

# Antitrust Chronicle

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**25 YEARS OF LENIENCY...  
WHERE DO THINGS STAND?**

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# LETTER FROM THE EDITOR

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Dear Readers,

It is generally accepted that leniency programs are an important and effective tool in the fight against cartels. That is the starting point of this month's CPI Chronicle. But from this starting point, many questions and topics of discussion arise.

1993 and 1994 marked important early years in the enforcement of cartels...the U.S. Corporate and Individual Leniency Policies came into effect. Soon thereafter, the EU implemented a leniency policy and many other jurisdictions have since followed suit.

A number of the articles in this edition of the Chronicle offer perspectives on the evolving debate on a perceived decline in the numbers of leniency applications for cartel infringements in multiple jurisdictions.

In addition, articles in this month's edition of the Chronicle cover a variety of jurisdictions and particularly in the U.S. such topics as "Leniency Plus" and ACPERA are covered. Similarities and differences between the U.S. and EU leniency programs are also addressed.

Where do things stand today with leniency programs in different jurisdictions? What changes need to be made moving forward and what lesson have been gleaned from previous experiences? Will competition regulators continue to "almost exclusively" depend on leniency programs in the years to come?

As always, thank you to our great panel of authors.

Sincerely,

CPI Team



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## **“Leniency Plus” and its Potential Minuses**

*By Tara L. Reinhart*

Many companies avail themselves of the Antitrust Division’s “leniency plus” policy. Leniency plus allows companies pleading guilty to price-fixing of one product to receive a significantly reduced fine if, at the same time, they obtain leniency for reporting illegal conduct related to one or more additional products. The benefits are significant, but companies taking advantage of leniency plus also face risks. First, the burdens of cooperation can be immense, and companies must be prepared to pay significant time and expense. Second, companies must do what they can to avoid “penalty plus.” Finally, the reality that employees often will obtain leniency for price-fixing of some products but face prosecution for others greatly complicates the company’s efforts. This article explores those risks.

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## **The Future of Cartel Deterrence and Detection**

*By Rosa M. Abrantes-Metz & Albert D. Metz*

Over the last few decades, leniency programs recorded a successful history of identifying and dismantling cartels. But can authorities continue to almost exclusively depend on leniency programs going forward? In this short paper we explore the role of leniency programs in the next generation of cartel detection, and ultimately deterrence. Will it continue to be the dominant source of cartel detection, or will advances in data collection and analysis – so-called “big data” and “machine learning” – reduce the cost and increase the effectiveness of screening and artificial intelligence techniques? Will traditional leniency and whistleblower programs even remain effective in a future which may keep no “paper trail” of communications proving the necessary intent? Have cartels been changing and what does that imply for leniency? Have we learned the lessons from extensive rigging in financial markets? Do we need to revisit the entire detection approach?

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## **Leniency Will Remain an Essential Part of The EU’s Cartel Enforcement Toolkit**

*By Alexandros Papanikolaou*

This contribution offers thoughts on the evolving debate in antitrust circles on a perceived decline in the numbers of leniency applications for cartel infringements in major jurisdictions, and in particular the EU. Leniency has obvious benefits for companies and leniency programs in Europe have produced many examples of successful enforcement, but there is increasing attention on whether certain factors are affecting how companies and their lawyers weigh incentives with regard to self-reporting cartel behavior. While the question of whether to self-report may be more complicated than before, a failure to report cartel conduct can allow the harm to continue even if the company ceases its participation. Enforcers should contemplate measures to deter companies from concealing cartel conduct in the hope that infringements become time-barred.

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## **The U.S. Corporate Leniency Policy: It is Time for a Renaissance**

*By Donald C. Klawiter*

This article reviews the history and success of the Leniency Policy and the actions that have caused the apparent decline in leniency and antitrust criminal enforcement. It then offers three recommendations to revive and renew the Policy: (1) establishing a constructive dialogue between the Division leaders and cartel defense bar leaders to harmonize existing controversies in the Division’s Frequently Asked Questions and the Leniency Policy generally, so that all potential leniency applicants are confident in the transparency of the Division’s actions; (2) requiring, for the first time in its history, and consistent with federal criminal enforcement trends, that the leniency applicant establish an antitrust compliance program; and (3) promoting the great value and transparency of the renewed Policy to business and the bar, and, in word and deed, creating and sustaining a welcoming partnership with the leniency applicant. These modest steps will go a long way to create a renaissance in US cartel enforcement.

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## Why Acpera isn't Working and How to Fix it

*By John M. Taladay*

The uncertainty surrounding ACPERA's benefits have limited its impact. The statute is ineffective before trial, when the vast majority of antitrust civil matters are resolved. If the leniency program and ACPERA are to continue to be effective tools in cartel enforcement, an amendment to the ACPERA statute is necessary. Creating a rebuttable presumption of cooperation would correct the current ambiguities in the statute that have reduced its potential impact. Both plaintiffs and ACPERA applicants would benefit — plaintiffs will continue to receive full cooperation and ACPERA applicants will receive the reduction in civil penalties anticipated by the statute.

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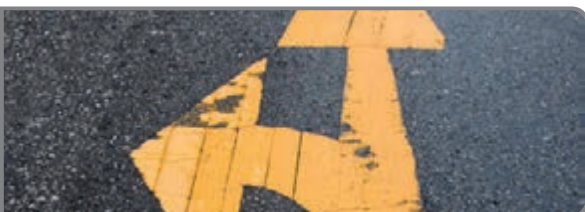


## Implications of Regional Cooperation on Country Specific Corporate Leniency Policies

*By Mfundo Ngobese*

A good corporate leniency program together with a less unified industry, where firms tend to cheat on the cartel arrangement, could be a good recipe for initial significant filings of leniency applications. The ability of a competition authority to detect and obtain information independently is, in no small measure, a contributing factor in incentivizing firms to opt for voluntary disclosure of collusion. It may be advisable to avoid pursuing more involved cooperation at the time of adopting a leniency program but overtime, as the early impact of the leniency program wanes, a more intense cooperation with other regional authorities could be pursued.

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## 25 Years of Leniency Programs: A Turning Point in Cartel Prosecution

*By Joan-Ramon Borrell, Carmen García, Juan Luis Jiménez & José Manuel Ordóñez de Haro*

This contribution reviews what we know about the effectiveness of leniency or amnesty programs in cartel prosecutions. Leniency programs have gradually been adopted by as many as 53 competition policy jurisdictions around the globe during the last 25 years. We show that the available evidence supports that the leniency programs have had a strong impact on anti-cartel policy design and effectiveness. The introduction of leniency programs has offered in most jurisdictions a short-term impact in the discovery of existing cartels, but in the long-term the number of discovered cartels faded down. This is not because cartels become more secretive and remained under cover, but otherwise we show that after leniency is introduced, a strong destabilization and dissuasive effects prevail.

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## Leniency Carrots and Cartel Sticks – A Practitioners' View on Recent Trends and Challenges Presented by The EU Leniency Program

*By Christian Ritz & Lorenz Marx*

In the past 25 years, leniency programs have been established in more than 80 jurisdictions across the globe. The overall purpose of such programs is to create incentives for cartelists to “blow the whistle” and to fully cooperate with the authorities to uncover and sanction the cartel. Leniency programs are a very important tool in the fight against cartels. However, such programs have currently come under pressure from various directions. This article aims to give a practitioners' overview of the EU Leniency Program, to trace recent challenges, and to highlight current efforts to solve these issues, as well as to provide a practical outlook on the factors to take into account when considering a leniency application.

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## Leniency Programs in Antitrust: Practice vs Theory

*Evgenia Motchenkova & Giancarlo Spagnolo*

There are various reasons that may explain why the designs of the EU and U.S. leniency programs and damage claims differ. In this note we discuss the welfare and deterrence implications of both designs as well as costs associated with each of the designs. We also show that there are substantial gaps between the design implied by economic theory and the way the main anti-trust policy instruments are implemented in practice. The analysis implies that the U.S. system performs better in terms of deterrence and welfare criteria as well as in terms of increasing victims' ability to obtain compensation. The EU system allows prosecutors to obtain more evidence through multiple leniency applications not disclosed to victims, which may increase the likelihood of conviction of the entire cartel and helps to save on investigation and litigation costs, at the price of lower fines and much lower expected damages, which in the absence of criminal sanction cast doubt on the possible deterrence effects.

# WHAT'S NEXT?

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For February 2019, we will feature Chronicles focused on issues related to (1) **Private Enforcement**; and (2) **Data Protection**.

## ANNOUNCEMENTS

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CPI wants to hear from our subscribers. In 2019, we will be reaching out to members of our community for your feedback and ideas. Let us know what you want (or don't want) to see, at: [antitrustchronicle@competitionpolicyinternational.com](mailto:antitrustchronicle@competitionpolicyinternational.com).

### CPI ANTITRUST CHRONICLES MARCH 2019

For March 2019, we will feature Chronicles focused on issues related to (1) **Leadership EU**; and our annual (2) **China the Year of the Pig**.

Contributions to the Antitrust Chronicle are about 2,500 – 4,000 words long. They should be lightly cited and not be written as long law-review articles with many in-depth footnotes. As with all CPI publications, articles for the CPI Antitrust Chronicle should be written clearly and with the reader always in mind.

Interested authors should send their contributions to Sam Sadden ([ssadden@competitionpolicyinternational.com](mailto:ssadden@competitionpolicyinternational.com)) with the subject line "Antitrust Chronicle," a short bio and picture(s) of the author(s).

