Preface

My interest for European law, and competition law in particular, mainly come from the enthusiasm of my university professors, K.J.M. Mortelmans, L.A. Geelhoed and J.W. van de Gronden. I started to take an interest in antitrust damages claims in 2006. It was the course of antitrust law at Duke University that opened my eyes on what was to be expected with regard to antitrust damages claims in Europe. An interesting topic that I could not - and still cannot - let go. The rise of antitrust damages claims created dozens of legal questions. One of the questions that interested me from the beginning was whether the leniency policy would be jeopardized by an upcoming private enforcement. The topic of my thesis was therefore an easy choice. But there would be a long road ahead. One with new initiatives from the legislators over and over again, a lot of new case law and dozens of judicial authors who wrote about the topic, all with different views and outcomes.

I am very much indebted to Prof. Johan van de Gronden for supervising my doctoral dissertation and for being helpful throughout the entire process. For example, I remember fondly of an evening in Utrecht at the chessboard table where we discussed my work with homemade waffles. I remember lively discussions about European law and competition law in particular. A love that we clearly share.

I would also like to thank Prof. Carla Sieburgh, Prof. Jörg Terhechte, dr. Catalin Rusu for taking part in the manuscript commission. I thank them for their valuable suggestions.

Last but not least, I thank my family and everyone who supported me during the time of writing. My special gratitude goes to Camilla for her patience and encouragement during the darker days of writing. She knew I would reach the finish line before I did.

Chapter 1

Introduction

1.1 Introduction

Policymakers and scientists often say that cartels harm consumer interests and therefore warrant severe administrative fines.[1] However, due to their secrecy, cartels are often difficult to uncover. To encourage whistle-blowing and disrupt cartels, the European Commission and Member States of the European Union ("Member States") have introduced a "leniency policy". To ease the cartel discovery and elimination process, cartel participants have been afforded a few limited opportunities to avoid or reduce administrative fines. This grants full or partial immunity from fines to a cartel participant that provides information to the European Commission or a national competition authority concerning a cartel. The competition authorities have been actively using this leniency policy to fight cartels. In fact, this is how the vast majority of European cartels have been discovered.

Especially at the beginning of this millennium, the European Commission also started to encourage a second measure called "private enforcement" to target competition law infringements and protect consumers. According to the European Commission, cartel victims should be encouraged and assisted to start civil proceedings against cartel participants.[2] It is expected that private enforcement will acquire a more prominent role in competition law in Europe.[3]

A problem that arises, however, is that private enforcement and the leniency policy may work against each other.[4] A company blowing the whistle on a cartel risks litigation, liability and financial risk. Legal and other scholars expect the leniency policy to become less attractive to managers basing their decision-making predominantly on financial risk.[5] Even a 100% fine reduction could potentially offer little incentive for a company if liability were hanging over its head like the sword of Damocles.

1. Verstager 2016. See also Appeldoorn & Vedder 2013, para I.I and p. 110.
2. Verstager 2016.
3. Rusu 2017, p. 796.
4. OECD 2015, p. 30; Buccirossi, Marvão & Spagnolo 2015, p. 2; Emmerich 2014, para 3; Vedder 2014, pp. 1 and 3 et seq.; Silbye 2011, p. 692.
5. See *inter alia* Wils 2007, pp. 57-58.

In fact, the European Commission was facing a dilemma. On the one hand, as a policy-maker it encourages private enforcement in line with European case law. On the other, as a public enforcer of competition law, the European Commission obviously tries to safeguard the functionality of public enforcement tools, specifically the attractiveness of the leniency programme, as a means of discovering cartels.[6]

1.2 Topic

The research question of this study is whether the rise of private enforcement in Europe would interfere with the effectiveness of the leniency policy. If the answer is considered in the affirmative, the study further examines whether and how the leniency policy can remain effective if more private enforcement actions take place.

To answer the first question, several sub-questions will have to be answered first. The study starts by describing what leniency is, how it works, and what makes a leniency policy effective. The study also highlights elements in legislation and practice that could be considered barriers to an effective leniency policy. In addition the study will answer the questions of whether private enforcement takes place, what the relevant developments are (on the EU and at national level), and what the connection and relation between leniency and private enforcement is and how they are intertwined.

To examine these questions the author will not only examine the systems in the European Union ("EU"), Germany and the Netherlands but also analyze the practice in the United States of America ("United States"), where both a leniency policy and private enforcement have co-existed for many years. By comparing the laws and practice in the EU, the Member States and the United States, the author will identify flaws and potential flaws in the European system. The author will make his own suggestions for a more effective system. He will also analyze the opinions and expectations of economists and legal scholars regarding the question whether leniency can remain effective if private enforcement actions increase.

