidence need not be presented upon the first contact with the competition authority it needs to be within a couple weeks, or even days, reach. In connection to this it is important to remember the Fine Art Auction Houses case in which Sotheby's could not, due to difficulties in producing evidence and information, make a formal leniency application for many months. It is however worth noting that Sotheby's were the second-in company, meaning that the threshold for any information they provided was higher.

Even if immunity is no longer available, time is still an important factor. Not only are second-in companies generally granted more and better rewards than subsequent companies but the time at which the company applies will also be taken into account when the level of reduction is set. As there is no marker system for applicants subsequent to the first in the door such companies will need to make sure that they have all relevant information and evidence when they approach the competition authority. There is a risk of this somewhat hindering a company in its race for leniency.

The leniency offered to applicants subsequent to the first in the door is a part of the leniency program in the EU, the UK and Sweden. An applicant might see this as a more clear and transparent system than the American plea agreement system, as this latter system does not present any fixed rewards. It is possible that the rewards in the plea agreement will be of the same levels as in the EU but the fact that the plea agreement is a separate procedure outside the leniency program seemingly adds some insecurity as to what the rewards might be. In comparison, the EU rules may seem more secure and generous to second-in and subsequent applicants. The reduction for second-in companies can be as high as 50 % in the EU, the UK and Sweden while the reductions under plea agreements will generally be about 30-35 % for second-in companies and substantially lower for any subsequent companies. This means that second-in companies in the U.S. generally receive reductions on a level equal to that of third-in companies in the EU. If a reduction of fines is a desirable benefit for a company there is little to lose in filing a leniency application in the EU even though immunity is no longer available.

However, even though the possibility to enter into a plea agreement may seem uncertain compared to the European set levels of reduction of fines, the plea agreements leave a certain room for negotiation, which might be of great value for a company or an individual. In order to get a reduction of fines in the EU an applicant will have to hand over all evidence and information in its possession. The applicant can then only hope to get a high reduction as the exact level is in the discretion of the relevant competition authority. In contrast, the plea agreement system makes it possible for a company to negotiate as to what rewards certain information will give. A company can for example use carve outs to negotiate a better deal for itself and an individual can, as Mrs Brooks did in the Fine Art Auction Houses

cartel, testify against others in exchange for concessions on his or her own punishment. Rewards other than reduction of fines, such as favorable treatment of culpable employees, might be more valuable to a company than a reduction of fines as a company might find a larger fine preferable to the negative publicity and other problems that might follow upon having employees imprisoned. Plea agreements make it possible for companies and individuals to obtain such alternative rewards. Depending on the circumstances of each individual case, the possibility of negotiations that the plea agreements offer is therefore likely to be of a high value, possibly even a higher value than a reduction of fines.

Furthermore, another advantage of plea agreements is that such agreements may be entered into at any time. This provides an opportunity to settle a case quite rapidly which can be of great value. Time is a crucial factor in applying for leniency but once a cartel is detected time becomes a crucial factor for the participants in a different way. Once a cartel is detected the companies and individuals involved are likely to want to get the procedure over with as soon as possible to avoid a long-spun legal process that might lead to bad publicity and bad-will. A rapid process allows cartel participants to leave the infringement behind and move on with their businesses. There is of course also a value in knowing early on what the sanctions will be as it enables a company to make plans for payments of fines and damages. In comparison, the Commission will only make a position on an application for reduction of fines after a position on immunity has been made. Furthermore, a final determination of any reduction of fines will be made through the Commission's final decision, which can sometimes take years. Sotheby's American plea agreement was for example accepted in court in February 2001 while the Commission's final decision was not made until October 2002.

The EU settlement procedure does not seem a very appealing procedure for companies, especially compared to leniency programs and plea agreements. It is questionable whether the possibility of the extra 10 % reduction that the settlement procedure offers will be appealing enough for a company to want to go through a procedure that is from start to end in the discretion of the Commission. As the settlement can be applied in addition to the leniency program it might be worth engaging in such discussions but I am hesitant as to its actual value for companies.

An applicant needs to remember that an application is the end of the cartel but the beginning of an often long legal process. The cooperation requirements of all programs are demanding and far-reaching. The applicant will have to be prepared to make documents and employees available to the competition authorities and a lot of time, money and effort will have to be spent in order to fulfill the obligations of the leniency programs. It will be necessary to make sure that all employees and directors will help the company fulfill the obligations of cooperation, as key individuals' refusal to cooperate can be fatal for the granting of leniency. An even worse scenario

is of course an individual applying for leniency on its own behalf, thereby barring a company from immunity altogether.

As the Fine Art Auction Houses cartel shows, it might sometimes be necessary to incentivize employees to cooperate. At the end of the day people, not companies, engage in cartel behavior. This means that people, not companies, will be in possession of the evidence needed to prove the existence of the cartel, at least all non-written evidence. If the cooperation requirements are not met, the leniency will in the end not be granted. The company may then be at risk of severe sanctions as the information provided by the company under the leniency program might be used against it. This is for example the case for leniency applicants who fail to meet the cooperation requirements in the UK and the U.S.

The respective confidentiality rules do not seem to pose a problem. It is however important to remember that even if no access is granted to files in the respective competition authority's possession, competition authorities of other countries will, at the latest when a final decision or judgment is made, find out about the existence of the cartel. Such a decision or judgment might then be reason enough for a competition authority to launch an investigation. Even if no access to leniency applications or other files means that it will be more difficult for other competition authorities and third parties to find evidence to prove an infringement or to be granted damages, any final decision or judgment will in many ways speak for itself and help such other competition authorities and third parties.

As a final remark it is worth mentioning that the considerations discussed in this Chapter can possibly also be used by the legislator of a country in designing or altering the country's leniency program and sanctions. Factors that would make a company or an individual choose to apply for leniency in a certain jurisdiction can be used to alter the leniency program as well as the sanctions in order to make them both more effective.

6.4 Summary

To sum up, I think the most crucial factors to take into consideration when evaluating whether and where to make a leniency application are:

- What level of significance the different national sanctions hold to you. The treble damages and the greater likelihood of imprisonment of culpable individuals in the U.S. speak greatly in favor of applying there.
- As an individual, if there is any risk of becoming a carve out. If not, being part of the company's leniency application seems to generally be the best choice for an individual.
- The role you have played in the cartel. If you have clearly been the *single* leader or instigator immunity can be obtained in the EU but not in the U.S.

- What information and evidence you are able to provide and whether you are able to provide it on a full and continuous basis. This includes making sure that all relevant employees and directors are on board with the application.
- If, when immunity is no longer available, the generous reduction of fines in the EU, and/or the timesaving features and possibilities to negotiate rewards through the American plea agreements, could still make applications worthwhile. If so, a further evaluation of the information you hold will should be made, as the threshold for information from second-in or subsequent applicants is a higher one. As a second-in or subsequent applicant you will however not be able to know for sure if you will be granted any benefits, as you will not know what your number in line is.

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