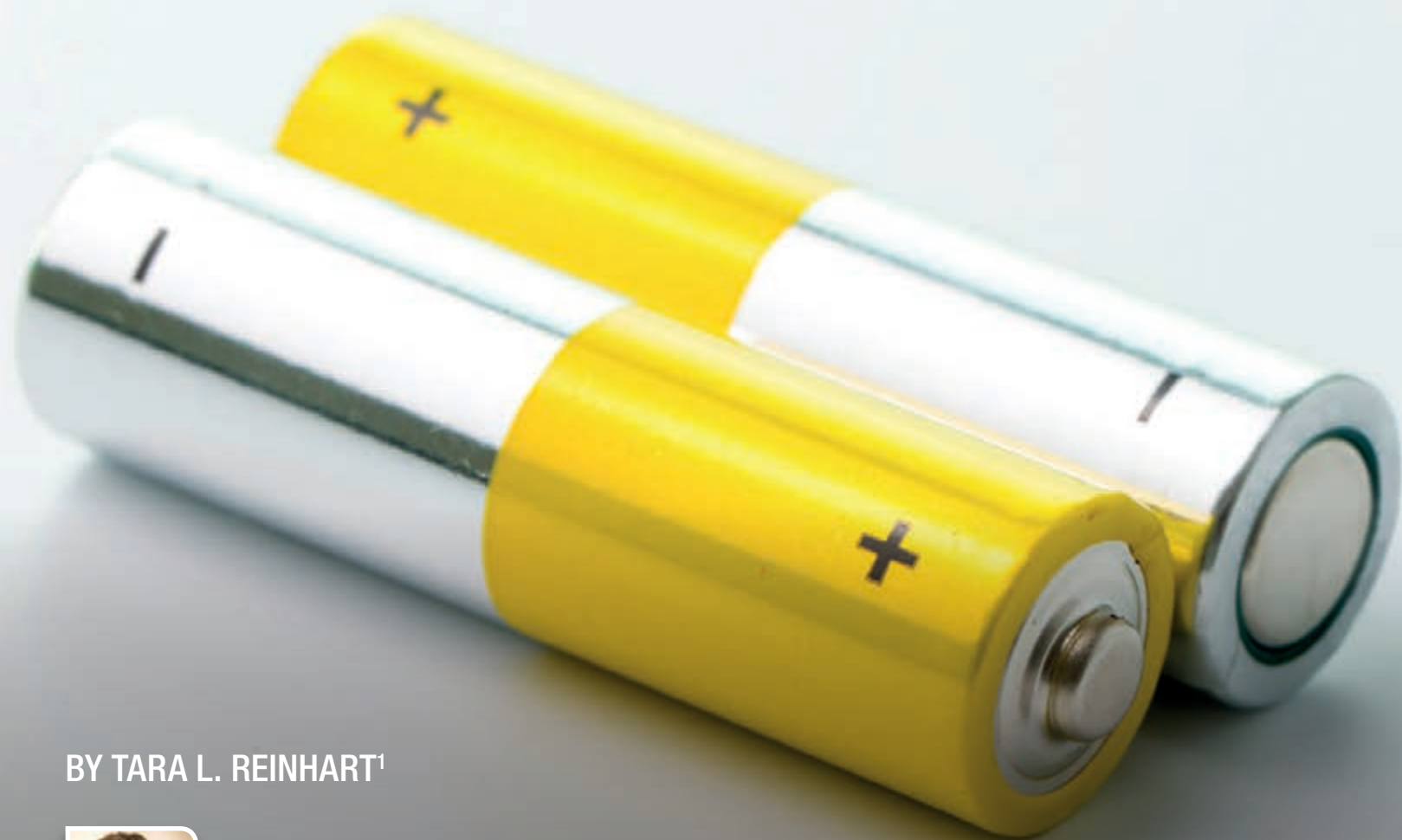
The CPI Editorial Team will evaluate all submissions and will publish the best papers. Authors can submit papers on any topic related to competition and regulation, however, priority will be given to articles addressing the abovementioned topics. Co-authors are always welcome.





# “LENIENCY PLUS” AND ITS POTENTIAL MINUSES

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BY TARA L. REINHART<sup>1</sup>



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<sup>1</sup> Head of the Antitrust/Competition Group in Skadden's Washington, D.C. office.



# I. INTRODUCTION

The Department of Justice (“DOJ”) Antitrust Division leniency program can provide significant benefits to a company that discovers its employees are price-fixing and self-reports the crime, if it is the first among co-conspirators to make a corporate confession and agree to cooperate. If it satisfies DOJ’s requirements, the company receives complete immunity for the conduct, which means no guilty plea and no fine. The employees — even the most culpable — also walk free. The leniency program is unique in federal white-collar enforcement. If a company discovers its employees are engaged in other white-collar crimes, it can self-report to DOJ and cooperate fully, but in all likelihood the cooperation will end with a corporate guilty plea. The most culpable employees will be fired and prosecuted. Not so under the Antitrust Division leniency policy.

Under the current iteration of the leniency policy, which has been in effect since 1993, companies can qualify even where the Antitrust Division already has an ongoing investigation, as long as DOJ has not yet collected sufficient evidence to indict. No wonder the Antitrust Division considers leniency to be its most important investigative tool.<sup>2</sup> In the last 10 years, the Antitrust Division has collected more than \$10 billion in fines and sent more than 260 individuals to jail.<sup>3</sup> The incentives of the leniency program to self-report crimes and cooperate are largely responsible.

One factor can greatly complicate a company’s efforts to get and keep leniency: the potential for exposure on other products. Of course, when a company discovers price-fixing in one product line and its internal investigation confirms the conduct did not spill over into other products, then leniency typically can be secured and kept. But, many investigations spread from product to product, engulfing entire industries, because companies discover price-fixing in more than one product line. This frequently happens to companies that are implicated in a price-fixing conspiracy by a leniency recipient. They conduct their own internal investigation and — surprise! — discover employees are involved in additional conspiracies.

In fact, about half of the Antitrust Division’s criminal cases arise from an investigation of a completely separate market.<sup>4</sup> This means that one or more companies cooperating in an investigation into price-fixing in one product line discover and disclose to the DOJ conduct relating to price-fixing in one or more additional products. In that circumstance, the company and its employees may qualify for leniency plus. And that’s where it gets tricky.

## II. WHAT IS LENIENCY PLUS?

The 1993 leniency policy does not mention leniency plus, also known as amnesty plus. Then-Deputy Assistant Attorney General Gary Spratling first articulated the policy in a 1999 speech.<sup>5</sup> He provided a hypothetical, which is repeated in the Antitrust Division’s *Frequently Asked Questions About the Antitrust Division’s Leniency Program and Model Leniency Letters* (originally published on November 19, 2008; update published on January 26, 2017). The hypothetical is straightforward:

As a result of cooperation received pursuant to an amnesty application in the widgets market, a grand jury is investigating the other four producers in that market, including XYZ, Inc., for their participation in an international cartel. As part of its internal investigation, XYZ, Inc. uncovers the information of its executives’ participation not only in a widgets cartel but also in a separate conspiracy in the sprockets market. The government has not detected the sprockets cartel, because the amnesty applicant was not a competitor in that market and no other investigation has disclosed the cartel activity. XYZ, Inc. is interested in cooperating with the Division’s widgets investigation and seeking leniency by reporting its participation in the sprockets conspiracy.

In other words, when a co-conspirator tags a company for price-fixing in one product line, that company may tag co-conspirators for price-fixing in additional products. The company benefits by obtaining a reduced fine related to the original product and complete immunity for price-fixing in the additional products.

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<sup>2</sup> Leniency Program, <https://www.justice.gov/atr/leniency-program>.

<sup>3</sup> Antitrust Division Workload Statistics FY 2008-2017, <https://www.justice.gov/atr/file/788426/download>.

<sup>4</sup> See, e.g. Remarks of Gary Spratling, Deputy Assistant Attorney General for Criminal Enforcement, U.S. Dept. of Justice, *Making Companies An Offer They Shouldn’t Refuse, The Antitrust Division’s Corporate Leniency Policy—An Update*, presented at the Bar Association of the District of Columbia’s 35<sup>th</sup> Annual Symposium on Associations and Antitrust (Feb. 16, 1999); remarks of Scott D. Hammond, Director of Criminal Enforcement Antitrust Division, U.S. Dep’t of Justice, *A Summary Overview of the Antitrust Division’s Criminal Enforcement Program*, presented at the New York State Bar Association Annual Meeting (Jan. 23, 2003); Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement, U.S. Dept. of Justice, *An Update of the Antitrust Division’s Criminal Enforcement Program*, presented at the ABA Section of Antitrust Law Cartel Enforcement Roundtable, 2005 Fall Forum (Nov. 16, 2005).

<sup>5</sup> Spratling, *Making Companies an Offer They Shouldn’t Refuse, The Antitrust Division’s Corporate Leniency Policy—An Update*.

To secure leniency for the additional products, the same procedure as for ordinary leniency applications applies and the same requirements must be met. The applicant must be the first to report the conduct, take prompt and effective action to stop the conduct, make a corporate confession, and cooperate fully with the DOJ's investigation of others.<sup>6</sup> If the company obtains leniency, then it can negotiate a guilty plea for price-fixing in the original product line that includes a substantially reduced fine.

### III. MORE SCRUTINY, MORE WORK

By the time a company discovers employees engaged in not one, but two or more, price-fixing conspiracies, Antitrust Division staff will have already heard an earful about the company, its exposed employees, and the conduct related to the original product from the co-conspirator cooperating in the investigation related to the original product line. Witnesses will have painted a picture of the role of individuals. The company may have been surveilled. Employees of the cooperating co-conspirator may have worn wires. Antitrust Division staff may have phone records. Business records provided by the cooperator may have provided DOJ a roadmap to what happened before and after any calls or meetings between the competitors. So, when company counsel make the call to the DOJ to put a marker down on the additional products, staff likely have composed a comprehensive picture of the company's role in the original conspiracy. Staff may view the culpable employees as enthusiastic, active participants in the conduct. If so, their going-in assumption upon hearing that the company uncovered conduct in other products will be that the employees engaged in similar conduct wherever they could. And, if the employees involved in the additional conduct are different from those involved in the original conspiracy, staff will wonder whether such conduct is endemic to the company.