Based on the findings, the author analyzes the solutions of the Antitrust Damages Directive[7] to prevent the emergence of private enforcement from jeopardizing the leniency policy. The author will also review the solutions provided by the Antitrust Damages Directive to remove the potential disincentive caused by this situation and examine whether and how the leniency policy could be even more effective.

6. *Cf.* Wilman 2016, pp. 906, 930 and 931 (footnote 242).
7. Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance.

1.3 Comparative and Legal Approach

Legal scholars often state that one can come to an understanding of a legal system only by comparing it with another. A comparative approach can help to solve legal questions.[8]

This thesis will compare and evaluate the rules relating to leniency and private enforcement in the EU, the Netherlands, Germany, and the United States. The American leniency and private enforcement system serves as inspiration, with the EU, German and Dutch systems being the primary subjects of this research. As part of this comparative approach, the author will discuss and analyze the legislation, case law and literature of those countries.

Dutch competition law is a relatively new field. Until 1998, the Netherlands was considered a "cartel paradise".[9] As the Dutch economy became more open, however, it was important for businesses to be dynamic and able to respond promptly to international changes.[10] Cooperation between companies to protect market shares and benefits made the economy rigid and certainly not dynamic, thereby hindering the country's competitive position.[11] Dutch politicians realized that cartels were having a negative impact on the economy as a whole.[12] Therefore, a new law concerning competition came into force in 1998. Over the last decades, Dutch competition policy has changed drastically. Because Dutch competition law (as it is known today) has only applied for two decades, in order to conduct a thorough and more accurate European-American comparison of the policies of leniency and private enforcement, the situation in a second country within the EU (Germany) will be considered and examined.

The author chose Germany and the United States because of their history and development of competition law. In Europe Germany was one of the founding fathers of European competition law.[13] According to several German scholars, European competition policy was initially modeled on German competition policy.[14] Currently, German economists and legal scholars are holding lively discussions about competition law. They have thoroughly researched the effects of leniency policy and private enforcement and there are quite a few cartel damages claims pending in Germany. Furthermore, Germany is especially interesting as it was one of the first European countries to introduce special private enforcement action provisions into its legislation. Germany is also particularly interesting for another reason: the German competition authority, *Bundeskartellamt* ("BKartA"), has existed for more than 50 years. In contrast, the Dutch competition authority, *Autoriteit Consument & Markt* ("ACM"), has existed for around twenty years. Moreover, when the Dutch system of competition law and enforcement was created, the Dutch legislature

8. *Cf.* Koopmans 2003, pp. 1-14.
9. Van de Gronden 2017, p. 15; Mahler 2017.
10. Amador Sanchez, Dijkman, Lamboo & Smits 2008, p. 22.
11. Ibid.
12. Ibid.
13. Immenga 2008, pp. 3-19.
14. See *inter alia* Immenga 2008, p. 5.

closely mirrored EU competition law, but also certainly examined the German system as well.[15]

The United States influenced German competition policy because of its presence in Germany after World War II.[16] American competition law, or "antitrust law" as it is referred to in the United States, evolved at the end of the 19th century because of the necessity of protecting consumers from the rampant expansion, collaboration and consolidation of companies as a result of industrialization.[17] Since then, American antitrust law has become a model for the rest of the world on how to maintain a competitive market and protect consumers from anticompetitive behavior. The United States is particularly interesting because of its system of punitive damages, the assistance of claimants by leniency applicants and its far-reaching right of discovery.

1.4 Structure of the Dissertation

The aim of the study is to describe the existing systems in the EU, Germany and the Netherlands, to analyze their strengths and weaknesses and take a similar approach towards the system that is implemented following the Antitrust Damages Directive. The goal is to identify the options and opportunities for further improving the effectiveness of overall competition law enforcement, focusing on both the leniency programme and private enforcement.

