

## ANALYSIS OF THE CARTEL LEGISLATION AND LENIENCY PROGRAMS IN GERMANY AND THE CZECH REPUBLIC

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**Abstract:** *Judging the influence of private law enforcement on the success of the leniency programs is a very interesting and current topic. When dealing with it, it is necessary to find an answer to following question: How should be handled the initiative of the European Commission to strengthen the private law pillar of the cartel law enforcement not to weaken the public law pillar at the same time? It is possible to assume that the support of private enforcement of damages discourages cartel participants to report the existence of a cartel and avoid the fine imposed by the state, because by admitting a cartel they potentially face an even larger financial burden than in the case of a fine. However, the other point of view is, taking into account the very low effort of the impaired parties (mainly consumers) to enforce their claims through private means, that the support of private enforcement should not be perceived as a danger to the functionality of leniency programs, but only as their suitable complement, which can exert sufficient pressure on the cartel participants to perform their activities in accordance with law. The article strives to show that at the moment the support of private enforcement of cartel law does not pose any danger to leniency programs and that the implementation of legal institutions proposed by the European Commission, which would emphasize the role of private enforcement, is desirable.*

**Keywords:** *leniency program, cartel law, effectiveness, comparative study*

### 1. INTRODUCTION

Judging the influence of private law enforcement on the success of the leniency programs is a very interesting and current topic. When dealing with it, it is necessary to find an answer to following question: How should be handled the initiative of the European Commission to strengthen the private law pillar of the cartel law enforcement not to weaken the public law pillar at the same time? It is possible to assume that the support of private enforcement of damages discourages cartel participants to report the existence of a cartel and avoid the fine imposed by the state, because by admitting a cartel they potentially face an even larger financial burden than in the case of a fine. However, the other point of view is, taking into account the very low effort of the impaired parties (mainly consumers) to enforce their claims through private means, that the support of private enforcement should not be perceived as a danger to the functionality of leniency programs, but only as their suitable complement, which can exert sufficient pressure on the cartel participants to perform their activities in accordance with law.

With regard to both the similarities of legal culture and mutual economic interconnection I will be interested in the differences between leniency programs in the Czech Republic and Germany as to their effectiveness. I will also try to find out, what role the support of private enforcement has played in this particular area. It will be remarkable to compare the approaches of both countries to the suggestions of the European Commission and put them into connection with the relevant legislation regulating the claims for damages in cartel matters, as well as with the factual benefits of leniency programs, which

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have been recently substantially modernized both in the Czech Republic and Germany. One of the partial goals is to establish, whether at certain point these parallel systems of cartel law enforcement (i.e. leniency programs representing the public pillar and private enforcement representing the private one) cease to be mutually compatible and endanger the motivation of cartel participants to report the existence of cartels, and provided the answer is positive, then where it approximately lies. The main objective is to prove or deny the following hypothesis:

The support of private enforcement of cartel law poses a danger to leniency programs.

The implementation of legal institutions proposed by the European Commission, which would emphasize the role of private enforcement of cartel law, is undesirable.

## 2. PRIVATE ENFORCEMENT OF THE CARTEL LAW AND LENIENCY IN GERMANY

### 2.1 Legislation after the 7<sup>th</sup> amendment of the GWB in 2005

#### 2.1.1 Introductory remarks

The Commission's proposals, significantly inspired by the US legislation, often transcended the traditional German anti-cartel policy based on the ordoliberal philosophy; that is why they sparked a great debate and encountered a strong opposition in the beginning.<sup>1</sup> However, even Germany has had to alter its legislation to mirror the latest development in the EU. First of all, it was inevitable to address the Regulation (EC) No. 1/2003. Of course, other topics of our interest entered the discourse as well, especially the private enforcement of competition law and its compliance with the existing leniency program. The most important outcome of this harmonization effort was the so called 7<sup>th</sup> amendment of the Act against the restraints of competition (hereafter referred to as "GWB").<sup>2</sup> How did the German legislator deal with the challenges presented by the Commission in its set of documents, analyses and proposals? And what impact has the existing legislation had on the efficiency of the German leniency program?

### 2.2 Claim for damages and the abandonment of the "Schutznormprinzip"

Before the reform, if the plaintiff claimed for damages because of violation of the European cartel law, the charge had to be based on the Section 823 para 2 BGB in combination with the current Art. 101 and 102 SEFU, while the GWB applied for domestic cases. After the reform the legislation is simpler and all claims for damages are subject to the GWB.<sup>3</sup> Essential is Section 33 para 1 and 3 GWB. Para 1 sets forth that everyone, who com-

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<sup>1</sup> Further on the topic of German anti-cartel law and attitude of the Monopolkommission see Buxbaum, H. German Legal Culture and the Globalization of Competition Law: A Historical Perspective on the Expansion of Private Antitrust Enforcement. *Issues in Legal Scholarship*. The Berkeley Electronic Press 2006, Article 10, pp. 477–483, 489–491. Available at: <http://www.bepress.com/ils/iss9/art10>.

<sup>2</sup> Current version available online at <http://bundesrecht.juris.de/bundesrecht/gwb/gesamt.pdf>. Currently the 8<sup>th</sup> amendment is under discussion in the German Parliament, but has not been passed yet.

<sup>3</sup> PEYER, S. Myths and Untold Stories – Private Antitrust Enforcement in Germany. Centre for Competition Policy Working Paper No. 10–12, p. 11. Available at: <http://ssrn.com/abstract=1672695>.

mits the specified violation of the competition law, is liable to compensate the damaged party and cease his activity, if there is a danger of recurrence.<sup>4</sup> Para 3 provides for that anyone, who intentionally or due to negligence violates the law according to par. 1, is liable to compensate the damage incurred. The compensation is awarded even then, if the increased price had been transferred to the next link in the market chain by the damaged party. When calculating the exact amount, the proceeds gained due to the illegal activity should be taken into consideration. The amount is subject to the interest rate<sup>5</sup> according to private law, starting with the day the damage occurred.<sup>6</sup> Therefore, the legislator admitted that private enforcement of cartel law by means of claiming for damages was substantiated and *de facto* only explicitly repeated, what long before had been clear from the case law of the Court of Justice of the European Union (CJEU).

Nevertheless, the most important fact is that this amendment abandons the “doctrine of protective scope” (*Schutznormprinzip*<sup>7</sup>), which was not accommodating to the enforcement of damages by the individual damaged parties and once even prevented their compensation in case of the so-called *vitamin cartel*.<sup>8</sup> Currently the Section 33 para 3 clearly states that *every damaged person* including indirect buyers has a claim for damages and no other auxiliary criteria exist. This provision substantially redrew the imaginary “legal map” for the damaged party being put in a much better legal position to enforce its claim.

