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GRADUATE
SCHOOL OF
LAW

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A BLIND CASTING INTO THE
EVIDENTIAL SEA:

The Interplay Between Fundamental Rights
and the Efficacy of Leniency Programmes

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Abstract

In the wake of increased globalization with undertakings strategically targeting their production and logistics across borders for profit maximization and optimal cost reduction, competition for consumers' business is fierce, whereby pressures on players can be the impetus for collusion and anti-competitive agreements to obtain better profit margins and market power outside what is dictated by supply and demand in free market economies. Violative undertakings are becoming increasingly savvy at keeping their activities secret due to the negative stigmatization and severe fines that attach to such behaviour upon detection. This makes uncovering evidence of said behaviour increasingly difficult as companies go to great lengths to remain imperceptible, until such time that stakes become intolerably high and the fear of detection becomes irrefutably plausible that undertakings will admit or acknowledge their participation in collusive activities to circumvent the impact of stringent sanctioning. The leniency program has emerged as a stealth tool in the fight against competition disruption as it utilizes time and fear as conduits to obtain complete exoneration from severe fines in exchange for evidence that successfully leads to the initiation of an investigation to uncover said anti-competitive infringement. But as the severity of fines attached to this type of unlawful behaviour increases, the expectation that predictability and transparency will be implemented in procedural protocol and investigatory policy intensifies, to assure proper protection of a Defendant's fundamental rights to enhance the efficacy and sustainability of leniency programs. This article makes the case that proper protection of Defendants' fundamental rights, through the enhancement of procedural predictability and increased evidentiary transparency, will lead to more efficient, efficacious and sustainable leniency programs equating to more fear of violative behaviour detection, an increased acknowledgment of anti-competitive participation, and enhanced overall cartel destabilization for more balanced competition in the marketplace.

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INTRODUCTION

Due to the complexity of successfully identifying, investigating and uncovering indicia of anti-competitive behaviour in the marketplace, the leniency program has proven to be a lucrative tool as it drives cartel participants towards acknowledging participation in activities that disrupt competition in free market economies, and aides competition authorities in collecting the adequate evidence necessary for destabilizing and punishing hard-core cartel infringement. Cartels operate outside the auspices of regulatory detection, because undertakings are fully aware that they will face serious sanctioning and fines upon detection, as the anti-competitive conduct they engage in increases market prices, decreases product quality and innovation, and degrades overall consumer welfare. Over the past decade, the European Commission, Member State's National Competition Authorities and other comparative jurisdictions around the globe have identified these activities as particularly egregious and pernicious, whereby they have increased the stakes and fear of detection by attaching significant fines and penalties to said offenses. But with the deliberate transition towards larger sanctioning comes the increased expectation that competition authorities will implement more transparent and predictable procedural regimes to reap the benefit of penalties that both prevent future destabilizing behaviour and deter recidivist anti-competitive practices. With implementation of more transparency and predictability in procedural protocol comes the necessary protection of Defendants' fundamental rights to ensure institutional policy will be upheld against heightened judicial scrutiny. This article argues that competition authorities must enhance the predictability of sanctioning, increase the transparency of procedural protocol, and fervently safeguard a Defendant's fundamental rights if they are to increase cartel destabilization and usage of the leniency program, demonstrate the viability of cartel detection and imposition of severe sanctioning, and develop a successful penal system that balances punishment with prevention.

In *Chapter 1*, the author will explain the two methodological research approaches that were utilized when developing investigatory and evidentiary recommendations for modification to existent national competition policy and procedural regimes. Said recommendations will be developed and analysed throughout the article for the overall enhancement of leniency programs concurrently with safeguarding a Defendant's fundamental rights.

In *Chapter 2*, the author will describe the impact economic principles have on competition law by targeting market power, different economic model structures, and how pressures on players can lead to anticipatory decision-making in oligopolistic markets. Game theory will be utilized to predict when companies will compete or collude with each other for maximization of profit and efficiency gains and how fear of detection can destabilize cartels for the potential of immunity or reduction of severe sanctioning.

In *Chapter 3*, the author will introduce the concept of leniency, its benefits for both the authorities and cartel participants, and its ability to destabilize cartels and intensify competition in the marketplace. The author will then traverse between different

jurisdictional program structures and competition regimes, highlighting how said differences impact investigatory strategy, decision-making analysis and penalties imposed on infringing undertakings. The Chapter will conclude with a reiteration of the foundational cornerstones of leniency, why the interplay between said program elements creates a dynamic of increased participation in the leniency program, and why, with increased penal severity, the obeisance of Defendants' rights becomes paramount to the transparency and predictability necessary for decreased cartel behaviour and a more efficacious leniency program.

In *Chapter 4*, the author will further underscore the salient link between the severity of sanctions, the incentives of the leniency program, and the necessity of safeguarding a Defendant's rights to ensure the structural integrity of investigatory protocol and subsequent findings of infringement destabilizing the market. The author will discuss the powers conferred on the European Commission to carry out its duties and the different fundamental rights that attach to its procedural regimen, narrowly focused on the preliminary investigatory stage. This section will discuss the different types of rights available to Defendants, when said rights attach, and why each right will assist undertakings in the proper preparation of their defence in the adversarial stages. In summation, this Chapter will assimilate the foundational law necessary for use in the following chapter regarding whether a Member State's search warrant protocol can withstand heightened procedural scrutiny in relevance to a Defendant's rights when examining the evidentiary context, subject matter, purpose and scope of the underlying investigation.

In *Chapter 5*, the author will explain Member State's parallel competencies and delve into provisions of Latvian Competition Law in relevance to its investigatory warrant procurement, by analysing shortcomings in its Article II Section 9 and Article II¹ Section 10 provisional language via comparison with High Court recommendations and Saeima amendment proposals. The author will then utilize comparative methodology to explore the Irish Competition and Consumer Protection Act warrant provisions to glean important differences and challenges related to Defendants' rights protection for introduction of best practices for modification of said provisional language. This Chapter will finish with four targeted recommendations on how Latvian Competition Law can be modified to better safeguard a Defendant's rights at the investigatory stage and increase overall participation in the leniency program due to strengthened procedural protocol.

The author will conclude by linking all the interworking components introduced within the constructs of the article by incorporating the underpinning of game theory and oligopolistic economic strategy, collating all the divergent system structures and leniency regimes, and tying in all the rules of law and provisional recommendations from the previous chapters to provide final recommendations on how to strengthen leniency programs by and through safeguarding a Defendant's fundamental rights in furtherance of market competition within the European Union.

CHAPTER ONE: RESEARCH METHODOLOGY

a. Introduction to Research

To develop an in-depth understanding of the overt differences between 13 European Member State jurisdictions, the European Commission ("EC"), and the United States of America ("US" or "USA"), in relevance to the procedure and structure of their leniency programs and the extent to which each protects a Defendant's fundamental rights in competition proceedings, two methodological approaches were employed for interpretation and comparative analysis. As evidence was uncovered regarding different system structures, decision-making vehicles, investigatory methods, courtroom procedure and transparency/predictability of the leniency process, three salient issues emerged for which one is the basis of my article and the other two will be suggested as additional areas of academic research that can be conducted in furtherance of strengthening existent EU leniency programs.

b. Two Methodological Approaches to Article

To extract differences among the leniency programs, semi-structured questions were developed to delve into specific areas of interest with subjective follow-up questions being formulated and utilized during each interview, or from each correspondence, to hone in on the salient issues acting in derogation of a Defendant's fundamental rights. Each of the salient issues were then examined by using legal comparative analysis of primary and secondary sources regarding European rules of law and US legal precedence to discern the main legal authoritative differences and to posit recommendations for potential areas of system improvement to enhance the protection of Defendants' rights and to increase the efficacy and impact of the existent leniency programs in both Central and Eastern Europe.

i. Semi-Structured Interview Questions – Qualitative Approach

1. National Competition Authorities

To develop the initial semi-structured questions, a preliminary review of the European Commission ("EC") and of 24 National Competition Authority ("NCA") websites, including the Austrian ("AT"), Belgian ("BE"), Bulgarian ("BG"), Croatian ("HR"), Czech ("CZ"), Cypriot ("CY"), Danish ("DK"), German ("DE"), Estonian ("EE"), Finnish ("FI"), Hungarian ("HU"), Icelandic ("IS"), Irish ("IE"), Latvian ("LV"), Lithuanian ("LT"), Macedonian ("MK"), Maltese ("MT"), Norwegian ("NO"), Polish ("PL"), Slovakian ("SK"), Slovenian ("SI"), Swedish ("SE"), Turkish ("TK") and British ("UK") competition divisions, was conducted to study jurisdictional differences in relevance to leniency and protection of Defendants' fundamental rights. The gaps of information identified in said websites included the following areas of legal interest to which semi-structured questions were developed to uncover additional legal system data for further legal analysis and interpretation: fining system and structure, settlements and informants,

quantification/estimation of harm, implementation of Directive 2014/104/EU, leniency program structure, two-tier vs. divided systems, purely administrative vs. purely criminalized systems, severity and pervasiveness of the cartel problem, and the intersection between collusive pressures on market players and game theory. Each NCA listed above was initially contacted via telephone with a follow-up email being directed to the head of its cartel/investigative division listing the aforementioned semi-structured questions and requesting a meeting time be scheduled for a phone or in-person interview at headquarters. 13 jurisdictions responded to the initial email request in the following ways:

The 13 respondents were categorized into four separate and distinct groupings designated by how each preferred to respond, including email correspondence, phone, Skype, and in-person interviews at headquarters. The first set of respondents provided insight regarding the interworkings of their respective NCAs via email correspondence employing the initial targeted email as a guide to format their responses. Said responses were reviewed and analysed, and follow-up questions were posited via email to delve deeper into further areas of legal interest utilized in this article. The NCAs that utilized this method of correspondence, included: CY, CZ, HR, HU, SE, and TR. The second respondent set provided information via phone interview, preparing for the interview using the initial targeted email as a guide and allowing for follow-up questions to dissect the information given providing the author the opportunity for further extrapolation on specific areas of legal interest. The NCAs that utilized this method were AT and DE. The third respondent set provided information via Skype interview, allowing for an unstructured question and answer session in which many legal issues were posited, developed and expounded on for an in depth understanding of each legal area of interest. The NCA that utilized this method was NO. The fourth set of respondents provided the greatest platform for developing a solid knowledge base by providing the opportunity for an in-person interview at headquarters. Here, the NCAs and author were able to delve deeper into each issue of law, extrapolate on examples of specific issues/challenges the NCAs were facing when enforcing competition law, and identify areas where modification of EU/national law could lead towards more efficient and competitive market outcomes. The NCAs that chose this method were IE, LT, LV and PL.

From the above interviews, the issue of potential harmonization regarding the proper usage of leniency documents between departments of the same and different systems failed to be considered by the legislature in Directive 2014/104/EU and will be recommended for further research to better delineate proper documentary protocol to safeguard victims' rights concurrently with protecting leniency documents to ensure enhanced cartel participation in existent leniency programs. All notes taken during the above interviews were reviewed in light of the demands posed by the current article topic and all relevant information was extracted for use in the article. Each NCA director provided personal contact information and offered their assistance if any follow-up questions transpired during the later stages of article creation and submission.

2. Law Firm / Legal Practitioners

Law firms were also contacted to identify unique issues faced by legal practitioners defending companies alleged to have infringed competition law and destabilized competition in the internal market. Most law firms enter the competition proceedings directly after the commencement of a dawn raid or investigation, such that they can ensure the protection of the Defendant's rights during and after the cartel investigation and discern what if any issues to raise with respect to evidence collection, transparency of the infringement findings and other subsequent parts of the proceedings. Unsurprisingly, the information gleaned from interviewing with legal practitioners uncovered the last two of the three respective issues addressed in this article.

The first interview conducted was with an associate of bnt attorneys-at-law located in Riga, LV who focuses his practice on joint ventures, M&A, competition and state aid, and EU regulatory affairs. The issues discussed during the interview were of the potential goals and challenges related to the future implementation of Directive 2014/104/EU and of the transparency of documents requested and utilized in civil follow-on cases. The second interview was with a partner of Vilgerts Legal & Tax in Riga, LV who concentrates her practice on employment, corporate and competition law. The issues discussed were of the LV leniency program, the LV Statement of Objections ("SOO") and the complexity of the economic analysis relied on by the Court, the cultural influence on whistle blowing in prior Communist nations, and on Defendants' procedural rights. The third interview was with an associate with Sorainen in Riga, LV who concentrates her practice on the intricacies of competition law and who was the prior head of the LV NCA cartel division handling dawn raid investigations stemming from alleged infringements of competition in the LV/EU internal market. The issues discussed were of the LV leniency program and cartel investigations, the inadequate scope of LV search warrants, the full copying of computer content, LV NCA limitations on dawn raids, the protection of Defendants' human rights, and the jurisdictional differences regarding the usage of search warrants.

From the above interviews, the salient issues of (1) overbroad search warrants and (2) inadequate transparency in SOOs surfaced as potentially violative of Defendants' fundamental rights. Pursuant to the hierarchical weight the author placed on each of the aforementioned issues, the focus of the article will be on identifying and developing recommendations on proper pre-investigatory protocol for obtaining search warrants in accordance with safeguarding Defendants' fundamental rights; the issue of the lack of transparency in SOOs will be recommended as an area of further research for proper formulation of thresholds to ensure Defendants can fully understand the contents of the SOO and develop a proper defence to the NCA's allegations of infringement. Thus, based on the evidentiary depth to which each can advance the targeted issue and focus of the article, the following NCA's investigatory/evidentiary competition procedure will be highlighted below in the appropriate and relevant legal sub-categories: DE, IE, and LV. All notes taken during the above interviews were analysed and all relevant information was utilized in the article. Each practitioner provided personal contact information and

offered additional assistance if any follow-up questions surfaced during the later stages of article drafting.

3. US Department of Justice / Federal Trade Commission

Similar to the above approach utilized when comparing and analysing different NCA jurisdictions, the US Department of Justice - Antitrust Division ("USDOJ") and the Federal Trade Commission-Bureau of Competition's ("FTC") websites were reviewed to compare with European national competition regimes and identify best practices in relevance to pre-investigatory procedure and effective enforcement mechanisms. The ultimate goal of said multi-jurisdictional comparison will be to recommend methods European NCAs can employ for improvement of current pre-investigatory procedural protocol and overall goal attainment towards enhancing national enforcement of existent competition law and increasing participatory acknowledgement of cartel behaviour inflicting the internal market.

ii. Primary/Secondary Source Analysis – Comparative Approach

In complement to the above semi-structured interviewing, each issue subsequently underwent a thorough examination by and through researching and comparing targeted primary/secondary multi-jurisdictional resources including the European rules of law and US legal precedence critical to determine the main authoritative differences for both the identification of best practices utilized in each market and the presentation of recommendations for potential areas of system improvement. Proper footnoting and bibliographical citations followed each source utilized in the article.

c. Concluding Remarks: Goals of the Two Methodologies

As elicited above, two methodological approaches were utilized to extract salient circumstances where persistent Defendants' rights violations can decrease the efficacy of the leniency program and increase the likelihood that secretive, violative behaviour will be exacerbated in the marketplace. This article posits that action taken and deference paid towards upholding Defendants' rights is the necessary step towards enhancing cartel destabilization, as the future vision of an effective leniency program lies in the purview of evidentiary transparency, procedural predictability and participatory acknowledgement.

CHAPTER TWO: ECONOMICS OF CARTELS AND COMPETITION LAW

a. Background and Goals of Competition Law

In free market economies, competition law is designed with the inherent interest and focus towards fostering, preserving and protecting competition in the marketplace.¹ Because in free market societies, the distribution of resources relies on the natural movement and interplay between supply and demand², protection of competition aides in creating market efficiencies, including: achieving a decrease of market prices, an enhancement of product/service quality and consumer choice, an increase in innovation, an aligned production/supply output level supported by demand, a higher degree of targeted response to “public tastes”, and an overall strengthening of consumer welfare.³ With competition equating to “a struggle or contention for superiority...competition has been described as a process of rivalry between firms...seeking to win consumers’ business over time”⁴; this becomes even more pronounced when assessing the impact and level of market elasticity and transitional consumer loyalty influencing targeted product/service segments internationally.⁵ Summarily, market competitors can achieve increased profits and turnover by producing high quality products at reasonable prices; alternatively, companies that deliver low quality products coupled with excessive prices can be: “punished” by losses in sales, inflicted with overbearing costs, or eliminated from the market due to inefficient economies of scale or inability to effectively compete.⁶ This forces companies to cater to the “wishes and preferences of the opposite side of the market” or bear the negative consequences of resisting the interdependent components of free market competition.⁷

¹ A. Jones, and B. Sufrin, “*EU Competition Law: Text, Cases, and Materials*” (United Kingdom: Oxford University Press, 2014), 5th edition, Chapter 1, pp. 1-2.

² *Ibid*, p. 2.

³ R. Folsom, “*European Union Law in a Nutshell*” (Minnesota: West Nutshell Series, 2014), 8th edition, Chapter 8, p. 336.

⁴ UK Office of Fair Trading and Competition Commission (now the Competition and Markets Authority), “*Merger Assessment Guidelines – September 2010*”, para. 4.1.2, CC2 revised and OFT 1254, currently available on: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284449/OFT1254.pdf, as found in D. Bailey and R. Whish, “*Competition Law*” (New York: Oxford University Press, 2012), 7th edition, Chapter 1, p. 3.

⁵ *Ibid*, see Bailey and Whish.

⁶ Bundeskartellamt - German Competition Authority website, “*Advantages of competition as an organising principle*”, available on: http://www.bundeskartellamt.de/EN/AboutUs/Bundeskartellamt/bundeskartellamt_node.html#do_c4548786bodyText1.

⁷ *Ibid*.

Even with the overt budgetary/financial, production/logistical and innovation/technological enhancement that results from said generated efficiencies, corporations may still take the position that competition is inconvenient and problematic, or that they simply cannot effectively compete in their respective market segment.⁸ In some instances, said acknowledgement can be the impetus for companies to collude with their key competitors, impede the natural progression of supply and demand, or take strides towards eliminating analogous competition.⁹ Because of the covert nature of anti-competitive corporate practices and the complexity of initiating/facilitating successful investigations leading to findings of infringement/convictions, competition law aims to dismantle anti-competitive agreements, destabilize abusive market behaviour, ensure against harmful merger concentrations, and scrutinize State enablement towards intervening and distorting the market.¹⁰ Summarily, without competition law, consumer welfare would be openly exposed to harmful practices causing inflated pricing and reduction of choice, and there would be a notable decrease in quality of administration, limited or nominal sustainable growth and reduction in internal job security, and a subsequent decrease of overall efficiency in the internal market.

b. Study of Economics and its Intersection with Competition Law

To develop a deeper understanding of the dynamics of competition and in turn why companies engage in certain decision-making patterns in the market, one must understand the direct relationship between competition policy and its inclusion of economic principles, with specific importance focused on corporate strategy, economic behaviour and the dynamics of market power.¹¹ Market power is important as it creates the ability for a dominant firm to charge a higher price than dictated by supply and demand (usually by “reducing its output or by making competitors reduce theirs”), translating into the power to “raise a price above the marginal cost” to produce the product in the short run, and “above the average total cost” to produce the product in the long run, which can lead to “supra-normal profits” for a notable period.¹² To understand how market power is created, maintained and manipulated by firms, one must also appreciate the dynamics of consumer surplus (i.e. the resultant benefit derived from the difference between what a patron is willing to pay vs. what s/he actually paid), production costs (i.e. the cost the firm incurred to produce each product and the potential returns/increased productivity for incurring said cost), profit maximization (i.e. to only “produce up to the point where the additional costs of producing one extra unit of output are still covered by the additional revenue

⁸ *Ibid*, “Act against Restraints of Competition (ARC)”.

⁹ *Ibid*.

¹⁰ See Chapter 1, pp. 2-3, *Supra* note 5.

¹¹ J. Faull and A. Nikpay, “*The EU Law of Competition*” (United Kingdom: Oxford University Press, 2014), 3rd edition, Chapter 1, p. 3.

¹² *Ibid*, p. 10.

earned...”), economies of scale (i.e. a higher production capacity will lead to a reduction in average total costs vs. the concentration percentages of efficient firms in the market in tandem with the optimal level of internal production for positive market outcome), and the usage of entry barriers (i.e. the way prices can be increased concurrently with entry barriers eliminating easy entry by firms to exploit the additional demand at a higher price).¹³ In light of the above dynamics, firms can strategize, exploit and manipulate their economic behaviour in “defence of their market” to enhance their market share for increased profits in furtherance and/or in derogation of free market competition. It is important to note that an increase in market share by a dominant firm does not automatically destabilize competition in the market, as some firms are just superior at developing/selling products that consumers want to purchase automatically giving them a larger share of the market through competition; it is when a firm enters into anti-competitive agreements, or abuses its dominant position in the market, when it is in violation of competition law.¹⁴ Thus, one must look at the type of market a firm is conducting business in and the types of pressures market participants face to predict the strategies they will employ to compete amongst their peers.

To develop a better overall perception of the pressures faced by players in a particular market, one must attain a more in-depth understanding of the different theoretical economic model structures and how each works to either benefit or harm consumer interests; the following analysis will distinguish between perfect market, monopolistic and oligopolistic competitive economic structures. Perfect market competition exists where there are many buyers and sellers, each firm is small relative to the market and all the players in the market produce similar non-differentiated homogeneous products; buyers and sellers have perfect information, there are no barriers to entry (so if a profit is made, new entrants can enter the market and drive down the price), no firm has any real advantages over the others, and consumers view the products/services as perfect substitutes.¹⁵ All firms charge the same price for the goods/services and the price is determined by the intersection of the market supply and demand curves; both producers and consumers are price takers, and no one firm will be able to influence the market price as the price is perfectly elastic.¹⁶ Here, the demand curve for a firm’s product or service is simply the market price and if a firm were to increase their price even by only a nominal amount, it would cause buyers to go elsewhere for the product, as there is no loyalty in a perfectly competitive marketplace.¹⁷ In Monopolistic markets, there is only one supplier in a market with

¹³ *Ibid*, pp. 10-18.

¹⁴ United States Department of Justice website, “*Antitrust and You*”, available on: <http://www.justice.gov/atr/antitrust-laws-and-you>.

¹⁵ R. Flood and D. Hewitt, “*Microeconomic and Data Analytical Theory– In-Class Notes, Handouts and Test Preparatory Materials*”, College of William and Mary – Mason School of Business Student Web Portal, as found in C. Kollmar, “*RGSL RF 104: Micro/Macro Economics Exam*”, submitted on 3 November 2014.

¹⁶ *Ibid*.

¹⁷ *Ibid*.

numerous buyers, the supplier will be a price setter and "market demand is [will equate to] the demand for the company's product"; through the manipulation of production output the supplier "can determine the market price along the [product's] demand curve", and there are entry barriers that prevent the entry of any competitors ultimately creating the potential for the supplier to maximize profits above cost and pursue other market destabilizing goals.¹⁸ Here, the supplier can manipulate competition by reducing output and selling less product than demanded in the market, thereby driving up the price and creating a "dead-weight welfare loss" as consumers lose the benefit of any consumer surplus including "a transfer of income from consumers to [the] monopolist".¹⁹ It can be argued that monopolies do bring positive competitive aspects to the marketplace when referring to production efficiency gains, increased investment in innovation and a decrease in negative consumptive externalities, but persistent monopolistic profits weighed against any arguable market benefits "must be seen as something negative which competition policy should try to avoid".²⁰

Oligopolistic competition exists where there are between 2-10 firms serving many customers based on strategic concentration ratios, the supplier's provide either differentiated or homogeneous products, and there are barriers of entry that exist forming overt obstacles disallowing strategic analogous competitor entry; the main differentiator in this economic model is that a single firm chooses a efficacious output level before competitors select their production plan with the leader's output being where profits are maximized.²¹ Thus, the main focus between the oligopolistic economic model and other economic model structures is that companies operating in oligopolistic markets act on the belief that their individual strategy "concerning output, price, etc. [and innovation] has a perceptible influence on the market outcome and...provokes reactions from the side of competitors".²² Given the complexity of behaviours in oligopolistic markets, and the amount of firms that operate in said markets, competition policy must be geared towards identifying and developing legal authority that accounts for factors that increase/decrease competition and promotes anti-collusive, pro-competitive behaviour in the marketplace to safeguard consumers' interest.²³ Furthermore, because the oligopolistic economic model structure most closely aligns with the posturing of competition law in the current internal market, the focus of the article will be on the competition and decision-making of market participants in oligopolistic markets. When discerning how oligopolistic firms strategize and make decisions for the development of policy promoting "fierce competition", one can make use of non-cooperative gaming models to identify the conditions and factors existent for collusive behaviour to arise among market players and how pressures on the players

¹⁸ See Chapter 1, pp. 21-24, *Supra* note 11.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ See *Supra* note 15.