When a company seeks leniency plus, the Antitrust Division staff expects counsel to have conducted — or be in the process of conducting — a wide internal investigation. It may be that one bad apple has been engaging in conduct that violates company policy as well as the law, and that the company determines that the conduct is limited following a review of the products handled by the bad apple. The DOJ staff, however, may insist that, as part of the company's cooperation, the company conduct a more expansive investigation and present the results. The DOJ requires extensive assistance from its cooperators, and the burden on companies and their employees can be staggering. As for business records, Antitrust Division staff often seek broad document productions from cooperators, even though they also expect the company to isolate and separately provide the most probative documents. Staff will question cooperating employees about all of the products they handle and all of their interactions with competitors. Cooperation may span years. The risk is real that a company enters the leniency plus program with a plan to satisfy its obligations through relatively narrow cooperation, and then, because the DOJ staff go where the evidence takes them, the breadth of cooperation balloons. Before the company decides to take advantage of leniency plus, company counsel should anticipate the potential scope of the investigation and cooperation and estimate the associated burdens.

### IV. AVOIDING THE FLIP-SIDE: PENALTY PLUS

Another scope-related danger exists, for the company and individuals alike. No matter how much conduct related to how many products the company discloses, there may be more. Sometimes this is inadvertent. Companies may not investigate broadly enough, and, after the DOJ has begun investigating and receiving subpoena responses from other companies, troubling conduct related to even more products is revealed. Sometimes employees decline to disclose all of their conduct to company counsel. They stay silent about relationships with competitors if they are not asked specifically about them, or they choose to confirm only facts or conduct observable in business records or phone logs, often believing that what they do not reveal will remain hidden away.

Once a company has accepted the benefits of leniency plus, the risk remains that DOJ will uncover even more conduct on other products that the company inadvertently failed to unearth and report. If the DOJ uncovers more conduct after the company pleads guilty to the original conspiracy, then the DOJ will seek a sentencing enhancement in connection with prosecuting the company for the additional conduct, and will also strip the company of its leniency plus benefits on the products it did report. The sentencing enhancement will be more severe if the DOJ concludes the company did not sufficiently investigate its employees' conduct, or if the company knew about the conduct but declined to report it. This is the flip-side of leniency plus, called "penalty plus." In the same 1999 speech in which he described leniency plus, Spratling laid out the penalty plus policy, and incorporated it into the Antitrust Division's leniency FAQs. The risks of penalty plus incentivize companies to go to great lengths to root out wrongdoing and disclose all of it.

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<sup>6</sup> Department of Justice, *Frequently Asked Questions About the Antitrust Division's Leniency Program and Model Leniency Letters* at 4-5 (Jan. 26, 2017).

Clearly the DOJ expects companies taking advantage of leniency plus to investigate broadly and do what they can to uncover any and all price-fixing. But companies in that situation often are racing co-conspirators to qualify for leniency as they uncover new conduct. Companies need not complete their internal investigations before seeking leniency plus out of fear of not reporting all additional conduct at once. Once counsel reach out to DOJ to put down a marker for leniency for additional products, the key is to be candid with Antitrust Division staff about the company's internal investigation. Ensure that staff know that the investigation is continuing and the company is committed to uncovering, disclosing, and seeking leniency for any additional conduct that comes to light. Tell staff explicitly that the ongoing internal investigation may lead to more leniency applications. They will react by noting that they cannot promise that leniency for any given product will still be available in the future, but they will not reject additional applications for leniency just because they come later.

## V. EMPLOYEE-RELATED COMPLICATIONS

The factor that most complicates a company's ability to get and keep leniency plus, and to avoid the flip-side of penalty plus, is the reality that key employees may receive the benefits of leniency on some products and face exposure to prosecution on others. This occurs when the same individuals are involved in both the original conspiracy and the price-fixing related to additional products. The company needs their cooperation to get and keep leniency, but the most culpable employees face prosecution for conduct related to the original product for which leniency is not available.

Complications arise immediately. The company is under investigation for price-fixing in the original product line, and needs quickly to re-view business records and interview employees to determine the extent of the potential exposure. At the outset, counsel may interview employees after providing an *Upjohn* warning<sup>7</sup>—advising that counsel represent the company, not the employee; that the interview is confidential and may be privileged, but the company holds the privilege; and that at its discretion the company may waive its privilege and disclose what it learns from the employee to the DOJ. But because counsel for the company may not represent employees, and key employees need legal advice to navigate the investigation, individual representation for many employees is inevitable.

Once retained, individual counsel necessarily act as gatekeepers for their clients, doing what they can to prevent employees from incriminating themselves. They often resist requests by company counsel to interview the individuals directly, and may refrain from disclosing details their clients provide them. Company counsel may react by threatening termination of employees for failure to cooperate fully in the internal investigation. But if the company fires key employees, it loses access to them and runs the risk that they will decide separately to cooperate with the DOJ and ruin the company's chance at leniency plus.

In some investigations, key employees may not be necessary to the company's investigation. Lower-level employees may have knowledge of key employees' conduct but may not be exposed to prosecution because they played a tangential role. In that instance, company counsel may gather sufficient facts to secure leniency, even if key employees do not contribute to the story. And at that point, key employees, with advice of individual counsel, may decide to cooperate with the company to reap the benefits of leniency for conduct related to the additional products, even though they face prosecution for conduct related to the original product. Employees, especially those in the United States who easily can be indicted, tried, and imprisoned, often do opt for that route. They believe that, by cooperating together with the company in the DOJ investigation, they have the best chance of receiving a lenient plea deal, even though a prison sentence is likely. The Antitrust Division insists on jail time for individual pleas.<sup>8</sup>

## VI. CONCLUSION

Given that half of the Antitrust Division's criminal cases arise out of investigations in completely separate markets, we know that companies avail themselves of the leniency plus policy. Companies facing the prospect of leniency plus must be prepared to investigate broadly and disclose all of the illegal conduct it uncovers. The DOJ will then require extensive and often drawn-out cooperation across all of the products the company discloses. Dealing with employees whose cooperation is crucial but who face exposure themselves is a significant challenge, and may be the factor that determines most significantly a company's ability to reap the benefits of leniency plus.

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7 *Upjohn Co. v. United States*, 449 U.S. 383, 394-95 (1981).

8 Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement, U.S. Dep't of Justice, *The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades*, presented at the 24<sup>th</sup> Annual National Institute on White Collar Crime, (Feb. 25, 2010).

# THE FUTURE OF CARTEL DETERRENCE AND DETECTION

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BY ROSA M. ABRANTES-METZ & ALBERT D. METZ<sup>1</sup>



<sup>1</sup> Rosa M. Abrantes-Metz is a Managing Director in the Antitrust, Financial Regulation, and Securities Practices at Global Economics Group, and an Adjunct Associate Professor of Economics at New York University's Stern School of Business; [RAbrantes-Metz@GlobalEconomicsGroup.com](mailto:RAbrantes-Metz@GlobalEconomicsGroup.com). Albert D. Metz is a Managing Director in the Antitrust, Financial Regulation, Securities, and Data Mining Practices at Global Economics Group, and a former Group Managing Direction at Moody's Investor Services; [AMetz@globaleconomicsgroup.com](mailto:AMetz@globaleconomicsgroup.com). The views expressed in this article are our own independent views and do not represent the views of the organizations with which we are affiliated or our clients.



## I. MOTIVATION

Over the last few decades, leniency programs recorded a successful history of identifying and dismantling cartels. The essential idea is simple, that authorities will reward a cartel member who self-reports. It is instructive to consider why authorities have relied so heavily on leniency in the past. First, it is not particularly resource intensive to implement. It doesn't require collecting large amounts of data and employing economists and data analysts to sift through the haystack in hopes of finding the occasional needle. Second, almost by definition leniency is likely to have a high success rate of prosecution, among those applications selected to be fully investigated. It is noteworthy though that authorities are reluctant to produce statistics on the overall efficacy of their leniency programs. We should have a better idea of how many leniency applications are reviewed and investigated (among all those filed), and of those, how many lead nowhere. But we are not privy to such valuable information.

Can authorities continue to almost exclusively depend on leniency programs going forward? There is no other area of criminal investigation which essentially waits for the guilty to confess as its key detection tool, yet the advantages of resource and success of such "passive detection" would equally apply to robbery or homicide: it doesn't cost much to wait for a confession, and if someone confesses, the case will almost certainly be closed successfully. But while the police surveil neighborhoods to monitor possible illegal conduct, ready to not only detect ongoing conduct but also hopefully to deter such conduct from even getting started, several competition authorities still tend to lack the proactive nature of detection and deterrence through screening or market monitoring, relying (almost entirely) on leniency programs. Hence, cartel detection appears, at least at first, to be a uniquely passive area of law enforcement.

In this short paper we explore the role of leniency programs in the next generation of cartel detection, and ultimately deterrence. Will it continue to be the dominant source of cartel detection, or will advances in data collection and analysis – so-called "big data" and "machine learning" – reduce the cost and increase the effectiveness of screening and artificial intelligence techniques? Will traditional leniency and whistleblower programs even remain effective in a future which may keep no "paper trail" of communications proving the necessary intent? Have we learned the lessons from extensive rigging in financial markets? Do we need to revisit the entire detection approach?

## II. LENIENCY HAS STRENGTHS AND WEAKNESSES

Before authorities investigate any sort of crime, the crime must be identified. The police will investigate every missing person report, but they do not knock on every door every day to make sure everyone is accounted for. Instead, they wait ("passively") until someone *informs* them that a person is missing.

In general, most crime is reported by the victim. The challenge with many cartels is that the victims of the cartel are diffuse, and the victims may not *know* they are victims. As a practical matter, who else but a member of the conspiracy is likely to report the crime, if even the victims do not know? It is eminently sensible for competition authorities to put an emphasis on leniency.

But while leniency is effective, and likely necessary, many competition authorities no longer believe it should be their almost exclusive approach to cartel detection. For example, in its 2006 Committee of Public Accounts Report, the Office of Fair Trading's competition enforcement explained that:

**The OFT has been too reliant on complaints as a source for its competition enforcement work.** The OFT should start a greater proportion of investigations on its own initiative, rather than waiting for a relevant complaint.<sup>2</sup>

After all, leniency is not without its drawbacks. It requires some cartel member to calculate that reporting the cartel is more beneficial than participating in it. But if the cartel is very successful – which means that its social harm is that much greater – then it becomes *less* likely that it will be self-reported to authorities. On the other hand, the more effective the cartel in terms of affecting market outcomes, the easier it will be to find through empirical screening techniques. Put simply, the likelihood of detection through leniency is *decreasing* with the cartel's effectiveness, while the opportunity of detection through screening is *increasing*.