### 2.3 Changes facilitating the claims for damages

The most visible change facilitating the private enforcement of competition law is included in the Section 33 para 4, which sets forth that in the proceedings for damages caused by infringement on competition law the court is bound by a decision legitimately issued by the Commission, the *Bundeskartellamt* or the authority for protection of competition of any EU Member State (or by a court deciding in its stead) in the given

<sup>4</sup> Section 33 par. 1: “Whoever violates a provision of this Act, Articles 81 or 82 of the EC Treaty or a decision taken by the cartel authority shall be obliged to the person affected to remediate and, in case of danger of recurrence, to refrain from his conduct. A claim for injunction already exists if an infringement is foreseeable. Affected persons are competitors or other market participants impaired by the infringement”.

<sup>5</sup> Basic Bundesbank rate + 8%, see WURMNEST, W. New Era for Private Antitrust Litigation in Germany? A Critical Appraisal of the Modernized Law against Restraints of Competition. *German Law Journal*. Vol. 6, No. 8, 2005, p. 1184.

<sup>6</sup> Section 33 par. 3 “Whoever intentionally or negligently commits an infringement pursuant to paragraph 1 shall be liable for the damages arising therefrom. If a good or service is purchased at an excessive price, a damage shall not be excluded on account of the resale of the good or service. The assessment of the size of the damage pursuant to Section 287 of the Code of Civil Procedure [Zivilprozessordnung] may take into account, in particular, the proportion of the profit which the undertaking has derived from the infringement. From the occurrence of the damage, the undertaking shall pay interest on its obligations to pay money pursuant to sentence 1. Sections 288 and 289 sentence 1 of the Civil Code shall apply *mutatis mutandis*.”

<sup>7</sup> The doctrine of protective scope bound the possibility of redress to the fulfillment of certain criteria, which at the same time defined the limits of the provided protection. The protective effect of the norm thus applied only to a restricted number of cases (so-called *Schutzbereich*).

<sup>8</sup> Landgericht Mainz, NJW-RR 2004, 478 Vitaminkartell; Oberlandesgericht Karlsruhe NJW 2004, 2243 Vitaminkartell; Landgericht Mannheim GRUR 2004, 182 Vitaminkartell. The courts based their decisions on an older decision of the BGH, according to which only those, who the illegal activity was specifically aimed at, were entitled to redress. The diverging interpretations could not have been sorted out by the CJEU, because no one asked a preliminary question, and because of the out-of-court settlement not even by the BGH itself. Further WURMNEST, W. Fn. 5, pp. 1179–1180.

matter.<sup>9</sup> This is a real breakthrough not only because it makes the position of the damaged parties much easier when proving the existence of the cartel, but also because those effects are granted to administrative acts of all other EU Member States (regarding the *Bndeskartellamt* this is only a codification of the procedure applied even before).<sup>10</sup> Usually the biggest obstacle for the damaged party is to bring a proof of the cartel's existence, because it has no access to relevant information. Originally, the damaged party needed to prove the cartel's existence again and without the possibility to gain sufficient evidence, even if a corroborative ruling of the relevant authority for protection of competition was given. According to the current legislation the damaged party can take advantage of this decision and use it in the following procedure. It "only" has to prove that in consequence of the particular cartel it has incurred some damage. However, the damaged parties still cannot use the results of the official investigation,<sup>11</sup> which relates to the necessity not to threaten the functioning of the leniency programs.

A change has also been made in relation to the limitation period. This period stops as soon as the *Bndeskartellamt*, Commission or a competition protection authority of another EU Member State begins the relevant procedure. It resumes 6 months after the end of the procedure.<sup>12</sup> Thus, private enforcers can wait for the decision on the cartel's existence without any procedural pressure and then act accordingly.

#### 2.4 Absence of the class actions, discovery and punitive damages

Despite the significant progress described above one cannot help but notice that some of the potentially very useful proposals of the Commission are still being ignored by the German legislators. The class actions haven't been implemented and even the models of representative actions do not exist long in Germany.<sup>13</sup> The *Bundesrat* refused to support the proposal that the group of subjects entitled to file these representative actions should encompass the consumer associations.<sup>14</sup> The aim of this proposal was to put cartels under pressure even in the cases where the individual claims are negligible.<sup>15</sup> In Germany consumer associations can still file the so-called action for skimming-off proceeds

<sup>9</sup> Section 33 par. 4: "Where damages are claimed for an infringement of a provision of this Act or of Article 81 or 82 of the EC Treaty, the court shall be bound by a finding that an infringement has occurred, to the extent such a finding was made in a final decision by the cartel authority, the Commission of the European Community, or the competition authority – or court acting as such – in another Member State of the European Community. The same applies to such findings in final judgments resulting from appeals against decisions pursuant to sentence 1. Pursuant to Article 16(1), sentence 4 of Regulation (EC) No. 1/2003 this obligation applies without prejudice to the rights and obligations under Article 234 of the EC Treaty."

<sup>10</sup> WURMNEST, W. Fn. 5, p. 1185.

<sup>11</sup> KERSTING, CH. Perspectives for Private Enforcement in European Antitrust Law. *Zeitschrift für Wettbewerbsrecht (ZWeR) – Journal of Competition Law*. Heft 3, 2008, p. 255.

<sup>12</sup> Section 33 par. 5: "The limitation period of a claim for damages pursuant to paragraph 3 shall be suspended if proceedings are initiated by the cartel authority for infringement within the meaning of paragraph 1, or by the Commission of the European Community or the competition authority of another Member State of the European Community for infringement of Article 81 or 82 of the EC Treaty. Section 204(2) of the Civil Code shall apply *mutatis mutandis*."

<sup>13</sup> FIEDLER, L. *Class Actions zur Durchsetzung des Europäischen Kartellrechts*. Tübingen: Mohr Siebeck, 2010, pp. 105–106.

<sup>14</sup> However, this is one of the main changes proposed by the bill of the 8<sup>th</sup> amendment to the GWB and possibly the reason, why *Bundesrat* has rejected the whole bill of the 8<sup>th</sup> amendment.

