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The Leniency Programme in Estonia — Illusion or Reality?

1. Background on the fight against cartels in the EU and Estonia

The fight against cartels has been a long-term top priority for the European Commission (hereinafter ‘Commission’). The reason for this is pragmatic: an arrangement between undertakings at the same level in the same market concerning division of the market, price fixing, etc. — known as a cartel — is most damaging to competition and deals the heaviest blow to the consumer, one way or another. Since 1996, the Commission ‘involved’ cartel members themselves in the anti-cartel fight¹ — it formalised the idea of giving undertakings that were ‘coming out’ a chance of immunity or favourable treatment if they betrayed other cartel members. The initiative was called a ‘leniency programme’, and the immunity and favourable treatment were granted on the ‘first come, first served’ principle. A renewed legal framework for the leniency programme was adopted with great expectations in 2002: the Commission notice on the non-imposition or reduction of fines in cartel cases.² It seems now that these expectations have been or are being fulfilled.

According to the Commission, after the adoption of the renewed leniency notice, applications for immunity or favourable treatment became the main trigger for instituting the Commission’s procedures against the most severe violations of EU competition rules.³ Reliable and unambiguous statistics that could confirm this argument are lacking, as the Commission itself is not prone to delivering exact statistics to the wider public.⁴ However, one cannot deny the fact that a large number of applications for favourable treatment have been submitted under the 2002 leniency programme. For example, the 2003 Competition Policy

¹ Commission notice on the non-imposition or reduction of fines in cartel cases. — OJ 1996/C No. 297, p. 4.

² Commission notice on immunity from fines and reduction of fines in cartel cases. — OJ 2002/C No. 45, p. 3 (hereinafter also ‘leniency notice’).

³ E. Paulis, E. De Smijter. Enhanced enforcement of the EC competition rules since 1 May 2004 by the Commission and the national competition authorities. The Commission’s view.

⁴ For example, neither the Web site of the European Commission nor the 2004 Competition Policy Report contains information on the number and success of leniency applications.

Report⁵ declares: ‘Since the entry into force of the new leniency notice in February 2002, the Commission has received 34 applications for immunity, concerning at least 30 individual alleged breaches’. Secondly, from 2001 to 2003 the Commission issued an average of eight cartel decisions a year, which is enormous growth from the previous 30 years’ average of 1.5 decisions a year.⁶ The comparison suggests that most cartel cases that have reached a penalty decision were initiated under the leniency programme.

Presumably inspired by the Commission’s success in uncovering cartels via the leniency procedure, leniency procedures are now in place in the domestic legislation of 18 EU member states.⁷ Domestic leniency procedures have yielded good results in, among the EU member states⁸, the Netherlands and, among other countries, Australia.⁹

A leniency programme has also been formally implemented in the Republic of Estonia, as affirmed by the Competition Board. The Competition Board casts light on the target group of the Estonian leniency programme as regards its legal bases as follows: ‘The leniency programme in Estonia arises from § 205 of the Code of Criminal Procedure (hereinafter ‘CCrP’), which provides for the termination of criminal proceedings in connection with assistance received from a person upon ascertaining facts relating to the subject of proof.’¹⁰ By all presumptions, leniency applications should also be submitted in Estonia and a larger number of cartels identified than earlier.

But what is the real situation? It seems to meet expectations where the number of cases initiated and growth in the number of cases are concerned. In 2004, the Competition Board undertook proceedings in seven cases the object of which was an alleged horizontal agreement, decision, or co-ordinated activity between undertakings — i.e., a cartel.¹¹ One year earlier, in 2003, one proceeding was commenced on grounds of horizontal co-operation.¹² One year further back, in 2002, also, one proceeding was instituted on grounds of suspected cartel agreement.¹³ Thus, in 2004 when § 205 of the new CCrP entered into force (01.07.2004), the number of proceedings in cartel cases indeed increased, but there is no indication that they were based on leniency applications.

To the contrary, the authors have information that in the last few years’ operation of the Competition Board, proceedings addressing situations with the elements of a cartel agreement have been initiated in only one case that deserved public attention; subject to the proceedings were local tare purchasers. In other words, the current practice in the Republic of Estonia does not confirm that the leniency programme has yielded any notable results in the fight against cartels — i.e., led to the discovery of a greater number of cartels, as in many other countries utilising leniency procedures. It is also possible that there are no cartels in Estonia.

It is known that identifying cartels is a complicated task because of their highly secret nature, usually based on oral agreements, regardless of the quality of substantive or procedural law. By introducing leniency procedures, the European Union admitted its failure — as it sought help from the cartel members — while also launching a counterattack. The extensive reform of the leniency procedure to increase its legal certainty, reliability, and transparency just six years after the initial introduction of the leniency procedure shows that the Commission believes in the success of the counterattack, shadowed by an admission to failure, and work is constantly being done to improve the quality of the counterattack, even in a direction that reduces the Commission’s discretion. If we believe that cartels do exist in Estonia, we should consider how to make better use of the nation’s leniency programme.