While properly structured leniency programs are desirable and should remain in use, there is no reason they can't be supplemented by other methods, namely active market screening, and other programs. We have made this argument before, over the years (see, for example,

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<sup>2</sup> House of Commons, Committee of Public Accounts, "Enforcing competition in markets," Forty-second Report of Session 2005-06, page 5.

Abrantes-Metz (2013)).<sup>3</sup> This is especially true given the large success that screens have had over at least the last decade. In the last 15 years since screens have been advanced and implemented by economists including Abrantes-Metz, Harrington, Bajari, Froeb, and others,<sup>4</sup> many competition authorities around the world have started to develop and implement screening methods. These efforts need to continue, but what else should be done?

### III. SCREENS ALSO HAVE STRENGTHS AND WEAKNESSES, BUT COMPLEMENTARY TO LENIENCY

Screens are not an alternative to leniency, they are best seen as a supplement. Often, after screens first flag the possibility of collusion, successful leniency applications follow. The question is no longer whether leniency should be supplemented, but *how* leniency *must* be supplemented.

It was reporters and economists, not competition authorities, who developed and implemented screens which flagged the possibility of collusion in *LIBOR*, *Foreign Exchange*, *Gold* and *Silver London Fixings*, among others. Many of these led to leniency applications down the road such as on *LIBOR* and *Foreign Exchange*. Had the alleged conduct not first been flagged through screening, how likely is it anyone would come forward to confess to authorities and forego significant profits from the alleged market rigging?

Furthermore, these alleged collusions initially flagged by screens have in some cases led to investigations in other markets, such as Euribor. Several of these have yielded tens of billions of dollars in settlements for governmental agencies and private plaintiffs around the world, with more still to come.

Many of these cases involved structures which were flawed from the start, easy to rig, and which should never have been put in place. There have consequently been efforts to reform several financial benchmarks around the world through International Organization of Securities Commission, the Commodities Futures Trading Commission, the United Kingdom Financial Conduct Authority, and the European Commission. If successful, these reforms may reduce future malfeasance.

While screens are effective, we commonly hear concerns from competition authorities that they are too resource-intensive. This and several other common arguments against screens, along with counterarguments, were addressed in detail in Abrantes-Metz 2013's submission to the OECD. Resources will always be limited, and choices will always be necessary. But screening programs are becoming less expensive to develop as data are increasingly available, and sophisticated algorithms are constantly being developed and improved. While there may be some practical challenges in some cases, at least in principle screening is a type of "pattern matching" at which artificial intelligence and machine learning techniques excel.

### IV. PROVING EXPLICIT COLLUSION

Once collusion is identified, whether through leniency or through screens, the successful prosecution of a cartel often relies on the paper trail left by its members. E-mails, notes, and other records documenting the intent to collude and the existence of an explicit agreement is what separates illegal explicit collusion from legal, and otherwise perhaps mostly indistinguishable, tacit collusion.

Everyone – including the guilty – knows this. And everyone – especially the guilty – have learned their lessons from *LIBOR* and *Foreign Exchange*: actual and potential wrongdoers have learned that their incriminatory emails and chat messages may hang them. We should expect cartel members to adopt new communication technologies which do not keep records, at least not as easily.

Just as communication methods have become more sophisticated, the same needs to happen to detection methods. Authorities need to face the reality that direct evidence will probably be harder to come by, and that proactive reform of deficient structures is needed, coupled with active market screening. It is past time we learn our lessons.

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3 "Roundtable on *Ex Officio* Cartel Investigations and the Use of Screens to Detect Cartels, A Paper by Rosa M. Abrantes-Metz," prepared for the Directorate for Financial and Enterprise Affairs, Competition Committee, Organization for Economic Cooperation and Development, for discussion at its meeting held on October 31, 2013, OECD, Paris.

4 Examples of some of the first papers advocating for screening include "A Variance Screen for Collusion," R. M. Abrantes-Metz, Luke M. Froeb, John F. Geweke & Chris T. Taylor, *International Journal of Industrial Organization*, 24, 467-486, 2006; "Competition Authorities are Screening for Conspiracies: What are they Likely to Find?" R. M. Abrantes-Metz, Luke M. Froeb, *The American Bar Association Section of Antitrust Law Economics Committee Newsletter*, 8(1), 10-16, Spring 2008; "Screens for Conspiracies and their Multiple Applications," Rosa Abrantes-Metz & Patrick Bajari, *The Antitrust Magazine*, 24(1), Fall 2009; Joseph Harrington, 2004, "Detecting Cartels," preliminary draft available at <https://www.competitionpolicyinternational.com/assets/Uploads/Detecting-Cartels.pdf>, later published in the *Oxford Handbook of International Antitrust Economics*.

## V. A BRAVE NEW WORLD IN THE COLLUSION ARENA

Our experience from working on cases of collusion across all manner of industries for about two decades tells us that cartel behavior is changing. Over time, we are seeing less of the traditional “smoke filled rooms” of in-person conversations directly fixing prices; instead we are seeing more elaborate cartels, new forms of collusion, and new, more complex markets emerging in which collusion may flourish. Deterrence and detection tools need to change accordingly, or they will eventually become obsolete and potentially ineffective.

- *Changes in Financial and Commodities Markets Trading Facilitate and Provide the Incentive for Rigging*

There have been significant changes in financial and commodities markets over the last decades. The greater transparency from real time trading information across markets combined with a handful of dominant market players facilitates the emergence of collusion. Collusive conduct is easier to monitor and deviations from an explicit agreement are more easily punished, thus extending the duration of cartels.

In addition, the ever-expanding set of financial derivatives which are based on opaque price benchmarks provide an additional incentive, and opportunity, for collusion and manipulation, through a multiplier effect on illicit gains. Derivatives, while creating real economic efficiencies and helping to complete markets, also have the potential to magnify a “small” artificiality in the price of the underlying good into many millions or even billions of dollars in illicit daily gains. Furthermore, the complexity inherent in these transactions and their variety make it hard for regulators to identify foul play.

- *New Types of Collusion Are Emerging*

New types of collusion also seem to emerge at higher frequencies. For example, more cases of market spoofing have been identified. Market spoofing refers to a practice in which traders give a false impression of particular market conditions – for example, by placing too high bids or too low asks which they don’t intend to execute – in order to fool the market into believing fundamental prices have moved. As the market adjusts to the perceived information moving prices to the desired direction by colluders, they cancel their orders to buy or sell, benefiting from the market artificiality they caused in the same market or in a related market. The communications below identified in filings by authorities in precious metals show a couple of examples of this conduct.

On January 25, 2008, a UBS trader, Trader A, discussed trading activity with a trader, Trader B, who was employed by another large financial institution (“Financial Institution 1”). Trader A wrote: “hahaah,” to which Trader B responded: “**u [mu]st have [a] bout gazillions ... and u spoof the sell.**” Trader A wrote: “we good ain[’]t we,” to which Trader B responded: “not very friendly.” Trader A wrote further: “we never are ... u want a fr[ien]d ... get a dog ... ahahahah.”<sup>5</sup> (Emphasis added.)

In a July 19, 2011 chat, Trader F discussed trading activity with another trader, Trader H, who was employed by Financial Institution 1 in Singapore. Trader F wrote: “u are short, u want me to ram up gold? ... haha.” Trader H at Financial Institution 1 responded, “haha ... yes.” Trader F wrote further: “**just sit on the bid ... let me spoof it for u ... don[’]t pay me on the futures.**”<sup>6</sup> (Emphasis added.)

- *New, Complex, and Unregulated Markets Facilitate Rigging*

There are not only new ways to collude, new incentives to collusion, but also new markets to potentially manipulate and collude upon. For example, cryptocurrency is a relatively new and complex market, and potential wrongdoing is being identified by reporters and economists, as detailed in Bloomberg’s article dated June 29, 2018.<sup>7</sup> The article describes some of the trading patterns in one of the exchanges which raise red flags of potential illegal conduct. Markets in which (1) large trades do not seem to move prices; (2) some trades occur too frequently at very irregular and usual lot sizes; and (3) possible wash trades may have happened, to fool the market into an artificially high volume.

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<sup>5</sup> Source: CFTC Order Re: UBS AG, filed January 29, 2018, p. 3.

<sup>6</sup> *Id.*, p. 4.

<sup>7</sup> Matthew Leising, Mira Rojanasakul, Demetrios Pogkas & Brandon Kochkodin, “Crypto Coin Tether Defies Logic on Kraken’s Market, Raising Red Flags,” Published: June 29, 2018 | Updated on June 30, 2018, Bloomberg, available at <https://www.bloomberg.com/graphics/2018-tether-kraken-trades/>.

According to news, an investigation on possibly fraudulent practices has been initiated by the U.S. Department of Justice and other bodies.<sup>8</sup> The complexity of these markets and the apparent lack of oversight are an indication that authorities are likely at the bottom of the learning curve in how these markets actually operate and on what normal conduct may be. It may be some time before they can form an opinion on how these markets should operate, to ultimately be able to identify what is likely to be collusive.

- *The Dynamics of Competition, and that of Collusion, are Changing with Big Data and Pricing Algorithms*

The availability of big data, not only historical but also contemporaneous, and the emergence of pricing algorithms have raised concerns on whether collusion may be facilitated and explicit collusion may more easily be replaced by tacit collusion. Before jumping to the tempting conclusion that pricing algorithms will inevitably lead to more collusion, let's take a step back and think about whether they also (or even primarily) facilitate competition. It is true that pricing algorithms are likely to lead to equal prices across competitors, but the relevant question is whether prices converge to a high rather than to a low level.