(*Gewinnabschöpfungsklage*) only in cases of unfair competition beyond the cartel law, although this mechanism would enable to strip the companies of illegal profits and transfer them directly to the consumers.<sup>16</sup> But the German claimants succeeded in circumventing this shortcoming by using the traditional institutions of procedural law in cases of the so-called *cement cartel*, where the Belgian company *Cartel Damage Claims* has collected claims in the amount of 110 million EUR and enforces them jointly.<sup>17</sup> The company became entitled, because the rights had been ceded to it by their previous holders and this practice was deemed acceptable by the courts.<sup>18</sup>

The institution of discovery process and treble damages were however completely left out despite the fact that they would have been on one hand a procedural and financial motivation for the damaged parties and efficient deterrent for the law breakers on the other one. This may be the reason for emerging opinions that Germany neglects those components of cartel law, which serve the protection of individuals.<sup>19</sup>

### 3. FUNCTIONING OF THE GERMAN LENIENCY PROGRAM

#### 3.1 Leniency program efficiency before the 7<sup>th</sup> amendment of the GWB (2000–2004)

The leniency program has been implemented in Germany by the *Bundeskartellamt* since April 2000.<sup>20</sup> Two years later a special department for combating cartels was established within its organizational structure, which is also the central contact point for the leniency program participants.<sup>21</sup> The *Bundeskartellamt* considered this to be a significant contribution to the program's efficiency,<sup>22</sup> which is evidenced by the statistical data on imposed fines:

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<sup>15</sup> This means that only the relevant authorizations of commercial association are still in effect. Further see WURMNEST, W. Fn. 5, p. 1187.

<sup>16</sup> MICKLITZ, H. W. Collective enforcement of competition law – what is wrong in the discussion. In: Luboš Tichý (et al.). *Soukromé vymáhání kartelového práva*. Praha: Centrum právní komparatistiky PF UK, 2009, p. 111. According to Sections 34, 34a GWB the action for skimming-off proceeds can be filed only in cases of the subject being forced out of the market by the cartel and only the afflicted parties have a legal standing. See BERNHARD, J. *Kartellrechtlicher Individualschutz durch Sammelklagen*. Tübingen 2010, p. 333.

<sup>17</sup> KERSTING, CH. Fn. 11, p. 257.

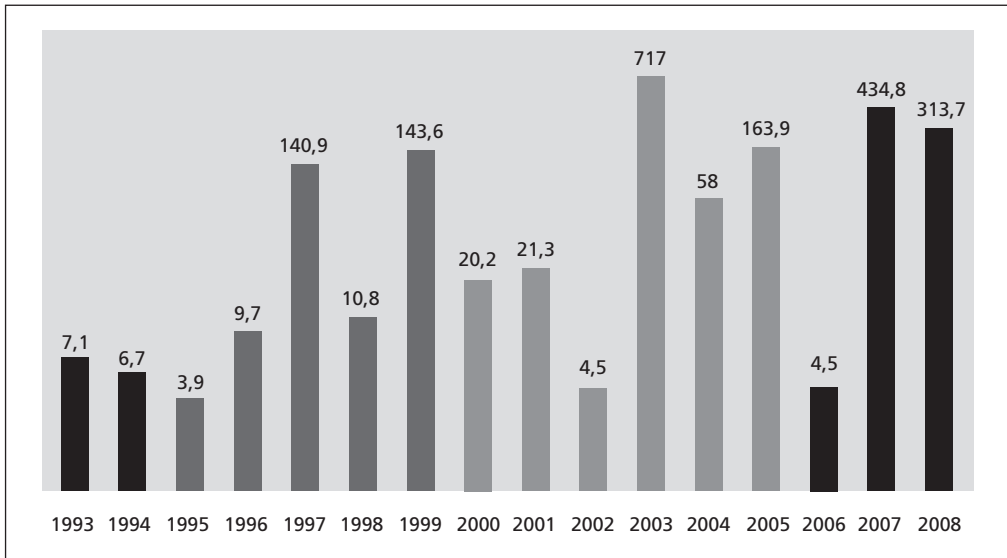
<sup>18</sup> PEYER, S. Fn. 3, p. 14.

<sup>19</sup> FIEDLER, L. Fn. 13, p. 16

<sup>20</sup> The notification No. 9/2006, which defines the current policy of the *Bundeskartellamt*, does not have the legal force of an act, but is binding for the authority; see MOBLEY, S. J. – DENTON, R. (eds.). *Global Leniency Manual 2010*. New York: Oxford University Press, 2010, p. 176.

<sup>21</sup> Activities report of the *Bundeskartellamt* 2001–2002, p. 22. See [http://www.bundeskartellamt.de/wEnglisch/download/pdf/03\\_TB\\_Kurz-E.pdf](http://www.bundeskartellamt.de/wEnglisch/download/pdf/03_TB_Kurz-E.pdf).

<sup>22</sup> Activities report of the *Bundeskartellamt* 2003–2004, p. 47. See [http://www.bundeskartellamt.de/wEnglisch/download/pdf/05\\_TB\\_Kurz\\_e.pdf](http://www.bundeskartellamt.de/wEnglisch/download/pdf/05_TB_Kurz_e.pdf).

Chart 1 (million EUR)<sup>23</sup>

Although there was a certain drop in the amount of imposed fines in 2002 (perhaps because the widespread inspections in the cement industry, which were conducted in that year, had results one year later), the trend is staggering. During the 5 years of this program's existence (red in the chart) fines in total of 821 million EUR were imposed, which means an average of 164.2 million EUR a year. In the five years before the implementation of this program a total of 308.9 million EUR had been imposed, which means 61.5 million EUR a year. If we take into account all the available data since 1993, we can see that the average fines did not exceed 46.1 million EUR a year.

However, the data can be somewhat misleading. Firstly we can raise the objection that a significant increase in imposed fines happened also before the implementation of the leniency program. We can speculate on the factors of this development, but probably it was a synergic effect of both an increased number of harmful activities and a more efficient system of monitoring. These influences were surely present between the years 2000–2004, too, and therefore the judgment on the program's usefulness and the organizational changes behind must be supported by other evidence.

One of them is that since the start of the program until May 2005 the *Bundeskartellamt* received more than 100 requests for leniency,<sup>24</sup> which could have been caused by the increased level of monitoring. Another significant fact is that between the years 2002–2004 the special department for combat against cartels performed inspections in 486 companies and 44 private objects within the framework of 26 procedures.<sup>25</sup>

<sup>23</sup> Taken from Activities report of the *Bundeskartellamt* 2007–2008, p. 19. See [http://www.bundeskartellamt.de/wEnglisch/download/pdf/TB\\_Kurzfassung\\_07-08-GB.pdf](http://www.bundeskartellamt.de/wEnglisch/download/pdf/TB_Kurzfassung_07-08-GB.pdf).

