

Fixing the regulatory tension between leniency and damages

Article by Silos Economics

28 October 2025

Introduction

In recent decades, leniency has become a vital tool in antitrust, helping competition authorities uncover otherwise secret cartels. In parallel, private damages actions have substantially increased, largely supported by regulatory frameworks that have created better conditions for victims to seek compensation. Together, leniency and damages complement more traditional tools used to fight cartels, like monitoring and sanctions. Ensuring that they interact effectively is key to deterring cartels and achieving better outcomes for consumers.

In most jurisdictions, firms receiving immunity from fines are liable for damages. Their liability is generally more limited than that of other cartel participants, in an attempt to preserve incentives to 'blow the whistle'. For the same reason, many jurisdictions restrict claimants' access to leniency statements in private damages actions.

We believe that the approach described above raises two key concerns. First, by limiting the overall pay-off to firms 'blowing the whistle', it undermines incentives to self-report, making cartels more stable and likely. Second, by denying claimants access to vital information in leniency statements, it weakens their ability to litigate effectively against infringers.

We consider that these effects weaken the effectiveness of both leniency and damages policies, unintentionally facilitating collusion and harming consumers. Indeed, some competition authorities – the Bundeskartellamt in 2022, and the Competition and Markets Authority (CMA) more recently, in October 2025 – have made proposals to improve how leniency and damages complement each other.

We think that there is scope to fix the regulatory tension between leniency and damages, and make them interact more effectively. We make two recommendations towards achieving this goal. First, to fully shield immunity recipients from liability for damages. This would strengthen the incentives to self-report and 'rush to the courthouse', enhancing the effectiveness of leniency programmes. Second, to facilitate claimants' access to leniency statements in follow-on private damages actions. This would help them to sue more effectively and, coupled with our first recommendation, would provide further incentives for cartel infringers to self-report first.

The rest of the article is structured as follows. First, we provide a quick overview of leniency and damages in key jurisdictions, focusing on the extent to which immunity recipients are liable for damages, and whether claimants can access leniency statements in private damages actions. Second, we discuss the key concerns with the current approach and assess the merit of potential justifications for it. Third, we assess the proposals made by some competition authorities. Fourth, we set out our recommendations. Fifth, we conclude. We include references at the end.

Leniency and damages: a very quick overview of key jurisdictions

Leniency programmes offer cartel members the opportunity to report their conduct and cooperate with an investigation in exchange for immunity or a reduction in fines (OECD, 2022). Leniency has become a vital tool for strengthening cartel deterrence (OECD, 2023). It helps competition authorities uncover cartels that would otherwise have gone undetected, and breaks internal trust within a cartel, destabilizing cartels and making them less likely.

Leniency programmes exist in more than 60 jurisdictions (OECD, 2023). In some cases, like the United States (US), leniency programmes only reward the first applicant with immunity (DOJ, 2023), whereas in other cases, like the European Union (EU) and the United Kingdom (UK), the first applicant receives immunity and subsequent applicants can also benefit from more lenient treatment (EC, 2022; CMA, 2014).

Private damages actions enable victims of anticompetitive practices to bring claims before the courts and obtain compensation. In the US, these actions have a long-established history and play a substantial role within its competition law system (OECD, 2015). By contrast, in jurisdictions that strongly rely on public enforcement, like the EU and the UK, private damages actions have traditionally been less prominent, despite having experienced a rise over the past decade following the adoption of frameworks that improve conditions for victims to seek compensation, such as Directive 2014/104/EU of the European Parliament and of the Council (hereinafter, EU Damages Directive 2014).

In most jurisdictions, firms receiving immunity from fines are liable for damages. Their liability is generally more limited than that of other cartel members, in an attempt to preserve incentives to 'blow the whistle'. For the same reason, many jurisdictions restrict claimants' access to leniency statements in private damages actions. Below we assess how leniency and damages frameworks interact in three key jurisdictions: EU, UK and US.

In the EU, according to the EU Damages Directive 2014, cartel participants are jointly and severally liable for the harm caused by the cartel. An

immunity recipient faces limited liability because it is only jointly and severally liable to its direct or indirect purchasers or providers. Nonetheless, it is also jointly and severally liable to other cartel victims when they cannot obtain full compensation from the other cartel members (for example, due to insolvency). National courts cannot order a party or a third party to disclose leniency statements.