Pricing algorithms provide many potential supply- and demand-side procompetitive effects, enhancing both static and dynamic efficiencies. When there are many competitors, products are homogeneous, cost functions are identical, there is perfect information and no barriers to entry, we attain the socially desirable outcome of perfect competition. This means that price is equal to marginal cost, the standard benchmark for competition. By allowing a quicker spread of information in the market (between supply and demand), and a rapid response to market conditions, pricing algorithms are likely, at least in some cases, to further facilitate reaching a perfect competition-like outcome.

That said, in industries where collusion was already more likely to occur (for example, because structural factors, such as having few customers and high barriers to entry, facilitated the occurrence of such conduct) pricing algorithms may enhance the monitoring and punishment of an explicit collusive agreement. They may even potentially replace the need to explicitly collude, with the convenience of tacit collusion. Pricing algorithms may increase the likelihood of tacit collusion in other markets where tacit collusion may have been harder to achieve and sustain over time, as in less concentrated markets (more easily allowing alignment of pricing across a larger number of competitors). Fundamentally, pricing algorithms change structural features of the market in terms of demand elasticity, barriers to entry, diversification, and others, changing the dynamics of competition and likely, the dynamics of collusion as well.

While neither the theoretical nor the empirical literatures yet provide a definitive answer as to whether the likelihood of collusion is increased due to big data and pricing algorithms, competition authorities should (and some, such as the U.S. Federal Trade Commission, already have)<sup>9</sup> study this topic to decide what, if anything, should be done in terms of law and regulation.

Until then, we should acknowledge that pricing algorithms do change the structural features of a market. What is worth stressing is that, to the extent they change the dynamics of competition and collusion, techniques beyond leniency will have to be deployed to detect collusion.

## VI. EFFECTIVE CARTEL DETERRENCE AND DETECTION IN THE FUTURE

Besides leniency programs and active market screening, several other components of effective deterrence and detection programs should be reinforced and improved in some cases, while others need to be implemented. Below we describe these in some detail.

- *Key Role of Antitrust Compliance Programs, Even More So Since Pricing Algorithms*

Collusive conduct occurs within and across corporations, and that is where deterrence needs to start. While one could hope for a change in corporate culture, we cannot simply rely on the natural rehabilitation of bad actors. Antitrust compliance programs need to be significantly enhanced. We all remember the few hours a couple of times a year or so that we were made to attend presentations on compliance at our work places, presentations usually so boring that we would be hard pressed to repeat any of it. More thought needs to be placed into the design of these programs, so that they can deliver enhanced awareness and adherence to the rules. Employees should be made aware that systems are in place which monitor conduct, and in particular, interactions with competitors. They need to know that pricing and bidding decisions are regularly screened for potential unusual patterns, and that they may be called to explain such patterns when needed.

<sup>8</sup> Matt Robinson & Tom Schoenberg May 24, 2018, 4:00 AM EDT Updated on May 24, 2018, "U.S. Launches Criminal Probe into Bitcoin Price Manipulation," Bloomberg, available at <https://www.bloomberg.com/news/articles/2018-05-24/bitcoin-manipulation-is-said-to-be-focus-of-u-s-criminal-probe>.

<sup>9</sup> See for example, <https://www.ftc.gov/news-events/audio-video/video/ftc-hearing-7-nov-14-welcome-remarks-session-1-algorithmic-collusion>.



In particular in the era of pricing algorithms, antitrust compliance takes on even greater importance: corporations need to fully understand the inputs and the output of their algorithms, and their general objectives, lest the corporations find themselves liable of collusion through algorithmic practices.

To make the cost-benefit calculation work for the corporation, there needs to be a recognition by competition authorities of the importance of antitrust compliance programs in the fight against collusion. Incentives such as reduced fines or criminal prosecution need to be in place which are strong enough for corporations who have developed reliable compliance programs. After all, such programs may lead to the internal self-identification of collusion, and don't we want corporations to have a larger incentive to self-monitor and self-report? This is where deterrence starts.

Furthermore, the stronger such a program is, the more resources may end up being saved by authorities. Everything else the same, high deterrence within the corporations and high likelihood of internal detection would reduce the need for as many resources to be put in place by authorities for deterrence and detection.

- *Corporate Leniency*

Authorities should also consider corporate leniency. Despite the several incentives already provided by leniency programs, we should ask ourselves if there is anything else that could and should be done to provide an even larger incentive for executives to come forward with direct evidence of the cartel. Leniency programs only partially mitigate the grave consequences faced by an executive who comes forward with the evidence (his own evidence of that of others in the firm) on the existence of a cartel. Even if he receives full amnesty and no criminal prosecution, personal and professional repercussions are likely to be very high (see Klawiter & Driscoll (2008)).<sup>10</sup>

- *Whistleblower Programs*

More generally, whistleblower programs which provide a monetary incentive to those coming forward with information leading to a successful prosecution or settlement are also needed, independently of whether or not they personally were part of the cartel. While many people will act on their conscience as good citizens, the reality is that often in these situations they will jeopardize their jobs, their reputations, and likely risk never working in the same industry again. Too risky if the financial incentive is not large enough to ensure whistleblowers can keep providing for their families, at the least. Other regulators such as the U.S. Securities and Exchange Commission have these programs, and have successfully detected illegal conduct through them, why shouldn't competition authorities do the same? Inside detailed knowledge of the workings of a cartel will be even more important as written direct evidence becomes scarcer.

- *Public and State Agencies Training and General Awareness*

Educating the general public should also play a role in deterrence and detection. If consumers and officials at local agencies know what to look for, what seems off, they are more likely to detect conduct that would otherwise have just passed through them completely. We are aware of examples bid-rigging with visible concerning red flags which should have easily been identified by state authorities but which were completely missed.<sup>11</sup>

- *Higher Penalties*

And in our view, higher penalties should be considered. While the sentencing guidelines provide a general description of factors to be relied upon for the calculation of fines, the reality is that several of these may not be directly measurable *a priori*, and may also be subjective to a great extent. We are too familiar with cases where the estimated and alleged illicit gains seem to be many orders of magnitude larger than the actual penalties. If actual gains are much larger than penalties, doesn't crime pay? What are a couple of years in jail compared to several hundreds of millions in illicit gains in the bank, to enjoy all the following years? Worthwhile, for many.

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10 Donald Klawiter & Jennifer Driscoll (2008), A New Approach To Compliance: True Corporate Leniency for Executives, Antitrust, 22(3).

11 "City construction bids are paved with questions," published September 15, 2012, *The Montreal Gazette* available at <http://www2.canada.com/montrealgazette/news/saturdayextra/story.html?id=eb95260e-dc40-4ada-b7f0-ae56796c8b25>; and "Montreal construction companies share common addresses," published June 21, 2014, *The Montreal Gazette*, available at <http://www.montrealgazette.com/news/Montreal+construction+companies+share+common+addresses/9959958/story.html>.

- *Proactive Restructuring of Defective Structures Facilitating Rigging*

All in all, we need to deter crime from the start, by making it harder for markets to be rigged. Authorities need to be more proactive in building structures which discourage abuse.<sup>12</sup> To frame the case, let's look at LIBOR rigging more closely. It was a daily report of the interest rate at which large banks could borrow in the interbank market. Hundreds of trillions of dollars in transactions and derivatives were tied to the rate, making it one of the most important financial rates in the world and creating an obvious incentive to manipulate it.

What allowed the manipulation of LIBOR to be as prolonged and successful as it was rests with how it was set. Historically it was based on a simple trimmed average of rates voluntarily postulated and reported by the participating banks with deeply vested interests in the outcome. It was administered by the British Bankers' Association, the banks themselves. Is it surprising that abuse was rampant?

Unfortunately, these sorts of deficiencies are not limited to LIBOR, and just as in LIBOR, the writing is on the wall. Another example, the London gold fixing was set twice a day by five competing banks that participated in private, undisclosed calls as part of a selective auction to trade physical gold. The final auction prices determined the morning and afternoon fixings, setting the value of hundreds of billions of dollars of financial contracts around the world.

While participating in the auction, members not only set prices but held private information on price evolution while trading gold derivatives. The benchmark administrator was, again, the banks themselves through the London Gold Market Fixing. Silver worked similarly, with only three banks and one daily fixing.

Failing to acknowledge the clear structural weaknesses of these settings can perhaps be dismissed as a mistake of the past. Many of these benchmarks have already been reformed and passed to be administered by exchanges such as Intercontinental Exchange and CME Group. But regulators should be asking themselves what other important structures may present similar deficiencies that make them highly susceptible to abuse, and proactively reform them before potential harm is incurred. There certainly are many that we can think of. Our concern though, is that these questions are neither being proactively being asked nor addressed. Should we then be shocked to learn sometime in the future that several other obviously flawed structures have been extensively rigged? Unfortunately, we do not think so.

## VII. CONCLUDING REMARKS

Competition authorities have long relied on those with inside knowledge to report collusive behavior. There are a number of good reasons for this and we don't see it going away. Indeed, as communications become more difficult to track, as humans may become increasingly removed from basic pricing decisions, we think the role of the whistleblower may grow in importance in the years to come.

But it would seem short-sighted not to supplement leniency with active screening and other methods. Leniency is less likely to capture the more successful cartels. And empirical screening has already proven its effectiveness in recent years. With the cost of data and data analysis falling, it would make sense for authorities to invest more in active screening programs.

Compliance and antitrust training programs can also effectively deter some cartel formation. It could be, if we are feeling generous, that some more junior staff can form cooperative relationships with their counterparts without realizing that this is illegal. In any event, if the penalties of their behavior attach to some degree on their managers, this again could deter cartel formation.

Ultimately policymakers want to discourage the formation and maintenance of cartels. The benefits of forming a cartel are obvious to its members. Policymakers hope to increase the cost (or risk) of the cartel to the point where it either doesn't form in the first place, or if it does, that it does not endure for long. But as a starting point, they also need to ensure that market structures are inherently harder than currently to be rigged, and they should monitor markets regularly.

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12 Abrantes-Metz "Time to Reform Deficient Market Structures," Opinion Article published in the Financial Times, April 11, 2016.