<sup>24</sup> Activities report of the *Bundeskartellamt* 2003–2004, p. 33.

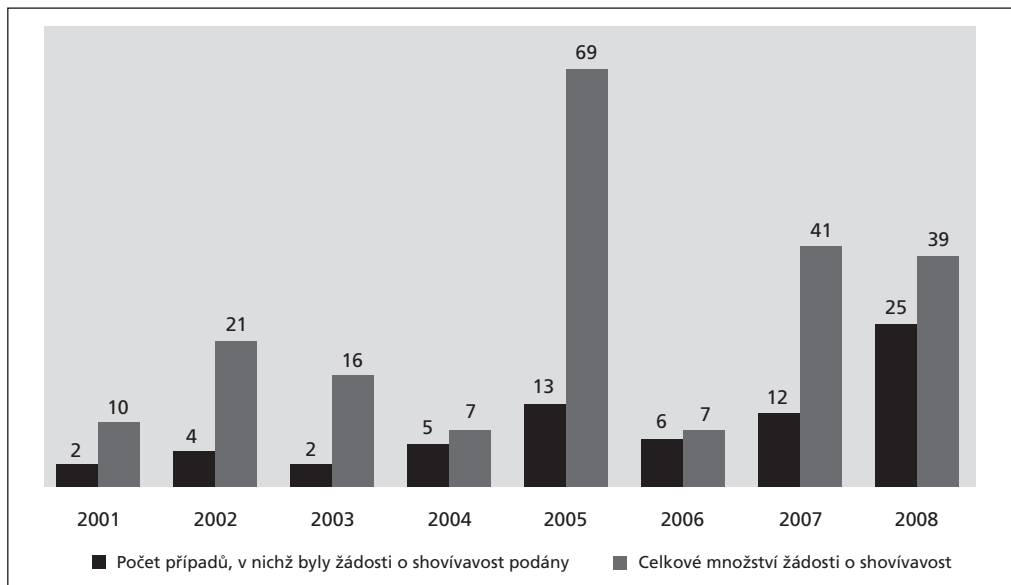
<sup>25</sup> See *Bundeskartellamt* activities report 2001–2002, p. 22; *Bundeskartellamt* activities report 2003–2004, p. 33.

The leniency program drew attention to anti-competition activities, but also brought a thorough reorganization of the *Bundeskartellamt* and perfection of its monitoring efficiency. All these changes evidently led to increased efficiency of discovering cartels and imposing relevant fines, regardless of the complementing trends in unfair competition. If we think about the German leniency program in its context consequently, we have to come to the conclusion that without its implementation a number of cases would not be solved, knowledge of which enables us to speak about an increased rate of unfair competition activity in the recent years. It is also possible to assert that these activities could have (and probably have) remained undiscovered prior to the implementation of the program, although they existed. Whereas deliberations about the trends in anti-competition activities are mere speculations, the results of the leniency program can be proved by precise statistical data. The conclusion, that this program significantly helped the public law enforcement of the cartel law in Germany, is fully justified.

### 3.2 Leniency program efficiency after the 7<sup>th</sup> amendment of the GWB (2005–2008)

The 7<sup>th</sup> amendment of the GWB came into force on 1<sup>st</sup> July 2005 and had no real impact on that year's statistical data: the amount of imposed fines of 163.9 was in line with the increasing trend of the previous years (see Chart 1). The leniency program was on top also as far as the amount of filed requests and the total number of cases, in which these requests had been filed, are concerned. If in 2003 there were 16 requests pointing out 2 cases of cartel law infringement, then two years later there were 69 requests pointing out 13 such cases (see Chart 2).

Chart 2<sup>26</sup>



<sup>26</sup> Taken from *Bundeskartellamt* activities report 2007–2008, p. 18.



The development in the following years was more remarkable. Both our charts show that in 2006 there was a huge drop regarding the results of the leniency program: fines in total of 4.5 million EUR were imposed and only 7 requests filed in 6 cases. The cause probably was that after the amendment of the GWB the cartelists were not certain about further functioning of the system and they apparently feared that – because of the legislative changes – they would risk an increased number of claims for damages enforced privately. However, the data from the following years show that this development, which would be lethal to a meaningful existence of the leniency program, did not continue. The number of investigated cartel cases doubled in the following two years and in 2008 reached a record level of 25 investigated cases (see Chart 2). The amount of imposed fines increased as well and after the drop in 2006 it increased sharply and in the years 2007–2008 exceeded the amount of 400 and 300 million EUR respectively. These results significantly exceed the long-term average of the years prior to the 7<sup>th</sup> amendment of the GWB, when the average amount of fines was ca. 164 million EUR per year.

### 3.4 Conclusion

It is evident that the legislative changes adopted in Germany in order to support the private law enforcement of the cartel law did not distort the balance between private law and public law enforcement as many feared it would. Unfortunately, there are no data on the amount, success rate and overall financial amount of the privately enforced claims based on cartel law infringement, but the reaction of cartels asking for leniency suggests that they are not burdened by the private enforcers to a great extent. According to the latest available information the interest in participation in the leniency program run by the *Bundeskartellamt* remains high, even increasingly intensive, which shows that the filing of requests for leniency is still financially advantageous even after all the attempts to facilitate the private law enforcement have been done. It is questionable if this would be the case also after the eventual implementation of collective or representative actions proposed by the Commission.

## 4. PRIVATE ENFORCEMENT OF CARTEL LAW AND LENIENCY IN THE CZECH REPUBLIC

### 4.1 Claim for damages caused by competition law infringement

#### 4.1.1 Legislation on private law enforcement de lege lata and its shortcomings

Compensation of damage caused by infringement on competition law is subject to the provisions included in Sections 373–386 of the Commercial Code, as can be found in the Sections 41, 42a and 757 of the Commercial Code.<sup>27</sup> The Commercial Code protects free development of competitive activities with the aim to reach economic success.<sup>28</sup> It further regulates the abuse of competition, which it calls unfair competition, whereas a special

<sup>27</sup> See NERUDA, R. Náhrada škody způsobené protisoutěžním jednáním jako způsob soukromého vymáhání antimonopolního práva. *Právní rozhledy*. 12/2005, p. 439.