²² See Chapter 1, p. 25, *Supra* note 11.

²³ *Ibid*, pp. 25-26.

and the frequency of interactions can force decisions based primarily on financial/budgetary bottom-line impact and fear of detection.²⁴

c. Non-Cooperative Game Theory

Game theory analyses "situations of strategic interaction using mathematical models" by identifying the relevant market players, the information they possess or for which their decision can be based, the selected actions they can choose from and the timing of said actions, and the particular numerical payoffs each selection will award each player.²⁵ For the game to elicit an equilibrium, a player must select a "plan of action that maximizes his payoffs based on the information available to him and his expectations about his rival's actions".²⁶ These theoretical models accurately reflect competition policy as their underpinning relies on the expectation that players will not be able to make binding anti-competitive agreements as they are unenforceable (and illegal) pursuant to law, and any strategies invoked by players will be chosen by the anticipated actions of their competitors.²⁷ Moreover, when decisions of a company lead to a "self-reinforcing set of strategies in which each strategy is the best response to the other strategies [of its rivals]" this is called a Nash equilibrium²⁸; a Nash equilibrium produces a "stable" outcome when companies maintain their chosen strategy and "a firm cannot increase its own profit by choosing an action other than its equilibrium action".²⁹ If analysed under the purview of the two differentiated models of competition (i.e. Bertrand and Cournot competition models), the Bertrand competition model assumes that "each company in the market decides on its price assuming that other prices in the market will remain unchanged...[featuring] a market price equal to marginal cost in the case of homogeneous products, and a price that is higher in the case of differentiated products"; the Cournot competition model assumes that "each company in the market decides on its profit maximizing output assuming the other's output will remain unchanged... [featuring] a market price below the monopoly level but (well) above marginal cost".³⁰ It is believed that the two aforementioned models reflect the way companies are expected to strategize and compete utilizing assumptions pursuant to the specific competition model chosen.

To provide a 'general' example of how game theory works when analysing collusion in the legal "criminal" realm, the game of Prisoner's Dilemma will be illustrated below and will later be extrapolated on when applying the intricacies of said game to

²⁴ *Ibid.*

²⁵ *Ibid*, p. 26.

²⁶ *Ibid.*

²⁷ *Ibid*, pp. 26-27.

²⁸ D. Yao and S. DeSanti, "Game Theory and the Legal Analysis of Tacit Collusion", pp. 113-141, *The Antitrust Bulletin*, 1993, as cited in *See Supra* note 11, p. 26.

²⁹ Tirole, "The Theory of Industrial Organization", n.1, p. 206, as cited in Chapter 1, p. 26, *Supra* note 11.

³⁰ *See* Chapter 1, pp. 27-28, *Supra* note 11.

cartelists' collusive behaviour in oligopolistic markets. In the instant Prisoner's Dilemma game (see below), there are two prisoners (Prisoner A and Prisoner B) alleged to have committed the crime of Premeditated Murder in the 1st Degree with Deadly Weapon Enhancement; each has been arrested and taken into custody. Due to the inadequacies of the underlying investigation (including a lack of concrete and/or circumstantial evidence), the investigating officer must elicit testimony from each prisoner to determine guilt for the prosecutor to attain a conviction. Each prisoner will not be allowed to collude, converse or create any binding agreements with the other prisoner prior to or during the interrogation of the investigating officer. Each must make his/her decision on what to tell the officer based on what s/he believes the other will reveal during the interrogation. If only one of the prisoners "snitches" (i.e. testifies) against the other prisoner; the snitching prisoner will be released and the other will get 28 years of incarceration for Premeditated Murder in the 1st Degree with Deadly Weapon Enhancement (i.e. Class A Serious-Violent Felony, presuming a 0 offender score (i.e. no prior criminal history)); if both prisoners refuse to snitch on each other, each will only get one and ½ years of incarceration under the conviction of Illegal Possession of Firearms in the 1st Degree (i.e. Class B Non-Violent Felony, presuming 0 offender scores); if both prisoners snitch on each other, each will get 13 years under the lesser included offense of Murder in the 2nd Degree (i.e. Class A Serious-Violent Felony, presuming 0 offender scores, with no weapon enhancement and a downward departure for investigative preferring prior to trial):³¹

Prisoner's Dilemma Game

	Prisoner B	
	Not Snitch	Snitch
Prisoner A		
Not Snitch	1,5 / 1,5	28 / 0
Snitch	0 / 28	13 / 13

[Years of Incarceration]

³¹ *Ibid*, pp. 28-29; the entirety of the instant citation includes both the description of the prisoner's dilemma game as well as the matrix that follows. This game matrix illustrates how game theory works in the prisoner's dilemma setting, which will be utilized later for comparative purposes when determining players' strategies in relevance to collusive cartel behavior in oligopolistic markets. The payoff structure used in the instant game was replaced with the actual years of incarceration denoted in the 2015 Sentencing Guidelines of the State of Washington in the US to develop an example more true to life, and arguably more reflective, of a prisoner's actual decision making process when facing a foundational serious violent offense. (The State of Washington Adult Sentencing Guidelines Manual is available at: http://www.cfc.wa.gov/PublicationSentencing/SentencingManual/Adult_Sentencing_Manual_2014.pdf)

As one can see from the above game, the most lucrative strategy for both Prisoner A and Prisoner B is to snitch on each other. This is true because snitching awards the least jail time irrespective of what the other prisoner decides to do. When both prisoners benefit by doing the same action, this action is considered to be the “dominant” strategy. In the instant case, the dominant strategy is for both prisoners to snitch against each other for the lesser-included offense (i.e. decreased sentence) of 13 years.³² The author will now analyse if the game of Prisoner’s Dilemma remains constant when applied to collusive cartel behaviour in an oligopolistic marketplace.

d. The Uncovering and Destabilization of Cartels

“People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.”³³

From a definitional perspective, cartels are “agreements or concerted practices between two or more undertakings aimed at coordinating their competitive behaviour...in order to maximize their profits”.³⁴ The motive of a cartel is to achieve enhanced future profits and more lucrative efficiencies than what would otherwise be dictated by supply and demand by agreeing with each other to reduce production or fix a more generous price for similar products in elastic markets; this can only be achieved if each cartel member abides by the schematic rules in place to preserve the equilibrium of the cartel.³⁵ Said schematic strategy is invoked in countless illegal ways, including: fixing purchase prices/contractual selling prices, manipulation of production output, reallocation of market share, bid-rigging (the most serious offense), import/export restrictions and other collusive conduct.³⁶ Similar to other types of fraud, cartel behaviour creates the “most serious breaches of competition law” by invoking a continual misallocation of resources (i.e. capital and income) and causing harm to consumer interests, as cartels “are doing so [committing offenses] only with the motivation of greed and with nothing to be gained but financial profit”.³⁷

Making it increasingly more difficult and complex to investigate, cartel behaviour is conducted in secrecy as many firms are becoming progressively savvier with circumventing competition law to continue their violative behaviour for more handsome

³² *Ibid.*

³³ A. Smith, “*An Inquiry into the Nature and Causes of the Wealth of Nations*”, 205 (William Playfair ed., 1995), 1776, as cited in P. Botana “Prevention and Deterrence of Collusive Behavior: The Role of Leniency Programs” (2006/Winter), *Columbia Journal of European Law*, p. 48.

³⁴ R. Grasso “The E.U. Leniency Program and U.S. Civil Discovery Rules: A Fraternal Fight?” (2008/Spring), *Michigan Journal of International Law*, pp. 568-571.

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ D. McFadden and Gorecki, “Criminal Cartels in Ireland: the Heating Oil Case” (2006), *ECLR* 631-640, p. 640, as cited in D. McFadden, “*Some Thoughts on Criminalizing Cartels*”, p. 4, Presentation at the European Competition Day, Budapest, 29-30 May 2011.

profits.³⁸ This is accomplished by employing internal legal advisors for insight on the intricacies of competition law, utilizing encrypted technological advancement during phone calls and email correspondence, meeting in obscure undetectable locations, hiding internal documents in “constitutionally” protected buildings, premises and personal chattel, and employing other devious measures to keep silent specific internal cartel agreements.³⁹ Cartelists operate in secrecy because they know what they are doing is against competition policy, and if detected will face serious sanctioning, fines, penalties and potentially jail time depending on which jurisdiction they conduct their business in, and whether said jurisdiction is purely administrative in nature or invokes criminal prosecution/penalties for illegal collusive behaviour. Because severe fines, sanctions and penalties are the main driver behind keeping collusive practices secret, the fear of detection becomes one of the key components behind destabilizing cartels.⁴⁰ This is because individual cartelists will never know if and when other cartel members will give away the secret details of the underlying collusive schema, ultimately exposing the ongoing illegal behaviour and enabling the opportunity for authorities to lodge penal sanctioning and fines against violative companies (and in certain jurisdictions against individual directors). The author will now illustrate, by creating a *hypothetical* coffee cartel, how game theory can explain cartelists’ decision making in oligopolistic markets by assuming abidance to the rules of prisoner’s dilemma.

In the instant game, the world’s largest coffee producing countries formed a coffee cartel with the aim of driving up the wholesale price of coffee beans, whereby they agreed to withhold tons of coffee beans off the market. Countries A (Brazil and Columbia) agreed to withhold the most beans as they were the largest contributors in said market; Countries B (other smaller countries) agreed to withhold smaller quantities of beans off the market. At harvest time, instead of the prices being higher and more lucrative, they plunged below the level of profitability expected. This is because “each has a dominant strategy to break from the deal and supply more (i.e. dump) beans on the market to take advantage of the higher profits, thereby forcing prices to plunge downward”:⁴¹

³⁸ Czech Republic Office for the Protection of Competition website, “*Leniency and Settlement Information Bulletin 3/2013*”, available on: <https://www.uoohs.cz/en/information-centre/publications.html>.

³⁹ *Ibid.*

⁴⁰ European Commission website, “*ICN Curriculum Project – Learning Module on Leniency*”, video, available on: <http://ec.europa.eu/competition/cartels/leniency/leniency.html#video>.

⁴¹ R. Flood, and D. Hewitt, “*Game Theory – In-Class Notes, Handouts and Test Preparatory Materials*”, College of William and Mary – Mason School of Business Student Web Portal. This citation includes both the explanation of the game and the matrix illustrating the pay-off matrix.

Coffee Bean Cartel Game

Countries B / Countries A	Withhold Beans	Dump Beans
Withhold Beans	10 / 10	5 / 12
Dump beans	12 / 5	7 / 7

[Profit in Millions]

Countries A - Brazil, Columbia

Countries B - Smaller Countries

As one can see from the instant game, the most lucrative strategy for both Countries A and Countries B is to dump beans on the market (i.e. compete) due to the “temptation” of attaining a better overall profit margin; when one of the Country players abides by the cartel agreement and withholds beans off the market (thereby ensuring higher prices), it makes it more advantageous for the other Country player to dump beans on the market to take advantage of the resultant higher profits it can make when the prices are high (i.e. 12 million EUR total vs. 10 mil EUR total).⁴² Moreover, when the other Country player breaks away from the agreement, it no longer makes good business sense to continue withholding beans, thereby making it more profitable for the withholding Country player to not maintain a restriction on its own production (i.e. 7 million EUR total vs. 5 million EUR total).⁴³ This is true because competing, awards the most beneficial outcome irrespective of what the other Country players decide to do (i.e. 7 million EUR). When both Country players benefit by doing the same action, said action is considered to be the “dominant” strategy; here, the dominant strategy is for both Country players to compete against each other irrespective of the lower resultant price. Thus, if both Country players simply cooperated with each other on their collusive agreement they would have enjoyed a higher combined overall profit margin (i.e. 10 million EUR), but instead they end up with an “equilibrium with the lower collective profit” (i.e. 7 million EUR).⁴⁴ This illustrates the theoretical instability of a cartel, as the “collusive outcome creates the possibility to free ride or cheat on the cooperative behaviour of the others [inciting the increased possibility of snitching and fear of detection], as witnessed in practice by the breaking down and erosion of many cartel agreements”.⁴⁵

The above coffee cartel example effectively provides an instance where the dominant strategy was for both players to deviate from the cartel agreement, but in other circumstances collusive agreements may be upheld and will not align with the

⁴² See Chapter 1, pp. 29-30, *Supra* note 11, and *Ibid*.

⁴³ *Ibid*, p. 29.

⁴⁴ *Ibid*.

⁴⁵ *Ibid*, p. 30.

aforementioned logic. The reasons for this are that in oligopolistic markets the players have the potential opportunity to meet numerous times and “play the game” more than once potentially making it more profitable to collude to not forego future revenue.⁴⁶ Additionally, when taking into account the impact of different cultures and mentalities, there could also be different expectations in relevance to upholding agreements where collusion between companies might not necessarily be seen as something criminal in nature and trust exists between colleagues to abide by cooperative agreements.⁴⁷ Thus, when applying game theory to real oligopolistic situations, there are a number of factors that must be considered to discern what market players will actually do when faced with the decision to compete or uphold a collusive agreement. Said factors that enhance the “ease” for which companies can coordinate collusive terms are: increased market transparency, a greater frequency of company interactions, stronger entry barriers, greater excess capacity, increased demand growth and the presence of a ring leader; factors that ‘decrease’ the longevity of cartel collusion are: a large number of market suppliers, notable product differentiation, greater market share asymmetry and cost asymmetry, and enhanced innovation/R&D.⁴⁸ To make matters even more complex, firms can also employ collusive “facilitating devices” such that implementation can aide in the collusion between market players, which includes: trade associations, price and contract clause cooperation, cross patents and research, and common resale price maintenance and costing book allocation; said factors/facilitating devices can influence the payoff structures of game theory by “reducing the gains of competing” making it more profitable to collude to reap the benefits of higher profits and generation of revenue.⁴⁹

e. Concluding Remarks: Game Theory as the Underpinning of Leniency

The aforementioned economic/financial principles and prisoner dilemma games illustrate that there are a number of factors at play when determining whether or not a firm will compete or collude with its analogous competitors in an oligopolistic market, which will undoubtedly change the decision-making each cartel member will employ to enhance its own financial status or bottom line. However, the main instigators of action that remain constant, irrespective of all the permutations/combinations of factors and devices used by firms to increase the efficacy and strength of cartel agreements, is the instability introduced by the inability to rely on another cartel member’s actions regarding (1) if and when it will cheat and free-ride on the benefits ensued by others withholding their production output or (2) when the fear of detection is strong enough to drive another cartel member (or its employees) to snitch or reveal cartel behaviour for leniency or alternative personal

⁴⁶ *Ibid.*

⁴⁷ *J. Jerneva, “In-Person Interview”, Partner with Vilgerts Legal & Tax – Riga Office, interview conducted on: 23 September 2015, and Ibid, p. 31.*

⁴⁸ *See Chapter 1, pp. 32-33, Supra note 11.*

⁴⁹ *Ibid, pp. 33-34.*

gain. This is precisely why game theoretical models are utilized to discern and potentially predict the factors that will motivate and instigate cartelists to act in favour of immunity, lower fines and/or decreased penal sanctioning when they believe the stakes are too high to continue their participation in collusive agreements undermining competition in the market.

For final demonstrative purposes, when applying the above rules of prisoner’s dilemma to the leniency program: the first cartelist who admits its own cartel participation concurrently with revealing the participatory actions/behaviours of others will get full immunity (i.e. no fines or jail time) and the others will get 100 million EUR in fines (or more depending on the severity and duration of the cartel); if both cartelists refuse to admit cartel participation, each will receive 200 million EUR in fines when the EC or NCA investigates and enters a finding of cartel infringement (i.e. belief in the inherent likelihood that the authorities will discover cartel behaviour is a cornerstone of the leniency program); if both cartelists later admit cartel participation after commencement of an investigation, each will receive 50 million EUR as a reduction in fines for engaging in continual and consistent cooperation with the EC/NCAs for favourable treatment via settlement.⁵⁰ But one must remember that even though the fines were reduced to 50 million EUR, said fines still significantly impact the profit margins of the firm, such that the race to secure first place in the queue becomes the dominant strategy to achieve maximum utility. Thus, the leniency program introduces the principle of speed/timing for complete immunity treatment in competition proceedings, which ultimately impacts game dynamics and payoff structures.⁵¹ The following game illustrates the above leniency program elements:

Leniency Programme Game

	Cartelist B	
	Not Admit	Admit
Cartelist A		
Not Admit	200 / 200	100 / 0
Admit	0 / 100	50 / 50

[Fines in Millions]

In summary, pursuant to the rules of game theory as the underpinning of the leniency program, the dominant strategy for each cartelist “in terms of...maximum...utility” is to be the first to admit its participation in a cartel agreement to benefit from complete

⁵⁰ See *Supra* note 38. Specifically review citation two at the bottom of page four of the bulletin where it describes how game theory is the underpinning of the leniency program.

⁵¹ *Ibid.*

immunity.⁵² This is because the “race” or timing component towards being the first admitting cartel member proves to be the most lucrative option for complete exoneration of fines/sanctions, and not the reduction in fines, as each cartel member is on an equal footing to obtain full immunity only if they are first in the “queue” with the EC or NCAs. Thus, “timing” and severity of fines (i.e. financial impact) becomes the determining factor in both the dominant strategy and payoff structure of the above game (i.e. both players will have to perform the same action to obtain a favourable payoff, but the actual timing of the action defines whether the participant will benefit from maximum utility or a reduction of the same). In the next chapter, the Author will describe in greater depth the goals, mission and purpose behind the leniency program through comparing the unique and distinct differences between three NCAs, the EC and the USDOJ in relevance to their competition regimes and leniency program structure.

⁵² *Ibid.*

CHAPTER THREE: LENIENCY PROGRAM REGIMES: A COMPARATIVE ANALYSIS

a. Structure and Purpose of the Leniency Program

Evidentiary information positioned to initiate cartel proceedings for alleged infringement can be provided or revealed to the EC, USDOJ and the European NCAs in a diverse number of ways, but the most successful and prolific tool in the effective enforcement against cartel behaviour has been the advent of the leniency program.⁵³ As highlighted above, because of the inherent secrecy for which cartels operate to remain undetected and circumvent high fines, sanctions and jail time, there is a notable level of conspiracy as cartelists are aware that their behaviour is illegal; this makes it incredibly difficult for authorities to discover, investigate and obtain the requisite amount of evidence to successfully prosecute cartels.⁵⁴ The leniency program provides authorities with a vehicle "to uncover cartels that may have gone undetected and continued to harm consumers".⁵⁵ The leniency (i.e. cartel immunity) program creates a system in which a firm receives complete exoneration from all penalties in exchange for participatory admission and complete cooperation throughout the cartel investigation and proceedings.⁵⁶ This corroborates game theory's underpinning with leniency as it is the fear of detection and the desire to circumvent potential sanctioning that drives market participants to utilize the leniency program as a tool of vindication.

The cornerstones of an effective leniency program are: (1) there is a sincere "threat of severe sanctions for those who participate in...cartel activity and fail to self-report", (2) there is a perceived "high risk of detection by antitrust authorities if they [cartelists] do not report", and (3) there must be overt "transparency and predictability...throughout a jurisdiction's cartel enforcement program so that companies can predict with a high degree of certainty how they will be treated if they seek leniency" and the appending punishment for not doing so.⁵⁷ The leniency program also creates a "preventative dimension" by creating an inherent "climate of permanent suspicion between cartel members [,]" which not only maximizes the inherent instability

⁵³ S. Hammond, "The Evolution of Criminal Antitrust Enforcement over the Last Two Decades", p. 1, National Institute on White Collar Crime presentation, Miami, 25 February 2010, available on: <http://www.justice.gov/atr/file/518241/download>.

⁵⁴ Bundeskartellamt, "Effective Cartel Prosecution: Benefits for the Economy and Consumers", p. 17, available on: http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Brosch%C3%BCren/Brochure%20-%20Effective%20cartel%20prosecution.pdf?__blob=publicationFile&v=12.

⁵⁵ See *Supra* note 53, p. 2.

⁵⁶ See *Supra* note 40.

⁵⁷ S. Hammond, "Cornerstones of an Effective Leniency Program", presentation given before the ICN Workshop on Leniency Programs, Sydney, 22-23 November 2004, available on: <http://www.justice.gov/atr/public/speeches/206611.htm>, as found in *Supra* note 53, p. 4.

of cartels but...also...discourages companies from engaging in such behaviour...".⁵⁸ This program is seen as a win/win for both the companies and authorities alike, as the firm who is the first to admit participation in a cartel receives complete immunity; the authorities receive inside evidence regarding the interworkings of a cartel harming consumers that they would not have been privy to without the leniency program incentives. Moreover, the premise that underscores the importance of the leniency program is that enhanced competition will equate to fewer cartels and "all the benefits that competition brings: lower prices, better service, more innovation and greater consumer choice".⁵⁹ Summarily, the leniency program provides the opportunity for authorities to detect and punish more cartels, and in turn, there will be a greater overall level of legal deterrence because of the salient public demonstration that cartels will be targeted and harshly punished.⁶⁰ The leniency program regime displays subtle but notable distinguishing differences across distinct jurisdictions internationally; this article will cover the differences between the competition regimes of the EC, and three NCAs, including: IE, DE and LV, in comparison with the USDOJ. Moreover, the below subsections will explore the differences not only between leniency programs, but also between distinct competition system structures, and laws relied on by antitrust authorities, as said differences reveal the aforementioned challenges with pre-investigatory measures and procedural enforcement vehicles necessary for efficacious leniency regimes in Central and Eastern Europe.

b. The EC Regime and the ECN

i. EC Leniency Regime

Competition policy in the EU is derived from two central rules proscribed in Article(s) 101 and 102 of the TFEU⁶¹; Article 101 prohibits both horizontal agreements (i.e. agreements between firms operating "at the same level of the supply chain") and vertical agreements (i.e. agreements "between firms operating at different levels"), and Article 102 prohibits firms from abusing their dominant position in the marketplace.⁶² Regarding anti-competitive practices prohibited by Article 101, both the EC (and EU

⁵⁸ See Chapter 8, pp. 1080-1081, *Supra* note 11.

⁵⁹ See *Supra* note 40.

⁶⁰ *Ibid.*

⁶¹ Treaty on the Functioning of the European Union, Article(s) 101 and 102, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2012:326:FULL&from=EN>. It should be noted that Article 101(1) deals with concerted business practices and agreements when they have the "potential to affect trade between MSs and have the object or effect of preventing, restricting or distorting competition within the Common Market", thereby making them prohibited; said practices, including horizontal price fixing, bid-rigging, market sharing, etc. are punished as "hard core infringements" as iterated in many primary and secondary sources (*see Supra* note 3).

⁶² European Commission – competition website, "Overview", available on: http://ec.europa.eu/competition/antitrust/overview_en.html.