In the UK, the approach is basically the same as in the EU, since the UK's legal framework continues to follow the EU Damages Directive 2014 on this matter. An immunity recipient is jointly and severally liable to its direct or indirect purchasers or providers, but also to other cartel victims if they are unable to obtain full compensation from other cartel members (Schedule 8A to the Competition Act 1998). A court or the Competition Appeal Tribunal (CAT) cannot make a disclosure order in respect of a cartel leniency statement, whether or not it has been withdrawn (Schedule 8A to the Competition Act 1998).

In the US, the immunity recipient is only liable for single damages, rather than treble damages, which is the case for other cartel participants (DOJ, 2023). Further, the immunity recipient is not jointly and severally liable for damages, unlike other cartel members. US courts can order the disclosure of leniency statements (DOJ, 2023).

Leniency and damages: key concerns with the current approach

The approach to leniency and damages in most jurisdictions raises two key concerns. First, it undermines incentives to self-report under leniency. Second, in many cases, it hinders the ability to litigate effectively when suing infringers, because it restricts claimants' access to leniency statements in private damages cases. We think that these effects weaken the effectiveness of both leniency programmes and private damages actions, and for no good reason. We set out our reasoning below.

Lower incentives to self-report under leniency

The first concern with the current approach is that it undermines incentives to 'self-report' under leniency. Immunity from fines is offset by the exposure to damages, limiting the pay-off from self-reporting, and hence reducing incentives to engage in it. In fact, the immunity recipient may become an 'easy target' for cartel victims, as it lacks a legitimate interest to challenge the competition authority's decision in court, compared to other cartel members (OECD, 2015).

The economic literature suggests that this is a relevant concern. Spagnolo (2004) shows that minimizing the damages paid by the immunity recipient maximizes the deterrence effect of leniency programmes. Sylbye (2012) models how private actions can affect self-reporting and finds that absence of immunity from damages reduces incentives to self-report, dampens

deterrence and is pro-collusive. Buccirossi, Marvão and Spagnolo (2020) show that the conflict between leniency and damages is apparent. They find that the effectiveness of both can be maximized by minimizing the immunity recipient's liability from damages and ensuring that claimants can access leniency statements in private damages actions. This theoretical literature suggests that exempting immunity recipients from damages would positively contribute to cartel deterrence.

This concern has been highlighted in key competition policy debates (OECD, 2023; OECD, 2015). The Bundeskartellamt (Bundeskartellamt, 2022) and the CMA (CMA, 2025) have also expressed concerns and set forth measures to mitigate or significantly reduce the immunity recipients' liability. We provide a detailed assessment of these proposals in the next section.

The empirical evidence is consistent with this concern. Marvão and Spagnolo (2024) explore the impact of the EU Damages Directive 2014 on leniency applications and cartel enforcement in Europe. The Directive created better conditions for private damages actions, but did not incorporate sufficient protection for immunity recipients from private damages actions. They show that cartel enforcement has fallen more intensively in the EU than in the US after the adoption of the Directive. They identify the EU Damages Directive 2014 as a key driver of the observed decline. Another relevant factor playing a role is 'leniency inflation', whereby leniency has been increasingly awarded to many (or all) cartel members, reducing the incentives to 'rush to the courthouse' (Marvão and Spagnolo, 2023). Bodnar, Fremerey, Normann, and Schad (2023) provide experimental evidence that suggests that damages liability for immunity recipients makes cartels more stable. This negative effect can be prevented by isolating the immunity recipient from private damages actions.

In sum, the absence of immunity from damages for immunity recipients seems to be an ill-suited policy option that is undermining leniency policy and weakening cartel deterrence.

Lower ability of victims to litigate effectively

The second concern arises because in many jurisdictions, like the EU and the UK, claimants lack access to leniency statements in private damages cases. This disclosure restriction aims to preserve cartel members' incentives to self-report, since they are liable for damages. However, it also hinders claimants' ability to litigate effectively when suing infringers. Leniency statements can provide critical information to assess responsibilities and quantify the harm caused by the cartel (OECD, 2023). Buccirossi *et al.* (2020) show that if the immunity recipient's liability for damages is minimized, granting claimants access to leniency statements is the most effective way to strengthen deterrence.