Act No. 143/2001 Coll., on the Protection of Competition<sup>29</sup> deals with its illegal restrictions. This act, contrary to the previous Act No. 63/1991 Coll., on the Protection of Competition,<sup>30</sup> does not involve a special provision on liability for damages and therefore the Commercial Code is applied in relevant cases.<sup>31</sup> Commercial law thus views the claims for damages caused by horizontal cartels as any other damage incurred in commercial relations. Because of the specific nature of the cartel law the current state does not reflect neither the factual state connected with this form of anti-competition activity nor the interest in maximum facilitation of enforcement for the damaged parties.

Section 373 of the Commercial Code is based on the concept of objective (strict) liability for damages, i.e. does not require fault, with a limited option to exculpate postulated in Section 374.<sup>32</sup> It remains a question if this provision is suitable from the doctrinal and practical point of view, if we assume that the horizontal cartel can only be created intentionally or as result of a qualified (direct) intent. The current legal *status quo* enables sanctioning e.g. even of those members of a holding, who did not take part in the cartel agreement nor did they know about its existence, as confirmed by the Supreme Court of the Czech Republic.<sup>33</sup> Particularly interesting is the eventual connection with the criminal penalty of legal entities, as conceived in the Act No. 418/2011 Coll., on Criminal Liability of Legal Entities. According to this law, there is not an objective liability in this case, but a quasi-objective one, since a legal entity is held accountable for activities of selected natural persons, whose liability has to be ascertained with regard to fault.<sup>34</sup> In practice this would mean a different definition of cartel participant in criminal and commercial law (e.g. the above mentioned member of a holding would be designated as a cartelist from the commercial law point of view, but not as a cartelist from the criminal law point of view) and a significant weakening of the legitimacy and justice of the decisions. Therefore it was laid down that only natural persons can commit a crime against competition, although the abovementioned logical conflict could have been prevented by a special provision on liability for damages relating to cartel participants, e.g. within the law on the protection of competition. In the end, without any reason legal persons cannot be held accountable in terms of criminal law at all.

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<sup>28</sup> Section 41 of the Commercial Code: “*Individuals and legal entities taking part in economic competition (hereafter referred to as “competitors”), even though they are not entrepreneurs, have the right freely to develop their competitive activity in order to achieve economic benefits and to associate for the pursuit of such activity. However, they shall observe the legally binding provisions on economic competition and may not abuse their participation in such economic competition.*”

<sup>29</sup> Section 42 of the Commercial Code: “*(1) Abuse of participation in economic competition means unfair competitive conduct (hereafter referred to as “unfair competition”) and unpermitted restriction of economic competition. (2) Unpermitted restriction of economic competition is regulated by a particular Act.*”

<sup>30</sup> See NERUDA, R. Fn. 26, p. 438.

<sup>31</sup> Section 757 of the Commercial Code: “The provisions of Section 373 et seq. apply, as appropriate, to liability for damage caused by a breach of the obligations stipulated by this Code.”

<sup>32</sup> Other prerequisites are illegality, existence of damage and causality between those two. See ZOULÍK, F. Kolektivní ochrana kartelového práva v ČR. In: Luboš Tichý (et al.). *Soukromé vymáhání kartelového práva*. Praha: Centrum právní komparatistiky PF UK, 2009, pp. 117–118.

<sup>33</sup> RAUS, D., ORŠULOVÁ, A. Aktuální aplikační otazníky soukromoprávního prosazování dodržování veřejného soutěžního práva v České republice a na Slovensku. *Justičná revue*. 2009, No. 12, p. 1663.

<sup>34</sup> See constitutive elements of the crime of violating the rules of economic competition included in Section 248 of the Act No. 40/2009 Coll., Criminal Code.

Another problematic point of the current legal regulation is that the burden of evidence lies fully with the damaged party, including the proof of the amount of incurred damage, which significantly complicates the claim. Its procedural situation is facilitated only when proving the existence of the cartel itself, because according to the law the court must consider it to be proven, if the Office for the Protection of Competition (hereinafter only OPC) has decided so.<sup>35</sup> Because the status and resources of the cartels and individually aggrieved consumers are completely unequal, it should be considered to swap the burden of proof as in the case of unfair competition.<sup>36</sup> This measure would have a great sense in cases, where the injured party cannot base his action on the OPC decision, particularly if the Office does not know about this cartel and therefore cannot pass a decision on it. A significant number of anti-competition activities remain undiscovered and unpunished by the competition offices (*enforcement gap*).<sup>37</sup> In cases where the office decided negatively about the cartel's existence the evidence should be presented by the accusing party. Such a model would lead to a simpler and less time consuming enforcement of claims in cases, where according to the current legislation it is necessary for the injured parties to turn to the OPC with a request to investigate the alleged anti-competition activity, because they alone do not have such professional and financial means to prove the cartel's existence themselves.

#### 4.2 Legislative changes prepared in 2008

OPC is aware of the shortcomings of the legislation on private law enforcement of damages caused by the competition law infringement and in past years initiated legislative changes in the Act No. 143/2001 Coll., on the Protection of Competition. It proposed to include a new Section 24a, which was inspired by the legislation on unfair competition. It included a complex regulation with the goal to help private subjects to enforce their claims caused by competition rules infringement. To a person, whose rights had been violated or threatened by some form of anti-competition activities outside the unfair competition (i.e. forbidden agreement, abuse of dominant position or forbidden merger), this bill granted a whole range of instruments with which to strive for rehabilitation, may it be a cease and desist order, removal of detrimental situation, provision of adequate satisfaction or damage compensation or finally the disbursement of unjust enrichment. It also calculated with the swapping of the burden of proof in cases where the consumer is the injured party. The judicial protection of consumers should have included the legal entities protecting their interests, which would obtain the authorization to request a cease and desist order and the removal of detrimental situation. In the context of the Commission's White Book this would mean the implementation of the institution of representative actions into the Czech competition law.<sup>38</sup> Class actions are currently "*acceptable in the matters of unfair competition, consumer protection and some burdens of business companies*"<sup>39</sup>, but as in Germany they are not acceptable in matters of cartel law

<sup>35</sup> Based on Section 135 of the Code of Civil Procedure: "*Otherwise, the courts shall have discretion to examine all other issues that fall under the decision-making competence of other bodies. However, where the competent body has made a decision on an issue considered by the court, the court shall respect such decision.*"

<sup>36</sup> PAVLŮ, V. *Current Issues of Competition Law Enforcement*. Brno: PF MU (Diploma thesis), 2010, p. 24.

<sup>37</sup> NERUDA, R. Fm. 26, p. 437.