NCAs) can apply Article 101 through usage of Regulation 1/2003, which lays out general EU competition procedure, and the investigatory and sanctioning powers against infringing firms (among a cadre of other protocol proscribed in the legislation).⁶³ Even though for many years it was the practice of the EC to award a reduction in sanctions to cartelists who admitted their participation in anti-competitive practices, it wasn't until 1996 when the EC formalized its leniency program/procedure, which included two subsequent revised notices/amendments to better enhance its policy of rewarding favourable treatment for cooperation in furtherance of cartel detection and competition enforcement.⁶⁴ The Commission's 2006 Notice on Immunity from fines introduces the premise that due to the complexity that attaches to the detection and investigation of cartels, it is in "Community interest to reward undertakings...which are willing to put an end to their participation and co-operate in the Commission's investigation...as ensuring that secret cartels are detected and punished outweigh the interest in fining...undertakings that enable the Commission to detect and prohibit such practices".⁶⁵

The basic EC leniency program structure allows for the first undertaking that admits its participation, and voluntarily presents its knowledge/role in an existent cartel, to receive a complete exoneration from administrative fines; it must be noted that the only sanction that the EC can impose, due to its competition regime being fully administrative, is fines for a finding of competition infringement.⁶⁶ To obtain full immunity (i.e. 100% exoneration of fines) a firm must provide evidence that will enable the EC to either (a) "carry out a targeted inspection in connection with the alleged cartel", or (b) "find an infringement...in connection with the alleged cartel".⁶⁷ It is important to note that subsection (b) allows for immunity to be obtained after an investigation has ensued if the information will enable the EC to find a competition infringement, but there will be a higher threshold required to obtain said immunity than in the pre-inspection stages; this practice distinguishes the EC from other international competition regimes that only allow for immunity in instances where the evidence provided serves as the impetus for commencement of an investigation.⁶⁸ When a cartelist wants to approach the EC to admit its participation in a cartel, it must first establish which jurisdictions the cartel is operating in, which authorities may be interested in pursuing an investigation, and obtain full company support to move

⁶³ Council Regulation (EC) 1/2003 of 16 December 2002, *on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty*, OJ C 326, available on: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003R0001&from=EN>, and *Ibid*, "Procedures in Anti-Competitive Agreements".

⁶⁴ See Chapter 8, p. 1081, *Supra* note 11.

⁶⁵ European Commission, "Commission Notice on Immunity from fines and reduction of fines in cartel cases", OJ C 298, pp. 17-22, 8 December 2006, available on: [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006XC1208\(04\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006XC1208(04)&from=EN).

⁶⁶ See *Supra* note 40.

⁶⁷ See *Supra* note 65.

⁶⁸ *Ibid*.

forward with filing an application for immunity.⁶⁹ EC procedure dictates that a cartel must work with diligence and speed to obtain and maintain the first marker (i.e. first position in the queue of cartelists willing to elicit evidence and admit participation in an existent cartel) to safeguard its chance of obtaining full immunity; complete and genuine cooperation is expected throughout the totality of the pre-investigatory/ investigatory stages, and the cartel cannot have coerced others to participate in the cartel.⁷⁰ Information that must be provided to the EC is what product or market the cartel is operating in, the firms/companies involved, names of individuals/directors participating in the cartel, any benefits derived from being in the cartel, any penalties for failure to abide by cartel rules, names of the parties who are responsible for the cartel's monetary compliance, and an overall description of the motive behind the cartel.⁷¹ Full cooperation that must be displayed by the cartel throughout the duration of the proceeding equates to refraining from conduct that can undermine the investigation, it must not inform others of the immunity application, it must discontinue participation in the cartel (unless continued participation is requested by the EC to circumvent tipping off others of the investigation), it must not destroy or modify evidence, it must ensure full cooperation of all employees/staff of its company and it must not misrepresent evidence or act dishonestly during the proceeding.⁷² "Indicators of cooperation" expected when collaborating with the EC are attending EC meetings, submitting supplemental evidence upon request of the EC, decoding company encryptions/acronyms, conducting internal investigations and forwarding an accurate report of the findings, and providing truthful testimony during proceedings.⁷³ Once the investigation and any formal proceedings have concluded, and the EC is satisfied that the immunity applicant fulfilled all its responsibilities, the conditional immunity designation will transition into full immunity from all fines for both the company and individuals alike.

Cartel participants that do not fulfil all the requirements to receive full immunity treatment (because they were not the first cartel submitting a leniency application, they could not produce the required evidence for full immunity, or they coerced others to participate in the cartel) can receive partial immunity or a reduction of fines, if they disclose their own participation, fully cooperate, and pointedly contribute to the ability of proving an infringement by providing evidence that represents significant added value ("SAV") in comparison with the existing evidence.⁷⁴ It should be noted that SAV defines "added value" in relevance to evidence submitted to the EC that actually "strengthens, by its very nature...the Commission's ability to prove the alleged cartel"; it must also be considered that not all evidence holds the same weight for band reduction purposes (i.e. direct, contemporaneous compelling and stand-alone evidence holds more merit than

⁶⁹ See *Supra* note 40.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ See Chapter 8, pp. 1105-1106, *Supra* note 11.

non-corroborated, indirect and circumstantial evidence). In such cases, firms will receive predictable band reductions that align with the following protocol: 2nd cartelist in the queue that can provide information of SAV will get a 30-50% reduction in overall fines; 3rd cartelist will receive a 20-30% reduction, and the 4th or subsequent will receive up to a 20% band reduction in fines; it is important to note that there is no cut-off for the number of participants requesting and receiving reductions in their fine, which is another critical distinction between the EC's regime and other global competition regimes.⁷⁵ What is most important is the cartelists' ability to provide evidence of SAV diminishes with each additional cartelist admitting its participation and providing evidence.⁷⁶

To fully appreciate what band reductions equate to in terms of fines, to underscore the deterrent effect said fines have from a preventative prospective, or as an impetus to initiate an immunity application, one must go to the EC's guidelines on the method of setting fines pursuant to Article 23(2) of Regulation No. 1/2003, which accounts for a "percentage proportion of the value of sales...[and] the degree of gravity of the infringement, multiplied by the number of years of the infringement", but provides that the legal maximum "fine shall not, in any event, exceed 10% of the total turnover in the preceding business year of the undertakings...participating in the infringement".⁷⁷ There are adjustments made to the calculated total both upward (i.e. when accounting for aggravating circumstances) or downward (i.e. when considering mitigating circumstances), but the ultimate goal of the fine is to possess an inherent "deterrent effect, not only in order to sanction the undertakings concerned [,] but also...to deter other undertakings from engaging in, or continuing, behaviour that is contrary to Articles 81 and 82 of the EC treaty".⁷⁸ Of course, it is posited that the fine cannot be disproportionate or set outside the purview of the offender's ability to pay, ultimately forcing the firm into insolvency, as it would be against Community interests and well outside the retributive threshold aimed for in competition infringements.⁷⁹ Summarily, the EU leniency program provides an attractive incentive for firms participating in cartels to receive maximum utility and escape severe sanctioning by proffering evidence of infringing competition activity as reflected above in the payoff structures of game theory in oligopolistic markets; it must however be emphasized that for successful participation in the leniency program, cartelists must understand and be able to rely on the results of the cartel proceedings through unwavering adherence to both transparency and predictability. In addition, because cartel infringement cases are often not limited to just one jurisdiction, or region of the internal market, it makes it that

⁷⁵ *Ibid*, p. 1107, and *See Supra* note 40.

⁷⁶ *See Supra* note 40.

⁷⁷ European Commission, "Guidelines on the method of setting fines imposed pursuant to Article 23(2)(1) of Regulation No 1/2003", OJ C 210, pp. 2-5, 1 September 2006, available on: [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006XC0901\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006XC0901(01)&from=EN).

⁷⁸ *Ibid*.

⁷⁹ H. Gilliams, "Proportionality of EU Competition Fines: Proposal for a Principled Discussion" (2014/December), *World Competition Law and Economics Review*, 37: No. 4, pp. 452-453.

much more important to develop ways to harmonize efficient leniency program structure between jurisdictions to ensure said predictability traverses successfully between distinct NCAs/EC for successful enforcement of competition law.

ii. European Competition Network (ECN)

It is well established, that NCAs have parallel competencies to those of the EC, whereby pursuant to Regulation No. 1/2003 they must apply Article(s) 81 and 82 (currently, TFEU Article(s) 101 and 102) to destabilize anti-competitive agreements and abuse of dominance issues plaguing the internal market; in furtherance of the aforementioned goal, a joint statement was entered between the Council and Commission making it clear that "all competition authorities are independent from each other [and that]...cooperation between NCAs and with the Commission takes place on the basis of equality, respect and solidarity".⁸⁰ Due to infringement cases appearing at a more transnational level and stealthily penetrating national borders, it became critical that the EC and NCAs developed ways to cooperate with each other to finesse strategies of investigation, exchange views on case analysis, and harmonize competition procedure to construct "an effective mechanism to counter companies which engage in cross-border practices restricting competition".⁸¹

The ECN was established as a forum that initiates cooperation between the EC and NCAs to "ensure an efficient division of work and an effective and consistent application of EC competition rules"; the ECN provides an effective platform for multinational authorities to: inform each other of "new cases and envisaged enforcement decisions", assist and coordinate with each other on complex investigations, exchange pertinent evidence and other investigatory-related leads, and deliberate on areas of multi-faceted mutual interest.⁸² As highlighted above, because the leniency program has been proven to be the most prolific tool in the fight against cartel infringements, the adoption of the leniency program has received strong transnational political support and promotion, as more than 25 NCAs are prioritizing ECN membership and promulgating legislation in furtherance of the principles posited in the 2006 ECN Model Leniency Program (MLP) to ensure further collaboration towards enhanced cartel destabilization and increased multinational competition.⁸³ The MLP has become a significant step towards fostering "convergence and consistency" between different competition regimes, ultimately decreasing the amount of discrepancy between jurisdictions, to ensure potential leniency applicants will not be dissuaded from applying

⁸⁰ Council of the European Union, "Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities", General Principles No. 7, 15435/02 ADD 1, Brussels, 10 December 2002, available on: <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2015435%202002%20ADD%201>, and See *Supra* note 62, "European Competition Network – Overview".

⁸¹ See *Supra* note 62, "European Competition Network – Overview", and See *Supra* note 40.

⁸² *Ibid*, "European Competition Network – Overview".

⁸³ See *Supra* note 40.

due to a lack of procedural predictability.⁸⁴ Even though the MLP is “soft law” (i.e. quasi-authoritative with no legally binding force) it provides the much-needed framework to assist MSs with the harmonization of the “essential procedural and substantive requirements” necessary for all MS’s leniency programs to simplify and make more predictable complex cases with multiple filings in different jurisdictions.⁸⁵ Summarily, the MLP provides a structure to which NCAs can align their legislation, but it is left in the purview and competence of the distinct MSs to adopt a competition regime that is most aligned with the expectations of their national constituency to bolster their respective leniency programs in protection of their individual domestic markets.⁸⁶ The author will now explore the overt divergences in the structures of three different MS’s competition regimes and the salient differences between each structure’s procedural protocol.

c. The NCA Regimes: A Closer Look at DE, IE and LV

i. Introduction: Council Regulation No. 1/2003

The NCAs obtain their parallel competencies with those of the EC pursuant to Regulation No. 1/2003, which emphasizes in its Preamble the principles of a system that ensures against distorted competition, must be applied “effectively and uniformly” such that the NCAs and MS’s courts are empowered to apply Articles 81 and 82 of the Treaty “where they apply national competition law”.⁸⁷ Moreover, Regulation No. 1/2003 does not preclude MSs from “implementing on their territory national legislation, which protects other legitimate interests... [if it] is compatible with the general principles and other provisions of Community law”; MSs are also empowered to promulgate stricter territorial NCA laws that “prohibit or impose sanctions on unilateral conduct engaged in by undertakings... [or] on abusive behaviour towards economically dependent undertakings”.⁸⁸ Summarily, Regulation No. 1/2003 provides the authority for NCAs to initiate, investigate and find competition infringements pursuant to TFEU 101 and 102 via national legislation, and it allows MSs the discretion to promulgate legislation and create procedure in alignment with what is most appropriate in their distinct jurisdictions, provided they uphold the general tenets set forth in Community law. For illustrative purposes, the author will now explore the differences between three NCAs (e.g. DE, IE and LV) in relevance to how they created their competition regimes and constructed their leniency programs; the audience should identify the strides MSs have

⁸⁴ European Competition Network, “*ECN Model Leniency Programme*” (revised 2012/November), available on: http://ec.europa.eu/competition/ecn/mlp_revised_2012_en.pdf.

⁸⁵ European Competition Network, “*Competition: the European Competition Network launches a Model Leniency Programme – frequently asked questions*” (2006/September), Brussels, available on: <https://www.cccp.ie/business/wp-content/uploads/sites/3/2017/02/Model-Leniency-FAQ.pdf>, and *Ibid.*

⁸⁶ *See Supra* note 82.

⁸⁷ *See Supra* note 63, “*Preamble*”.

⁸⁸ *Ibid.*

taken towards attempting to harmonize aspects of competition law in reflection of Regulation No. 1/2003 and Art. 101 and 102 of the TFEU, but also understand where regime differences are revealed, challenges have surfaced in terms of transparency, predictability and the irreverence towards Defendants' fundamental rights. The competition constructs of the below jurisdictions will also reveal differences between regimes that are purely administrative vs. fully criminalized or a combination of both, and systems that are bifurcated (i.e. separate chamber systems where there is an independent investigative body and infringement decision making body) vs. a two-tiered system (i.e. the investigative body makes a decision on the finding of an infringement based on the evidence it uncovered).

1. German Competition Authority

Pursuant to DE's designation as a EU Member State, its Federal Government in conjunction with its NCA "The Bundeskartellamt" (hereinafter, "BUND") has the authority under Regulation No. 1/2003 to develop national law in furtherance of the principles set forth in TFEU Articles 101 and 102 (formally Articles 81 and 82 of the Treaty).⁸⁹ In 1958, the BUND instituted the "Act against Restraints of Competition" (hereinafter, "ARC") as its central legal basis to protect competition in DE, which perfectly mirrors the TFEU; it has been amended eight times to enhance its ability to destabilize cartel behaviour.⁹⁰ There are 12 divisions, nine specialized in branches, with three focused on cartel infringements (i.e. additionally, specialized assistance of the Special Unit for Combating Cartels "SKK" is afforded to the Litigation and Legal Division).⁹¹ Competition "leads" funnel into the BUND by other competition authorities, via DE's anonymous platform or through formally filed leniency applications before they are allocated to the appropriate divisions; if it is a hard-core cartel case, it will be forwarded to three specialized divisions (i.e. Divisions 10, 11 and 12), otherwise it will be given to the Branch Division for a final decision on allocation.⁹² Once allocated to the most appropriate division, the BUND employs similar procedure to that of the EC at the investigatory, post-infringement finding and pre-trial stages.

The BUND's "key witness programme" (i.e. leniency program), enacted in 2000 and revised in 2006, has proven to be extremely successful with "over half of all cartel proceedings [having been] triggered by information from leniency applicants".⁹³ The key witness program operates essentially the same as that of the EC and MLP providing full immunity to the first cartel member who contacts and admits its cartel participation in

⁸⁹ See *Supra* note 6, "European Legislation".

⁹⁰ See *Supra* note 6, "National Legislation and Notices".

⁹¹ S. Cannevel, Head of Special Unit for Combating Cartels for the DE Competition Authority, "Phone Interview regarding the German Leniency Program and DE System Structure", interview conducted on 19 October 2015.

⁹² *Ibid.*

⁹³ See *Supra* note 6, "Leniency Programme".

conjunction with “continuous and unlimited cooperation” with the BUND.⁹⁴ Reductions of administrative fines also follow the same EC/MLP regimen, whereby the BUND sets the conditions for predictable band reductions pursuant to the value of the evidentiary contributions made by the subsequent approaching cartelists.⁹⁵ Because of increased investigatory measures, improved human resources and the advent of the leniency program, the BUND has been able to detect and combat more cartels with increased vigour and obtain higher overall fines/convictions equating to an increased deterrence of cartel infringement as seen in their prosecutorial statistics.⁹⁶

It is important to recognize that the BUND is “not a clearly administrative system, but not a real criminal system [either]...” as it has enacted “administrative offense proceedings” for use when pursuing cartel offenders, and it operates as a two-tiered system, whereby the investigation unit decides, based on the totality of evidence it collected, on whether there is a finding of infringement and the level of harm the cartel inflicted on the market.⁹⁷ During the first stage of the proceeding, the BUND investigates the alleged infringing activities by initiating dawn raids and other investigative measures to uncover the pertinent evidence necessary to prove cartel culpability; then, from the evidence it collected, the investigating unit proceeds to make an infringement decision based on the weight and gravity of the evidence and drafts a SOO with its findings.⁹⁸ It is at this point, the cartelist has the ability to comment on the merits of the SOO, including the fines proscribed; if after hearing the arguments of the cartelist the BUND is not convinced to depart from its SOO findings, then the case moves into the second stage where the prosecutor becomes involved and the SOO becomes the criminal indictment.⁹⁹ In the second stage, the BUND becomes the prosecutor’s key witness and a full-fledged complex trial ensues with the burden of proof on the prosecutor; “here, it is not the infringement decision that is tested, it is that of the evidence”.¹⁰⁰

To ensure transparency and predictability at both stages of the proceedings, DE enacted its national legislation to ensure deference was paid towards: safeguarding a Defendant’s fundamental rights, enhancing the transparency of investigatory measures, and increasing the integrity of procedural protocol and sanctioning policy.¹⁰¹ The aforementioned safeguards will be touched upon later in the conclusion when developing recommendations for best practices regarding the interplay between Defendants’ fundamental rights and participation in the leniency program.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ Bundeskartellamt, “*Effective Cartel Prosecution: Benefits for the Economy and Consumers*”, pp. 7-8.

⁹⁷ *See Supra* note 91.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

2. Irish Competition Authority

Pursuant to IE's designation as a EU Member State, and in alignment with Regulation No. 1/2003, the Irish Competition and Consumer Protection Commission (hereinafter, "CCPC") employs as its legal basis the Competition and Consumer Protection Act of 2014¹⁰² (in conjunction with the Competition Act of 2002¹⁰³) in furtherance of prohibiting "activities which prevent, restrict or distort competition in trade" in the Irish market.¹⁰⁴ The Irish competition regime is quite different from that of the EC, as IE operates a fully criminalized system, but the central tenets of TFEU Article(s) 101 and 102 makeup the backbone of the Competition Act in force to combat cartels.¹⁰⁵ The CCPC works in conjunction with the Director of Public Prosecutions (hereinafter, "DPP") to prosecute hard-core cartel infringements, and in concurrence with the Competition Enforcement Division to handle cases outside the hard-core criminal realm.¹⁰⁶ Whether the alleged anti-competitive case comes from another competition authority, an informant, or from the cartel immunity programme, every case will enter and be screened by the CCPC "Commission" before being allocated to the DPP or the internal Competition Enforcement Division.¹⁰⁷ If the incoming case deals with a hard-core cartel activity, the Commission will recommend that the parties be prosecuted by the DPP in the IE Central Criminal Court on indictment; in instances where the Commission believes the cartel infringement does not rise to the level of an indictable offense, then it will bring criminal proceedings against the cartel participants in the IE District Court as a summary prosecution (i.e. trial without a jury); when the Commission discerns that the activity has anti-competitive effects but is not an operable cartel, then it will be given to the civil competition enforcement division to initiate proceedings in the IE High Court to compel parties to stop their illegal activity.¹⁰⁸ All the aforementioned branches work in collaboration to ensure proper competitive functioning in the IE market, with the CCPC exercising its discretion when reviewing potential criminal allegations and determining to what extent the CCPC will intervene to correct the infringing behaviour.

The CCPC's "cartel immunity programme" (i.e. leniency programme) was recently revised in January 2015 to enhance the transparency of the collaborative policy,

¹⁰² Irish Competition and Consumer Protection Commission, "*Competition and Consumer Protection Act of 2014*", available on: <https://www.djei.ie/en/Legislation/Legislation-Files/Competition-and-Consumer-Protection-Act-2014-No-29-of-2014-.pdf>.

¹⁰³ Irish Competition and Consumer Protection Commission, "*Competition Act of 2002*", available on: <http://www.irishstatutebook.ie/eli/2002/act/14/enacted/en/pdf>.

¹⁰⁴ *Ibid*, p. 1.

¹⁰⁵ J. McNally, Barrister and Case Officer of the Criminal Enforcement Division for the Ireland Competition and Consumer Protection Commission, "*In-person interview regarding the Irish Cartel Immunity Programme and IE procedural protocol*", conducted on 6 October 2015.

¹⁰⁶ Irish Competition and Consumer Protection website, "*Cartels and Civil Competition Enforcement*", available on: <http://www.ccpcc.ie/enforcement-mergers-enforcement-mergers/cartels>.

¹⁰⁷ See *Supra* note 105.

¹⁰⁸ See *Supra* note 106, "*Cartels and Civil Competition Enforcement*".

between the DPP and the Commission, which proscribes the authority for the DPP to grant immunity from criminal prosecution.¹⁰⁹ It must be noted that the DPP is the sole entity that grants immunity from prosecution; not the Commission or its respective branches.¹¹⁰ The IE cartel immunity programme reflects the ECN model leniency program to the extent that it “encourages self-reporting of unlawful cartels by cartel participants at the earliest possible stage in return for immunity from prosecution”.¹¹¹ The Commission acts as the initial intermediary between immunity applicants and the DPP, as the Commission is the body that conducts the cartel investigation for the DPP and interacts with the applicants to determine if they fulfilled all their expectations and provided full cooperation throughout the preliminary stages; if the applicant provides the necessary information and evidence to secure a guilty verdict, then the Commission will recommend to the DPP to forego prosecuting said applicant.¹¹² The IE cartel immunity programme does not provide for settlements or band reductions for cartelists that do not meet the requirements of full immunity.¹¹³

As highlighted above, the IE competition regime is fully criminalized such that both undertakings and individuals can be prosecuted under Part 2, Art. 4 of the IE Competition Act 2002, where a separate decision-making body (i.e. the IE court system) determines criminal culpability; subsequent provisional amendments of said Act in relevance to penalties (e.g. fines and incarceration) have become more significant to exploit the salient deterrent effect heightened sanctioning can have against infringers and society as a whole.¹¹⁴ Because the criminal sanctions imposed could expose the accused to high fines and jail time, IE recognized and employed more stringent protocol to safeguard Defendants’ rights in both the investigatory and procedural aspects of their competition proceedings, as said protection of rights are paramount to the adherence of laws protecting human rights, and for fair, predictable and transparent procedural processes.¹¹⁵ The aforementioned IE protocol employed to safeguard Defendants’ fundamental rights will be discussed and critically analysed in more detail in Chapter Five when comparing IE’s procedural legislation with that of LV in relation search warrants and investigatory protocol.

¹⁰⁹ Irish Competition and Consumer Protection Commission, “*Cartel Immunity Programme*”, available on: <https://www.ccpic.ie/business/wp-content/uploads/sites/3/2017/02/2015-01-20-Revised-CIP-Final.pdf>.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² *Ibid.* It must be noted that “foregoing prosecution” means immunity from fines, jail time and any other sanction that could be imposed at sentencing after a finding of guilty under Competition Law.

¹¹³ *Ibid.*

¹¹⁴ *See Supra* note 103.

¹¹⁵ D. McFadden, “*Some Thoughts on Criminalizing Cartels*”, p.12, Presentation at the European Competition Day, Budapest, 29-30 May 2011.