The purpose of this article is to identify the main pluses and minuses of the Estonian leniency procedure (allegedly grounded on CCrP § 205) in comparison with the EU leniency procedure. An attempt is made also to indicate whether we are dealing with a correctable mistake in the existing framework or a conceptual problem that has its own prerequisites.

⁵ XXIIIrd Report on Competition Policy. Brussels, Luxembourg 2004, p. 24.

⁶ J.M. Joshua, P.D. Camesasca. Where angels fear to tread: the Commission’s ‘new’ leniency policy revisited. *Global Competition Review*. Available at: <http://www.globalcompetitionreview.com/ear/cartels.cfm>.

⁷ Authorities in EU Member States which operate a leniency programme. Available at: http://www.europa.eu.int/comm/competition/anti-trust/legislation/authorities_with_leniency_programme.pdf.

⁸ In the building industry sector in the Netherlands, more than 400 applications for the leniency procedure had been submitted as of June 2004; allegedly, this covered about one third of building sector undertakings (source: report by Attorney-at-Law Martijn Snoep of the Dutch law office De Brauw Blackstone Westbroek at the Competition Law Forum in Brussels, 24–25 June 2004).

⁹ In Australia, 14 applications for immunity or favourable treatment were submitted over two years (source: report by Attorney-at-Law Peter Armitage of the Australian law office Blake Dawson Waldron at the Competition Law Forum in Brussels, 9–10 June 2005).

¹⁰ Annual Report of the Competition Board for 2004. Competition Board. Available at: <http://www.konkurentsiamet.ee>, p. 17 (in Estonian and English).

¹¹ Annual Report of the Competition Board for 2004 (Note 10), pp. 7–8.

¹² Annual Report of the Competition Board for 2003. Competition Board. Available at: <http://www.konkurentsiamet.ee>, p. 7 (in Estonian and English).

¹³ Annual Report of the Competition Board for 2002. Competition Board. Available at: <http://www.konkurentsiamet.ee>, p. 8 (in Estonian and English).

2. Essence and implementation principles of the Estonian leniency programme (CCrP § 205)

As mentioned above, the Competition Board — the domestic competition supervision authority and the conductor of potential leniency procedures but not the authority deciding on the application of the procedure — has taken the view that the Estonian leniency procedure arises from CCrP § 205.

According to this provision, the **Public Prosecutor's Office may terminate criminal proceedings** with regard to a natural or legal person suspected or accused:

- (a) if the suspect or accused has significantly facilitated the ascertaining of facts relating to a subject of proof of a criminal offence that is important from the point of view of public interest in the proceedings and
- (b) if without the assistance, detection of the criminal offence and collection of evidence would have been precluded or especially complicated,

whereas the Public Prosecutor's Office may resume proceedings:

- (c) if the person has discontinued facilitating the ascertaining of facts relating to a subject of proof or
- (d) if the person has intentionally committed a new criminal offence within three years after termination of the proceedings.

It is true that the regulation of § 205 itself does not give any reason that these grounds for the termination of proceedings should not be applied to cartel cases for preferential treatment similarly to the leniency procedure. Moreover, since the termination of criminal proceedings ends the possibility of punishing a person, § 205 provides for even more favourable treatment in certain cases than the 'original' leniency notice of the Commission does.

Nevertheless, lenient treatment under the regulation of § 205 requires that several prerequisites be met that are not necessary for attaining the goal of lenient treatment, and that the procedure and its consequences be derived by interpretation that renders the leniency programme unattractive for undertakings.

2.1. Can an undertaking check its eligibility for leniency before, during, or at the end of the procedure?

The EU leniency procedure is structured so that cartel members can check their eligibility for leniency before the procedure — i.e., in a legally regulated and formal preliminary procedure (for the purposes of the Estonian legal order, before the criminal proceedings) — by supplying the Commission with the hypothetical abstract circumstances of the violation and the related evidence (indicating the nature and content of the evidence). This is 'situation A'¹⁴, where the violation-related procedure has not yet commenced and the Commission's goal is to collect sufficient source information and evidence for the procedure and to carry out a 'dawn raid' — a procedure for collecting actual evidence at the place of operation of the cartel members. In situation A, the undertaking files a leniency application, usually anonymously via a solicitor. The Commission informs the undertaking in writing of its eligibility for leniency, after which the undertaking can decide whether or not to submit the actual evidence to the Commission and apply for (preliminary) conditional protection.

In Estonia, situation A does not fall within the spectrum of the leniency procedure. As CCrP § 205 lays down the grounds for termination of criminal proceedings, it may be applied only if criminal proceedings have already been commenced. Moreover, since CCrP § 205 allows for terminating criminal proceedings with respect to a specific person, lenient treatment can be applied via this provision with respect to a specific person being the subject of favourable treatment. So, for the ability to decide as to the application of the leniency procedure, including eligibility for leniency, certain preconditions have to be met; i.e., pre-trial criminal proceedings have to be instituted against the person.¹⁵

Although the application of CCrP § 205 is essentially similar to the end of the first stage of the EU leniency procedure, or granting of conditional protection by the Commission, the wording of CCrP § 205 implies that eligibility for leniency is decided **after** co-operation has commenced — criminal proceedings may be termi-

¹⁴ Point 8 (a) of the leniency notice: 'the undertaking is the first to submit evidence which in the Commission's view may enable it to adopt a decision to carry out an investigation [...] in connection with an alleged cartel affecting the Community' (situation A). Situation B means that: 'the undertaking is the first to submit evidence which in the Commission's view may enable it to find an infringement of Article 81 EC in connection with an alleged cartel affecting the Community.'