<sup>38</sup> See KREISELOVÁ, I. Soukromoprávní vymáhání opět, ale trochu jinak. *Informační list*. 2008, No. 4, Brno: OPC, pp. 4. Available at [www.compet.cz](http://www.compet.cz).

infringement. However their implementation would surely have to be accompanied by a thorough analysis of the situation in Sweden and Great Britain, where the implementation of this legal institution did not meet the original expectations.<sup>40</sup>

However the abovementioned changes were not implemented, because the proposed article had been excluded from the amendment of the Act on protection of economic competition in 2009 after a negative stance of the Government's Legislative Council.<sup>41</sup> By not accepting the modernizing proposals a chance had been squandered to bring the Czech competition law closer to modern trends and make the private enforcement of competition law its efficient and useful component. Surely this insufficiently accommodating legislation was one of the reasons why *"these cases appear very sporadically in the agendas of the Czech courts"*<sup>42</sup>.

## 5. FUNCTIONING OF THE LENIENCY PROGRAM IN THE CZECH REPUBLIC

### 5.1 Concept and efficiency of the first leniency program (2001–2007)

The first leniency program in the Czech Republic was implemented by the announcement of the OPC chairman and applied between July 2001 and June 2007. It was characterized by certain specifics, which made it a rather inefficient and unattractive tool for combatting horizontal agreements (so called hard core cartels): when lawful conditions were met, there was no claim for immunity, but the final decision was in the competence of the OPC and further it applied to the vertical agreements as well, which prevented the OPC from concentrating on more serious forms of competition rules violating activities. Further the program was not even discrete in a sufficient manner, because the access to the file reporting a cartel was subject to the Code of Administration Procedure,<sup>43</sup> which seriously threatened the status of the cooperating subject.

The result was that during the whole period of the first leniency program only 4 requests for immunity were filed, only one of them relating to horizontal agreements. Procedures for participation in vertical agreements ended only once in imposing a sanction, namely the case of ATEA EXPORT IMPORT, s.r.o. was fined 20 000 CZK.<sup>44</sup> The only request filed to the OPC relating to horizontal agreements involved 16 multinational engineering companies,<sup>45</sup> which divided the world market of the so called gas isolated switch assembly by

<sup>39</sup> ZOULÍK, F. Fn. 31, p. 119.

<sup>40</sup> In the UK it has been used in only one case (consumer association *Which?*, for which however the filing of the action wasn't lucrative in the end), in Sweden it hasn't been used at all. See BERNHARD, J. *Kartellrechtlicher Individualschutz durch Sammelklagen*. Tübingen: Mohr Siebeck, 2010, p. 329.

<sup>41</sup> Annual report of the OCP 2008, p. 7, available at: [http://www.compet.cz/fileadmin/user\\_upload/VZ\\_verejnost/Vyrocní\\_zpráva\\_2008.pdf](http://www.compet.cz/fileadmin/user_upload/VZ_verejnost/Vyrocní_zpráva_2008.pdf).

<sup>42</sup> ZOULÍK, F. Fn. 31, p. 117.

<sup>43</sup> Act No. 500/2004 Coll., Code of Administrative Procedure.

<sup>44</sup> File No. S 106/04. Available at [www.compet.cz](http://www.compet.cz).

<sup>45</sup> ALSTOM (Société Anonyme), AREVA T&D SA, AREVA T&D AG, AREVA T&D Holding SA, Fuji Electric Holdings Co., Ltd., Fuji Electric Systems Co., Ltd., Hitachi Ltd., Hitachi Europe Limited, Japan AE Power Systems Corporation, Mitsubishi Electric Corporation, Toshiba Corporation, Siemens AG, Siemens Aktiengesellschaft Österreich, VA Tech Transmission & Distribution GmbH & Co KEG, Siemens Transmissioin and Distribution Limited, Nuova Magrini Galileo S.p.A.

agreements from 1988. In 2006 the ABB Company admitted the cartel in connection to an investigation led by the Commission and presented relevant evidence. Therefore the OPC did not impose any sanctions on ABB and fined the other cartel members in the amount of 941 881 000 CZK.<sup>46</sup> It is an interesting fact that the fine included companies which were not active on the Czech market, which had been affected just indirectly.<sup>47</sup> It is necessary to add that not a single request for decreasing the fine or a collective request (the institution of collective request was not regulated within the program) had been filed within the program.

It is possible to state that the first leniency program did not gain much trust and was thus especially ineffective, as its only imposed sanction for participating in horizontal agreements was helped more by the investigative activity of the Commission than by its very existence. Its substitution on 2007 was therefore a highly legitimate and logical step.

## 5.2 The concept of the second leniency program (since 2007)

In June 2007 the announcement of the OPC chairman established a new leniency program,<sup>48</sup> which is still operational and additionally a new department has been created within the OPC specializing exclusively on investigation and uncovering of cartel agreements.<sup>49</sup> The program was based on the model leniency program of the so called European Competition Network (ECN Model Leniency Program) and the European Commission leniency program, and was also inspired by the so called game theory. It brought fundamental conceptual changes into the investigation of cartel agreements and it is necessary to point out that although it is an attempt to get closer to the Commission's model program, it is not a copy of it and differs in several important points:

- Partial or complete immunity cannot be granted to an applicant who initialized the cartel agreement, forced others to participate or remain in the cartel or had a leadership position in the cartel.
- The applicant must end his participation in the cartel immediately after submitting the application.
- The application can be submitted orally as well.<sup>50</sup>

If some requirements for candidate's successful qualification to participate in the procedure appear to be stricter than in the Commission's model program, then in comparison with its predecessor it is clear that these changes are principal and should help to make the participation in the program significantly more attractive. It is necessary to mention especially the following:

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<sup>46</sup> File No. S 222/06 or R 059-070, 075-078/2007. Available at: [www.compet.cz](http://www.compet.cz). The companies have been defending themselves against this decision before the courts (leaning upon the *ne bis in idem* principle), but the proceedings have not been finished yet.

<sup>47</sup> OPC Annual report 2007, p. 7, available at: [http://www.compet.cz/fileadmin/user\\_upload/VZ\\_verejnost/Vyrocn\\_i\\_zprava\\_2007.pdf](http://www.compet.cz/fileadmin/user_upload/VZ_verejnost/Vyrocn_i_zprava_2007.pdf).

<sup>48</sup> Available at [http://www.compet.cz/fileadmin/user\\_upload/Legislativa/HS/SoftLaw/Leniency\\_program.pdf](http://www.compet.cz/fileadmin/user_upload/Legislativa/HS/SoftLaw/Leniency_program.pdf).