3. Latvian Competition Authority

Similar to both DE and IE, because LV is an EU Member State, the Saeima (i.e. the Parliament of the Republic of Latvia), in conjunction with its NCA, the "Konkurences Padome" (hereinafter, "KP"), has enacted a document entitled "Competition Law " as its national legislation pursuant to Regulation No. 1/2003, "to protect, maintain and develop free, fair and equal competition in the interests of the public in all economic sectors..."; this legislation has undergone six amendments since its inception in 2002.¹¹⁶ Whether a potential anti-competitive case is introduced to the KP via another institution/municipality or through a leniency application, the case is reviewed by a case handler and an internal decision is made regarding whether the KP will intervene and initiate an investigation into the alleged infringing activities.¹¹⁷ If it is believed by the KP that the alleged activities warrant an investigation, then it proceeds with executing a dawn raid or other investigatory measure to uncover the evidence necessary to discern culpability of cartel behaviour.¹¹⁸ After its investigation, the KP will create a procedural action report laying out all the details and formalities that it followed when conducting the investigation; this report will highlight the "venue and date of occurrence", the legal basis for the investigation, the time when the investigation was "initiated and completed", the position/name of the person(s) conducting the investigation and compiling the report, the "state of progress of the action [with its] established facts" and the "property and documents obtained during the procedural action".¹¹⁹ Once a decision is made by the investigative unit as to the level of the cartelists' culpability and the fines that should be imposed, the investigative unit will draft a SOO and provide it to the cartelists at the conclusion of the investigation. If the company disagrees with the findings of the KP, and it cannot informally sway the KP towards a more favourable position, then it can appeal the case to the Higher Court of Latvia.¹²⁰

In an effort to decrease secret cartel agreements and increase the efficiency in which it uncovers such competition infringement, the KP enacted a leniency program that closely mirrors that of the ECN's MLP providing "an opportunity for an undertaking that is or was involved in a cartel to be the first one to submit evidence on a voluntary basis...and to receive a full exemption from a fine and an exemption from the prohibition to participate in public procurement".¹²¹ There are opportunities for undertakings that do not qualify for full immunity to obtain predictable reductions in sanctions as defined in

¹¹⁶ Konkurences Padome, "Competition Law", Latvian Norms on Competition, English Version, p. 2, available at: <http://www.kp.gov.lv/en/regulatory-enactments/norms-on-competition>.

¹¹⁷ N. Brieze et al., Senior Expert of Cartel Division for the Latvia Competition Council, "In-Person Interview regarding Latvian Leniency Program and LV Procedural Protocol", interview conducted on: 23 October 2015.

¹¹⁸ *Ibid.*

¹¹⁹ See *Supra* note 116, p. 8.

¹²⁰ See *Supra* note 117.

¹²¹ Latvijas Konkurences Padome (Latvian Competition Council) website, "Leniency Programme", available on: <http://www.kp.gov.lv/en/leniency-programme>.

Cabinet Regulation 796, which provides guidance on the determination of fines for specific violations of Competition Law.¹²² At the time of the Author's original research, the KP did not memorialize the details of its leniency programme as provisions or articles in its Competition Law (now it can be found in Chapter III Article 12¹), but did highlight the importance of the leniency programme on its website, calling attention to the fact that horizontal agreements are severe violations of LV Competition Law and that the maximum penalty equating to 10% of company turnover from the preceding financial year (and exclusion from public procurement) could be imposed for such violative activities.¹²³

The success of the LV leniency program to date has not been adequately tested, as it was revealed by both the 2014 KP Annual Report¹²⁴ and KP executives/investigative staff that the leniency program has been underutilized, whereby "there has only been two cases of immunity [that] have been granted under the leniency program... [where] all the essential information required to begin an investigation was provided by the leniency applicant".¹²⁵ Both KP staff and legal practitioners believe that some of the reasons for said underutilization of the leniency programme are due to the public's overall ignorance of LV's leniency program, their failure to understand the responsibilities and importance of the KP with respect to protection of the LV market, their inability to identify that collusive practices are harmful to general consumers, the pervasive cultural mind set towards condemning whistle blowing, and their inability to see that anti-competitive agreements are violative/criminal offenses.¹²⁶ LV does not stand alone on said issues, as it was revealed to the author during multiple interviews with NCAs from other prior-communist nations, that it is common for said communities to have the mentality that price fixing and anti-competitive agreements are not wrong, but rather just part of doing business in a small market, where everyone knows each other, and where restricted pricing agreements are created in the normal course of business.¹²⁷ It was also highlighted during an interview with the Lithuanian NCA that

¹²² Valsts valodas centrs, "Cab. Regulation No. 796 – Procedures for the Determination of Fines for the Violations Provided for in Section 11, Paragraph one and Section 13 of the Competition Law", available on: [http://vvc.gov.lv/export/sites/default/docs/LRTA/MK_Noteikumi/Cab. Reg. No. 796 - Determination of Fines for the Violations.doc](http://vvc.gov.lv/export/sites/default/docs/LRTA/MK_Noteikumi/Cab_Reg_No_796_-_Determination_of_Fines_for_the_Violations.doc).

¹²³ See *Supra* note 121. It must be noted that the KP was updated in 2016 to include information on Latvia's leniency programme; Chapter III "Restrictions on Competition", Article 12¹ "Leniency Programme" of the KP includes seven sections explaining the pertinent details of Latvia's leniency procedure.

¹²⁴ Competition Council of the Republic of Latvia, "Annual Report 2014", pp. 12-13, available on: <http://www.kp.gov.lv/documents/e56d86ff6597354bc500be3916c71ee2606cb604>.

¹²⁵ J. Stiritis, "Interview of KP Board Member - Dzintars Striks on LV Leniency Program", RGSL LL.B Project – Appendix 1, submitted on 23 May 2015.

¹²⁶ See *Supra* note 117, and J. Jerneva, Partner with Vilgerts Legal & Tax – Riga Office, "In-person interview regarding the Latvian Leniency Program and LV Procedural Protocol", interview conducted on 23 September 2015.

¹²⁷ *Ibid.*

the challenge with underutilization might be due to a lack of trust regarding predictability that is built into the general community, as potential applicants do not know with a sufficient degree of certainty, that once they come forward with news of cartel behaviour, that the NCA will properly respond and deal with the violative allegations in a sufficient, protective and proactive manner.¹²⁸ Even though the aforementioned challenges remain steadfast as issues faced by the KP (and other regional NCAs), the KP is hopeful that as market participants gain a higher level of knowledge/education regarding the benefits of competition, and an appreciation of the purpose behind LV's leniency program, there will be more applicants and utilization of said programme in the future.

As denoted above, the KP is a purely administrative two-tiered system, with its investigative unit both collecting evidence to expose cartel culpability concurrently with making decisions on said evidence to impose fines/sanctions on anti-competitive undertakings.¹²⁹ Because the author uncovered potential areas of violative protocol regarding the failure to safeguard Defendants' fundamental rights, the author will delve deeper into specific areas of LV's Competition law in Chapter Five, by comparing LV's laws with those of the IE NCA and the EC for insight into potential areas of necessary change, including targeted recommendations to follow.

d. The US Regime: A Comparative Stance

US Antitrust policy is derived from three major Federal antitrust laws, including the Sherman Antitrust Act¹³⁰, the Clayton Act and the Federal Trade Commission Act; the Sherman Act has been viable precedent since 1890 and criminalizes "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal".¹³¹

¹²⁸ D. Lurje, Head of Cartel Investigations for the Lithuania Competition Authority, "In-person interview regarding the Lithuanian Leniency Program, Informants and Settlements", interview conducted on 17 August 2015.

¹²⁹ See *Supra* note 117.

¹³⁰ The Sherman Antitrust Act (1890), "Trusts, etc., in restraint of trade illegal; penalty", 15 U.S. Code §1, available on: <https://www.law.cornell.edu/uscode/text/15/1>.

¹³¹ United States Department of Justice, "Antitrust Enforcement and the Consumer", Antitrust Pamphlet, available on: <http://www.justice.gov/sites/default/files/atr/legacy/2015/03/06/antitrust-enfor-consumer.pdf>, and see *Supra* note 130. It must be noted that there are two entities in the US that focus on violations of competition in the US market; one is the USDOJ-ATD and the other is the FTC-Bureau of Competition. The focus of this paper will be on the responsibilities and actions of the USDOJ-ATD as the author will focus on the criminalized prosecution of antitrust infringements and the US amnesty regime; the FTC focuses on anti-competitive practices in interstate commerce, and even though the FTC has a criminal liaison unit with the USDOJ, it will not be discussed at any length in this article. Moreover, only the Sherman Act will be discussed in this article as it is the federal act promulgated to criminalize violations of antitrust law; the Clayton Act is a civil statute and the FTC Act is a federal interstate commerce act (both of which carry no criminal penalties), and as such, will not be explored in this subsection.

The USDOJ-Antitrust Division (hereinafter, "ATD") is the only governmental entity, pursuant to US federal law, empowered to prosecute criminal violations of the Sherman Act in US District Courts; investigations for the ATD are conducted by external US governmental agencies in collaboration with the ATD.¹³² In 1978, the ATD introduced its first Corporate Leniency Program, which was subsequently revised in 1993 to increase the level of transparency, predictability and incentives that the former program lacked; the current US models of amnesty/leniency "demonstrate the importance [,] for any successful leniency regime [,] of 'certainty of outcome' for the applicant".¹³³ The amnesty policy of the US is quite different from that of the EC, as it invokes separate corporate and individual amnesty policies to aide in the criminal prosecution of both corporations and individuals in US federal courts.¹³⁴ The three most significant policy departures of the 1993 Corporate Leniency Program (as distinguished from the initial 1978 version) are that (1) it provides corporations automatic immunity from prosecution upon adherence to strict requirements, (2) it offers an alternative amnesty for corporations providing information after the start of an investigation, and (3) it offers full amnesty for the directors/employees of corporate applicants that come forward and admit their involvement in a corporate statement.¹³⁵ The Corporate Leniency Program is touted as being a "case generator" and the "single most effective investigatory tool" in the ATD's arsenal, as it has aided in the discovery and successful prosecution of vast numbers of international cartelists harming American consumers.¹³⁶ In 1994, the ATD launched its Individual Leniency Program, which applies to "all individuals who approach the Division on their own behalf, not as a part of the corporate proffer or confession, to seek leniency for reporting illegal antitrust activity of which the Division has not previously been made aware".¹³⁷ Both the Corporate and Individual Leniency Policies together make up the US leniency regime, of which the elements and structure of the Corporate Leniency Policy will be discussed in further detail to illustrate the ATD's commitment towards detecting and deterring cartel activity in the US market.

¹³² See *Supra* note 131.

¹³³ M. O'Kane, *The Law of Criminal Cartels – Practice and Procedure* (New York: Oxford University Press Inc., 2009), p. 12.

¹³⁴ *Ibid*, p. 201.

¹³⁵ G. Spratling, *The Corporate Leniency Policy: Answers to Recurring Questions*, ABA Antitrust Section Presentation, 1998 Spring Meeting, presented on 1 April 1998, available on: <http://www.justice.gov/atr/speech/corporate-lenieny-policy-answers-recurring-questions>, and US Department of Justice, *Corporate Leniency Policy*, available on: <http://www.justice.gov/sites/default/files/atr/legacy/2007/08/14/0091.pdf>.

¹³⁶ S. Hammond, *Recent Developments, Trends, and Milestones in the Antitrust Division's Criminal Enforcement Program*, ABA Section of Antitrust Law Presentation, 56th Annual Spring Meeting, presented on 26 March 2008, available on: <http://www.justice.gov/atr/speech/recent-developments-trends-and-milestones-antitrust-divisions-criminal-enforcement>, and See *Supra* note 133, p. 202.

¹³⁷ US Department of Justice, *Leniency Policy for Individuals*, available on: <http://www.justice.gov/sites/default/files/atr/legacy/2006/04/27/0092.pdf>.

To receive full immunity (by reporting infringing activity prior to the ATD conducting an investigation), the corporate applicants must: (1) provide information/evidence that has not already been reported to the ATD from an alternative source, (2) take "prompt and effective action [to divulge] and terminate its part in the activity", (3) report the "wrongdoing with candor and completeness and provide full, continuing and complete cooperation to the Division throughout the investigation", (4) provide a corporate wide confession; not individual confessions of directors/employees, (5) make restitution to injured parties (if possible) and (6) not to have been the ringleader of said illegal corporate conduct or to have coerced another party to participate in said illegal activity.¹³⁸ If any of the above elements are not met, the undertaking can still apply for immunity, whether before or after the ATD conducts an investigation, if: (1) the corporation is the first to come forward, (2) the ATD does not have the evidence necessary to sustain a conviction, (3) the company took "prompt and effective action to terminate its part in the activity", (4) the report was made with "candor and complete cooperation", (5) the confession is a "truly corporate act", (6) the undertaking makes restitution (where possible), and (6) the granting of leniency would not be unfair to others.¹³⁹ It must be noted that timing becomes critically important after an investigation ensues, as participants are put on notice that their behaviour has been detected by the ATD, and it is very likely that other cartel participants will be frantically seeking immunity from prosecution as the 1st applicant; especially since the penalties in the US for cartel behaviour are extremely stringent and individuals can be criminally [personally] prosecuted for their participatory acts.¹⁴⁰

One of the salient differences between the US leniency regime, and that of other nations, is the seriousness to which US federal law attaches penalties to cartel offenses, which undoubtedly infiltrates both the operational scope and incentive structure of its leniency regime.¹⁴¹ Sanctions can have a huge bearing on whether companies will come forward and self-report; making one of the other unique differences of the US leniency regime that US federal law carves out potential personal legal exposure and imprisonment for directors engaging in cartel conduct, demonstrating an inherent trend of "enhanced individual liability, greater numbers of individuals prosecuted, longer periods of incarceration, and greater frequency of imprisonment".¹⁴² The ATD has proclaimed that "if the threat of incarceration is the greatest deterrent of criminal conduct", then the promise of immunity from criminal prosecution and no prison time is a "game changer" that becomes the impetus behind taking advantage of the leniency program, for individual directors to avoid going to jail and for companies to completely circumvent criminal prosecution, convictions and fines.¹⁴³

¹³⁸ See *Supra* note 133, pp. 202-203.

¹³⁹ *Ibid*, p. 203.

¹⁴⁰ *Ibid*.

¹⁴¹ See *Supra* note 40.

¹⁴² *Ibid*.

¹⁴³ *Ibid*.

For companies that do not meet the criteria of full immunity, the ATD provides predictable reductions of imposable fines, but provides no insight as to how it will affirmatively address how “subsequent” co-operators will be treated, making it even more imperative to be the first reporting cartel. ¹⁴⁴ Due to the US Sentencing Guidelines being highly detailed and incredibly structured, it allows for defence counsel to openly discuss with their client’s case options and strategy, and to negotiate plea agreements with the Government regarding ATD’s transparent discounts for cooperation (e.g. samples of the Model Annotated Corporate Plea Agreements are online for Defendants’ perusal). ¹⁴⁵ The mentality behind the transparency of online plea agreements is to simplify the facilitation of discussion between the Defendant and defence counsel as it is believed that increased transparency of procedure will enhance the predictability and reliability Defendant’s will have with the US competition regime, ultimately making more efficacious the leniency program and participants use of said program. Moreover, there are no band discounts offered, like in the EC regime, but the US system provides for a base fine of 20% of the volume of US commerce affected by the cartel, multiplied by minimum/maximum multipliers corresponding with the Defendant’s culpability score, with the maximum fine not equating to double the minimum fine; only on the Government’s motion (and the Court’s acceptance of said motion) can a company receive a downward departure below the minimum fine for significant cooperation in advance of the instituted investigation. ¹⁴⁶ The minimum/maximum multipliers include: number of employees, involvement in or tolerance of cartel behaviour, criminal history (i.e. offender score), obstruction of justice (i.e. failure to comply with requests of investigators; destroying evidence, dishonest testimony) and acceptance of responsibility. One must also note the hybrid nature of the prosecutor’s ability to follow the structured Sentencing Guidelines concurrently with imposing his/her own subjective views of cooperation for a downward departure of fines.

As was highlighted in the initial section of this chapter, the ATD believes there are three hallmarks behind a successful amnesty program for which it recommends for enhanced “detecting and cracking cartel activity”, including; (1) the “threat of stiff sanctions for those who participate in hard-core cartel activity”, (2) a “cultivation of a law enforcement environment in which business executives perceive a significant risk of detection by antitrust authorities”, and (3) there must be “transparency, to the greatest extent possible, throughout the anti-cartel enforcement program so that prospective cooperating parties can predict with a high degree of certainty their treatment following cooperation”. ¹⁴⁷ The author will explore the aforementioned three hallmarks in greater

¹⁴⁴ *Ibid.*

¹⁴⁵ US Department of Justice “*Model Annotated Corporate Plea Agreement*”, available on: <https://www.justice.gov/atr/file/889021/download>, and *See Supra* note 40.

¹⁴⁶ *See Supra* note 40.

¹⁴⁷ S. Hammond, “*Fighting Cartels - Why and How? Lessons Common to Detecting and Deterring Cartel Activity*”, available on: <http://www.justice.gov/atr/file/518526/download>.

depth in the conclusion, to emphasize the necessary elements at the intersection of leniency programs and Defendants' fundamental rights, to secure a greater legal deterrent effect and enhanced participation of leniency programs for increased overall competition in the market.

e. Concluding Remarks: A Comparative Approach to Leniency

When looking at the above jurisdictional differences through a comparative lens, one can see that the type of competition regime (i.e. bifurcated vs. two-tiered and/or purely criminalized vs. administrative or both), in conjunction with the approach to leniency program structure, will have an impact on the transparency and predictability for which leniency applicants will be treated, how investigatory measures will ensue and be carried out, and how decisions on infringement will be taken in relevance to cartel infringement. Said differences may play in favour of or against safeguarding a Defendant's rights, which in many respects can undermine the efficacy of the leniency program and cartel destabilization as a whole. As posited above, the author will now look at the purpose behind specific procedural fundamental rights and point to distinct challenges appurtenant to different competition regimes/leniency structures, which if improved, may lead to attainment of increased competition in the market.

CHAPTER FOUR: DEFENDANT'S FUNDAMENTAL RIGHTS IN COMPETITION PROCEEDINGS

a. The Link between Leniency and a Defendant's Fundamental Rights

From the very nature of how the leniency program operates, one can see an unequivocal link between the severity of sanctions, the incentives of the leniency program, and the necessity of safeguarding a Defendant's fundamental rights for the system structure to uphold the principles conferred on the EC/NCA's by the TFEU through Regulation No. 1/2003. In this Chapter, the author is going to dissect and delve deeper into competition sanctioning, the legal authority granting fundamental rights to Defendants, what rights are afforded in competition proceedings and at what stages they attach, and what are the ramifications for legal authority that is violated when Defendants' rights are not upheld.

If successfully implemented, the leniency program at its most basic level, provides the menagerie of incentives necessary to "induce disclosure" of covert anti-competitive behaviour in the marketplace by and through full immunity from severe sanctioning; said sanctioning should be a balance between "a nature and level that lead[s] to the most efficient prevention and deterrent effects".¹⁴⁸ As highlighted above, sanctioning is stridently different between jurisdictions in the EU and in other global markets, such that discerning the necessary severity level of sanctioning, pursuant to individual market standards, is a current hot topic of debate. The US has become a prominent enforcer with its success in prosecuting antitrust cases that affects American commerce, because it treats hard-core antitrust violations as criminal offenses prosecuting both undertakings and individuals, concurrently with laying the Constitutional foundation necessary to impose both severe fines (in terms of corporations) and fines/imprisonment (in terms of individual directors/employees involved in the violative scheme).¹⁴⁹ It has been suggested by the USDOJ-ATD that jurisdictions that do not impose criminal sanctions and individual criminal liability "will never be as effective at inducing leniency applications...this is due to individuals seeking the greatest incentive to disclose a collusive practice when they are threatened in ways that are not reimbursable by their undertakings".¹⁵⁰ However, with the EC operating a purely administrative regime (i.e. only imposing fines for violative cartel behaviour), the focus will now transition towards the severity of fining, the balancing act between the

¹⁴⁸ P. Botana, "Prevention and Deterrence of Collusive Behavior: The Role of Leniency Programs" (Winter 2006/2007), *Columbia Journal of European Law*, p. 49.

¹⁴⁹ *Ibid.*

¹⁵⁰ R. Hewitt Pate, "International Anti-Cartel Enforcement", Presentation before the ICN Cartels Workshop 12-13, presented on 21 November 2004, available on: <http://www.usdoj.gov/atr/public/speeches/206428.pdf>, as found in *Ibid.*

length and gravity of the offense (i.e. proportionality), the point at which said fines surpass the threshold necessary to entice cartelists to exploit the leniency program, and when sanctions are severe enough to be considered criminal such that Defendants' rights attach to the appurtenant competition proceedings.

The ability of an administrative fine to rise to the adequate level of severity to induce leniency program participation, in the absence of individual culpability, is a complex question; one where a multi-faceted approach must be employed for a targeted analysis of the quantification of harm to attain the goals of sufficient fining. The legal authority for the EC to impose fines (pursuant to Articles 101 and 102) is derived from Articles 23(2) of Regulation No. 1/2003, which lays out the elements that must be met concurrently with the maximum fine that "shall not exceed 10% of the sum of the total turnover of each member active on the market affected by the infringement of the association".¹⁵¹ This along with Article 23(3) of Regulation no. 1/2003, providing that the amount of fine imposed must "[illustrate] regard...both to the gravity and to the duration of the infringement"; including Article 5(4) of the TFEU, which states "under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties", and Article 49(3) of the Charter of Fundamental Rights of the European Union (hereinafter, "CFREU"), which posits "the severity of penalties must not be disproportionate to the criminal offense", makeup the legal context behind EU fining policy.¹⁵² When analysing the proportionality of the fining structure to determine how severe a fine can be without crossing the threshold of becoming unreasonable, one must look at how "proportionality" is defined, regarding if fines should follow a more "retributive" view of punishment as mandated by the Charter and Article 23(3) of Regulation No. 1/2003 (i.e. fines determined by assessing the gravity/duration of the infringement and that they are not disproportionate to the same), or a more relative/pragmatic view (whereby fines will be set where deterrence can be "achieved at the lowest cost"), as there is no clear cut methodological doctrine/case law targeting competition infringements.¹⁵³ In tandem with what the USDOJ posited regarding the structure of sufficient punitive sanctioning, settled EU case law provides that fines are not set at a level to merely counteract "illegal profits[,] but also aim to punish past conduct...[and] prevent such conduct from being repeated in the future"¹⁵⁴, as fining an amount that could be covered by "cartel gains" would not equate to a sufficient enough deterrent to effectuate use of the leniency program or affect directors' behaviour regarding cartel infringement. Moreover, as held

¹⁵¹ See *Supra* note 63, Article 23(2).

¹⁵² See *Supra* note 61, "Article 5(4)", and See *Supra* note 63, "Article 23(3)", and Charter of Fundamental Rights of the European Union, OJ C 326 02, 26 October 2012, pp. 391-407, available on: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012P/TXT&from=EN>, as found in See *Supra* note 79, p. 436.

¹⁵³ *Ibid*, note 79, p. 438.