¹⁵ Leaving aside the almost always available possibility of informal preliminary discussion outside criminal proceedings.

nated with respect to a person who ‘has sufficiently facilitated [...]’. The Estonian leniency procedure lacks the stage of determining the person’s eligibility for leniency (checking of prerequisites); it is merged with the stage of providing evidence, or the co-operation stage.

Initiation of criminal proceedings has two risks that could be regarded as negative side effects for a rational undertaking. Firstly, the public could become aware of the proceedings and the suspected cartel agreement. In view of the requirements of CCRP § 6 and public pressure, it is difficult to imagine that the Competition Board would waive further proceedings also with respect to the undertaking itself — i.e., the applicant. Secondly, the information collected in the course of criminal proceedings that the Competition Board is obliged to conduct might at some point acquire such quality and quantity that the information disclosed by the undertaking becomes irrelevant to the final result of the proceedings. The undertaking places itself at the mercy of the values of the person conducting the proceedings, which is a further risk because the immediate proceedings are conducted by the Competition Board while the Public Prosecutor’s Office decides on the application of CCRP § 205.

In contrast to those being dealt with under the Commission’s leniency programme, which offers the possibility to contribute to the detection of a cartel without immediate risk, Estonian cartel members face a risk in any case — whether they report or not.

One gets the impression that the goal of CCRP § 205 has never been to reveal the circumstances of the act that is the object of the crime — the motive for the criminal proceedings (i.e., realisation of situation A) — but to establish the fact of a crime that is the subject of criminal proceedings (in which there are several suspects or one chain of events has caused the suspected commission of many crimes) instituted and conducted on the basis of facts already known.*¹⁶ It is not allowed under CCRP § 205 for anyone to attain any considerable certainty or position favourable to that of others **before** criminal proceedings.

Of course, another approach could be taken to the issue. We can imagine that the anonymous application of CCRP § 205 could be developed in Estonia — by extraprocedural oral explanatory work with the Competition Board and the Public Prosecutor’s Office. Such explanatory work needs to be done in both institutions, because, as already mentioned, it is the Public Prosecutor’s Office that has been granted the possibility of applying leniency procedure in Estonia, which is why the Competition Board, which essentially conducts the proceedings in the matter, cannot give any factual guarantees of the leniency procedure applying in any given case. However, such extraprocedural co-operation would lack all those qualities and incentives of the leniency procedure that should motivate an undertaking to disclose a cartel — legal certainty; transparency; and predictability, including the objectively expressed commitment of the body conducting the proceedings.

While in the EU leniency procedure, after identifying the essential eligibility for leniency on the basis of hypothetical information and before the hypothetically described evidence is presented, the Commission gives the applicant written confirmation that the type and content of the evidence hypothetically described by the undertaking allow for fulfilling or do fulfil the conditions for granting immunity, **no prior or even conditional preliminary decisions concerning essential eligibility for leniency are provided for in the case of application of CCRP § 205**. The application of CCRP § 205 includes many preconditions based on subjective assessments (the relevance of facilitation, preclusion of the detection of the crime without co-operation, etc.), so that the undertaking cannot obtain any reasonable legal protection before it has irrevocably ‘turned itself in’. Adequately formalised legal protection (e.g., a written statement of eligibility for leniency by the Competition Board) should contain maximally clear procedures and steps that should be taken for the termination of the proceedings under CCRP § 205, and which could also be reversed against the body conducting the proceedings if the leniency procedure turns out to be just a feint by the state.

In summary, the essential need (facilitating the detection of crime) and the reciprocity (avoidance of sanction) are overlapping in the Estonian and EU leniency procedures, but the sequence of ‘coming out’ and the risks thereby assumed are completely different. While the EU leniency procedure allows a person to check his eligibility for leniency in a legally regulated procedure where the interim results are fixed, the Estonian leniency programme does not provide for anything of the kind, at least not on the level of written law. It is quite clear that this is a fundamental problem. **The Estonian leniency procedure focuses on a choice of ‘guilty’ or ‘not guilty’, not on the detection of cartels (situation A).**

2.2. Immunity, reduction of fines, or both?

As stated above, a person may be eligible for immunity or the reduction of fines in the EU leniency procedure. The favourable treatment of undertakings is differentiated based on the time at which the application is made and the quality and relevance to the charging procedure of the person’s co-operation, whereas the

¹⁶ However, the explanatory memorandum to the draft act by which CCRP § 205 was passed indicates that the ‘predecessors’, in a certain sense, of CCRP § 205 — namely §§ 164 (3), 164¹ (3), and 165 (3) of the Criminal Code — attempted to initiate reporting through creating an air of distrust. The content and effect of these provisions are discussed in several further connections in the present article.

conditions are known in advance by all, including other potential applicants. Although utterly cynical, such differentiation of potential favourable treatment is an essential part of the concept of the leniency programme — it causes competition for immunity among the cartel members in an atmosphere of mutual distrust and uncertainty. Only the one who files a leniency application first and meets all the other conditions is entitled to immunity — competition is the driving force.