Chapter 2 provides a broad overview of the leniency policy in the EU, Germany and the Netherlands. The aim of the research is to investigate whether the increase in private enforcement will jeopardize the leniency programme and render overall competition law enforcement less effective. By describing the leniency programmes, the author encountered several (other) characteristics of the leniency programmes of the EU and Member States, which potentially impede the effectiveness of the leniency programmes and overall competition law enforcement. Therefore, he also evaluates their effectiveness and provides an analysis of the interaction between the different programmes. Chapter 3 describes and evaluates the development of private enforcement on an EU level. Chapter 4 provides an overview and comparison of the private enforcement systems in Germany and the Netherlands. In Chapter 5, an overview of the leniency system and the system of private enforcement in the United States is provided. Chapter 5 also compares the American system with the private enforcement systems as discussed in Chapters 3 and 4. Chapter 6 brings the earlier chapters together. The bottlenecks and possible solutions for the bottlenecks encountered in the previous chapters are discussed; an attempt is made to solve the bottleneck problems and provide suggestions that would make overall competition law enforcement more effective. The conclusion of the study is in Chapter 7.

15. See *inter alia* Netherlands, Parliamentary Papers II 1995/96, p. 50. See also Netherlands, Parliamentary Papers II 2004/05, p. 9.
16. Bunte 2018, pp. 3-4.
17. Gifford & Kudrle 2015, p. 4.

1.5 Remarks

Impact on national civil law

The discussions on the Antitrust Damages Directive make clear that civil practitioners do not always agree with the pan-European changes influencing their national laws. The author is fully aware of the fact that the laws of the various Member States have merit in their own right. Because of the principle of proportionality and subsidiarity, European legislators must be reticent in introducing new legislation influencing national laws. However, pan-European rules are sometimes necessary. Differences in the laws and (legal) systems of the various Member States have led to forum shopping. In some Member States, undertakings are succeeding in their damages claims; in others, they are not. Some suggestions in Chapter 6 might not be in line with basic concepts in the civil-law systems in many of the Member States. However, pan-European legislation and the introduction of a competition law system with its own characteristics will not always fit perfectly with existing civil-law provisions that stem from the Napoleonic Code or even from Roman law. There is a Latin adage saying that changes could be necessary over the course of time: "*Tempora mutantur, nos et mutamur in illis*" ("Times change, and we change with them.")

Changes within the field of competition law

Competition law is a relatively new field of law, especially in the Netherlands. It is in constant flux with developments happening in rapid succession.[18] This study is based on the books, case law, articles, etc. that were available on 1 July 2017. Articles and case law published afterwards are possibly not incorporated into the study.

Changes in article numbering and terminology

Because of constant changes in the European law and the development of the European Union itself as an institution, the enumeration of competition law provisions has changed several times. For example, the former Article 81 of the EC Treaty is now Article 101 of the TFEU. Also, the names of courts and competition authorities have changed from time to time.

To keep the study readable, especially for those who are not familiar with the previous article numbers, names and terminology, the author has chosen to use the terms as they are today, even in references to older articles and institutions.

18. See *inter alia* Appeldoorn & Vedder 2013, p. vi.

Chapter 2

Leniency Policy of the European Commission, Germany and the Netherlands

2.1 Introduction

In the Antitrust Damages Directive, the leniency programme is described as a programme concerning the application of Article 101 TFEU or a corresponding provision under national law on the basis of which a participant in a secret cartel, independently of the other undertakings involved in the cartel, cooperates with an investigation of the competition authority, by voluntarily providing presentations regarding that participant's knowledge of, and role in, the cartel in return for which that participant receives immunity from, or a reduction in, fines for its involvement in the cartel.[19]

Illegal cartels are often difficult to detect without the cooperation of the undertakings or individuals involved in them.[20] Therefore, the European Commission considered it in the EU's interest to reward undertakings that are willing to put an end to illegal practices and cooperate in the European Commission's investigation independently of the other undertakings involved in the cartel.[21]

Applying for leniency was, and still is considered as tattling and betraying, and therefore has a negative connotation. However, there is empirical evidence that leniency programmes are beneficial because they encourage the disruption of collusive practices and expedite the cartel investigation.[22] In fact, leniency programmes are now the main tool for the discovery and prosecution of cartels.[23] To be effective, it is important for the leniency policy to be effectively set and carried out. In the United States, for example, the amount of fines collected in 1993 was almost twice as high as in 1992, a significant increase in whistle-blowing attributable just to the

19. Antitrust Damages Directive, Article 2(15).
20. Reuter 2016, p. 483. See also Wils 2016, pp. 336-337; Vedder 2014, pp. 1 and 3.
21. European Commission 2006 (Notice on immunity of fines and reduction fines).
22. See e.g. OECD 2002, pp. 10, 13, 26 and 106; Borell, Jiménez & Carcía 2013, p. 111.
23. Bigoni, Fridolfsson, Le Coq & Spagnolo 2012, p. 368 et seq. See also *inter alia* European Commission 2017 (Proposal Enforcement Directive), pp. 3 and 27.