¹⁵⁴ Case T-56/09 and T-73/09, *Saint-Gobain v Commission*, Judgment of the General Court, (2nd Chamber) [2014], paragraph(s) 379 and 390, available on: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62009TJ0056>, as cited in See *Supra* note 79, p. 437.

in the *Archer Daniels Midland* case, if a “fine were set at a level that merely negated the profits [benefit] of a cartel, it would not be a deterrent...[as] insufficient account would be taken of the fact that the conduct in question constitutes an infringement of Article 81(1) EC”.¹⁵⁵ It is logical to presume that when corporations “make financial calculations and management decisions, undertakings take [into] account rationally not only the level of fines that they risk incurring in the event of an infringement[,] but also the likelihood of the cartel being detected”.¹⁵⁶ Thus, it is apparent that firms look at a number of financial data points when discerning whether to continue cartel behaviour due to the penalty not being severe enough to make it unprofitable to violate competition law (i.e. the fine does not affect the bottom line enough to validate stopping cartel infringement), or take advantage of the leniency program to circumvent severe fines, better handle massive civil damages claims and negative press affecting future corporate value, and avoid the ultimate risk of approaching corporate insolvency. Therefore, the issue always comes back to if the EC were to gradually increase fine levels, so as to more effectively penalize competition infringements proportionate to the objective of achieving sufficient deterrence (i.e. to punish infringers to curtail recidivist behaviour and to demonstrate the severity of cartel infringements to the public to prevent future violative behaviour), what safeguards need to be put into place for the more severe fines to be upheld as not trampling on the procedural rights of Defendants. Even more specifically, when does the purported increase in fines meet or exceed the level considered to be “criminal” such that Defendants’ fundamental rights attach to the competition proceedings. And in turn, how does deference paid towards procedural safeguards equate to increased participation in the leniency program and an overall decrease in cartel behaviour.

b. The Law on Defendant’s Fundamental Rights

“Rights of defence must be respected in all proceedings in which sanctions may be imposed, a reminder of particular importance in the context of ever-increasing fines and other grave consequences attached to cartel decisions”.¹⁵⁷

i. A Closer Look at the ECHR and ECtHR

As the severity of sanctioning increases, so does the “concern regarding the fairness and stability of the procedures used by the EC to achieve such penalties”.¹⁵⁸ As a general

¹⁵⁵ Case T-329/01 [2006], *Archer Daniels Midland v Commission*, ECR II-3255, paragraph 141, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62001TJ0329>, as cited in *See Supra* note 79, p. 437.

¹⁵⁶ *Ibid.*

¹⁵⁷ J. Calzado and G. De Stefano, “Rights on Defense in Cartel Proceedings: Some Ideas for Manageable Improvements”, Article Reprint, Latham & Watkins, an essay published in P. Cardonnel et al., “Constitutionalising the EU Judicial System – Essays in Honour of Pernilla Lindh” [2012].

¹⁵⁸ D. Anderson and R. Cuff, “Cartels in the European Union: Procedural Fairness for Defendant’s and Claimants” (February 2011), *Fordham International Law Journal*: p. 385.

rule, when fines rise to levels analogous to sanctions imposed on criminal behaviour, the jurisdiction must implement a more heightened and rigorous procedural regimen to ensure fundamental rights and due process are upheld in such a competition regime.¹⁵⁹ Without more stringent practices in place, there will undoubtedly be issues of “effectiveness and fairness” that transpire undermining overall efficaciousness of the regime and participation in the leniency program.¹⁶⁰ In response to said implications, the EC-Directorate General for Competition (hereinafter, “DG”) has taken significant strides to “render its processes more transparent and subject to more internal scrutiny” (e.g. the DG published a best practices guideline for antitrust proceedings/hearing officer procedures¹⁶¹ and an explanatory note regarding inspection authorization for DG decisions¹⁶²). Perhaps the most impactful debate regarding fairness in competition proceedings is the increasing stigmatization towards DG’s practices operating in derogation of a Defendant’s human rights. Once the Treaty on European Union (i.e. Treaty of Lisbon) entered into force on December 1, 2009¹⁶³, it triggered the commitment towards the EU becoming a contracting party with the European Convention on Human Rights (hereinafter, “ECHR”).¹⁶⁴ The ECHR is an international treaty that “enshrines basic human rights and fundamental freedoms of everyone within the jurisdiction of any MS...[including] the right to life...to freedom and safety, to a fair trial, [and] to respect...private and family life...”; the European Court of Human Rights is the counterpart to the ECHR as it renders obligatory judgments on alleged human rights violations of the Convention, and will be able to scrutinize all EC actions in light of deference paid towards Defendants’ human rights if the EU accedes to the ECHR.¹⁶⁵ It must be noted that the current status of the applicability of the ECHR to the EU is still *nonbinding* (i.e. to the EU and its institutions; not to MSs), but Article 6(3) of the Treaty

¹⁵⁹ *Ibid*, p. 386.

¹⁶⁰ *Ibid*.

¹⁶¹ European Commission DG Competition, “*Best Practices on the Conduct of Proceedings Concerning Articles 101 and 102 TFEU*” (2010), available on: http://ec.europa.eu/competition/consultations/2010_best_practices/best_practice_articles.pdf, and European Commission Hearing Office, “*Guidance on Procedures of the Hearing Officers in Proceedings Relating to Articles 101 and 102 TFEU*” (2010), and see *Supra* note 158, p. 386.

¹⁶² European Commission, “*Explanatory Note to an Authorization to Conduct an Inspection in Execution of a Commission Decision Under Article 20(4) of Council Regulation No 1/2003*” (2008), available at http://ec.europa.eu/competition/antitrust/legislation/explanatory_note.pdf, and See *Supra* note 159.

¹⁶³ Consolidated Version of the Treaty on European Union (30 March 2010), pp. 1-361, available on: <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=OJ:C:2010:083:TOC>.

¹⁶⁴ Convention for the Protection of Human Rights and Fundamental Freedoms (Nov. 4, 1950), available on: http://www.echr.coe.int/Documents/Convention_ENG.pdf. It is important to note that the Lisbon Treaty requires that the European Union accede to the ECHR, See *Supra* note 164, art. 6, p. 19, and See *Supra* note 159, p. 387.

¹⁶⁵ Council of Europe, “*Accession by the European Union to the European Convention on Human Rights*” (June 2010), available on: http://www.echr.coe.int/Documents/UE_FAQ_ENG.pdf.

on EU “refers to the ECHR as part of the general principles of Community law”.¹⁶⁶ However, the ECJ held in its 2/13 Opinion that “the agreement on the accession of the EU to the ECHR is not compatible with Article 6(2) [of the] TEU or with Protocol (No. 8) relating to Article 6(2) of the TEU on the accession of the Union to the ECHR”; said opinion set out four reasons behind its holding and has effectively stopped all progression on the accession.¹⁶⁷ Even though there is no current forward movement, the potential impact of the accession could be quite significant as it would arguably (1) “further strengthen the protection of human rights [through] independent external control”, (2) create a “coherent system of fundamental rights protection across Europe”, (3) subject all EU legal systems “to the same supervision in relation to protection of human rights” and (4) would allow the EU to be a party to proceedings before the ECtHR; the final coagulative outcome would designate the ECJ as the final authority on the interpretation and enforcement of EU law, and the ECtHR as the final arbiter on the ECHR, with the ECtHR being a “specialised human rights court exercising external control over the international law obligations of the Union resulting from the accession”.¹⁶⁸ Even with all the current challenges related to the ECHR, there has been heightened awareness and scrutiny of potential human rights violations pursuant to EU Charter of Fundamental Rights, but this will notably intensify if the shift is made towards accession. These developments are important to recognize as they will provide accessible venues of “potential recourse for individuals and companies” and will make more expansive external scrutiny of DG actions.¹⁶⁹ This could also dampen the effectiveness of the leniency program as the Defendant could simply point to the human rights violations as a way to circumvent sanctioning and culpability, develop an increased mistrust for competition case handling due to the inept level of transparency, or not take the program seriously due to the DG’s inability to effectively achieve predictable results in light of the procedural insecurities. As stated above, because the DG has the wide pervasive discretion and expansive authority over every aspect of the competition proceeding (i.e. the EC power encompasses the role(s) of “law-maker, policeman, investigator, prosecutor, judge and jury”), with a very limited function played by the EU courts, it breeds many potential fundamental human rights challenges.¹⁷⁰ The author will now explore where fundamental human rights/safeguards are derived from and how they attach to EU competition proceedings.

¹⁶⁶ *Ibid.*

¹⁶⁷ Opinion 2/13 of the Court (Full Court) [18.12.2014], available on: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62013CV0002>.

¹⁶⁸ *See Supra* note 165.

¹⁶⁹ *See Supra* note 158, p. 387.

¹⁷⁰ *See Supra* note 1, p. 933.

ii. When and how do Defendant's Rights Attach to Competition Proceedings

When looking at a competition regime's structural/procedural composition and enforcement regimen, the general position of human rights in relevance to competition law infringement begins with Recital 37 of Regulation No. 1/2003, which provides, "this regulation respects the fundamental rights and observes the principles recognized in particular by the CFREU. Accordingly, this Regulation should be interpreted and applied with respect to those rights and principles".¹⁷¹ Moreover, Article 52(3) of the CFREU holds where it "contains rights which correspond to rights guaranteed by the ECHR [at a minimum]...the meaning and scope of those rights shall be the same as those laid down by the said Convention".¹⁷² In the case of *Archer Daniels Midland*, the Court held "it should be recalled that in all proceedings in which sanctions...may be imposed, observance of the rights of defence is a fundamental principle of Community law which must be complied with even if the proceedings in question are administrative proceedings".¹⁷³ Shifting over to the ECtHR, it held that the contents of both Article Six (i.e. Right to Fair Trial/Right to Presumption of Innocence) and Article Eight (i.e. Right to Respect for Private and Family Life) is relevant to both natural and legal persons (i.e. undertakings), which makes it directly applicable to the protocol employed by the DG to carry out its inspections during dawn raids or in suspicion of violative anti-competitive behaviour.¹⁷⁴ Thus, it can be extrapolated that one of the motives behind the application of the aforementioned law, to competition proceedings, is to afford rights to Defendants to increase the procedural safeguards necessary to lawfully impose stricter sanctioning, to uphold DG's current competition regime, and to increase the overall viability of the leniency program. To reflect back on the foundational context germane to the current issue, the DG procedural debate stems from whether the DG has (1) the authority to carry out a full investigation of alleged cartel behaviour, then (2) impartially decide on the finding of an infringement based on the evidence it uncovered, and subsequently (3) impose fines in an unbiased manner, concurrently with being compatible with the "EU principle[s] for effective judicial protection".¹⁷⁵ The bone of contention comes from whether or not the current DG regime meets the essence of 'constitutionality' set forth in the aforementioned legal authority by properly affording Defendants the protection of guaranteed fundamental rights in competition cases that rise to the level of being considered "criminal' because of the potential severity of sanctions imposed for findings

¹⁷¹ See *Supra* note 63, Recital 37, and *Ibid*, note 1, p. 934.

¹⁷² Article 52(3) of the CFREU, see *Supra* note 152, and *Ibid*, p. 934.

¹⁷³ C-511/06 *Archer Daniels Midland v Commission* [2009], paragraph 84, available on: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62006CJ0511>, and See *Supra* note 1, p. 934.

¹⁷⁴ See *Supra* note 1, p. 934.

¹⁷⁵ R. Nazzini, "Administrative Enforcement, Judicial Review and Fundamental Rights in EU Competition Law: A Comparative Contextual-Functionalist Perspective", *Common Market Law Review* 49 (2012): pp. 971-972.

of cartel infringement. The significance of finding “criminality” is important for the attachment of fundamental rights in administrative proceedings pursuant to Art 6 of the ECHR, and predictably, the ECtHR in its *Engel* holding, proscribed a very broad interpretation of the meaning of “criminal” in relevance to said Article.¹⁷⁶ In *Engel*, the Court established three criteria for determining whether proceedings are criminal, including (1) the domestic classification of criminality under national law, (2) the nature of the offense, and (3) the “severity of the potential penalty which the person concerned risks incurring”.¹⁷⁷ Delving deeper, the domestic classification element is “of relative weight and serves only as a [mere] starting point”; where the domestic law considers the offense criminal, then this finding is dispositive, but where the domestic law does not deem the offense criminal, the Court will use this only as a starting point in their analysis.¹⁷⁸ More deference is paid to the second criterion, in that the “nature of the offense” accounts for: the binding character of the offense, if the proceedings are instituted by a public body, or if there is a “punitive or deterrent element to the process” (among many other factors), but none of these items are entirely decisive.¹⁷⁹ The third criterion can be dispositive especially where there is the potential for significant financial penalties or imprisonment; irrespective, “it is the *potential* penalty, rather than the actual penalty imposed, which is decisive”.¹⁸⁰ To develop a more thorough understanding of the above criteria, one can view the analysis in the context of the *Ozturk* case, where the Court held that an administrative minor driving offense can be deemed criminal because the underlying “rule of law [was] directed towards all road users proscribing certain conduct and imposing a sanction for its breach...the penalty was intended to be punitive and deterrent in its effect”; here, the purpose of the penalty was enough to define the offense as criminal, whereby the nominal nature of the fine did not sway the Court away from finding favourable Art. 6 application.¹⁸¹ It has been posited that when looking at subsequent holdings that employ the *Engel* criteria, one can see that the Court is applying a more expansive definition as to what it deems criminal allowing for the attachment of Art. 6 criminal safeguards in administrative proceedings.¹⁸² However, the question still remains whether the EU competition proceedings meet the *Engel* criteria for favourable Article 6 treatment, especially since Article 23(5) of Regulation No. 1/2003 overtly provides that affirmative findings of

¹⁷⁶ *Ibid*, p. 979.

¹⁷⁷ *Engel v Netherlands* (1979-1980), paragraph 81, as explained in B. Emmerson et. al., “*Human Rights and Criminal Justice*”, Chapter 4, pp. 210-211, available on: https://books.google.lv/books?id=AWJI6OwYY3MC&pg=PA211&lpg=PA211&dq=engel+v+netherlands+1+ehrr+647&source=bl&ots=A8q9lXXNCn&sig=LY5dnmTRy8aFx9NzV_dvLIRUbs4&hl=en&sa=X&ved=0CBkQ6AEwAWoVChMI14H70abvyAIV57NyCh3cFQ-s#v=onepage&q=engel%20v%20netherlands%201%20ehrr%20647&f=false.

¹⁷⁸ *Ibid*, pp. 211-212.

¹⁷⁹ *Ibid*, pp. 212-213.

¹⁸⁰ *Ibid*, p. 213.

¹⁸¹ *Ozturk v Germany* (1984), paragraphs 49-50, as explained in *Ibid*, pp. 214-215.

¹⁸² See *Supra* note 175, pp. 980-981.

competition infringement that impose fines “shall not be of a criminal law nature”.¹⁸³ Here, one can point back to ‘criteria one’ of *Engel*, which provides that the domestic classification of the offense is not dispositive, but merely a starting point of inquiry, and allow for the Court to employ a more expansive analysis including: the severity of the fines imposed, the objective the fine is tasked to accomplish, the expectation of overall recidivist deterrence (accounting for public condemnation), and the elements of proportionality (i.e. gravity/duration of offense) accounted for in competition sanctioning. From this vantage point, it can be extrapolated that cartel infringements are to be considered criminal in nature and must be afforded procedural safeguards pursuant to Article 6 of the ECHR.¹⁸⁴ In summary, pursuant to Articles 6 and 8 of the ECHR (through the application of CFREU Article 52(3) allowing for the contents of its Articles 47 and 48 to mirror that of the ECHR), Defendants are afforded the right to a fair trial, right to the presumption of innocence and the right to privacy in competition proceedings.

Now that it is established how criminal procedural safeguards attach to competition proceedings, the author will traverse through the distinct fundamental rights that attach to competition proceedings at the investigative stage. It must be made clear at the outset that Defendants’ fundamental rights attach to every stage of the proceeding, but the author will now narrow the focus of the article to only rights that attach during the preliminary-investigative stage. The reasons for this are two-fold; the first is so the author can delve deeper into the respective rights specifically attached to investigatory procedure, and second so that the author can extend the analysis past DG procedure (i.e. EC-focused procedure) and provide a more concrete example of safeguarding a Defendant’s rights in the jurisdiction of Latvia by and through comparative methodology in relevance to search warrants. This will provide readers with the opportunity to apply the aforesaid knowledge to the competition regime of an NCA; shedding light on both the legal and procedural differences that can lead to the safeguarding or undermining of a Defendant’s rights in NCA competition proceedings and the overall goals of the leniency program in a selected MS.

iii. Defendant’s Fundamental Rights: Investigatory Stage

“The Commission has wide powers of investigation...but, precisely because of that nature and because one and the same body is invested with the power to conduct investigations and...to take decision, the rights of defence of those subject to the procedure must be recognized without reservation and respected”.¹⁸⁵

As noted above, due to the secretive nature of cartel behaviour and the intensity for which the undertakings will try to cover up evidence of wrongdoing, the DG relies

¹⁸³ See *Supra* note 1, pp. 936-937.

¹⁸⁴ *Ibid.*

¹⁸⁵ C-204/00 P (joined cases), *Aalborg et al. v Commission* [2004], paragraph 26, and *See Supra* note 11, p. 1141.

heavily on documented evidence including both pre-existing documentation and retrospective oral and written testimony from directors and employees of the undertaking.¹⁸⁶ But with the scope of allowance expanding to issues that touch upon the fundamental rights of Defendants, the goal of strengthening procedural safeguards to ensure due process becomes paramount to the maintenance and further development of the EU competition regime and a more efficacious leniency program. Pursuant to Article 20 of Regulation 1/2003, the DG is allowed to perform surprise inspections (ie. dawn raids), without providing prior notice to the undertaking under investigation, as basic common sense would underscore that without this right the DG would be unable to successfully uncover the necessary evidence for a finding of infringement due to the predictable destruction and tampering with evidence.¹⁸⁷ In addition, pursuant to Articles 18-21 of Regulation No. 1/2003, the DG possesses the right to make requests for information (i.e. Article 18), the power to take statements (i.e. Article 19), the authority to conduct inspections of undertakings' premises (i.e. Article 20), and the ability to conduct inspections of other premises, like that of private homes (i.e. Article 21).¹⁸⁸ When delving even deeper into Article 20(2), the Commission is empowered to: (a) "enter any premises, land and means of transport of undertakings and associations of undertakings", (b) "examine the books or other records related to the business, irrespective of the medium for which they are stored", (c) "take or obtain in any form copies of or extracts from such books or records", (d) "seal any business premises and books or records for the period...[of] the inspection", and (e) "ask any representative or member of staff...for explanations on facts or documents relating to...the purpose of the inspection...".¹⁸⁹ But with said expansive rights analogous to those that attach to criminal investigations, comes a heightened responsibility to safeguard Defendants' rights to ensure adequate predictability and transparency of procedural protocol to protect the viability of the infringement finding. With this said, the rights of defence are applicable to every stage of the investigative proceeding (e.g. preliminary investigative stage and the adversarial SOO stage), however the types of rights that attach are different with respect to each phase of the proceeding. The rights that are considered to be the most relevant to the preliminary investigatory stage, which will be discussed below, are the right against self-incrimination, the privilege to engage in lawyer-client communications, the right to legal assistance and the right to be informed of the subject matter and purpose of the investigation; the author has previously addressed the Defendant's right to fair trial, right to the presumption of innocence and right to privacy in subsection two of this Chapter.¹⁹⁰

¹⁸⁶ See *Supra* note 11, pp. 1136-1137.

¹⁸⁷ L. Blanco, "EU Competition Procedure", 3rd edition, p. 333, (Oxford, United Kingdom: Oxford University Press, 2013), and see *Supra* note 63, Article 20.

¹⁸⁸ *Ibid*, note 63, Articles 18-21, and See *Supra* note 11, p. 1136.

¹⁸⁹ *Ibid*, note 63, Article 20(2), and See *Supra* note 187, p. 338.

¹⁹⁰ See *Supra* note 11, p. 1141.

1. Right against Self-Incrimination

One must take into account that due to the severity of the fines/sanctions that can be imposed in cartel infringement cases, which can directly stem from inquiries during said investigations, “undertaking[s]...cannot be expected to volunteer information which will be used against them”.¹⁹¹ The right against self-incrimination (i.e. the right to remain silent) allows for the accused to refuse supplying information that would directly prove culpability of an infringing or violative act.¹⁹² An undertaking can invoke its right against self-incrimination, only in circumstances where the DG is actually compelling information from said undertaking, which becomes critical when the DG is asking for information by request under a binding decision and when the DG elicits questions during on-site inspections.¹⁹³ Said right is memorialized in Recital 23 of the Preamble to Regulation No. 1/2003, which provides the DG “should be empowered...to require such information to be supplied as necessary to detect any agreement, decision or concerted practice prohibited by Art. 81. When complying...undertakings cannot be forced to admit that they have committed an infringement, but they are...obliged to answer factual questions and to provide documents, even if this information may be used to establish against them...the existence of an infringement”.¹⁹⁴ Moreover, in the *Orkem* case, the ECJ held that the DG “may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement [,] which it is incumbent on the Commission to prove”.¹⁹⁵ Thus, the prior rule of law safeguards against undertakings from being forced to elicit statements that would prove full culpability of cartel infringements, but it does not provide the right for the undertaking to remain completely silent as that “would go beyond what would be necessary to preserve the rights of defence...and would constitute an unjustified hindrance to the Commission in the accomplishment of its task under...the Treaty...”.¹⁹⁶ This is an important distinction as an undertaking could just take the position of answering no questions, providing no information, and circumventing all data collection to completely undermine the DG’s ability to collect a sufficient amount of evidence to find an infringement; this would be in complete derogation of the DG’s powers conferred on it through Regulation No. 1/2003. Thus, pursuant to the right against self-incrimination, Defendants cannot be expected to say “yes, I am a participant in a cartel, or yes, I have entered into anti-competitive agreements that undermine market competition”, but they are mandated to provide information upon a request that falls within the purview of the

¹⁹¹ *Ibid*, p. 1136.

¹⁹² *Ibid*.

¹⁹³ *Ibid*, pp. 1143-1144.

¹⁹⁴ *See Supra* note 63, Recital 23 of the Preamble.

¹⁹⁵ C-374/87, *Orkem v Commission* [1989], paragraphs 34 and 35, available on: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61987CJ0374>, and *See Supra* note 11, p. 1142.

¹⁹⁶ T-305/94, *Limburgse Vinyl Maatschappij et. al. v Commission* [1999], paragraph 448, available on: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61994TJ0305>, and *See Supra* note 11, p. 1142.

investigative scope (i.e. subject matter and purpose) as set forth in the search warrant. This mirrors the holding in *Orkem*, where the ECJ held that undertakings are expected to actively cooperate and provide all information that is related to the subject matter of the investigation, which consists of all pre-existing documents and factual information in its possession, even if it is later “used to establish the existence of anti-competitive conduct”.¹⁹⁷ The most alarming rule of law the author found in relevance to the right against self-incrimination was in the *Amann et. al.* case, where the General Court held if a reply provided by an undertaking is self-incriminating, this “must be regarded as spontaneous cooperation...capable of justifying a reduction...of the fine, in application of the Leniency Notice...[but the] undertaking cannot claim that their right not to incriminate themselves has been infringed where they voluntarily replied...”.¹⁹⁸ When looking at the totality of the above-cited law, the parties’ obligations are clear: Defendants must actively cooperate in competition proceedings by providing honest testimony (whether oral or written) upon request of the DG if said requests are within the narrow scope, subject matter and purpose of the investigation; Defendants are not obligated to provide statements of an incriminating nature, as being able to prove (by meeting the appropriate burden of proof), full culpability, is the responsibility of the DG.

This section was not meant to be an exhaustive analysis of all the law related to the right against self-incrimination, but rather an overview of where the law stands in relation to this issue for a general understanding of both the Defendant’s rights/obligations and of the DG’s responsibilities. The author will now ‘briefly’ touch upon other rights that attach during the preliminary fact-finding stage; it must be noted that the below rights will not be expounded upon in great detail, however, it is envisioned, that the reader will obtain a brief but requisite knowledge sufficient to understand the overall rights that attach as this stage of the proceeding.

2. Legal Professional Privilege: Protection of Lawyer-Client Correspondence

Another right of defence that attaches during cartel investigations is the ability for the undertaking to refuse providing any details regarding correspondence that ensued between it and its external retained counsel.¹⁹⁹ More specifically, the right protects disclosure of any confidential communication that has as its intent the solicitation of legal advice, exchanged between the lawyer and client, for the purpose of preparation of the client’s defence.²⁰⁰ Said right can only be invoked when the DG is compelling the production of information, by and through external information requests or during an actual investigation.²⁰¹ Regulation No. 1/2003 does not directly provide any guidance in

¹⁹⁷ See *Supra* note 11, pp. 1144-1145.