# LENIENCY WILL REMAIN AN ESSENTIAL PART OF THE EU'S CARTEL ENFORCEMENT TOOLKIT

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BY ALEXANDROS PAPANIKOLAOU<sup>1</sup>



<sup>1</sup> Case Handler, Antitrust case support and policy unit, DG Competition, European Commission. The views expressed in this article are those of the author and do not necessarily represent the position of the European Commission.



# I. INTRODUCTION

In recent months, it has become a common occurrence at antitrust-related conferences and international fora to encounter discussions and panels concerning a decline in the number of cartel leniency applications received by authorities in some major jurisdictions. Assuming this is the case in certain jurisdictions in terms of absolute numbers, the causes and the question of whether it is in fact something to be concerned about are matters for debate. The issue has even been framed by some as “the decline and fall” of leniency programs, especially in Europe.<sup>2</sup> Others have been more tentative, noting the trend but arguing that the number of leniency applications tends to be somewhat cyclical, with investigations and enforcement actions in certain specific sectors causing clusters of applications in those same industries, which naturally have a peak before declining and eventually ending. There is even the most optimistic possible interpretation, which is that leniency is a victim of its own success and any decline in the number of cases coming to light nowadays is due to increased compliance efforts by companies and their boards, credited in part to high levels of deterrence achieved by years of strong enforcement.

The available empirical data does not allow us to draw firm conclusions. There may be some validity to the argument that, due to a strong track record of enforcement in the EU and other large jurisdictions as well as changes in the economy and business practices in many sectors, the stereotypical “smoke-filled-room” type of cartel that leniency programs were originally designed to uncover, could be less prevalent than before. However, in light of the attention that the issue is now receiving, it would be unwise for regulators simply to conclude that greater compliance is the sole reason for any reduction in the number of leniency applications.

This being said, it is not the case that regulators, including the European Commission, are simply standing by and waiting for immunity applicants to come to them. The Commission recognizes that an essential part of an effective leniency policy is to make companies perceive a credible risk that a cartel could be discovered anyway if a company does not report it first. This could occur by various means, including the Commission’s own monitoring of important markets, a complaint to a competition authority from an aggrieved customer, or a tip from a whistleblower. In order to raise awareness among the public that anticompetitive conduct is illegal, that it can be reported to authorities, and that credible reports will be acted upon, in 2017 the Commission introduced an online tool allowing whistleblowers to submit tips anonymously.<sup>3</sup> Experienced staff vet all tips and decide if they merit further follow-up; tips which are credible but which seem to describe conduct limited in geographic scope may be passed to the relevant national competition authority (“NCA”). It is understood that the tool has already produced tips that have led to investigative steps by the Commission and by certain Member States.

## II. LENIENCY BRINGS TANGIBLE BENEFITS

All of that aside, before wading into the debate, it is useful to remember that there are still significant incentives to apply for leniency when a company has discovered cartel conduct. Obviously, chief among these for the first applicant is immunity from fines. In recent years, UBS AG avoided a fine of EUR 2.5 billion by virtue of applying for immunity in the *Yen Interest Rate Derivatives* case before the European Commission; MAN AG similarly avoided a fine of EUR 1.2 billion in *Trucks*; and Barclays a fine of EUR 690 million in *Euro Interest Rate Derivatives*.

For applicants who are not first in line, immunity is in principle not available but there are still benefits to coming in, in the form of often significant reductions in fines. A review of all cartel fines decisions adopted by the Commission under the 2006 Fining Guidelines should reveal that, in a majority of cases in which a second undertaking applied for leniency after an immunity applicant disclosed the infringement to the Commission, the leniency award for that undertaking was at least 40 percent (and frequently 50 percent, the highest reduction available).

The combination of leniency with the further 10 percent-reduction for settling with the Commission can further increase these benefits. In *Trucks* alone, approximately EUR 1.5 billion was saved by companies that applied for a reduction of fines and cooperated with the Commission’s investigation. The use of the settlement procedure, which is more likely in cases where all or most participants have applied for leniency and cooperated, notably also implies the adoption and publication by the Commission of a shorter, less detailed final decision than would otherwise be the case.

There are still other benefits to cooperating under the Leniency notice. Arguably, companies can mitigate reputational damage resulting from an eventual fines decision by adopting a stance towards the investigation that signals to the public and to shareholders that they have “come clean” and will better ensure compliance in the future. Further, immunity applicants in particular have certain protections established by EU legislation ensuring that they are not disadvantaged in follow-on damages actions compared with other cartel participants, and that their employees who cooperate with the investigation will not be subject to criminal sanctions in any Member State. These will be discussed further below.

<sup>2</sup> Johan Ywesyn & Siobhan Kahmann “The decline and fall of the leniency programme in Europe,” *Concurrences* No 1-2018.

<sup>3</sup> <http://ec.europa.eu/competition/cartels/whistleblower/index.html>.



### III. HOW STRONG ARE THE POTENTIAL DISINCENTIVES?

Members of the private antitrust bar have raised many different factors that they say can tip companies against reporting an infringement and/or cooperating with the investigation in a particular case. These include:

- a purported lack of certainty in relation to whether particular conduct constitutes an infringement, or whether it may do so but not be covered by the Commission's Leniency notice or the leniency program of a Member State;
- issues related to jurisdiction and case allocation between and among the Commission and NCAs; and
- uncertainty concerning exposure to private damages actions and criminal proceedings in national courts.

#### A. The Concept of a (Secret) Cartel

The Commission's 2006 Leniency notice sets out the framework for rewarding cooperation by companies who have been party to "secret cartels." It goes on to define cartels as:

agreements and/or concerted practices between two or more competitors aimed at coordinating their competitive behaviour in the market and/or influencing the relevant parameters of competition through practices such as the fixing of purchase or selling prices or other trading conditions, the allocation of production or sales quotas, the sharing of markets including bid-rigging, restrictions of imports or exports and/or anti-competitive actions against other competitors.<sup>4</sup>

This has since been incorporated into binding Union law in Article 2(14) of the 2014 Damages Directive, which further clarified that the definition above is in any case not exhaustive.<sup>5</sup>

The Commission's decisional practice under the 2006 Leniency notice and its 2002 predecessor has shown that it will in principle construe the above definition broadly enough to cover most patterns of behavior involving contacts between actual or potential competitors that are not known to the public nor to customers or suppliers, and are intended to influence parameters of competition, including by removing uncertainty about their respective intentions. The Commission has adopted fines decisions, and granted leniency rewards, in cases involving practices as diverse as:

- the exchange of information on weekly reference prices (*Bananas*);
- coordination of factory prices ("list prices") as opposed to final prices, and coordination on timing for the introduction of new technologies (*Trucks*);
- exchanges of information on trading positions and attempts to influence benchmark interest rates via exchanges in Bloomberg chatrooms (*Yen, Swiss Franc, and Euro Interest Rate Derivatives*); and
- inter-linked bilateral contacts among multiple competitors which consisted of the exchange of information on pricing intentions as well as other factors such as capacity and inventory (*Smart Card Chips*); and
- facilitation of a cartel by an undertaking that was not active on the cartelized market but which otherwise actively aided the objectives of the infringement (*Yen Interest Rate Derivatives*).

Accordingly, it is submitted that at least insofar as the European Commission is concerned, the cartel concept, even as it evolves to follow changing business realities, is sufficiently well-developed in the case law and practice to allow sophisticated antitrust lawyers to make substantive calls on potential infringements in the large majority of cases, and advise their clients accordingly. This is so even if the lawyers cannot in every case correctly predict whether the Commission would ultimately decide to devote resources to pursuing it. To the extent that uncertainty remains, the Leniency notice itself explicitly foresees the possibility for undertakings to submit an immunity application in hypothetical terms

<sup>4</sup> Commission Notice on Immunity from fines and reduction of fines in cartel cases (OJ C 298, 8.12.2006, p. 17), point (1).

<sup>5</sup> Directive 2014/104/EU on antitrust damages actions (OJ L 349, 5.12.2014, p. 1).

(point 16(b)) with names and other sensitive information removed. On this basis, the Commission will examine the submission to verify if the criteria for conditional immunity appear to be met, and notify the undertaking of its views before the immunity application is formally submitted (point 19). This possibility is virtually never used in practice.

The European Competition Network (“ECN”), composed of the Commission’s DG Competition and the NCAs of the Member States, is taking steps to ensure that any legal uncertainty concerning whether NCAs would take a different view on whether a leniency policy would apply to a particular case than the Commission would, is minimized. The ECN+ Directive, published in the EU’s Official Journal of January 14, 2019, defines a “secret cartel” as a cartel “the existence of which is wholly or partially concealed.” A recital clarifies that, in order to be secret, it is sufficient that “elements of the cartel which make the full extent of the conduct more difficult to detect are not known to the public or the customers or suppliers.” Articles 17 and 18 provide that all Member States must have in place leniency programs allowing them to grant immunity from or reductions of fines for secret cartels.<sup>6</sup> Once transposition of the Directive into national laws is complete, this should ensure that all ECN authorities will effectively be working with the same concept, even though the Directive authorizes NCAs to also award leniency to other conduct in addition to secret cartels. Any broader scope for leniency that may be possible in a particular Member State should not act as a disincentive to apply for leniency in relation to conduct that appears to come within the definition of a secret cartel.

## ***B. Jurisdiction and Case Allocation***

The lack of a one-stop-shop for leniency in the EU has often been cited as a complication that companies and their lawyers must take into account when considering whether (and where) to self-report participation in a cartel. Since there is no direct legal link between the leniency program of the Commission and those of the Member States, the Commission has always encouraged companies to protect their leniency position in the Member States when submitting a leniency application to the Commission, by submitting summary applications to all Member States concerned by the conduct at the same time. This would in principle prevent a loss of immunity status or a place in the leniency queue if the case were wholly or partially re-allocated within the ECN. This system, which respects the founding principles of work-sharing within the ECN, specifically in relation to parallel competencies and non-binding case allocation rules has worked reasonably well in most cases and will now be codified into binding law via the ECN+ Directive.