Assessment of potential justifications for the current approach

Below we look at potential justifications for the current approach. We consider that these potential justifications are not sufficiently convincing. We set out our reasoning below.

On immunity recipients' liability in private damages cases, Wils (2023) sets forth three justifications against granting immunity recipients immunity from damages in the EU context. We present and assess them below.

First, it would go against corrective justice, a centuries-old legal standard that requires not only full compensation to the victim, but also that the party that caused the injury pays.

We find this argument slightly problematic. The current system already allows for the possibility that a cartel member causing harm may not pay compensation for it. For instance, due to joint and several liability, a victim to whom a cartel member caused harm may seek compensation from another cartel member. Invoking corrective justice to defend the current system therefore seems somewhat inconsistent, as the current system itself already conflicts with this legal principle. What is relevant in the current system is full compensation. But full compensation is also possible in a framework that exempts the immunity recipient from damages liability, but makes the other cartel participants jointly and severally liable for the harm caused by the cartel. Further, there is a trade-off between efficiency and corrective justice. We also see this in other areas of the law. When strictly adhering to corrective justice would entail significant efficiency costs, there is a rationale in deviating from it to a certain degree.

Second, it would harm public enforcement by reducing the evidentiary value of the immunity recipient's leniency statements. Without liability for damages, the immunity recipient might have an incentive to exaggerate the harm caused by the cartel to disadvantage its competitors. In principle, this risk could be mitigated using information provided by subsequent leniency applicants for corroboration. However, exempting the immunity recipient from damages liability would shift a greater burden onto subsequent applicants, reducing their incentives to report.

We are not persuaded by this argument. It is unclear that the evidentiary value of leniency statements would diminish if immunity recipients were exempt from damages. While it is true that damages liability makes immunity recipients incur a cost if they exaggerate the harm the cartel caused, it is also the case that exempting them from liability, could make them more willing to speak freely, refrain from withholding information and provide detailed and accurate information on the cartel. The reason is that they would not have a conflict of interest arising from the potential

damages that victims may claim from them. In addition, competition authorities usually have a range of evidence, including evidence gathered in raids following a firm 'blowing the whistle', to corroborate and complement leniency statements and further investigate cartels. Finally, subsequent applicants could face lower incentives to report. However, while they can provide additional information or help with corroboration, subsequent applicants have also contributed to 'leniency inflation', as discussed above. The economic literature suggests that subsequent applicants may have a negative contribution in terms of overall deterrence (Marvão and Spagnolo, 2023). The US leniency programme has proven to be very effective without enabling subsequent applicants to benefit from leniency.

Third, it would increase market concentration. Immunity recipients are in some cases the firms with the highest turnover in the market affected - roughly in 46% of EU cases examined by Wils. Wils argues that this stems from calculating fines on the basis of revenue, which creates enhanced incentives to self-report for relatively large firms. Exempting the immunity recipient from damages would tend to favour the largest firms in addition to immunity, increasing market concentration.

We are not persuaded by this argument. It is unclear that concentration would increase, or that any such increase would weaken competition. We have not seen any evidence in support of this claim. We think this risk is very low. By contrast, the theoretical and empirical literature discussed above suggests that making immunity recipients liable for damages chills incentives to self-report, undermining cartel deterrence and facilitating collusion across the board in the economy. On balance, the expected harm to competition from weaker deterrence and increased collusion is likely to be substantially higher than any potential harm arising from higher concentration in specific cases. Moreover, stronger cartel deterrence from making immunity recipients not liable for damages would reduce the number of cartels over the long run and, thereby, reduce the number of cases where the market structure distortion discussed by Wils could potentially arise.