¹⁹⁸ T-446/05, *Amann & Sohne and Cousin Filterie v Commission* [2010], paragraph 329, available on: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62005TJ0446>, and See *Supra* note 11, p. 1146.

¹⁹⁹ See *Supra* note 1, p. 957.

²⁰⁰ *Ibid.*

²⁰¹ See *Supra* note 11, p. 1147.

relation to the issue of legal privilege, however its protection is derived from the *AM&S* case, where the ECJ found in favour of the right for an undertaking to safeguard the confidentiality of its business communications with its external legal advisors.²⁰² The holding narrowed the scope of the right to only protecting confidential communications between the undertaking and external counsel; this does not apply to in-house counsel or the legal department of an undertaking, as this would enable the concealment of crucial evidence necessary to undercover cartel infringement as in-house counsel are not deemed to be “sufficiently independent” from the cartel decision-making body.²⁰³ Pursuant to *AM&S*, for the undertaking to protect the confidentiality of its business correspondence, said correspondence must have been prepared in furtherance of the client’s defence and with the purpose of obtaining legal advice “in relation to the subject matter of the procedure”.²⁰⁴ Interestingly, the protection of documents created for the purpose of a client’s defence covers those that take the form of “internal notes which are confined to reporting the text or the content of those communications” with outside counsel²⁰⁵; this can even be extended to documents made in preparation of future communications with said outside counsel.²⁰⁶ The validation for this is that “it may be necessary, in certain circumstances, for the client to prepare working documents or summaries, which will be useful, or essential, to that lawyer for an understanding of the context, nature and scope of the facts for which his assistance is sought”.²⁰⁷ Here, the documents do not even need to be exchanged between the lawyer and client, as long as they were prepared in furtherance of legal advice, in relation to the subject matter of the procedure, for the adequate preparation of the client’s defence.²⁰⁸ It must be noted, however, that it is for the undertaking to prove to the DG that documents they want to protect were created for the sole purpose of advisement and case preparation.²⁰⁹

3. Right to Legal Assistance

Similar to the aforementioned legal professional privilege, the right to legal assistance is not memorialized in Regulation No. 1/2003, whereby its protection is also derived from

²⁰² C- 155/79, *Australian Mining and Smelting Europe (AM&S) v Commission* [1982], paragraph 23, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61979CJ0155>, and *See Supra* note 11, p. 1147.

²⁰³ *See Supra* note 11, pp. 1147-1148.

²⁰⁴ *See Supra* note 202, paragraph 23.

²⁰⁵ T-30/89, *Hilti Aktiengesellschaft v Commission* [1990], paragraph 18, available on: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61989TO0030>.

²⁰⁶ Joined Cases T-125/03 and T-253/03, *Akzo Nobel Chemicals and Ackros Chemicals v Commission* [2007], paragraphs 122-124, available on: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62003TJ0125>, and *See Supra* note 11, p. 1149.

²⁰⁷ *Ibid*, paragraph 122.

²⁰⁸ *Ibid*, paragraphs 122-124 and *see Supra* note 11, p. 1149.

²⁰⁹ *Ibid*, note 11, p. 1149.

ECJ case law.²¹⁰ In the *Hoechst* case, the ECJ held that, “although certain rights of defence relate only to the contentious proceedings...other rights, such as the right to legal representation and the privileged nature of correspondence between lawyer and client must be respected as from the preliminary-inquiry stage”.²¹¹ Where Regulation No. 1/2003 provides a bit more guidance is in Article 18(4), where it expressly allows for external counsel to answer interrogatories and information requests on behalf of their client; sub-section four provides in part the following, “...in the case of ...companies...having no legal personality, the persons authorized to represent them by law...shall supply the information requested on behalf of the undertaking...Lawyers duly authorized to act may supply the information on behalf of their clients. The latter shall remain fully responsible if the information supplied is incomplete, incorrect or misleading”.²¹² When applying the rule to inspections of business premises, there is case law directly on-point entitling the undertaking to have legal counsel present during the search.²¹³ In paragraph 232 of the *Koninklijke Wegenbouw Stevin* case, the General Court held that “the presence of an undertaking’s...lawyer is possible... [during] an investigation, but that the presence of [the] lawyer cannot determine [its] legality. When an undertaking...desires, and...when it does not have... [a] lawyer at the investigation site, it can...request the advice of [one] by telephone and ask that lawyer to go there [investigation site] as soon as possible”.²¹⁴ However, one must keep in mind that having a lawyer present, or subsequently calling for a lawyer, cannot impede the progress of the investigation, as in most cases, time is a critical element towards the proper recovery of anti-competitive evidence necessary for a finding of infringement. One can also argue, that the right of legal assistance can be expanded to inspections that are conducted in private homes/premises (by analogous application, pursuant to Article 21 of Regulation No. 1/2003).²¹⁵

4. Right to be informed on the Subject Matter and Purpose of Investigation

Case law is also the principle authority behind the right to be informed on the subject matter and purpose of the investigation, as Regulation No. 1/2003 is relatively silent as to any guidance attaching to said right. In the *AC Treuhand* case, the General Court made a connection between the initial commencement of an investigation and the subsequent adversarial portion of the proceeding identifying the right for the defence to be informed of the subject matter and purpose of the investigation at the outset for the

²¹⁰ *Ibid*, pp. 1152-1153.

²¹¹ Joined Cases 46/87 and 277/88, *Hoechst v Commission* (1989), paragraph 16, available on: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61987CJ0046> and *Ibid*.

²¹² *See Supra* note 63, Article 18(4).

²¹³ Case T-357/06, *Koninklijke Wegenbouw Stevin BV v Commission* (2012), paragraph 232, available on: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62006TJ0357>.

²¹⁴ *Ibid*.

²¹⁵ *See Supra* note 11, p. 1153, and *See Supra* note 63, Article 21.

enablement of adequate defence preparation at every stage of the proceeding.²¹⁶ Further, the Court held that because an “excessively lengthy preliminary investigation [could]...have an effect on the future ability of the undertakings concerned to defend themselves... [due to] the greater likelihood that exculpatory evidence can no longer be obtained or only obtained with difficulty”, it makes it vital for the DG to inform the defence of what it faces (i.e. subject matter/purpose of investigation) so an undertaking can facilitate a properly tailored defence in due time.²¹⁷ The Court went on to cite to Article 11 of Regulation No. 17 (which has now been amended by Regulation No. 1/2003) regarding the DG’s duty to inform, stating “in a request for information...the Commission is required... to respect the rights of defence... [and] to state the legal basis and the purpose of that request”; this also applies to a decision ordering investigation, whereby both the subject matter and purpose must be laid out in relevance to investigatory scope.²¹⁸ Traversing back to the *Hoechst* case, the ECJ provided, even though “the Commission’s obligation to specify the subject matter and purpose of the investigation constitutes a fundamental guarantee of the rights of defence...the scope of the obligation...cannot be restricted on the basis...[of] the effectiveness of the investigation. Although the Commission is not required to communicate...all the information at its disposal...or make a precise legal analysis of [the]...infringements, it must none the less clearly indicate the presumed facts which it intends to investigate.”²¹⁹ One must remember that when the DG initiates an infringement investigation, they usually conduct their initial appearance by surprise, to ensure evidence is not destroyed or tampered with due to the severity of the consequences that attach to hard-core cartel behaviour. Because the DG will be ‘raiding’ the undertaking’s premises, requesting documents and oral statements, going through business reports, targeting computerized data and collecting other important business-related evidence, it is paramount that the DG executes their search properly by indicating the subject matter and purpose behind their investigation to ensure that Defendants’ rights are upheld and that the integrity of their investigation will withstand heightened scrutiny on appeal. The author will now briefly navigate through some of the current areas of potential fundamental rights violations faced by undertakings during DG investigatory proceedings; this will give the reader examples of current challenges with the EC competition regime before delving into the violative investigatory protocol of the LV NCA.

c. DG Procedure: Current Issues of Concern

DG procedure has remained under stringent examination by undertakings facing cartel infringement allegations as many believe the current procedural protocol invoked by the DG falls short of the required fundamental guarantees provided by general principles of

²¹⁶ Case T-99/04, *AC Treuhand v Commission* (2008), paragraphs 50-60, available on: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62004TJ0099>, and *See Supra* note 11, p. 1153.

²¹⁷ *Ibid*, paragraph 51.

²¹⁸ *Ibid*, paragraphs 52-53.

²¹⁹ *See Supra* note 211, paragraph 41, and *See Infra* note 253.

EU law and the aforementioned Articles of the Charter and the ECHR.²²⁰ It is important at the outset to underscore that "...the rights of defence must be respected in all proceedings in which sanctions may be imposed", as a finding of cartel infringement carries with it severe penalties making it necessary to take a closer look at whether the DG's protocol upholds a Defendant's fundamental rights.²²¹

One critical issue that has surfaced regarding the EC's "sweeping" power is the potential need to obtain "appropriate prior court approval and supervision by an independent body before an investigation [can ensue] and effective ex post facto control by an independent court" to remain aligned with the intent of Article 8 of the ECHR.²²² In the holding of *Delta Pekarny a.s.* case, the ECtHR provided that, when applying the "principle of proportionality", emphasis must be placed on investigations receiving a "sufficient degree of judicial oversight" to halt dawn raids that do not meet the threshold of "strictly necessary to attain the otherwise legitimate aim being pursued by the Authority".²²³ In *Stes Colas* case, the ECtHR held that it is in derogation of the Defendant's rights for the Authorities to execute a surprise inspection without being accompanied by "a prior judicial warrant and...a police officer with judicial investigation powers..."²²⁴, illustrating the vast power held by the Authorities "to determine the expediency, number, length and scale of its inspections", which necessitates the protection of judicial scrutiny prior to the execution of a dawn raid.²²⁵ The ECtHR clarified its position in *Niemietz* regarding the need for adequate privacy protection of both professional/business activities and private activities, as people develop vast circles of relationships inside and outside of work equating to an overlap between the two functions; this makes it difficult if not impossible to "draw precise distinctions" as to where the privacy protection begins and ends.²²⁶ Thus, "... [the] right to privacy [also] encompasses the privacy of business premises or offices of legal persons and does not qualify or limit such right in comparison to physical persons".²²⁷ Subsequently, in the

²²⁰ A. Ablasser-Neuhuber, "Investigation and Due Process: A Defense Lawyer's View", p. 5, Best Practices in Investigations, Competition Conference, Vienna, available on: <http://www.en.bwb.gv.at/Events/Documents/Panel%20IV%20-%20Ablasser-Neuhuber.pdf>, presented on: 12 December 2014. Please note that the author could not find an English version on the HUDOC for Delta Pekarny case; said citation is taken directly from the above presentation in relevance to it merits.

²²¹ See *Supra* note 157, p. 1.

²²² See *Supra* note 220, p. 6.

²²³ Gibson Dunn & Crutcher, "Human Rights Law and Competition Actions in Europe: The Delta Pekarny v Czech Republic Ruling" (October 2014), available on: <http://www.gibsondunn.com/publications/pages/Human-Rights-Law-and-Competition-Actions-in-Europe--Delta-Pekarny-v-Czech-Republic.aspx>.

²²⁴ See *Supra* note 157, pp. 2-3.

²²⁵ *Case of Societe Colas Est and Others v France*, Application no. 37971/97 [16.04.2002], paragraph 49, available on: <http://hudoc.echr.coe.int/eng?i=001-60431>.

²²⁶ *Case of Niemietz v Germany*, Application no. 13710/88 [16.12.1992], paragraphs 27-33, available on: <http://hudoc.echr.coe.int/eng?i=001-57887>.

²²⁷ See *Supra* note 157, p. 3.

Roquette Freres case, the ECJ pointed to the holdings of the ECtHR paying deference to its case law regarding affording the right to privacy to business premises, and the heightened protection of the home of legal persons within certain limitations, concurrently with positing that there is perhaps a more expansive right of interference regarding business premises as reflected in the Article 8(2) exception.²²⁸ Because the Commission is bound to protect a Defendant's right to privacy as memorialized in Article 7 of the Charter (and Article 8 of the ECHR by and through Article 52(3) of the Charter), the above rules of law were aimed to prevent the execution of illegitimate investigations without meeting a proper burden or threshold as discerned by an independent authority prior to the execution of a dawn raid; this protection ensures legitimacy, predictability and independent verification in furtherance of protecting a Defendant's privacy rights.

Another issue of concern deals with "fishing expeditions" (i.e. conducting dawn raids without a pointed scope looking for any evidence that equates or can be used to prove cartel behaviour), where it is inadmissible for the DG to conduct investigations where they are reviewing, copying or seizing the entirety of an item's contents (i.e. entire mail servers/share drives) just to identify sources of evidence for which the DG is not currently aware.²²⁹ Pursuant to the *Roquette Freres* holding, the ECJ stated, "...to ensure that there is nothing arbitrary about a coercive measure designed to permit implementation of an investigation ordered by the Commission...there [must] exist reasonable grounds for suspecting an infringement of the competition rules by the undertaking...".²³⁰ The *Nexans* decision, provides "...inspections carried out by the Commission are intended to enable it to gather...evidence to check the actual existence...of a given factual and legal situation which it already possesses certain information...the ECJ must satisfy itself that there exist[s] reasonable grounds for suspecting an infringement of the competition rules...".²³¹ Moreover "...if the Commission were not subject to that restriction, it would in practice be able, every time it has indicia...that an undertaking has infringed the competition rules..., to carry out an inspection...with the ultimate aim of detecting any infringement...[which is] incompatible with the protection of...legal persons, guaranteed as a fundamental right in a democratic society."²³² Thus, the *Hoechst* case provides that at a minimum, the DG must state with clarity the subject matter and purpose of the investigation.²³³ Here, the above rules of law were aimed to prevent the DG from easily executing on authorization decisions,

²²⁸ Case C-94/00, *Roquette Freres S.A. v Commission*, Judgment of the Court, EU:C:2002:603, paragraph 29, available on: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62000CJ0094>.

²²⁹ See *Supra* note 220, p. 7.

²³⁰ See *Supra* note 228, paragraph 54.

²³¹ Case T-135/09, *Nexans France SAS v Commission*, Judgment of the General Court (8th Chamber), EU:T:2012:596, paragraph 43, available on: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62009TJ0135>.

²³² *Ibid*, paragraph 65.

²³³ See *Supra* note 211, paragraph 29.

without providing some indicia of relevant scope regarding the subject matter and purpose of the investigation, so that an undertaking could comprehend the “particular context of a case...[and] the actual scope of the investigation”.²³⁴ This is a point of contention between practitioners and the DG’s procedural protocol due to its inattention towards crafting authorizations with sufficient “pointed reasoning and material scope” such that an undertaking can act appropriately “without compromising their defense”.²³⁵

When traversing over to concerns with the legal professional privilege, the DG must not infringe on the correspondence that ensues between an undertaking and its external counsel if said exchanges are in furtherance of preparation for an adequate defence.²³⁶ In the holdings of *AM&S and Akzo*, “[the] legal professional privilege in investigation procedures in matters of competition law...European Union law must take into account the principles and concepts common to the laws of the Member States concerning the observance of confidentiality [regarding]...certain communications between lawyer and client.”²³⁷ Thus, it is imperative that confidentiality between the undertaking and its external attorney is stringently upheld, without even a “glance” afforded to the Commission in concern of such documents.²³⁸ In summary, safeguarding the legal professional privilege is of critical importance especially when the DG is allegedly executing warrants with convoluted context and a lack of precise scope. The aim of the above laws is to protect an undertaking’s ability to have meaningful conversation with its external lawyer in preparation of an adequate defense without violative interference from DG investigators uncovering documents and discussions with evidence of protected attorney/client correspondence.

d. Concluding Remarks: Importance of Viable Investigatory Protocol

When taking into account all the aforementioned rights of defence, one can see that there is a clear link between the severity of sanctioning, the exploitation of the leniency program, and the critical need for safeguarding a Defendant’s rights to destabilize cartels and protect competition in the internal market. Investigations are a vital tool for the DG to uncover the evidence necessary for finding anti-competitive behaviour between undertakings, but with the increasing severity of sanctions that attach to cartel behaviour, and the ability for the DG to conduct investigations with analogous criminal investigative tools, strategy and protocol, it is imperative that Defendants’ rights are upheld to properly secure a later finding of cartel infringement, and in turn, higher overall penal sanctioning. In the following Chapter, the author will transition away from

²³⁴ See *Supra* note 157, p. 4.

²³⁵ *Ibid.*

²³⁶ See *Supra* note 220, p. 8.

²³⁷ Case C-550/07 P, *Akzo Nobel Chemicals Ltd.*, Judgment of the Court (Grand Chamber), EU:C:2010:512, available on: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62007CJ0550>, and See *Supra* note 202, paragraph 18.

²³⁸ See *supra* note 220, page 8.

the EC competition regime and take a comparative look at the differences between the law and investigative procedure in two MSs (e.g. Latvia and Ireland) regarding their search warrant procurement and protocol. Here, the reader will be able to apply the knowledge gleaned from the above chapters directly to an inherent problem appending to the creation and deployment of search warrants in the Republic of Latvia. It is at this point in the article that the author will be able to illustrate all the interworking components of what it takes to maintain (and further develop) an efficacious leniency program to ultimately destabilize cartel behaviour for a more effective competitive market.

CHAPTER FIVE: JUDICIAL WARRANTS IN CARTEL INVESTIGATIONS

a. NCA Regimes: Parallel Competencies

As denoted in Chapter Three, MSs possess parallel competencies to those of the EC pursuant to Regulation No. 1/2003, whereby MSs are empowered to initiate, investigate and compile adequate evidence necessary to find infringement through application of Articles 101 and 102 of the TFEU via national legislation.²³⁹ Thus, when MSs “apply Articles 101 and 102 to the cases they investigate, their procedures and powers of investigation are those available under national law”²⁴⁰, which equates to the procedural aspects of MS’s investigations not being harmonized due to said parallel competencies pursuant to Regulation No. 1/2003.²⁴¹ In terms of Defendants’ fundamental rights protection, Regulation No. 1/2003 provided that it respected, and should be interpreted and applied, with deference paid to the principles laid out in the Charter²⁴²; the Charter subsequently became binding on both MSs and the EC after the signing of the Treaty of Lisbon in 2009.²⁴³ Thus, the Charter has a “binding legal effect equal to the Treaty on EU institutions and MSs when each applies EU law”.²⁴⁴ Moreover, the legal authority defining the principles applicable to MS’s competition proceedings can be found in the ECHR, which was “signed and ratified by 47 MSs of the Council of Europe EU... [and] enshrines [the] basic human rights and fundamental freedoms of everyone within the jurisdiction of any MS”.²⁴⁵ As highlighted above, the rights memorialized in the ECHR are not directly binding to the EC, but said rights do apply to the MSs, whereby the ECtHR renders judgments for findings of human rights violations occurring in MS jurisdictions.²⁴⁶ In summary, the aforementioned law provides that one must look to national law to discern MS’s specific procedural and investigatory protocol due to MSs having parallel competencies to promulgate legislation in application of TFEU Articles 101 and 102 pursuant to Regulation No. 1/2003; with respect to the safeguarding of Defendants’ fundamental rights in MS jurisdictions, one must look to both the Charter and the ECHR for relevant principles. Now that it has been identified where MS’s NCAs derive their authority to conduct evidentiary investigations, the author will turn to comparative methodology when analysing three MS’s laws in relevance to securing and

²³⁹ See *Supra* note 63, “Preamble”.

²⁴⁰ See *Supra* note 11, p. 1137.

²⁴¹ See *Supra* note 220, p. 4.

²⁴² See *Supra* note 63, “Recital 37 of the Preamble”.

²⁴³ See *Supra* note 11, p. 1139.

²⁴⁴ *Ibid.*

²⁴⁵ See *Supra* note 165, p. 1.

²⁴⁶ *Ibid.*, pp. 1-2.

executing search warrants to uncover intrastate anticompetitive behaviour destabilizing national markets.

b. Latvian Search Warrants: Challenges with Procedural Protocol

i. Research Background

The inherent challenge when interviewing with 13 distinct MS NCAs becomes understanding the salient differences between system structures and procedural protocol, and how each impacts the exploitation of the leniency program, concurrently with safeguarding a Defendant's fundamental rights, especially when focusing on the issues of search warrant procurement. When parsing through national legislation regarding search authorization thresholds, and subsequently interviewing the respective MS directors of cartel investigations regarding search warrant *ex parte* procurement burdens, the author identified important variations between the applicable law of IE and LV. Even though the author identified several jurisdictions with arguably overbroad and imprecise search warrant executory protocol, the author decided to focus this subsection on LV legislation, as several amendments have been proposed and higher court recommendations have been made, to align LV's protocol with the safeguards represented in the Charter and the ECHR and to circumvent violations of the same. In this Chapter, said amendments and recommendations will be discussed, search warrant language will be addressed, and a comparative analysis will be conducted, to discern best practices that should be employed by LV to sharpen its search warrant procedure to withstand heightened rights-based scrutiny. It must be noted that there have been subsequent amendments and modifications made to LV's Competition Law that was implemented in 2016 (after the Author's original research), but the main premise of the article remains to be true even after said legal modifications, making the instant research highly relevant and applicable towards positive change. The below subsections will provide an overview of the necessity behind needing legal modifications and will include updated sections to bring the law into its current state.

ii. Latvian Case Study: Overbroad Search Warrants

As reported in Chapter Three, the Saeima in conjunction with its NCA (i.e. KP) enacted a document entitled "Competition Law" as its national legislation to carry out its obligations under Regulation No. 1/2003.²⁴⁷ Prior to Section 9 superscript 1 being omitted from the current legislation on 12/05/2016, it encompassed the totality of the

²⁴⁷ See *Supra* note 116, "Competition Law". It must be noted that the translated English version of said legislation is attached as a link to the KP website for which the author refers to throughout this section of the article.

law regarding the procurement protocol of search warrants in the Republic of Latvia.²⁴⁸
At that time, Section 9¹ subsections (1) and (2), provided the following:

“(1) A judge of a district (city) court on the basis of the legal address of the Competition Council shall take a decision on permission to perform the activities referred to in Section 9, Paragraph 5, Clauses 4 and 5 of this Law. The judge shall, within 72 hours, examine the submission by the ED and other documents, which justify the necessity to perform such activities, hear the information provided by officials of the ED[,] and take a decision on permission or refusal of the activity.

(2) A true copy of the judicial warrant shall be sent to the Executive Directorate within 24 hours from the moment of taking of the decision”.²⁴⁹

As one can see from reading the above passage, the legislation provided no guidance as to (1) what evidence needed to be contained in the “submission” from the Executive Director (hereinafter, “ED”), (2) what documents/information needed to be provided to “justify” the scope of the investigation, (3) what the deadline should have been for the execution and conclusion of the investigation, (4) what person(s)/locations should have been identified as the focal point of the search, or (5) what oral testimony needed to be elicited by ED officials, for a judicial warrant to issue. Moreover, there was no burden or threshold (e.g. probable cause, reasonable suspicion, more likely than not, etc.) set out in Section 9¹ of the legislation to identify the level of evidentiary proof required to necessitate the issuance of a warrant for the execution of forcible investigatory measures. Due to said inadequacies, complaints were made and recommendations proposed to introduce change to the law, which a relevant timeline and important modifications will be outlined and explained below.

Current Section 9, paragraph 5, Clauses 4 and 5 (once referred to in Section 9¹) was revised in May 2016 in an attempt to make more transparent the powers of the KP, which provides the following:

“4) on the basis of a judicial warrant, without prior notice and in the presence of police, to enter the non-residential premises, means of transport, flats, structures and other immovable and movable objects that are in the ownership, possession or use by a market participant or by an association of market participants, to open them and the storage facilities existing therein, carry out a forcible search of the objects and the storage facilities therein and perform an inspection of the existing property and documents therein including the information (data) stored on computers, floppy disks and other information media in an electronic information system.