If we presume that it is CCRP § 205 that serves as the legal basis and source for the Estonian leniency procedure, we may conclude that **lenient treatment in cartel matters in Estonia consists solely of the termination of proceedings** — i.e., **granting immunity** to the undertaking under suspicion or accused, or to a member of its directing body.¹⁷ If the person turns out to be eligible for leniency and meets the condition of unconditional co-operation, the proceedings are terminated as regards the person in question.¹⁸ So there is no question in Estonia about alleviating potential punishment under the leniency procedure and when its preconditions are met.

It may seem at first glance that the Estonian leniency programme allows for broader protection of the co-operating cartel members than the EU leniency procedure does. This is essentially true, but it has almost no effect in terms of achieving the main goal of lenient treatment — reporting on cartels. The reasons for that are given below.

2.3. Are competition and timing relevant to favourable treatment?

Neither CCRP § 205 nor any other legal act provides for the dependence of immunity or the possibility of obtaining it on first confessing and beginning co-operation, or any other condition that could be practically met by only one member of a cartel. Therefore, the **Estonian leniency programme theoretically allows for the immunity of not only one but two or more undertakings that meet the conditions set out in CCRP § 205**. Reporting on a cartel (which the first submission of an application essentially means) does not give the reporting cartel member any objective or irrefutable advantage over the other cartel members — **the sequence (timing) of applying for the application of CCRP § 205 has no objective meaning in the Estonian leniency procedure in terms of the possibility or content of favourable treatment**.¹⁹ The implication for the undertaking is that the body conducting the proceedings may choose on legal grounds to which person immunity is to be granted. We demonstrated above that commencing co-operation entails risk for an undertaking. The fact that one undertaking has taken the risk has no meaning under the law. It certainly does not make the law more efficient.

On the contrary, considering the regulation of CCRP § 205, we would find it reasonable to instead (a) monitor the activities of the Competition Board; (b) be prepared to make a co-operation proposal if there is risk of criminal proceedings (e.g., if administrative proceedings are commenced); (c) let the Competition Board show its cards in the course of the proceedings, at least in part; and (d) address the Competition Board and the Public Prosecutor's Office to identify the possibilities of applying CCRP § 205 if evidence is revealed that allows for detecting a violation or may lead to other evidence allowing for the same. The non-existence (abolishment) of timing as a major qualitative condition deserves attention also because the regulation of §§ 164 (3), 164¹ (3), and 165 (3) of the Soviet Criminal Code²⁰, whose example CCRP § 205 followed, allowed for the favourable treatment of the person who stepped forth first; the whole concept of favourable treatment was actually built on that.

2.4. The possibility of annulment of immunity, and the grounds for this

Similarly to the leniency procedure conducted by the Commission, the Public Prosecutor's Office may resume the proceedings on its own initiative or at the request of, e.g., the Competition Board. The first case involves an Estonian analogue of grounds existing in the EU leniency procedure: an undertaking that was initially granted favourable treatment (conditional protection) stops facilitating the ascertainment of facts relating to

¹⁷ Although (a) § 57 (1) 3) of the Penal Code enables the courts to take account of such mitigating circumstances as appearance for voluntary confession or active assistance in detection of the offence, and (b) § 56 (1) of the Penal Code allows for taking into account the type of intent or negligence involved in commission of the offence and mitigating the person's punishment depending on the level of guilt, such grounds are, presumably, provided for in the penal law of all EU member states. Yet this is not considered part of the leniency procedure anywhere. It is part of general penal law.

¹⁸ Note that CCRP § 205 can be applied without the condition of precluding its application to the undertaking that solicited other undertakings to participate in the offence — immunity is thus available to all participants.

¹⁹ Let us disregard the fact that sincere confession is a generally recognised mitigating circumstance in criminal law.

²⁰ Criminal Code (RT I 1992, 20, 287; 2001, 65, 378; in Estonian), invalid since 01.09.2002.

a subject of proof of a criminal offence. This basis for resumption of proceedings should also, within the meaning of CCRP § 205, cover both express waiver of facilitation and apparently insufficient facilitation.