On access to leniency statements in follow-on actions, one potential justification is to protect leniency applicants and incentivize them to self-report. However, once the lack of justification for making the immunity recipient liable for damages has been established, restricting access to its leniency statement does not seem justified. There is a question on access to the remaining leniency statements in jurisdictions where subsequent applicants can benefit from leniency. We think there is no sufficiently convincing justification for restricting access to their leniency statements either. The overall contribution of these subsequent applicants to overall deterrence may be negative as discussed above. Hence, while we

acknowledge that providing access to subsequent applicants' leniency documents could in principle make it less attractive to become one, we also think that it would provide enhanced incentives to 'rush to the courthouse' to come first and help competition authorities discover cartels quicker. Finally, we note that in the US, where the leniency programme has proved to be very effective, courts can order access to the immunity recipient's leniency statements in private damages cases.

In sum, we do not think that there are sufficiently compelling reasons that justify making immunity recipients liable for damages or restricting claimants' access to leniency statements in private damages follow-on actions.

The Bundeskartellamt and CMA proposals

Concerns with current approaches to leniency and damages and their impact on leniency programmes have led some competition authorities to make proposals to improve how they interact.

In 2022, the Bundeskartellamt proposed granting immunity recipients immunity from damages except when the immunity recipient held a dominant position or when other cartel participants were unable to pay (Bundeskartellamt, 2022; Wils, 2023). It also proposed to make the immunity recipient's leniency statement available to claimants in private damages actions. It recommended amending the EU Damages Directive 2014 along these proposals.

More recently, in October 2025, the CMA has proposed granting immunity recipients' (Type A immunity within the UK regulatory framework) full immunity from liability for damages. However, the CMA has also stated that "it may also be appropriate, in this regard, for such full immunity from damages to be able to be withdrawn by the CAT or the relevant court in cases where full compensation for loss or damage cannot be obtained from other undertakings involved in the cartel infringement (which might be the case for example, if all of those undertakings are insolvent)" (CMA, 2025). Hence, liability could be possible in this latter scenario, as in the Bundeskartellamt proposal.

We welcome these proposals and consider that they would improve how leniency and damages interact, particularly the CMA proposal. However, we also think that there is scope for improving them further.

The Bundeskartellamt proposal of narrowing immunity from damages to firms without a dominant position lacks a sufficient justification. The motivation for this proposal relates to Wils (2023) concern that immunity from damages may increase concentration. As discussed above, we do not

think that this concern raises risks that offset the losses in terms of lower leniency effectiveness and lower cartel deterrence.

Further, the Bundeskartellamt proposal creates a last resort liability for immunity recipients, making them liable if other cartel members cannot fully compensate victims. The motivation is ensuring full compensation for victims for detected cartels. However, last resort liability is not cost-free. Uncompensated harm may arise from detected and undetected cartels. While last resort liability may reduce uncompensated harm from detected cartels compared to full immunity, it also increases liability risks for immunity recipients, weakening deterrence, and likely increasing uncompensated harm from undetected cartels. Buccirossi *et al.* (2020) find that fully isolating the immunity recipient from damages reduces overall uncompensated harm compared to a regime of last resort liability. This is because the proportion of damages that are effectively redeemed in private damages actions is low and the extent to which cartel members other than the immunity recipient can pay awarded damages is high.

Finally, the Bundeskartellamt proposal to facilitate access to leniency statements by claimants in private damages follow-on actions would be a relevant improvement. However, for the reasons provided above, we would extend this disclosure requirement to subsequent leniency applicants' statements as well.

We consider that the CMA proposal improves the Bundeskartellamt proposal regarding the immunity from liability for damages, since it does not narrow it to firms without a dominant position. However, as the Bundeskartellamt proposal, it also creates a last resort liability for the immunity recipient when the other cartel members are unable to pay. For the reasons given above, we consider that while there is merit in this proposal, we advocate fully isolating the immunity recipient from any damages liability to strengthen deterrence and reduce overall uncompensated harm. Finally, in contrast with the Bundeskartellamt proposal, the CMA does not recommend to facilitate access to the immunity recipient's leniency statements to claimants in private damages actions. In line with our reasoning above, we consider that there is room to improve on leniency statements disclosure to claimants.

Recommendations

For the reasons provided in this article, we think that there is scope to fix the regulatory tension between leniency and damages, and make them interact more effectively.

We make two recommendations towards this goal:

First, to fully shield immunity recipients from liability for damages. This would strengthen the incentives to self-report and 'rush to the courthouse',

enhancing the effectiveness of leniency programs and strengthening cartel deterrence.