If a person whose property or documents undergo a search refuses to open the objects or storage facilities existing therein, the officials of the Competition Council are entitled to open them without causing substantial damage. During the search and inspection the officials of the Competition Council are entitled to:

²⁴⁸ *Ibid*, pp. 7-8. **Here it must be noted that Section 9¹ subsections (1) and (2) were excluded from the Competition law as of 12/05/2016.**

²⁴⁹ *Ibid*.

- a) prohibit the persons who are present at the site under inspection from leaving the site without permission, from moving and from conversing among themselves until the end of the search and inspection;
 - b) become acquainted with the information included in the documents and in the electronic information system (including information containing commercial secret);
 - c) withdraw property items and documents which have been found and which may be of importance to the case;
 - d) request and receive derivative documents certified in accordance with the procedures laid down in laws and regulations;
 - e) print out or record the information (data) stored in the electronic information system to electronic information media;
 - f) request and receive written or oral explanations from the employees of the market participant;
 - g) temporarily, but not longer than for 72 hours, seal the non-residential premises, means of transport, structures and other objects and the storage facilities therein, in order to ensure the preservation of evidence;
- 5) on the basis of a judicial warrant, if there are **justifiable grounds for suspicion** [i.e. reasonable suspicion] that documents or property items that might serve as evidence of an infringement of this Law are being stored in non-residential premises, means of transport, flats, structures and other immovable and movable objects in the ownership, possession or use of other persons, perform, in relation to such persons, the activities referred to in Clause 4 of this Paragraph in the presence of police.²⁵⁰

One can submit that these clauses (and their select modifications) are of obvious importance, but they still only provide parameters regarding permissible activities the ED can invoke 'after' the issuance of a judicial warrant; the clauses provide no clear guidance as to what needs to be submitted to the Court for the judicial warrant to issue. It must also be noted that it is only in Clause 5 that there is a burden/threshold introduced (e.g. reasonable suspicion) when the ED determines 'during' an inspection, 'on the basis of a warrant' that documents or property items may serve as evidence, and as such, it may carry out its duties proscribed in Clause 4. Due to this legal shortcoming, it makes it abundantly clear that another section needed to be added to the Competition Act to ensure that the current state of the law does not allow for the ED to procure judicial warrants without providing enough indicia of anti-competitive cartel behaviour, which permits forcible investigations in violation of privacy rights of allegedly violative undertakings. The assessment and justification behind drafting this additional section (which currently can be found in Chapter II¹, Section 10, entitled 'Permission to Perform Procedural Actions') will be expounded upon below.

As stated above, due to the severity of the sanctions the KP can impose for a finding of cartel infringement, and the level of investigatory measures that can be exploited by the KP upon the issuance of a judicial warrant, competition dawn raids are

²⁵⁰ *Ibid*, pp. 6-7.

considered to be analogous to criminal investigations for which Defendants' rights attach and must be safeguarded during every step of the proceeding, irrespective of LV operating a purely administrative system. In an effort to determine the appropriate language that should be utilized when drafting the new Competition Law section and judicial permission, the author believes that it would be useful to review what the Saeima deems necessary to promulgate in its 'criminal' legislation to protect a Defendant's rights when procuring a criminal search warrant. Thus, Article 180 of the LV Law of Criminal Procedure, entitled "Decision on a Search", provides the following (in part):

"(1) A search shall be conducted with a decision of an investigating judge or a court decision. An investigating judge shall take a decision based on a proposal of a person directing the proceedings and materials attached thereto.

(2) A decision on a search shall indicate **who will search and remove, where, with whom, in what case, and the objects and documents** that will be sought and seized.

(3) In emergency cases where, due to a delay, sought objects or documents may be destroyed, hidden, or damaged, or a person being sought may escape, a search shall be performed with a decision of the person directing the proceedings. If a decision is taken by an investigator then a search shall be performed with the consent of a public prosecutor."²⁵¹

As one can glean from the above clauses that LV criminal procedure mandates a search warrant shall include and describe who will execute the search, where the search will be conducted, other entities that will be involved with the recovery of evidence, what circumstances will trigger such action and the identification of the desired objects/documents that will be seized upon obtainment. Article 180 provides that a judge will make a decision based on a proposal submitted by a person directing the proceedings, and mandates a protocol be followed in cases of emergency or exigent circumstances. Because search warrants are created by Judges in LV, and not pre-written templates requiring a judge's signature, it is up to the investigative director to present and file with the Court all existent evidence necessary for the Judge to be satisfied that all requirements are met to issue a warrant. With this said, it can be argued that subsection 2, provides a bit more guidance as to what must be presented to the Court for a warrant to appropriately reflect the requisite scope that the authorities are allowed to exploit when conducting a search, thereby protecting a Defendant's privacy rights. Here again, the difference between what must be presented for a criminal warrant vs. what is necessary to procure a competition warrant is quite different under LV law, but due to the severity of sanctioning and repercussions of hard-core infringements, both can be considered criminal such that Defendants' fundamental rights automatically attach. Thus, without strategically reworking the law, said differences

²⁵¹ "Latvian Law on Criminal Procedure", English version, pp. 64-65, available on: http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Likumi/Criminal_Procedure_Law.pdf.

Please note words that are **bolded** are meant to add emphasis.

could repeatedly become the impetus for complaints of human rights (e.g. privacy) violations against the KP by undertakings/individuals that believe their fundamental rights have been undermined by the current competition regime regarding KP's preliminary investigatory protocol. This is because without precisely delineating the proper scope of an investigation, the warrant would permit unlimited exploration into areas of potential privacy which would be far afield from the intent behind competition law and in violation of Defendants' fundamental rights, especially when the search facilitates the copying the entire contents of laptops, share drives, and mail servers usually used for cross-purposes.²⁵² On the other hand, one must also question whether there should be two different protocols provided for in LV law to issue a judicial warrant (or make a judicial decision) when there are little to no differences between prosecutorial investigations and competition administrative investigations with the ED entitled to police investigatory rights during dawn raids.

When refocusing the argument back to case law, in the *Nexans* case, the undertaking was pleading that the Commission's inspection decision was "overly broad [and] vague [as to its] product...and...geographical scope".²⁵³ The General Court upheld the first part of the claimant's plea relying on Article 20(4) of Regulation No. 1/2003, which mandates "undertakings...are required to submit to inspections ordered by decision of the Commission. The decision shall specify the subject matter and purpose for the inspection, appoint the date on which it is to begin[,] and indicate the penalties provided for in Articles 23 and 24[,] and the right to have the decision reviewed by the ECJ...".²⁵⁴ The mentality behind the need to recitate "the subject-matter and purpose of the inspection...is a fundamental requirement not merely in order to show that the investigation to be carried out at the premises...is justified [,] but also to enable those undertakings to assess the scope of their duty to cooperate [,] while at the same time safeguarding the rights of defence".²⁵⁵ In terms of safeguarding said rights, the *Dow* case goes on to say that the "obligation to specify the subject-matter and purpose of the investigation constitutes a fundamental guarantee of the rights of the defence...the obligation to state the reasons on which inspection decisions are based cannot be restricted on the basis...concerning the effectiveness of the investigation. Although the Commission is not required to communicate...all the information at its disposal...it must none the less clearly indicate the presumed facts which it intends to investigate".²⁵⁶ In the appeal of the *Nexans* case, the ECJ dismissed the appellants arguments pointing to the *Roquette Freres* case, stating "the Commission is...obliged to indicate as precisely as

²⁵² See *Supra* note 226, paragraphs 27-33, and See *Supra* note 157, p. 3.

²⁵³ See *Supra* note 231, paragraph 33.

²⁵⁴ *Ibid*, paragraph 38 and See *Supra* note 63, Article 20(4).

²⁵⁵ Joined Cases C-97/87, 98/87 and 99/87, *Dow Chemical Iberica, SA and others v Commission*, Judgment of the Court [1989], ECR 3165, EU:C:1989:380, paragraph 26, available on: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61987CJ0097>.

²⁵⁶ *Ibid*, paragraph 45.

possible the evidence sought and the matters to which the investigation must relate²⁵⁷, however, it is not “indispensable...to delimit precisely the relevant market, to set out the exact legal nature of the presumed infringements, and to indicate the period during which those infringements were committed, provided that the inspection decision contains the essential [elements]...”²⁵⁸. Moreover, paying deference “to the fact that inspections take place in the beginning of an investigation...the Commission still lacks...precise information to make a specific legal assessment and must first verify the accuracy of its suspicions and the scope of the incidents which have taken place, the aim of the inspection being specifically to gather evidence relating to the suspected infringement”.²⁵⁹ All the above case law clearly indicates that in order to properly procure judicial authorization the Commission (or the NCA) must outline the alleged subject matter and purpose to sufficiently delineate the scope of its investigation to uphold a Defendant’s rights; it need not relinquish all information, knowledge and legal analysis it possesses as it is still in the preliminary stages of gathering the requisite data to prove culpability of infringement, but it must provide enough information to allow for the undertaking to adequately understand the foundation of the warrant and how to appropriately cooperate pursuant to Article 20(4) of Regulation No. 1/2003.

Because historically, Section 9¹ subsections (1) and (2) of LV’s Competition Law failed to outline the basic requirements necessary to properly procure a judicial warrant concurrently with safeguarding a Defendant’s rights, the author targeted this as an issue to discuss while interviewing with not only the LV NCA, but also with other NCAs for comparative purposes. During the author’s interview(s) with the KP investigative team (and with the prior head of cartel investigations), the issue of Section 9¹ being “empty or void of detail” surfaced and was discussed at great length.²⁶⁰ The author was told that Section 9¹ remained in force as initially written for 20 years without any scrutiny until recently when an undertaking addressed a complaint to the president of the High Court about the inadequate/imprecise content and overbroad application of a warrant issued pursuant to Section 9¹.²⁶¹ The complainant requested that the High Court find the judge of a district court who issued the warrant liable for disciplinary action²⁶²; thereafter the constructs of said complaint were analysed, the contents of Section 9 were scrutinized, 13 national case materials were examined and recommendations were published by the

²⁵⁷ See *Supra* note 228, paragraph 83.

²⁵⁸ See *Supra* note 255, paragraph 46.

²⁵⁹ Case C-37/13 P, *Nexans SA un Nexans France SAS v European Commission*, Judgment of the Court (5th Chamber) [2014], EU:C:2014:2030, paragraph 37, available on: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62013CJ0037>.

²⁶⁰ See *Supra* note 117, “LV NCA – In person Interview”, and M. Grunte, Associate Attorney with Sorainen, *In-Person Interview*, conducted on: 29 September 2015.

²⁶¹ *Ibid*.

²⁶² *Ibid*, LV NCA Interview. It must be noted that the above-cited information came from follow-up correspondence with the LV NCA regarding the inadequacies of Section 9.1, the recommendations as published by the High Court, and the proposed Amendments to LV’s Competition Law, which will all be discussed below.

High Court for modifications of LV's current investigatory protocol to better align it with safeguarding a Defendant's fundamental rights pursuant to the Charter and the ECHR.²⁶³ The recommendations were memorialized in a document entitled "Konkurences likuma 9.panta piektās daļas 4. un 5.punkta piemērošana", which the author will discuss in the following paragraphs.²⁶⁴ Said document provided recommendations in relevance to the Application of Section 9, Paragraph 5, Clause 4 and 5 and Section 9¹ of the LV Competition Law, whereby the most relevant discussions/recommendations were discussed to highlight the areas where the Court believed modifications should occur, and were analysed as to whether the modifications recommended were sufficient enough to align LV's protocol with the provisions of the Charter and ECHR.

The first chapter, entitled "Tiesu prakses apskats" provided the Court's summary of the examined case law in relevance to judicial authorization protocol in LV; the second chapter, entitled "Pieņemto lēmumu saturs un būtība" provided details as to the contents and nature of judicial warrants, whereby both in conjunction provided the legal foundation relevant to the origins of the Court's recommendations.²⁶⁵ The third chapter, entitled "Problēmas un to novēršana", detected the problems with LV's current protocol and how to invoke modification for preventative purposes. In this chapter, the Court provided argumentation behind its mandate necessitating modification to the law, including (in part):

(1) The activities enshrined in Section 9, paragraph 5, clause(s) 4 and 5 that permit the KP to enter non-residential premises, vehicles and other movable/immovable objects, to open them and carry out forcible search if necessary, perform an inspection of the existing property and documents (including the information stored on computers and on electronic information systems), withdrawing property items and documents that have been found and which may be important to the case, which of their nature are similar to activities of criminal proceedings, are regulated by Criminal Procedure Law and are recognized by the ECtHR. **According to examined judicial warrants, "other market participants", non-residential premises, other property of mentioned market participants, and employees of market participants are not identified. Without specifying the person and its property, it's unacceptable that the KP, for an indefinite period of time, can carry out investigative activities that are similar to criminal proceedings. Such**

²⁶³ *Ibid.*

²⁶⁴ Tiesu prakse Konkurences likuma 9. panta piektās daļas 4. un 5. punkta piemērošanā, "Application of Clause 4 and 5 Paragraph 5 Section 9 of the Competition Law", available on: <http://at.gov.lv/lv/judikatura/tiesu-prakses-apkopojumi/kriminaltiesibas/>. Please note that said document is only written in Latvian with no English translation on the Republic of Latvia Supreme Court Website; all translations were produced by the LV NCA investigative team for which the author relied on when writing the instant subsection. Please note words that are **bolded** are meant to add emphasis.

²⁶⁵ *Ibid.*, pp. 2-6, and *See Supra* note 117.

practice does not comport with Council Regulation (EC) No. 1/2003 regarding its rules on investigative powers.²⁶⁶

Taking the criminal procedure analysis a step further, the Court provided the following argumentation (in part):

(2) According to Article 179 of Criminal Procedure Law a search is an investigative action whose content is the search by force of premises, terrain, vehicles, and individual persons for the purpose of finding and removing the objects being sought, **if there are reasonable grounds to believe that the object being sought is located in the site of the search**; while Article 180 of Criminal Procedure Law states that decision on a **search shall indicate who will search and remove, where, with whom, in what case, and the objects and documents that will be sought and seized**. This means that legality of the decision depends on a judicial evaluation of conditions, where specific persons are identified, but are not informed before the search. **According to Article 40 Criminal Procedure Law an investigating judge shall be the judge whom issues search warrants, and who is tasked with the observance of human rights in criminal proceedings. Since, LV Competition Law has taken into account human rights by establishing judicial review (ie. Section 9¹ of Competition Law) for procedural activities carried out by KP, and because investigational activities carried out by KP may infringe [on] human rights, the investigating judge shall[,] with the observance of human rights[,] issue judicial warrants in competition investigations.²⁶⁷**

Irrespective of the High Court's arguments in favour of tasking an investigative judge with upholding Defendants' rights when issuing judicial warrants pursuant to Section 9¹, the KP informed the author that this would cause potential problems as an "investigating judge is strictly an institution of Criminal Procedure law", whereby an investigative judge cannot issue warrants in administrative proceedings as s/he would have to "account for all principles established under Criminal Procedure law" of which all are not applicable to competition proceedings²⁶⁸; a challenge that will undoubtedly have to be ironed out before said recommendations could work seamlessly.

The fourth chapter, entitled "SECINĀJUMI un IETEIKUMI", provided the actual recommendations and conclusions of the High Court for both modification and implementation purposes, whereby the Court established the following five relevant recommendations: (1) the compendium of the matter before the Court is currently absent regulatory framework, (2) the judicial warrant should be issued by an investigating judge, (3) the judicial warrant should provide argumentation as to why the ED is permitted to take concrete action, pursuant to Section 9, paragraph 5, clause(s) 4

²⁶⁶ *Ibid*, pp. 6-7, and *Ibid*, note 117. One must keep in mind that the instant quotation is a summary of multiple paragraphs of the High Court's recommendations and does not recite word for word everything this Court argued; moreover, translations were provided to the author by the KP investigative team and cross-referenced with Google translate. Please note words that are **bolded** are meant to add emphasis.

²⁶⁷ *Ibid*, please note words that are **bolded** are meant to add emphasis.

²⁶⁸ *See Supra* note 117.

and 5, due to reasonable suspicion of the undertaking's actions being in breach of Competition Law, (4) the judicial warrant shall indicate **where, with whom, in what case, and what objects and documents will be sought and seized during the inspection** as far as it is established beforehand, (5) the judicial warrant **must indicate the deadline** for which the KP can carry out the entirety of its investigatory activities.²⁶⁹

As one can see from the analysing the above passage, the Court identified as necessary, and recommended as appropriate, the threshold of "reasonable suspicion" which must be present for the KP to meet its burden for a warrant to issue, it delineated what evidence must be presented by the KP for consideration of judicial authorization, it made the search warrant terminable by providing an execution and termination deadline date, and mandated the identification of the persons and products that are the object of pursuit. However important these recommendations might be in terms of preserving Defendants' fundamental rights, it must be noted that not all said recommendations are currently enshrined in the LV Competition Act as rules of law. Even so, the author was able to obtain and translate copies of search warrants from the KP to identify the 'implemented' changes in the content of judicial warrants before and after the publishing of the High Court's recommendations.²⁷⁰

Concurrently with the High Court providing guidance on the LV's judicial warrant protocol, the Saeima was also promulgating legislation in furtherance of modification to the current Competition Act to help it better align with the Charter and the ECHR. The Amendments to the Competition Act, entitled "Grozījumi Konkurences likumā", were in their second reading (at the time of the author's original research) with several proposals of change being supported by the legislature's commission; said amendments affected the scope of KP's powers with the main changes focused on a more precise mandate to staff, a clarification of the judge's authorization protocol and a delineation of the sanctioning standards and procedural violations by market participants.²⁷¹ The following were the relevant proposed amendments to the law (regarding judicial

²⁶⁹ See *Supra* note 264, pp. 7-8. Please note words that are **bolded** are meant to add emphasis.

²⁷⁰ Lēmums satur ierobežotas pieejamības informāciju, "Decision Containing Limited Availability of Information"; search warrants were provided by email attachment on: 26 October 2015. Said search warrants were given to the author as follow-up correspondence after her in-person interview with the LV NCA. Search Warrant-Nr.1 provides an example of a judicial warrant issued in 2013 - before the publishing of the High Court recommendations; Search Warrant-Nr.2 provides an example of a judicial warrant in 2014 - after the publishing of the High Court recommendations. **Said warrants can be made available upon request** to illustrate the strides made by the High Court to better align with protecting a Defendant's rights in investigatory protocol and search warrant procurement. (All identification information was redacted for confidentiality purposes.)

²⁷¹ Grozījumi Konkurences likumā, "Amendments to the Competition Act", No. 269/LP12, 2nd Reading, available on: <http://titania.saeima.lv/LIVS12/SaeimaLIVS12.nsf/0/DB2C6D6DE90D4A4FC2257EE6004C9073?OpenDocument>.

warrants and KP activities), for which the author will list pursuant to each amendments provisional location in the Competition Act:

- Section 9, Paragraph 5, Clause 3, was proposed to read: "...pay a visit to any market participant or an association of market participants (including without prior notice). At the time of visiting the market participant, officials of the ED, presenting a written authorization **specifying the subject-matter and purpose**, have the right to:...";
- Section 9, Paragraph 5, Clause 5, was proposed to read: "If in time of the activities, ...[the] competition council had **obtained reasonable information** that the property, information or documents, which may serve as proof of an infringement of this Law, are stored in the property of [an]other person[,] or is in this persons possession or use of existing non-residential premises, vehicles, apartments, constructions and other movable and immovable objects in the urgency of the case- if due to delay[,] the property, information or documents may be destroyed, hidden or damaged– the Competition Council [can] decide [on] an investigation [regarding] the activities of the person concerned, indicating the actions object and purpose. Inquiry, based on a decision of the Competition Council, [will be] carried out by the Competition Councils' authorized official and in the presence of the State Police";
- Section 9¹ (now omitted), was proposed to read: "A judge of a district (city) court on the basis of the legal address of the KP shall take a decision on permission to perform the activities referred to in Section 9, Paragraph five, Clauses 4 and 5 of this Law. The judge shall, within 72 hours, examine the submission by the ED and other documents which justify the necessity to perform such activities, hear the information provided by officials of the ED and take a decision on permission or refusal of the activity. If the application can be reviewed without the Competition Councils hearing, the judge is entitled (may consider) to examine it in the written procedure."
- Section 9¹ Clause 2 (now omitted), was proposed to read: The decision on the Section 9 of the fifth paragraph 4, 5, 6 and 7 of the activities referred to the authorization of the judge points at **which market participant, association of market participants or persons, investigation activities [that] can be carried out, actions by the object and purpose of any property, information or documents to be searched, as far as it is known, and [an] activities deadline.**"²⁷²

Although not all of the proposed amendments were listed in their entirety, one can see that the merits or essence behind the High Court's recommendations were accepted by the Commission during its second reading. Currently, LV's Competition Act has been revised to include a new Chapter II¹ entitled Permission to Perform Procedural Actions, including Sections 10¹ – 10⁴ to address the issue of judicial permission for procurement of a warrant in competition cases. The following are the relevant added sections reflecting the recommended changes for better adherence to a Defendant's fundamental rights in Competition proceedings:

²⁷² *Ibid.* Analogous to the High Court recommendations cited above, said document is only available in the Latvian language; all translations were produced by the LV NCA investigative team for which the author relied on when writing the instant subsection. Please note words that are **bolded** are meant to add emphasis.

- Section 10.1 Jurisdiction for Issuing a Permission: (1) A judge of a district (city) court on the basis of the legal address of the Competition Council shall take a decision on permission to perform the procedural actions referred to in Section 9, Paragraph five, Clauses 4, 5, 6, and 7 of this Law.
- Section 10.2 Submission Regarding Issuance of a Permission: (1) In a submission regarding a permission to perform the actions referred to in Section 9, Paragraph five, Clauses 4 and 5 of this Law, the Competition Council shall specify in **respect of which market participants or association of market participants or persons the procedural actions need to be performed, the subject and purposes of these actions, and, to the best of its knowledge, what assets, information or documents are going to searched for.** (2) In a submission regarding a permission to perform the acts referred to in Section 9, Paragraph five, Clauses 6 and 7 of this Law, the Competition Council shall specify the **legal grounds and the scope of the data to be stored or not to be disclosed.**
- Section 10.3 Procedures for Taking a Decision: (1) The **judge shall, within 72 hours** after having received a submission from the Competition Council, examine this submission which substantiates the necessity to perform procedural actions, **become acquainted with the case materials** of the Competition Council, **hear out the representative of the Competition Council** and take a decision either to issue a permission to perform procedural actions or to refuse it. (2) A true copy of the judicial warrant shall be sent to the Competition Council within 24 hours from the moment of taking of the decision.
- Section 10.4 Warrant on Procedural Actions: (1) In its warrant permitting to perform the actions referred to in Section 9, Paragraph five, Clauses 4 and 5 of this Law, the **judge shall specify in respect of which market participants or association of market participants or persons the procedural actions need to be performed, the subject and purposes of these actions, and, to the best of his or her knowledge, what assets, information or documents are going to searched for, as well as the time period for performing procedural actions.**²⁷³

Irrespective of the positive strides taken by the Saeima, the author still has identified gaps in the Competition Act after its modification based on the aforesaid amendments as it remains void of expressly identifying or adequately explaining the necessary burden or evidentiary threshold that the KP must meet when requesting a judicial warrant (although reasonable suspicion was identified in the final version of Section 9 Paragraph 5 Clause 5 it is only referred to in Article II¹ Sections 10¹ – 10⁴), it provides no guidance as to the types of evidence/documents/information required to present to the Court when testifying to the subject matter and purpose of the investigation to delineate proper scope, nor does it provide examples of concrete wording that must be testified to and memorialized in a warrant for its issuance to be validated. The author will now briefly turn to the law of the Republic of Ireland to discern through comparative methodology what can be gleaned from the Competition Act of a fully criminalized

²⁷³ See *Supra* note 116, "Competition Law", Article II Permission to Perform Procedural Actions, Sections 10¹ – 10⁴, pp. 10-11. Please note words that are **bolded** are meant to add emphasis.

regime, and what strides said Act has taken to protect IE market competition concurrently with safeguarding a Defendant's rights.

c. A Comparative View on Search Warrant Protocol: IE Regime

As referred to in Chapter 3, the Irish CCPC (i.e. IE NCA) employs as its legal basis the Competition and Consumer Protection Act of 2014 (hereinafter, "CCPA"), in conjunction with the amended Competition Act of 2002, to carry out its obligations pursuant to Regulation No. 1/2003.²⁷⁴ One must keep in mind at the outset that the Republic of IE has a Constitution²⁷⁵ protecting the fundamental rights of persons (i.e. personal rights, family, privacy, education, private property and religion), and the IE CCPC operates a fully criminalized competition regime, whereby its Competition Act(s) include prosecutorial language and procedure for both penal fines and imprisonment under indictment in conjunction with the DPP. Accordingly, the judicial warrant provisions contain the language necessary to exploit investigatory measures analogous to those used in criminal offenses, due to the result of more severe prosecutorial sanctioning (e.g. fines/imprisonment), requiring pronounced deference paid towards safeguarding a Defendant's fundamental rights.