At the same time, proceedings terminated under CCRP § 205 may also be resumed on grounds of any other **intentional criminal offence by the immune person within three years after the termination of the proceedings**. In the context of the leniency procedure as a special procedure concerning only violations of competition law, this basis for resumption of proceedings is obviously too broad. It is not even limited to criminal offences that could be categorised as competition offences.²¹ Without it being limited to competition offences, an undertaking may find itself in a situation where it is deprived of immunity in respect of a competition matter because of, e.g., an environmental offence. This is not necessary or reasonable in the context of the leniency procedure. We may discuss whether the Competition Board or the Public Prosecutor's Office would in fact actualise the possibility of resuming proceedings, but this could not help but be an overly theoretical discussion, given the unambiguous text of the law.

The possibility of annulling immunity has a negative impact on the possibilities for applying the leniency procedure, particularly for the main target group of the procedure — i.e., undertakings that are legal persons. Namely, the regulation of the Estonian penal law regarding the liability of legal persons allows for the conviction of a legal person for an offence that is carried out by a 'senior official'²² in the interests of the legal person²³, of which offence the management of the legal person or the narrower circle of persons aware of the leniency procedure may not even know. Decision or informal approval by the management is not relevant to ascribing the offence to the legal person.

Again, in a situation where the effectiveness of the leniency proceedings does not depend only on the activities of the undertaking (in the narrow sense of the word) and its management (who actually decided to participate in the cartel and organised their participation), it cannot be reasonably presumed that the undertaking decided at the management level to use the leniency procedure — the number of circumstances not depending on the undertaking as an organisation is too large.

3. Access to the leniency file

3.1. On the meaning of limited access

The protection that the leniency procedure offers against fines or in the form of reduction of fines does not protect a favoured undertaking against the civil law consequences of participating in a cartel — e.g., damage claims by third parties. The principle is recognised that the information supplied by an undertaking in the course of the leniency procedure, which has value as evidence (that is, the 'leniency file') may be disclosed and used only for purposes of enforcement of Article 81 of the Treaty establishing the European Community (or a corresponding domestic legal provision). This principle is realised in the EU leniency procedure also via an unambiguous and generally applied legal rule.²⁴ Potential plaintiffs thus have no access to the undertaking's information that has been supplied to or recorded by the Commission in a format that can be reproduced in writing. Without the guarantee of a 'closed file', it is difficult to imagine that cartel members themselves would reveal the cartel.

What about access to the file under the Estonian leniency procedure?

²¹ The Estonian penal law criminalises the abuse of a dominant position by an undertaking; agreements, decisions, and concerted practices prejudicing free competition; concentration restricting competition (essentially, failure to notify of concentration and violation of a prohibition on concentration or the conditions of a decision granting concentration permission); and violation of obligations by undertakings with special or exclusive rights or in control of essential facilities, if committed intentionally.

²² 'Senior official' is an undefined term in penal law, one that might in practice not coincide with the persons having the civil law mandate to represent the legal person. Rather, 'senior official' is defined case by case depending on the person's freedom of decision and ability to direct the will of the legal person.

²³ 'Interest' is not limited to property gain by a legal person (increase in property, avoidance of decrease in property) but covers also such acts in the sphere of action of a legal person by which the legal person gains, e.g., a time advantage (e.g., in the processing of an application for an activity licence).

²⁴ Article 33 of the leniency notice provides: 'Any written statement made vis-à-vis the Commission in relation to this notice, forms part of the Commission's file. It may not be disclosed or used for any other purpose than the enforcement of Article 81 EC'. However, the author has information that some success has been achieved in breaking through this 'wall' at least once via the EC courts. Nonetheless, closing the leak is a highly topical matter, with the Commission declaring its readiness to protect the inviolability of the leniency file and hence the mainstays of the leniency procedure to the very end.

3.2. An injured party's right to examine the file

It follows from CCRP §§ 205 and 206 that criminal proceedings are terminated under the section that provides for the possibility of the leniency procedure on the basis of an order by the Public Prosecutor's Office, which has to be delivered to the injured party. By law, the natural or legal **person who has the status of an injured party in the proceedings may examine the criminal file**, meaning access to the leniency file within 10 days after receiving a copy of the termination order. Since the injured party's status in the proceedings allows for access to the file, central to the protection of the leniency file is the question of who the injured parties are in the case of cartel offences and how and when the status of injured party is acquired.

The answer to this question is simple and complicated at the same time. Firstly, under procedural law, an injured party is a person who has been caused immediate physical, proprietary, or moral damage by the criminal offence (the prohibited co-operation between undertakings, in this case) — the basis for acquiring the status of an injured party in the proceedings is **the very fact of incurring damage**, and no other acts are required by the body conducting the proceedings.²⁵ Therefore, a person has the rights and obligations of an injured party in the proceedings purely on the basis of whether he was caused damage by the criminal offence. Does definition of the status of injured party in the proceedings only via the fact of alleged²⁶ damage render the criminal file accessible to an unidentified number of persons?

In the context of the definition of an injured party and prevailing judicial practice, one has to take the view that damage caused by a criminal offence in an arbitrary and indirect way is not sufficient to accord the party in question the status of an injured party in the proceedings. There has to be a direct and immediate causal relationship between the criminal offence and the alleged damage. The question arises of whether there is such a direct and immediate relationship between the fixing of an (unreasonably high) product price by the cartel members (criminal offence) and the damage that the consumer incurs by paying a price higher than a price in keeping with market conditions. Maybe there is. Or maybe not. It cannot be predicted how an official of the Competition Board in the capacity of an investigator conducting proceedings concerning a competition offence would decide this question without clear instructions.