The ECN+ Directive aims to clarify the system and reduce the scope for differences between leniency regimes among its members. When the Directive comes into force, pursuant to Article 22, all NCAs will be required to accept summary applications meeting minimum criteria provided those applications cover more than three Member States as affected territories. The Commission will be recognized as the main interlocutor with the applicant until the point at which the Commission decides it will not take up all or part of the case. NCAs will further have a legal basis for accepting summary applications in a language other than an official language of the Member State, bilaterally agreed with applicants. Absent exceptional circumstances, NCAs will not be entitled to request a full application from an applicant who has already submitted a leniency application until the point at which the Commission informs them that it will not take up all or part of the case.

Applicants who have submitted summary applications will be given an opportunity to submit a full application should the NCA take up the case. If they do so within the time given by the NCA, the NCA will consider it as having been submitted at the time of the submission of the summary application. The Directive clearly puts the onus on applicants to keep NCAs updated if the scope of the conduct they have reported to the Commission changes, and NCAs can check if the scope matches up via cooperation within the ECN.<sup>7</sup> These clear principles should serve to reduce uncertainties concerning scope that could result in loss of immunity or leniency status in a Member State. However, the primary responsibility for ensuring that any summary application it submits is devoid of ambiguities as to its scope lies with the applicant, as recognized by the Court of Justice of the EU in the *DHL* case.<sup>8</sup> That preliminary ruling concerned an applicant that was beaten to immunity status in relation to conduct concerning road freight forwarding in Italy despite being first in line at the Commission-level for this conduct in addition to rail and sea freight forwarding. The applicant lost its position because its summary application failed to mention road freight forwarding, and another participant applied for immunity for that sector before the first applicant was able to supplement its application.

6 Directive (EU) 2019/1 of the European Parliament and of the Council of December 11, 2018 to empower the competition authorities of the Member States to be more effective enforcers and ensure the proper functioning of the internal market (OJ L 11, 14.1.2019, p. 3). See recital (53), Articles 17 and 18. The Directive will come into force twenty days after its publication, whereupon the Member States will have two years to implement it.

7 Recital (63).

8 Case C-428/14 *DHL v. AGCM*, judgment of January 20, 2016.

### C. Exposure to Private Damages and Criminal Sanctions

It used to be the case that in principle, companies considering whether to self-report cartels in Europe that were no wider than EEA-wide in scope, had little to fear in terms of legal exposure from any entity other than the competition authorities themselves. Financial exposure was largely limited to the fines imposed by the Commission or NCAs, while criminal liability was virtually non-existent within the EU. In recent years, this has changed. With the introduction of the Damages Directive and the recognition in case law that victims of cartels must have the right to seek redress in the courts, together with an increase in the number of Member States in which criminal prosecution for cartel offenses has become a possibility, it is said that the weighing of risks in relation to coming clean has become more complicated.

Private practitioners claim that this new unpredictability may make some clients more reluctant to self-report. This may well be the case, although it must be acknowledged that there is no good reason why a company that has uncovered a serious infringement of competition law within its ranks, and thereby harmed consumers, should be faced with an “easy” choice. The purpose of a leniency policy is not, and cannot be, to relieve infringers of all the consequences of their actions. The Commission and NCAs have taken steps to ensure that leniency remains as attractive as possible within certain constraints. The provisions of the Damages Directive concerning the protection from discovery of documents specifically prepared for purposes of leniency, as well as the limitation of joint and several liability for immunity applicants have been extensively discussed in the literature and there is no need to do so here.<sup>9</sup>

The ECN+ Directive introduces further measures. In order to bring protection from discovery into line with the practice of the Commission, NCAs will be required to accept leniency statements in oral form or by any other means that will permit applicants not to take possession, custody, or control of the statements. Most importantly, Member States will be required to ensure that current and former directors, managers, and other members of staff of immunity applicants are substantially protected from individual administrative and criminal sanctions based on the cartel behavior under national competition laws, provided those individuals cooperate with prosecuting authorities. Member States are also free to extend such protection from sanctions, or mitigation of sanctions, to current or former directors, managers, or other staff of applicants for reduction of fines.<sup>10</sup>

## IV. CONCLUSION

It is clear from the above considerations that deciding whether to report participation in a cartel infringement is not simple. Companies have to take into account financial exposure, reputational damage, relations with shareholders and the costs, burdens and uncertainties of managing investigations by sometimes multiple authorities, among other factors. Competition authorities understand this, and should make efforts to preserve incentives for companies to come in, provided these incentives do not tip the balance against effective deterrence and rightful compensation of victims. Self-reporting in the area of competition law in Europe is currently voluntary with few exceptions (for example, the UK's Financial Conduct Authority imposes on companies it regulates a duty to disclose to it any significant infringement of competition law). However, the voluntary system of reporting cartel infringements in exchange for leniency should not give rise to the impression that enforcement authorities do not take a very dim view of the prospect of companies essentially sitting on information they have discovered about their own participation in a cartel, and waiting for the infringement to be time-barred.

Once made aware of the conduct, boards of directors or senior management should obviously ensure that the company ceases its own participation in the cartel. This is not, however, a definitive step towards bringing the infringement as a whole to an end. Only the disclosure of the cartel to a competent authority can reliably achieve that. From a compliance standpoint, therefore, failing to report is clearly an inferior approach, even if all other appropriate measures are taken. The harm is allowed to continue and victims go uncompensated. Competition authorities will therefore continue to develop improved tools for detection and *ex officio* enforcement. Additionally, cartel enforcers could begin looking more closely at the specific internal reporting mechanisms of companies under investigation. It could even be envisioned, among other things, to treat evidence that participation in a cartel was known to senior management and covered up for a significant period while an infringement continued, as an aggravating circumstance justifying an increase in fines. Future reforms of leniency programs, when they occur, might do well to emphasize strengthening the stick, rather than further sweetening the carrot.

<sup>9</sup> See Damages Directive, Articles 6(6), 11(4)-(6).

<sup>10</sup> ECN+ Directive, Articles 20(1), 23(1)-(2), recital (66).

# THE U.S. CORPORATE LENIENCY POLICY: IT IS TIME FOR A RENAISSANCE

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BY DONALD C. Klawiter<sup>1</sup>



<sup>1</sup> Donald C. Klawiter is the Principal at Klawiter PLLC, an Antitrust and Competition Practice in Washington, D.C. For 43 years, Mr. Klawiter has practiced antitrust law; for ten years in several trial and supervisory positions at the Antitrust Division of the U.S. Department of Justice, and for the remainder as a partner at three major international firms and in his current practice. He served in many leadership positions in the ABA's Section of Antitrust Law, serving as Section Chair for 2005-2006. Mr. Klawiter has been Chair or Co-Chair of the Section's Criminal Working Group and the International Cartel Task Force, as well as an organizer, Co-Chair, or faculty member at the Section's International Cartel Workshops (1997-2018). The author thanks James A. Backstrom, Robert B. Bell, Jennifer M. Driscoll and Joseph Murphy for reviewing this article and providing valuable insights.



# I. INTRODUCTION

The Corporate Leniency Policy of the Antitrust Division of the U.S. Department of Justice is, without question, the single most effective tool in the detection and prosecution of cartels ever devised by enforcers. Significantly, 2018 marked the 40<sup>th</sup> anniversary of the original Leniency Policy of the Antitrust Division; it also marked the 25<sup>th</sup> anniversary of the revised Leniency Policy. As we celebrate these important milestones and review the stellar enforcement history that has resulted from the Leniency Policies, we should pause to assess the present state of the Policy and its future, especially as the Antitrust Division navigates through a serious downturn in leniency applicants and criminal enforcement.

This article will provide a brief historical review of the U.S. Corporate Leniency Policy from the perspective of a practitioner who served in the Antitrust Division and later, as defense counsel, sought and obtained leniency for his clients. It will be followed by a brief evaluation of the current slowing of U.S. criminal enforcement and how controversies relating to the Leniency Policy have contributed to it. Finally, it will offer the Division and the cartel defense bar “gentle encouragement” to restore, renew and seriously promote the Leniency Policy by proposing (1) urgent collaboration between the Division and the defense bar to determine solutions to the current leniency drought, including proposing revisions to the Frequently Asked Questions concerning treatment of current and past employees and characterization of “other offenses”; (2) a modest, but significant, change to better reflect today’s compliance environment; and (3) a return to the relentless promotion of the Policy by the Division and the welcoming partnership that provided its greatest success in the late 1990s and 2000s. Hopefully, these steps can spark a renewal – a renaissance – in the Leniency Policy and a significant strengthening of the criminal enforcement program.

## II. A BRIEF HISTORY OF THE U.S. CORPORATE LENIENCY POLICY<sup>2</sup>

From the beginning, the U.S. Leniency Policy has been a delicate balance of trust and good faith – and is the finest hour of collaboration among the Antitrust Division, the international corporate world and the antitrust cartel defense bar. The 1978 Leniency Policy came about as a result of an unusual request by one of the titans of the antitrust bar to give the Antitrust Division substantial evidence of cartel activity in a major industry that was unknown to the Division. In return, the Division declined to prosecute the company and its executives, so there would be no criminal charges, no criminal sentences, and no *prima facie* effect in civil damage actions. From that event, and its acceptance by the Division, came the terms of that first Leniency Policy. Assistant Attorney General John H. Shenefield announced the policy to a meeting of in-house counsel in April 1978. Nervous laughter filled the room as the audience realized that he was serious, and this was now the policy of the Department of Justice. The new Policy opened the debate on the value of corporate leniency and how far the Division should properly go. It created the spark that would lead to the 1993 Policy and the stunning enforcement successes of the next 25 years.