Within the 'amended' CCPA of 2014, Chapter 2, Section 37 (entitled, "Powers of authorised officers in relation to investigations under Act of 2002"), Subsection 3 provides,

"If a judge of the District Court is **satisfied by information on oath** of an authorized officer that there are **reasonable grounds for suspecting** that evidence of, or relating to, the commission of an offense under the Act of 2002 is to be found in any place, the judge may issue a warrant authorizing an authorized officer (accompanied by such other authorized officers or members of An Garda Siochana [police] or both) **at any time or times within one month from the date of issue of the warrant**, on production if so requested of the warrant, to enter and search the place **using reasonable force where necessary**, and exercise all or any of the powers conferred on an authorized officer under this section"²⁷⁶;

Regarding the activities/powers allowed during the investigation, one must look to Section 37, Subsection 2, which provides (in part):

(a) "to enter, if necessary by reasonable force, and search any place at which any activity **in connection with** the business of supplying or distributing goods or providing a service, or **in connection with** the organization or assistance of persons engaged in any such business, is carried on;

²⁷⁴ See *Supra* note(s) 102-104.

²⁷⁵ Bunreacht na hÉireann, "Constitution of Ireland", Articles 40-44 "Fundamental Rights", pp. 152-182, available on: http://www.taoiseach.gov.ie/eng/Historical_Information/The_Constitution/February_2015_-_Constitution_of_Ireland_.pdf.

²⁷⁶ See *Supra* note 102, p. 40. Please note words that are **bolded** are meant to add emphasis.

(b) to enter, if necessary by reasonable force, and search any place occupied by a director, manager or any member of staff of an undertaking that carries on an activity..., being, in either case, a place in...which there are **reasonable grounds to believe** books, documents or records relating to the carrying on of that activity...are being kept in it;

(c) to seize and retain any books, documents or records relating to an activity found at any place...and take any other steps **which appear to the officer to be necessary** for preserving, or preventing interference with, such books, documents or records;

(d) to require any person who carries on an activity...and any person employed in connection therewith to— (i) give to the authorized officer his or her name, home address and occupation, and...(ii) provide to the authorized officer any books, documents or records relating to that activity **which are in that person's power or control**, and to give to the officer such information as he or she **may reasonably require** in regard to any entries in such books, documents or records, and where such books, documents or records are kept in a non-legible form to reproduce them in a legible form;

(e) to inspect and take copies of or extracts from any such books, documents or records, including in the case of information in a non-legible form, copies of or extracts from such information in a permanent legible form;

(f) to require a person...to give to the authorized officer any information he or she may require in regard to the persons carrying on the activity...(including in particular, in the case of an unincorporated body of persons, information in regard to the membership thereof and its committee of management or other controlling authority) or employed **in connection** therewith;

(g) to require a person...to give to the authorized officer any other information which the officer **may reasonably require** in regard to the activity".²⁷⁷

As one can discern when comparing both the 2002 and 2014 versions of the IE Competition Act(s), as well as, what was revealed to the author during her in-person interview with the CCPC, the language of the 2014 Act was amended to provide a burden or threshold that the authorized officer must meet when eliciting testimony under oath for a warrant to issue. On the basis of the warrant, said Act also provides guidance as to (1) the evidence needing to display a connection between the alleged infringing activity and the actual persons/locations of the search, (2) that there must be reasonable grounds to believe that the evidence being sought will be found with said persons or in said locations, (3) that any requests for information be reasonably required by the authorized officer in furtherance of his/her duties, and (4) the information requested must be in the possession or control of said person and in connection with the alleged activities. During the interview, CCPC counsel and the author parsed through the differences between the language of the two Acts discussing the reasons behind why said language was carefully selected in the latter version, as precise word usage and/or modification can significantly change the scope of the investigation, the powers of the authorized officer when executing the warrant, and in terms of criminal

²⁷⁷ *Ibid*, pp. 39-40. Please note words that are **bolded** are meant to add emphasis.

proceedings, the potential loss of an entire case due to investigatory technicalities.²⁷⁸ Moreover, the language of both the 2002 and 2014 Act(s) was designed with the intent to pay an appropriate level of deference to the Defendant's fundamental rights as said subsections signify and denote the subject matter, purpose and scope of the investigation allowing for the Defendant to understand the extent of their responsibility to cooperate and the underlying reasons for which they are under investigation for alleged anti-competitive behavior.

It must be noted that when obtaining an investigatory warrant in IE, the authorized officer creates a draft of the warrant for the judge to sign prior to the *in camera* hearing, which tracks through the statutory language, and ties in the appropriate statutes, legal elements and factual circumstances of the case (i.e. currently known to the officer) to satisfy the threshold of "reasonable grounds for suspecting" criminal anti-competitive activity, such that the judge will be satisfied that the burden was met and sign the draft warrant permitting the search.²⁷⁹ The authorized officer will also be expected to testify under oath to any inquiries the judge may have in relevance to the evidence presented appurtenant to the draft warrant.²⁸⁰ It will be expected that the authorized officer will set out the nature of the matter, explain the type of criminal behavior that was involved, identify and present evidence for each individual allegation, and link each allegation with the specific person or location in connection with the criminal behavior, such that the judge can be assured that the scope of the investigation is appropriate and that the warrant clearly indicates the subject matter and purpose without being imprecise, disproportionate or overbroad. The author underscores that although the IE CCPA does not overtly provide 'examples' of the specific types of evidence/documents/information required to present to the Court to delineate the subject matter, purpose and/or scope of the investigation, and fails to denote the exact procedure for obtaining a warrant, it does effectively lay out the burden/threshold that must be met, the deadline for which the warrant must be executed, and the context or foundation of testimony that must be elicited during an *in-camera* hearing for a warrant to issue.

However, in May 2017, the CCPC's search and seizure powers were rendered in breach of Article 40.3 of the Irish Constitution and Article 8 of the ECHR when in the execution of a dawn raid the CCPC obtained digital materials deemed irrelevant and outside the scope and purpose covered by the warrant.²⁸¹ As background, in *CRH Plc*,

²⁷⁸ See *Supra* note 105, Interview with J. McNally.

²⁷⁹ *Ibid.*

²⁸⁰ *Ibid.*

²⁸¹ Arthur Cox, *Dawn Raids at the Competition and Consumer Protection Commission set to change following a Landmark Supreme Court Decision*, available on: <http://www.arthurcox.com/wp-content/uploads/2017/09/Dawn-Raids-by-the-Competition-and-Consumer-Protection-Commission-set-.pdf>.

*Irish Cement Ltd & ors vs. CCPC*²⁸², the CCPC conducted a search on the premises of Irish Cement Limited (ICL) (i.e. a CRH subsidiary) and seized the entire email contents of a crh.com mailbox related to Mr. Seamus Lynch (e.g. 96 gigabytes of data or 380,000 files), a previous managing director of ICL and senior director of the parent company, CRH.²⁸³ Attorneys for the Plaintiffs alleged that some of the material seized was irrelevant to the scope of the warrant and should not be reviewed by the CCPC; the CCPC posited they had the right to review all documents seized pursuant to their Section 37 powers and did not provide any “safeguards concerning irrelevant material other than making reference to its obligation of confidentiality” pursuant to Section 25 of the 2014 CCPA.²⁸⁴ The Supreme Court of Ireland held that the CCPC was only entitled “to access, review and make use of materials” directly related to its investigation and that it must ensure the identity of the documents through proper engagement with parties “in a manner that respects their constitutional rights to privacy”.²⁸⁵ The Court highlighted the salient gap in Irish legislation underscoring the need for the CCPC to develop an appropriate procedure to engage with parties to proportionately identify relevant materials within the scope and purpose of the warrant and to properly execute on enforcement protocol during dawn raids.²⁸⁶

In light of the above, the author will now traverse back to the LV Competition Act, with the help of the IE CCPA and subsequent IE Supreme Court holding, and critically analyse whether the strides that have been taken towards amending said law will be successful; the author will also make additional recommendations to (1) better align the Act with the Charter and the ECHR, and (2) ensure the Act provides undertakings with an even better understanding of the subject matter, scope and purpose behind the investigation, pursuant to Regulation No. 1/2003.

d. Concluding Remarks: Recommendations for Improvement

As LV Competition Law currently stands, its language and content still fails to adequately provide or explain the threshold or burden necessary to identify the level of evidentiary proof required to necessitate the issuance of a warrant, it provides no guidance as to the types of evidence/documents/information required to present to the Court when

²⁸² *CRH Plc, Irish Cement Ltd & ors vs. The Competition and Consumer Protection Commission*, Supreme Court of Ireland, [2017] IESC 34 (29 May 2017), available on: <http://www.bailii.org/ie/cases/IESC/2017/S34.html>. It must be noted that this judgment originated from a CCPC appeal from an IE High Court holding; all five Supreme Court justices dismissed the CCPC’s appeal.

²⁸³ *The future of CCPC dawn raids following landmark decision by Supreme Court*, Beauchamps law firm website, available on: <https://beauchamps.ie/publications/501>.

²⁸⁴ See *Supra* note 281.

²⁸⁵ *Ibid.*

²⁸⁶ Allen, Catherine, *Public & Administrative Law Update: Regulators Must Protect Privacy Rights When Conducting Dawn Raids*, Mason Hayes and Curran law firm website, available on: <https://www.mhc.ie/latest/insights/public-administrative-law-update-regulators-must-protect-privacy-rights-when-conducting-dawn-raids>.

testifying to the subject matter and purpose of the investigation to delineate proper scope, nor does it provide examples of concrete wording that must be testified to and memorialized in a warrant for its issuance to be validated. The High Court and the Saeima had identified the potential human rights infringements inherent with 'empty' legislative provisions and were proactive regarding publishing recommendations towards needed improvement and promulgating proposals for amendments to the current law. Said proposals did encapsulate the essence behind the High Court's recommendations by requiring an identification of persons/objects/locations and a deadline for which the search warrant can effectively execute, however even though the proposals were critical for better alignment with the Charter and the ECHR, they still lacked a number of important components that could make them even stronger and immediately impactful upon implementation. The following are the author's recommendations to strengthen LV's current investigatory protocol and procurement of judicial warrants:

(1) Subject Matter and Purpose of the Investigation: The author posits that alongside of the KP naming the desired persons/locations/objects and executory deadline in its submission to the Court, the law should also mandate what the KP must put on the record and testify to in order for the KP to obtain a warrant to perform its duties under Section 9, including examples of documents and information currently in the KP's possession to indicate evidence of the alleged anti-competitive behavior. Moreover, the law should denote exactly how the evidence should be presented and laid out such that the warrant can properly reflect and proportionately define the relevant subject matter and purpose of the investigation in obeisance of a Defendant's fundamental rights. The law should also include a reasonable and workable procedure to allow the parties concerned a mechanism to identify and separate evidential material that is determined to be unrelated or outside the subject matter and scope of the warrant, whereby the only evidence seized will be that which the KP is entitled to consider limited by the scope and purpose of the investigation.

(2) Burden/Threshold of Proof: The author recommends that the newly introduced threshold should be properly explained in Sections 9 and 10 to clearly define the burden necessary to satisfy the Court that the entirety of the evidence known to the KP at the time of submission rises to the level requisite to indicate there is an immediate need for a warrant to issue (or within 72 hours as denoted in the current law²⁸⁷). As reflected above, the High Court in its recommendations indicated that there should be "**reasonable suspicion** that the undertaking's actions are in breach of Competition Law"²⁸⁸, but the Saeima chose not to adopt said threshold with adequate explanation into their proposal for which was in its second reading, illustrating the need for further explanation of its procedural importance. One can argue that burdens of proof are critical to ensure the validity behind the issuance of the warrant and for the Court/KP to substantiate a warrant's contents when it is subsequently scrutinized for failure to meet

²⁸⁷ See *Supra* note 116, LV Competition Law.

²⁸⁸ See *Supra* note 264, Recommendations of LV High Court. Please note **bolded** words are meant to add emphasis.

the requisite standards necessary to safeguard human rights. Thus, the newly introduced burden or threshold should be adequately explained in LV Competition Law to identify the level of evidentiary proof required to necessitate the issuance of a warrant by 'defining' the actual threshold in a separate provision such that it is overtly clear what the burden/threshold means and how it will be interpreted by the Court when analysing the evidence prior to issuing its findings within the context and scope of the search warrant.

(3) Procedure on Warrant Execution: As a compliment to competition proceedings being analogous to criminal proceedings in the eyes of the law, the author believes that LV Competition Law should follow the provisional language of LV Criminal Procedure Law, as it not only provides that "the search decision indicates **which, where, in what case, and what objects and documents** will be searched and removed"²⁸⁹ (which the Saeima acknowledged and proposed as an amendment), but in Section 182, it also outlines the procedures that must be followed when conducting a search.²⁹⁰ The author believes this language is important to include in LV Competition Law as such provisions would enhance the transparency and predictability of the KP's investigatory actions, putting defendants on notice that 'when' their behaviour is detected and subsequently investigated, the procedural regimen is solid, does not infringe on Defendants' rights, and severe sanctions will be upheld due to the enhanced investigatory protocol. Resultantly, this will entice more exploitation of the leniency program and acknowledgement of anti-competitive behaviour. It must be noted that the author does not believe that the additional Chapter II¹ Articles 10¹- 10⁴ amendments adequately address the insufficient protocol mentioned above; more needs to be done in furtherance of safeguarding a Defendants procedural rights in alignment with the above recommendations.²⁹¹

(4) Follow-on Evidence: The author posits that LV Competition Law should also denote what procedure should be invoked by the KP at such time when they are investigating and identify potential evidence that is not covered within the scope of the current warrant. A provision needs to be drafted such that it encompasses the protocol necessary for the obtainment of a "follow-on" warrant, to include the items/documents/evidence not covered in the language of the initial warrant issued by the Court. The Saeima's proposals and later amendments cover what to do when there are issues of emergency or exigent circumstances in relevance to the potential tampering with or destruction of evidence²⁹², but said proposals were deficient when accounting for evidence that could be uncovered that is outside the purview of the KP's knowledge during the submission of evidence for the issuance of the initial warrant. It is clear that all evidence gathered by the KP must be done in accordance with the law and

²⁸⁹ See *Supra* note 251, LV Law on Criminal Procedure.

²⁹⁰ *Ibid*, Section 182.

²⁹¹ Latvijas Vestnesis, *Amendments to the Competition Law*, No. 2016/104.1, published on: May 31, 2016, available on: <https://www.vestnesis.lv/op/2016/104.1>.

²⁹² See *Supra* note 271, Amendments to the LV Competition Act.

within the subject matter, purpose and scope of the search warrant issued by the Court; any evidence uncovered outside the parameters of said warrant should not be used against the Defendant by the KP (or Judge) when finding an infringement or at the time of issuing sanctions.

The aforementioned recommendations were provided by the author to elicit a closer look at what could be modified or amended, such that LV Competition Law will better safeguard a Defendant's rights concurrently with enhancing the destabilization of cartels, by paving the way towards a more efficacious leniency program. This can only occur with a more intense focus on providing the requisite level of transparency and predictability regarding LV investigatory protocol, such that Defendants will recognize that their behaviour will be severely sanctioned upon detection, making the utilization of the leniency program the dominant strategy to circumvent high fines and prohibition from public procurement.²⁹³ In the following section, the author will conclude by incorporating the unpinning of game theory and oligopolistic economic strategy, collating all the divergent system structures and leniency regimes, and tying in all the rules of law and provisional recommendations from the previous chapters to provide final recommendations on how to strengthen leniency programs by and through safeguarding a Defendant's fundamental rights in furtherance of market competition within the EU.

²⁹³ See *Supra* note 121, LV Leniency Program.

CONCLUSION: THE LINK BETWEEN ALL INTERWORKING COMPONENTS

Throughout the constructs of this article, the author employed two methodological approaches to uncover and better understand the diversity between the EC and 13 Member States in relevance to different jurisdictional systems, decision-making vehicles and leniency regimes. These salient differences are important as they display a variety of approaches to investigatory protocol, evidential compilation and post-investigatory proceedings, which defines the level of importance that is attached to both transparency and predictability, and dictates to what extent each competition regime protects a Defendant's fundamental rights. As the level of efficacy and efficiency of each regime was revealed during the empirical interviewing stage, the author drew conclusions between the potential success of the leniency program and the level of transparency that was built in to each regime, as it defined the extent to which the Defendant would participate in the immunity program and acknowledge its participatory behaviour due to the predictability of favourable outcomes stemming from the leniency structure. Transparency and predictability of a system are in many ways derivatives of Defendants' fundamental rights protection and operate in tandem with the pressures on players to reveal collusive behaviour to circumvent severe sanctioning making game theory the underpinning of the leniency program. When applying the tenets of game theory to the leniency structure it corroborates why immunity has proven to be a prominent tool in the destabilization of cartels as it capitalizes on fear and timing to trigger maximum utility, to exploit the most lucrative option and to benefit from complete exoneration of fines/sanctions.²⁹⁴ The author then exposed differences in both EC and MS structures, including where each regime derived its legal authority, how each promulgated legislation in furtherance of its statutory obligations, and the extent to which each paid deference to a Defendant's fundamental rights, as said diversity punctuates salient problems in terms of potential violative protocol, whereby comparative methodology can be utilized to posit solutions for better functioning systems.

It is unequivocal that as sanctioning increases to levels analogous to those imposed in criminal proceedings, a jurisdiction must implement a more heightened and rigorous procedural regimen to ensure fundamental rights and due process are upheld, and employ "higher thresholds of proof, stricter evidential standards and more robust procedures"²⁹⁵ to align with the expectations and obligations set forth in the Charter and ECHR. It is well established that Defendants' fundamental rights attach to every stage of the proceeding, but as jurisdictional diversity was examined it became clear that potential human rights violations permeated both the EC and a select number of MS's competition regimes such that the author focused the article towards uncovering and

²⁹⁴ See *Supra* note 38.

²⁹⁵ J. McNally, "Evidentiary and Due Process Issues Regarding the Enforcement of Cartels; comparatives, in *Irish, UK and European Competition Law*", p. 4.

analysing violative investigatory policy and providing recommendations to strike a better balance between efficacious prosecution concurrently with safeguarding a Defendant's fundamental rights in furtherance of a properly functioning leniency programs. Since EC procedure has remained under stringent examination by undertakings facing cartel infringement allegations, due to EC protocol falling short of the required fundamental guarantees, the author analysed three respective issues in relevance to EC's sweeping power, including the need to (1) obtain adequate court approval and supervision prior to the execution of a investigatory search, (2) craft authorization with pointed reasoning, underscoring the subject matter, purpose and material scope of the raid, and (3) pay appropriate deference to the confidential correspondence between an undertaking and its external counsel to not interfere or compromise its defence. The author then investigated similar challenges inherent in LV's search warrant procurement and execution process, and proposed recommendations to better align LV Competition law with safeguarding a Defendant's rights. With the clear link that exists between the severity of sanctioning, the exploitation of the leniency program, and the protection of a Defendant's fundamental rights, it becomes imperative that said rights are not undermined so a later finding of cartel infringement can remain viable under heightened judicial scrutiny, and so increased penal sanctioning can attach and demonstrate its utility as a preventative measure in the destabilisation of cartels.

It is definitively understood that for a leniency program to remain a reliable tool in favour of more fruitful investigations and findings of infringement, the regime must ensure that (1) there is a sincere "threat of severe sanctions for those who participate in...cartel activity and fail to self-report", (2) there is a perceived "high risk of detection by antitrust authorities if they [cartelists] do not report" and (3) there must be overt "transparency and predictability...throughout a jurisdiction's cartel enforcement program so that companies can predict with a high degree of certainty how they will be treated if they seek leniency".²⁹⁶ It can be anticipated that Defendants will be loath to participate in the leniency program without said elements being in place as they will not have a salient understanding to a requisite amount of certainty that the authorities will properly handle the evidence they will provide as immunity applicants, and in turn, will be unable to detect violative behaviour of other cartelists or secure viable sanctioning, as any effort in violation of a Defendant's rights will not be upheld in a court of law. It goes without saying that if undertakings do not know to what extent they will be punished, or the benefits they will be receiving by admitting violative behaviour, they will be unlikely to divulge participating in an offense. Undertakings seek financial predictability when making decisions that could seriously affect their bottom line, thus, without said predictability companies might believe it is more secure to rely on the secretive nature of wrongdoing, than risk exposing ones violative behaviour without any assurance that severe sanctions can and will be imposed, or that promises of immunity will be upheld at the conclusion of the proceedings.

²⁹⁶ See Supra note 57.

The author has recommended many areas where targeted modification to legislation could enhance obedience towards Defendants' rights, and the transparency and predictability of competition protocol in relevance to preliminary investigatory procedure, however, with every stride taken to strategically modify legislation, deference must still be placed on implementation of preventative education for not only undertakings and consumers at large, but also on the judiciary, as each entity/participant/player must work in harmony to understand the benefits of competition, uphold viable findings of infringement and properly balanced sanction propositions, and to condemn undertakings that undermine consumer welfare. As stated before, culture and mentality can influence forward movement towards destabilizing violative behaviour in the marketplace, and as such, proper budgetary allocation invested towards communal awareness of EC/NCA responsibilities, and on the resources available in the marketplace for companies/consumers to educate themselves on the benefits of competition, can go a long way towards putting all participants on an even playing field and circumventing hard core cartel infringements destabilizing competition in the marketplace.²⁹⁷

In conclusion, if the collective desired outcome is to increase cartel destabilization and usage of the leniency program, to attract more leniency applicants and increase acknowledgement of cartel participation, to showcase the viability of cartel detection and imposition of severe sanctioning, and to develop an apposite fining and penal system that balances punishment with prevention, both the EC and NCAs alike must enhance the predictability of sanction and penalties, increase the transparency of procedures and internal decision-making, and fervently safeguard a Defendant's fundamental rights for optimal competition in free market economies.

²⁹⁷ It would be remiss to submit the findings of the instant article without returning to the issues posited in the initial methodology chapter regarding areas uncovered during empirical interviewing for further research in alignment with the enhancement of leniency program participation and protection of a Defendant's fundamental rights; said areas include (1) inadequate transparency in Statement of Objections and the ability to comment on the complexity of economic analysis relied on by the Court and (2) the harmonization of access to leniency documents between departments of the same and different systems to proscribe proper documentary protocol to safeguard victims' rights concurrently with protecting leniency application documents to ensure enhanced cartel participation in existent leniency programs.