Following from the above, it is likely that the issue of granting or not granting the status of injured party in the proceedings would be decided case by case. An undertaking is thus vulnerable, by virtue of the access granted to the file, at least during the criminal proceedings. We note that the injured party's rights include the filing of a civil action for compensation of the damage caused by the unlawful act. It is also not prohibited to prove the facts on which the civil action is based via the use of evidence originating from, e.g., criminal proceedings.

But is it possible for, after proceedings are terminated under § 205, a large number of 'injured parties' to come forth to examine the file? According to CCRP § 206 (3), the period during which injured parties may examine the file depends on when they receive a copy of the termination order. If a person has not received a copy of the order, does it mean that the term for examination has not yet elapsed? Although this does not seem reasonable, the applicable law does not expressly preclude this possibility.

Until the law contains a clear and understandable legal provision that would preclude the possibility of any third party examining the leniency file, the situation remains such that (a) an injured party who appears during the criminal proceedings may examine the leniency file, and (b) there is a certain possibility that an injured party who appears after the termination of the proceedings also has such a right.

3.3. Access to the file under the general procedure after the termination of criminal proceedings under CCRP § 205

Pursuant to CCRP § 209 (1), the **file on criminal proceedings terminated under CCRP § 205 is archived** according to the procedure and for the term established by the Government of the Republic (hereinafter 'Procedure').²⁷ Subsection 4 (6) of the Procedure states that a criminal file is maintained at the Public Prosecutor's Office after the termination of criminal proceedings, until the end of the above-mentioned three-year 'probationary period'²⁸, and is then forwarded to the Competition Board. However, the Proce-

²⁵ Kriminaalmenetluse seadustiku eelnõu (eelõu nr 594 SE I) seletuskiri (Explanatory memorandum to the draft Code of Criminal Procedure (draft No. 594 SE I)). Available at: <http://web.riigikogu.ee/ems/plsql/motions.show?assembly=9&id=594&t=E> (in Estonian).

²⁶ The actual incurrence of damage and the perpetrator's guilt in it are established only in the criminal proceedings.

²⁷ Vabariigi Valitsuse 30.07.2004.a. määrus nr 261 'Kriminaaltoimiku arhiivimise kord ja toimiku säilitamise tähtajad pärast kriminaalmenetluse lõpetamist' (Government of the Republic Regulation No. 261 of 30 July 2004: 'The procedure for archiving criminal files and the terms for preservation of the files shall be established by a regulation of the Government of the Republic'). – RT I 2004, 60, 430 (in Estonian).

²⁸ A reminder: this is the period during which the Public Prosecutor's Office may annul the immunity on grounds of the subject of favourable treatment committing a new intentional criminal offence.

procedure regulates neither the legal status of files on criminal proceedings terminated under CCrP § 205 nor the requirements or procedure for access to such files. Section 2 of the Procedure only provides that archival (i.e., managing the file after the termination of criminal proceedings) is understood as archiving within the meaning of the Archives Act.^{*29,*30} The fact that there is no special regulation and the further management of the file could be regarded as archiving creates many essential problems as regards the inviolability of the file.

Firstly, as regards the lack of special regulation, a remarkable fact that illustrates the practical situation and attitudes is that the draft Procedure prepared by the Ministry of Justice^{*31} did contain a special provision (its Section 9, 'Examination of criminal files') according to which access to the files on terminated criminal proceedings was to be regulated by the archiving rules of the investigative body or the county and city court (the internal legal procedure of the court!). This leads to two conclusions: (1) **a fundamental right of access is recognised on the level of the executive power** (including to leniency files) and (2) the content of the access rights — i.e., the circle of entitled persons and the scope of their rights — should have been decided by the investigative body (Competition Board) or the court involved. The wording of the Procedure established by the Government of the Republic omitted this special provision. It is possible that this was because of the State Chancellery's observation during the approval of the draft that, according to the Public Information Act^{*32} and the Archives Act, access to information intended for public use has to be guaranteed, and these acts also apply to investigative and judicial bodies. So, for securing the inviolability of leniency files it is important to know whether these acts allow for restricting access to leniency files. The answer is by no means clear, and it largely depends on the interpretation of law.