<sup>49</sup> OPC Annual report 2008, p. 9.

<sup>50</sup> POSPÍŠIL, I. Leniency Programme. Presentation at the St. Martin's Conference (Brno, 12<sup>th</sup> November 2009). Available at: [http://www.compet.cz/fileadmin/user\\_upload/Konference\\_a\\_seminare/SvMartin/Prezentace/Pospisil\\_Leniency.ppt](http://www.compet.cz/fileadmin/user_upload/Konference_a_seminare/SvMartin/Prezentace/Pospisil_Leniency.ppt). Differences between the national leniency programs and the EC model program available at: [http://ec.europa.eu/competition/ecn/model\\_leniency\\_programme.pdf](http://ec.europa.eu/competition/ecn/model_leniency_programme.pdf).

- The program doesn't apply on vertical agreements.
- There is a legal claim for immunity or decrease of the fine if the set conditions are met.
- Leniency I and II are still being differentiated drawing a line between the cooperating subjects, who can receive full immunity, and those, who can receive only a partial one. Within the group I there are now two categories A and B, depending on whether the information is sufficient to perform an unannounced investigation (A) or if it is sufficient to prove the existence of a cartel (B). As for the order in which the leniency applicants are considered the IA mode has priority over IB. Leniency II is connected to providing information with significant added value. Full immunity can be granted only to the first applicant.
- The program also strictly defines conditions that must be met by the applicant. Indispensable are full cooperation with OPC during the whole procedure and maintaining confidentiality about the submission of the application. As was mentioned above, an applicant cannot be successful if he initialized the cartel agreement, forced others to participate or remain in the cartel or had a leadership position in the cartel.
- If the applicant wants to participate in the program but does not have all the necessary materials at the moment, he can newly reserve a place through the grant of the so called marker.
- The manner of informing the participating subjects about the processing of their applications has also been changed. The OPC issues a confirmation of the application receipt including date and time of the receipt and then it preliminarily assesses the application in terms of conditions of its success.
- For submissions related to international cartels the so called summary application for the IA category was institutionalized. This enables the submission of an application to the European Commission within the ECN, whereas the national competition offices can be informed about it.<sup>51</sup>

However not even the operation of the second leniency program got by without criticism.<sup>52</sup> This crystalized into two particular complaints: the application of the Code of Administrative Procedure on the access to the OPC file makes it impossible to maintain the identity of cooperating subjects and leniency has no support in the legal system. The first problem was solved on 1<sup>st</sup> September 2009 when instead of the Code of Administrative Procedure the access to the file begun to be subject to a special provision § 21c of the Act No. 143/2001 Coll., on the Protection of Competition. Documents in the file, which contained trade secrets, were originally virtually inaccessible. The only exception was the situation when these were used as evidence. According to the Section 21c the protection of the business secret is now without exceptions. Relating the leniency applications the OPC then uses an approach according to which this is considered a business secret throughout the whole procedure. Documents included in the application are made available to the parties after the formal beginning of the procedure according to the Code of Administrative Procedure. The file must nevertheless include also documents, which are not desig-

<sup>51</sup> PETR, M. Hlavní změny v novém leniency programu. *Informační list*. Brno: OPC, 2007, No. 3, pp. 6–8. Available at [www.compet.cz](http://www.compet.cz).

<sup>52</sup> GLATZOVÁ, V. Kládivo na kartely: omilostnění. *Euro*. 2009, No. 28, pp. 60–61.

nated as a business secret.<sup>53</sup> The current OPC policy thus enables the identity of the applicant to be protected during the whole time, which makes it impossible for the other cartel participants to coordinate their strategy at the expense of the applicant. At the same time the OPC enables to put pressure on the procedure participants so that the business secret mode will not be abused to make unavailable data, which do not require such a level of protection.

### 5.3 Efficiency of the second leniency program

So far, thanks to all the changes described above the success of the second leniency program has been much greater than that of its predecessor. A more ingenious protection of the leniency applicant and a greater sophistication of the whole program enriched with a number of modern institutions, which make it more attractive, bore its fruit. This is evidenced by the statistical data: by 15<sup>th</sup> July 2011 there were 9 applications for immunity (type I), 2 applications for decrease of fine (type II) and 6 summary applications where the main application was submitted to the European Commission. However, only with 3 of the 9 type I applications the administration procedure was successfully started and ended by an effective decision (1 application did not meet the program requirements and with 5 applications the administration procedure has not been started).

The first ever case where an effective decision had been issued within the second leniency program was a TV screens cartel.<sup>54</sup> Type I application had been submitted by the Samsung group, type II application by Chungwa group. The procedure started in 2009 and ended on 19<sup>th</sup> November 2010 by a decision of the OPC chairman in the second grade after the submission of objections, where actions had been filed at the administration court against the effective and executable decision. The fines amounted to a total of 51 787 000 CZK.<sup>55</sup>

In the case of the last effectively decided cartel on the market of washing powder<sup>56</sup> a type I application was submitted by the Henkel group and a type II application by the Procter & Gamble group. The procedure, which begun in 2008, effectively ended on 2<sup>nd</sup> March 2011 with the participants using the so called procedure of accord and satisfaction to not file objections and pay fine: this amounted a total of 29 274 000 CZK for all cartel participants.<sup>57</sup>

As for the cartel on the hair color market,<sup>58</sup> only a type I application was submitted. The procedure began in 2008 and legitimately ended in February 2011 with the result that no competition law infringement had been proven.

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<sup>53</sup> POSPÍŠIL, I. Fn. 50.

<sup>54</sup> File No. S 13/09, resp. R 131,132,133,134,135,136/2010. Available at [www.compet.cz](http://www.compet.cz).

<sup>55</sup> The fine of the Samsung group was remitted. Chunghwa Picture Tubes Ltd. Received a 50% decrease (6 400 000 CZK) and other cartel members were fined in the full amount: Technicolor S.A. 13 858 000,- CZK; Panasonic Corporation 10 373 000,- CZK; MT Picture Display Co., Ltd. 9 430 000,- CZK nad Toshiba Corporation 11 726 000,- CZK.

<sup>56</sup> File No. S 169/08. Available at [www.compet.cz](http://www.compet.cz).

<sup>57</sup> The fine of the Henkel group was remitted, Procter & Gamble group received a 50% decrease (23 778 000 CZK) and the last participant Reckitt Benckiser was fined in the amount of 5 496 000 CZK (both fined participants received a 20% decrease of the fine within the accord and satisfaction procedure).

<sup>58</sup> File No. S 170/08. Available at [www.compet.cz](http://www.compet.cz).