Second, to facilitate access to leniency statements for victims in follow-on private damages actions. This would help them to sue more effectively against firms that have engaged in harmful cartel conduct and, coupled with our first recommendation, would provide further incentives to self-report first.

Conclusion

In most jurisdictions, firms receiving immunity from fines are liable for damages. Their liability is generally more limited than that of other cartel participants, in an attempt to preserve incentives to 'blow the whistle'. For the same reason, many jurisdictions restrict claimants' access to leniency statements in private damages actions.

We consider that the approach described above raises two key concerns. First, by limiting the overall pay-off to firms 'blowing the whistle', it undermines incentives to self-report, making cartels more stable and likely. Second, by denying claimants access to vital information in leniency statements, it weakens their ability to litigate effectively against infringers.

We consider that these effects weaken the effectiveness of both leniency and damages policies, unintentionally facilitating collusion and harming consumers. Indeed, some competition authorities – the Bundeskartellamt in 2022, and the Competition and Markets Authority (CMA) more recently, in October 2025 – have made proposals to improve how leniency and damages complement each other.

We think that there is scope to fix the regulatory tension between leniency and damages to strengthen cartel deterrence. We make two recommendations towards this goal. First, to fully shield immunity recipients from liability for damages. This would strengthen the incentives to self-report and 'rush to the courthouse', enhancing the effectiveness of leniency programmes. Second, to facilitate claimants' access to leniency statements in follow-on private damages actions. This would help them to sue more effectively against firms that have engaged in harmful cartel conduct and, coupled with our first recommendation, would provide further incentives to self-report first.

References

Bodnar, O., M. Fremerey, H. T. Normann, and J. Schad, (2023), "The Effects of Private Damage Claims on Cartel Activity: Experimental Evidence", *The Journal of Law, Economics, and Organization*, Vol. 39, Issue 1, 2023, pp. 27–76.

Buccirossi, P., C. Marvão and G. Spagnolo (2020), "Leniency and Damages: Where Is the Conflict?", *Journal of Legal Studies*, Vol. 49, Issue 2, 2020, pp. 335-380.

Bundeskartellamt (2022), *Hauptgutachten XXIV: Wettbewerb 2022* [24th Main Report: Competition 2022], July 2022.

CMA – Competition and Markets Authority (2014), *Applications for leniency and no-action applications in cartel cases: (OFT1495)*, issued by the Office of Fair Trading (OFT) in July 2013, and adopted by the CMA Board in 2014.

CMA – Competition and Markets Authority (2025), *Opt-out collective actions regime review: call for evidence*, Response from the Competition and Markets Authority, October 2025.

DOJ – United States Department of Justice (2023), *Frequently Asked Questions About the Antitrust Division's Leniency Program*, January 2023.

EC – European Commission (2022), *Frequently Asked Questions (FAQs) on Leniency*, October 2022.

Marvão, C. and G. Spagnolo (2023), "Leniency Inflation, Cartel Damages, and Criminalization", *Review of Industrial Organization*, 2023, pp. 155-186.

Marvão, C. and G. Spagnolo (2024), "Leniency inflation, the Damages Directive, and the decrease in cartel cases", *VoxEu Column*, March 2024.

OECD - Organisation for Economic Co-operation and Development (2022), *OECD Competition Trends 2022*, February 2022.

OECD - Organisation for Economic Co-operation and Development (2023), *The Future of Effective Leniency Programmes: Advancing Detection and Deterrence of Cartels Leniency Effectiveness*, June 2023.

OECD - Organisation for Economic Co-operation and Development (2015), *Relationship Between Public and Private Antitrust Enforcement*, June 2015.

Spagnolo, G. (2004), "Divide et Impera: Optimal Leniency Programs", Discussion Paper No. 4840. Center for Economic Policy Research, London.

Sylbye, F. (2012), "A note on antitrust damages and leniency programs", *European Journal of Law and Economics*, Vol. 33, 2012, pp. 691–699.

Wils, W. (2023), "Should the EU Competition Damages Directive be revised to grant companies that have received immunity from fines under the competition authorities' leniency programmes also immunity from damages?", *Concurrences* N° 3-2023, Art. N° 112968, 2023, pp. 52-71.