Information collected by the Competition Board in the course of the leniency procedure is basically 'public information'^{*33} and thus subject to the regulation of the Public Information Act. Therefore, the Competition Board as the investigative body of the pre-trial procedure or the Public Prosecutor's Office as the body competent to terminate proceedings under CCrP 205 must declare information collected in criminal proceedings or misdemeanour procedures as **information intended for internal use** (i.e., restricted information), but only **until the case is referred to a court** and not for longer than until the end of the limitation period (§ 35 (1) 1 of the Public Information Act). In Estonia, a cartel offence is an offence in the second degree, and its limitation period is five years.^{*34} Could the Competition Board or Public Prosecutor's Office declare a leniency file to be for internal use throughout the limitation period for a case of cartel offence on grounds that it has not been referred to the courts but has been terminated in the pre-trial procedure? It seems illogical. Once criminal proceedings have been terminated, there cannot be a limitation period. The purpose of the above provision should be to protect information collected on a matter that is in the pre-trial procedure stage and is presumably not yet complete. Could the situation be changed because of the fact that criminal proceedings terminated under CCrP § 205 have been only 'floatingly' terminated (i.e., are resumable when special conditions are met) until the above-mentioned three-year term has elapsed?

In the context of the Procedure, it is impossible to understand without doubt whether and during what time the file on criminal proceedings terminated under CCrP § 205 could be regarded as a file on 'floatingly' terminated proceedings, which are current rather than irrevocably terminated proceedings. However, (1) the three-year possibility of resumption itself; (2) the Procedure's § 4 (6), which provides for forwarding the file to the Competition Board — i.e., archival only after three years — and (3) the fact that the possibility of resumption (i.e., the right to annul immunity on grounds of co-operation stopping) is not limited by a similar term suggest that criminal proceedings 'terminated' under CCrP § 205 have not irrevocably ended for the person and could fall under § 35 (1) 1 of the Public Information Act.

However, the lines of reasoning and the justifications for protecting the file, as presented by the authors under this and the previous headings, are essentially artificial and are too complicated for an ordinary undertaking to be perceived as reliable.

²⁹ Arhiiviseadus (Archives Act). – RT I 1998, 36/37, 552; 2004, 28, 188 (in Estonian).

³⁰ The latter in turn generally provides general regulation of the organisation of preservation, destruction, and accessing of all documents and records, both private and public. It distinguishes between: (1) information in the stage of active communication and (2) information past the stage of active communication — i.e., at the stage of having been archived. Access to the latter is regulated at least in part by the same Archives Act; access to the former is regulated by other laws.

³¹ Vabariigi Valitsuse määruse 'Kriminaaltoimiku arhiivimise kord ja toimiku säilitamise tähtajad' eelnõu ja seletuskiri (Draft of and explanatory memorandum to the Government of the Republic Regulation 'Procedure for archiving criminal files and the terms for preservation of the files'). Available at: <http://eoigus.just.ee/> (in Estonian).

³² Avaliku teabe seadus (Public Information Act). – RT I 2000, 92, 597; 2004, 81, 542 (in Estonian).

³³ According to the Public Information Act, public information is understood as information that is recorded and documented in any manner and using any medium and which is obtained or created upon performance of public duties provided by law or legislation issued on the basis thereof.

³⁴ Subsection 4 (3) and § 400 of the Penal Code set out that a cartel offence is an offence in the second degree, whereas, pursuant to § 82 (1) 2, nobody may be convicted of or punished for committing a criminal offence in the second degree when five years have passed between commission of the offence and the entry into force of the court judgement.

3.4. Summary concerning the protection of files

An undertaking (its management) opting for the leniency procedure may be predicted to attempt to clarify the extent to which the leniency procedure can contribute to filing and, especially, proving civil law claims, especially against the undertaking itself (and, via the undertaking, the members of its directing bodies). The mere exposure of a cartel can be presumed to lead to many claims for damages. However, the resulting financial loss could in reality be limited to mainly legal expenses as far as the plaintiffs are not given ‘external’ help with evidence — in this context, access to the file as an arsenal of proof is invaluable. Since there is no 100% guarantee (without considering the ‘human factor’) or even any reliable guarantee of the protection of the file on criminal proceedings terminated under CCrP § 205 but only interesting theoretical lines of reasoning, a potential applicant will probably not avail itself of the leniency procedure option. In this context, it is difficult to imagine that undertakings would be ready to submit for the file materials and information that could be used as evidence against them in other proceedings so long as there is no special provision prohibiting any third party access to the leniency file.

4. On the protection of members of directing bodies

Finally, another angle should be highlighted, which on one hand, concerns the Estonian leniency procedure — i.e., the application of CCrP § 205 — but, on the other, has direct effect also on the possibility of applying the EU leniency procedure. This is the protection of the members of the directing bodies of a legal person applying for favourable treatment. Or rather, their unprotectedness. While the EU competition law does not allow the Commission to prosecute the members of a fined undertaking, the **Estonian penal law allows for separately prosecuting the undertaking and the members of its directing bodies in the case of a cartel offence**. The Competition Board can thus institute criminal proceedings against both an undertaking and one or more member of its directing body — and hence selectively terminate these criminal proceedings under CCrP § 205.