It is possible to judge from the given examples that the new leniency program started to have a practical effect with a certain delay, mainly because of the difficulty and time demands of the cartel cases. Nevertheless, the partial data for 2011 indicate that it really begins to produce positive results. In comparison to its predecessor the current program can be considered very effective as 50% of all successfully uncovered cartels are related to its use. By issuing 1–2 sanction decisions in cartel matters a year the Czech Republic belongs to the average compared to other smaller EU Member States.

#### 5.4. Recent changes

Last year the legislator finally incorporated the prevalent part of the leniency program into the law.<sup>59</sup> In doing so, it has also removed the possibility of criminal prosecution of natural legal persons<sup>60</sup>, once they apply for the leniency program and meet certain criteria. It brings extra motivation for competitors to participate, since besides the economic benefits they can also protect themselves from possible criminal prosecution.

The regulation of the access to the file has also been amended. Newly the application is kept outside the file until the other competitors raise their objections, so that the investigation of a cartel cannot be thwarted by means of destroying the evidence.<sup>61</sup> Moreover, even after only participants of the procedure can see the documents. This is in line with the judgment in case *Pfleiderer*, which states that people claiming damages are entitled to reach all documents related to a leniency procedure, but the exact conditions have to be set by the Member States.<sup>62</sup> In the Czech Republic it means that only a court can make the decision that the documents shall be revealed, if it is necessary in procedural terms. In Germany the claimant has a little bit stronger position, as he can substantiate his request for information on the basis of the *bona fide* principle (Section 242 BGB). In this sense neither the Czech Republic nor Germany can live up to the standards of Great Britain, where the discovery rule applies forcing both parties to reveal all relevant documentation.<sup>63</sup>

## 6. CONCLUSIONS

The comparison of legislation on private enforcement of cartel law and leniency programs in the Czech Republic and Germany provides some facts, which are common to both countries and if summarized they have a significant relevance in relation to the hypothesis formulated at the beginning:

- Private enforcement of cartel law is insufficiently developed in both countries.
- Public enforcement of cartel law works well in both countries, especially due to the reforms of relevant leniency programs performed in recent years.
- In neither country no major steps have been taken to facilitate the private enforcement of cartel law in accordance with the demands of the European Commission.

<sup>59</sup> Act No. 360/2012 Coll., on the Amendment to the Act on the Protection of Competition No. 143/2001 Coll.

<sup>60</sup> Under the law a legal person is not eligible to perpetrate a crime against competition.

<sup>61</sup> See Explanatory report to the Act No. 360/2012 Coll., points 13 and 14.

<sup>62</sup> Judgment of the ECJ (Grand Chamber) of 14 June 2011, *Pfleiderer AG vs. Bundeskartellamt*.

<sup>63</sup> SCHREIBER, T. Praxisbericht Private Durchsetzung von kartellrechtlichen Schadensersatzansprüchen. *KSzW* 2011, No. 1, p. 41.



In my opinion the fears, that the implementation of modern legal institutions to facilitate private enforcement would damage the well-functioning system of public enforcement, are unfounded. Private enforcement of cartel law currently does not present even a useful complement for the public enforcement, let alone a threat. For example in countries, which incorporated class actions into their legal systems (the above mentioned representative actions in Sweden and the UK), these were neither used frequently nor did the system of public enforcement collapse. They represent a rarely used and still developing tool for the injured parties to protect their economic interests. It is necessary to stress that no negative externalities have been detected even in Germany, where the injured parties proceed much more aggressively in protecting their interests, although with the absence of modern legal institutions this happens in a relatively complicated way with the use of the classical procedural (e.g. integration) and substantive law (cession of claims) forms. On the contrary, the leniency program in Germany has better results than ever before.

How is it possible that the leniency programs fulfill their function even with the strengthening of the role of private enforcement? On one hand both pillars of the cartel law protection fulfill a preventive and a repressive function, on the other this happens in different ratios and by pursuing different goals. The primary goal of the private enforcement is to rehabilitate the injured subjects; primary goal of the public enforcement is to punish the infringement on competition regulations. The result of the application of both mechanisms is of course the economic loss for the law breakers, but the current practice, where the private enforcement of damages caused by cartel law infringement does not actually happen, remains highly profitable for the cartel participants. Eventual financial losses from public sanctions can be incorporated as “costs” into their unjust profit plans and because of the level of the fines the infringement remains economically rational, which is currently one of the important aspects that make the leniency programs more and more popular. Even with the implementation of legal institutions enabling an easier enforcement of damages (representative actions, opt-out or opt-in class actions, profit skimming), according to the experience of the other countries, the establishment of cartels will not cease to be profitable. Not all cartels are uncovered and private enforcement would impact the positive calculation of cartel costs only exceptionally. However, a significant change would happen in the political-legal sphere: there would be a balance between the purposes which the private and public enforcement represent, i.e. punishment of the cartel participants and the rehabilitation of the injured parties. Both these purposes are equally legitimate and their achievement deserves equal level of support also in the sphere of availability of legal instruments, which are used for their enforcement.

In addition to this, if a level would be reached, when the private enforcement would begin to cause the cartelists such an economic damage that it would cause a decrease in the number of established and consequently uncovered cartels, it would prove that the public law repression in combination with the threat of liability to compensate the private injured parties fulfills its basic function, i.e. to reduce the number of cartels. It is not important in what ratio the private and public law mechanisms contribute to the reduction of cartels, but whether the reduction would happen or not. Therefore, if we measure the efficiency of leniency programs only with the number of uncovered cartels, it is a bad basis, because the increase in uncovered cases does not mean that the number of cartels is actually decreasing, but only that their investigation becomes more successful. In the same

way it is necessary to seriously ponder whether the number of cartels is really decreasing as a result of anti-cartel measures including the leniency program. The deterrent effect of the current legislation can be doubted, because from the economic point of view it is very favorable for the cartel participants.

The hypothesis formulated in the introduction are therefore disproved: the support of private enforcement of cartel law does not present any danger to leniency programs and the implementation of legal institutions, which would emphasize the role of private enforcement of cartel law, is desirable. It would strengthen the deterrent effect of the cartel law enforcement system as a whole, although it would mean a decrease in the number of uncovered cartels. Anyhow, this decrease could not be viewed as a failure or inefficiency of the system of public enforcement, but as a proof of the direct opposite. It is no longer a question whether to facilitate private enforcement, but by what means this should be achieved and how it should be adapted to the legal environment of the Czech Republic.