This opportunity opens up a real Pandora’s box: at the threat of criminal punishment, an undertaking that is a legal person and participates in a cartel and the members of a directing body of the undertaking (or some of them) can be placed on different sides. It seems an attractive procedural tactic: the final goal is to punish the undertaking, and to achieve this goal, a current (or, worse, former) member of a directing body of the undertaking is offered an opportunity for co-operation and immunity under CCrP § 205. This opportunity arises in particular when the cartel has essentially been uncovered already. However, the readiness of the directing body member for such co-operation (even when the cartel is disclosed) can be cooled down to zero by potential contractual or non-contractual (e.g., arising from a violation of the loyalty obligation) claims against the member of the directing body by the undertaking itself, its shareholders, or creditors.

Moreover, the possibility that the members of a directing body could be brought to justice separately may actually reduce the readiness of these members to make a confession on the part of the undertaking — i.e., to disclose the cartel. This means that the possibility of punishing the members of a directing body (and defencelessness from such punishment) has an effect counter to the achievement of the main goal of the leniency procedure — disclosure and termination of cartels. For obvious reasons, this fact has a direct effect also on the EU leniency procedure. A situation where granting immunity to an undertaking in a leniency procedure on the EU level does not eliminate the possibility of a member of a directing body being punished under domestic law has a direct inhibiting effect on the application of the EU leniency procedure.

The authors believe that **it is vital that the protection arising from lenient treatment of the undertaking be extended also to the members of the directing bodies** — members of directing bodies protect both themselves and the association they represent by applying for the leniency protection of the undertaking. In that case, they are interested in using the possibilities of the leniency procedure, from the angle of both personal liability and work performance, in a situation where the other prerequisites have been met. As far as leniency protection does not extend to the members of a directing body, the Competition Board may achieve certain results in securing a criminal conviction for the already disclosed cartel offences, but it will not be successful in disclosing new cartels. When tackling the issue of protecting the members of directing bodies, one should first study the example of, among others, the UK mechanism for protecting the members of the directing bodies of an undertaking that participated in a cartel and is applying for leniency protection: the ‘letters of non-action’ system.

5. In summary

The article posed as the main question whether the leniency procedure is an actually used and feasible possibility in Estonia or exists merely in legal theory. The authors believe that the leniency procedure as understood in European competition law does not exist in the Estonian legal order. We reiterate that the relevant European competition law is not an issue *per se*, but it provides a good example where its content corresponds to the needs of society and its individual members.

The Commission's leniency procedure was established to involve cartel participants themselves in the detection of cartels. The whole procedure is structured so as to be an economically attractive and risk-reducing option also for a cartel participant. The Estonian leniency procedure is structured paternalistically — sincere confession by (a) cartel member(s) and co-operation with the Competition Board may be followed by a release order from the Public Prosecutor's Office with respect to one or several cartel members. Considering that the economic activities of legal persons are rational and risk-optimising, and considering also the lack of positive examples of application of the leniency procedure, we find that the paternalistic legal approach cannot be successful.

The specific features of the Estonian leniency procedure are as follows:

- There is no preliminary procedure (analogue with the first sentence of article 16 of the leniency notice), which is why undertakings have no effective possibility to check their eligibility for lenient treatment before they commence co-operation — the body conducting the proceedings, on the other hand, can see all of the undertaking's cards before granting conditional protection.
- An undertaking can be granted only one form of favourable treatment — immunity. The possibility of obtaining it is not related to objective criteria and rules that would entitle only one undertaking to immunity. Therefore, there is no competition between a cartel's members for disclosing the cartel. The body conducting the proceedings can choose at its own discretion 'who has best reported on the others'.
- Obtaining immunity depends on the Public Prosecutor's Office, which does not, however, directly conduct the proceedings. In essence, an undertaking depends both on the Public Prosecutor's Office and on the Competition Board, as consent of the Public Prosecutor's Office without the approval of the Competition Board is highly unlikely.
- The conditional immunity of an undertaking can be annulled when the undertaking commits an offence that is not related to the offence concerned here and does not constitute a competition offence. The body conducting the proceedings can pursue goals of general prevention and punish the undertaking on easily reasoned grounds regardless of the undertaking's co-operation in the competition offence matter.
- There is no adequate and unambiguous regulation to ensure the inviolability of the leniency file — i.e., restrict access to the leniency file to only that required for purposes of cartel offence proceedings. An undertaking is unprotected if a third party uses the evidence presented in the leniency procedure against said undertaking in other legal proceedings.
- The conditions on separately prosecuting and punishing an undertaking that applies for lenient treatment and the members of its directing bodies do not contain special regulation that would extend the conditional immunity of the undertaking to the members of its directing body. The body conducting the proceedings can use the members of the undertaking's directing bodies against the undertaking and vice versa.

If we presume that cartels exist in Estonia and that help from the cartel members is needed to detect those cartels, the leniency procedure needs to be assessed from the standpoint of the cartel members. Such assessment suggests that the above characteristics are also substantial shortcomings of the Estonian leniency procedure. By way of broader generalisation of the above, we may claim that the Estonian leniency programme has been derived from the provisions of CCRP § 205, which actually do not provide for a leniency procedure. The general regulation of criminal procedure is not suitable in light of the specificity of cartels, and the launch of a real leniency programme requires clear and integral special regulation that takes greater account of cartel members' needs.