When the new Leniency Program was announced by Assistant Attorney General Anne Bingaman in 1993, it, too, was greeted with skepticism and it took some time to become a vibrant enforcement tool. While the Division heavily and skillfully promoted the new Policy, many members of the cartel defense bar held the strong belief that as long as the statutory corporate fine remained limited to \$10 million, corporate clients would be unwilling to turn against their friendly competitors and to even consider the available Leniency Policy. In *U.S. v. Mrs. Baird’s Bakery*<sup>3</sup> in 1996, the Division even declined the court’s invitation to utilize the alternative sentencing provision of the Criminal Fine Enforcement Act of 1987, 18 USC 3571(d), to increase the corporate sentence dramatically. Then, four months later, the Division dramatically changed its sentencing policy in October 1996 when it, for the very first time, invoked the alternative sentencing provision to obtain a \$100 million fine in *U.S. v. Archer Daniel Midland Co.*<sup>4</sup> That was a permanent change in antitrust sentencing policy, and it became the moment when the defense bar embraced corporate leniency and persuaded a significant number of culpable clients to seek leniency in the vitamins, graphite electrodes, food additives, chemicals, auto parts, and many other industries.

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2 This is my fourth article over almost twenty years entirely devoted to the U.S. Leniency Policy. The first three – in 2000, 2006 and 2013 – reflect the state of the Policy at that point in time with its benefits, challenges, and successes. They provide a detailed explanation of how the Leniency Policy operates and connects to international enforcement. That type of detail is not repeated in this article. The three earlier articles are Donald C. Klawiter, “Corporate Leniency in the Age of International Cartels: The American Experience,” *Antitrust Magazine*, Vol. 14, No. 3 (Summer 2000); Donald C. Klawiter, “US Corporate Leniency After the Blockbuster Cartels: Are We Entering a New Era?,” in Claus-Dieter Ehlermann & Isabela Atanasiu, eds., *European Competition Law Annual 2006: Enforcement of Prohibition of Cartels*, pp. 489-505, Hart Publishing, 2007; Donald C. Klawiter, “Corporate Leniency: Maintaining the Integrity and Power of Antitrust Enforcement’s Most Effective Tool,” in Frank L. Fine, ed., *China Institute of International Antitrust and Investment: First Annual Antitrust Symposium 2013*, pp. 327-345, LexisNexis 2013. All are available on-line or by email request ([don@klawiterpllc.com](mailto:don@klawiterpllc.com)).

3 No 3-95 CR-294-R (N.D. TX, May 30, 1996).

4 Cr No 96-CR00640 (N.D. ILL, October 15, 1996) (Plea Agreement).

The Division successfully structured and built on the Leniency Policy by developing the concepts of Leniency Plus and Penalty Plus.<sup>5</sup> Importantly, the senior leadership of the Division aggressively promoted the new Policy through speeches, programs, and the incredibly valuable consultation between the Antitrust Division and the American Bar Association Section of Antitrust Law. This relationship was first known as the DOJ-FTC Working Group (Criminal) and later became the International Cartel Task Force. Because of the sensitivity and confidentiality of the discussions, the group never issued a report, but, instead, set out the issues it discussed through the Section of Antitrust Law's International Cartel Workshops, first presented in 1997 and presented every two years since.

At the same time, as the Leniency Policy became more and more successful, many jurisdictions around the world developed their own leniency policies. This development – demonstrating that imitation is the sincerest form of flattery – expanded cartel enforcement worldwide, first in Europe, then in Asia and Latin America. Rather than applying for leniency only in the U.S. and Canada, many applicants had to apply in the European Union, Brazil, Japan, Korea, Australia, South Africa, and others. While extending enforcement, it also has complicated leniency consideration and dramatically increased the cost of obtaining leniency.<sup>6</sup>

Despite these complications and costs, U.S. leniency applications continued to increase. As the Policy flourished, there were situations where the Division was frustrated with the timing and quality of an applicant's cooperation, or the quality of witnesses, but the Division remained committed to the partnership it had forged with defense counsel. Since virtually all of these issues remained confidential, there was no public filing on these issues until the *Stolt-Nielsen* matter was adjudicated.<sup>7</sup>

*Stolt-Nielsen*, and the evolving “marker” system that lengthened the approval period, put a strain on the Leniency Policy, as did the increasingly multi-jurisdictional focus of leniency applications. Seeking leniency at the European Commission, for example, was much more adversarial and time-sensitive than in the U.S., and the EC did not make it easy and convenient for applicants to keep statements or interviews protected from private damage actions. Ultimately, the inability of major jurisdictions to compromise with each other and simplify procedures for the applicant added to the degree of difficulty in achieving leniency. This set of obstacles, however, did not appear to dampen the enthusiasm for leniency applications in the U.S.

The final major development in the U.S. Leniency Policy's history came in the 2010s and primarily involved the auto parts and banking industries. The most significant feature of auto parts was the extensive – some would say excessive – use of Leniency Plus, where a small number of major companies provided evidence in many markets in exchange for multiple Leniency Plus agreements. While this resulted in the largest investigation in antitrust history, it also created resentment by many smaller companies that were implicated by the industry giants, as well as allegations that the large companies coerced the small companies into cartel behavior.<sup>8</sup>

To some extent, the Leniency Policy was a victim of its own success. With size came more rules and procedures – and far less transparency. The 2017 Frequently Asked Questions created more questions and concerns. Persuading clients to seek leniency is hard enough; persuading them when rules are changing or being reinterpreted – or even appear to be – is unsettling to the client and damaging to the credibility of the Leniency Policy.

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<sup>5</sup> See *supra* note 2.

<sup>6</sup> This article does not discuss in detail the high costs of applying for and obtaining leniency in multiple jurisdictions around the world. Nor does it focus on the proliferation of private damage actions in many jurisdictions. This article focuses almost exclusively on the U.S. Leniency Policy which, unlike many around the world, relate to criminal liability of corporations and individuals. For an outstanding study of leniency around the world in all of its components, see Caron Beaton-Wells & Christopher Tran, ed., *Anti-Cartel Enforcement in a Contemporary Age: Leniency Religion*, Hart Publishing 2015.

<sup>7</sup> *Stolt-Nielsen* was the first and only attempted expulsion from the U.S. Leniency Policy that became public. Essentially, the Division believed that *Stolt-Nielsen* gave the Division incorrect information about the timing of its withdrawal and the evidence it provided.

<sup>8</sup> See *supra* note 2. The 2013 article provides a detailed analysis of this issue, including the concern that these large companies were “the organizer” or “leader” or otherwise “coerced” companies to participate in cartel behavior.

### III. THE CURRENT DECLINE IN CRIMINAL ENFORCEMENT – AND LENIENCY

The decline in criminal enforcement is dramatic and continuing. From FY 2008 through FY 2018, the United States secured \$10.5 billion in corporate criminal fines, the vast majority of which resulted from leniency-based cases. Over the past three years, total corporate fines were only \$700 million – this significant drop followed four consecutive years of over \$1 billion in fines. Recently, the *Financial Times* reported that criminal antitrust enforcement is at its lowest point since the Nixon Administration.<sup>9</sup>

Given its impressive history, why is criminal enforcement at such a low point? The factors of multijurisdictional leniency, multijurisdictional enforcement, and multijurisdictional damage actions have increased its cost and complexity, but the benefits to the applicant seeking leniency in multiple jurisdictions are palpable. There is no way to answer the question of the decline in enforcement with confidence and precision. The possibilities are industry behavior, the degree of prosecutorial focus, or the lack of incentives for corporate cooperation. With respect to industry behavior, there are a few practitioners and commentators who will argue that industries have seen the impact of huge fines, jail sentences, and damage actions and have cleaned up their anti-competitive conduct. Those who have practiced in this area, or studied the economics of collusion, or observed human behavior will understand that many business executives, especially in desperate economic times, will turn to cartel behavior to solve their revenue problems – and justify it as saving their companies. The ageless wisdom of Adam Smith's *Wealth of Nations* is as relevant today as it was in 1776.

As to the intensity of prosecutorial focus, a change of presidential administrations always brings about some bumps, and this change was more disruptive for a variety of reasons. The departure of Brent Snyder as the Deputy Assistant Attorney General for Criminal Enforcement slowed the opening of new investigations, a situation made more acute by the fact that it took over a year to bring in a successor. At the same time, the Division lost several of its most experienced and accomplished criminal prosecutors and managers in the past three years. Before that, in 2011, the Division announced that it would close four of the Division's field offices – in Philadelphia, Cleveland, Atlanta, and Dallas, taking away hundreds of years of prosecutorial (and, importantly, trial) experience that was responsible for blockbuster actions such as vitamins (Dallas), graphite electrodes (Philadelphia), USAID Egyptian infrastructure (Atlanta), and many others. This depletion of quality prosecutors between 2011 and 2018, together with the “all hands” effort the Division required for the auto parts investigations and bank rate manipulation investigations, did not provide the firepower to even begin to fill the pipeline.

The drop in the number of significant leniency applications also has been a major factor in the decline in criminal enforcement. Almost every major cartel investigation over the past two decades was the result of a leniency applicant. The Policy, which was promoted with such enthusiasm and great success in the late 1990s and early 2000s, has fallen into disrepair for a number of reasons, many related to breaches in the delicate balance of trust between the Division and leniency applicants. The “red carpet” approach of welcoming partnership between the Division and the applicant has waned over the years because of claims of breaches of trust and good faith between the parties. *Stolt-Nielsen*, where the Division attempted to expel a company from the leniency program, and *UBS*, where the leniency applicant in the bank rate manipulation investigations was charged with “another crime,” are examples of those very public controversies. Regardless of your position on these events, it was changes in the interpretation of treatment of corporate executives and interpretation of other crimes not being covered by the Leniency Policy that have opened up a rift between the Division and the cartel defense bar that needs serious attention. The fact that more than 50 jurisdictions around the world have signed on to the leniency idea following the initiatives of the U.S. and Canada – and later the EC – makes the need to renew the U.S. Policy all the more critical to the successful future of cartel enforcement.

The actions that have breached the delicate balance of trust on both sides of the leniency equation are detailed elsewhere. A particularly outstanding description is in a very recent article by Robert B. Bell & Kristin Millay.<sup>10</sup> The Bell-Millay article sets out the details of the 2017 changes to the Leniency Policy's Frequently Asked Questions relating to the availability of leniency for “antitrust crimes only” and the Division's discretion to exclude highly culpable current employees from Type B Leniency. Both the Division's treatment of UBS in 2014 for “other crimes” and the seeming shift of its Policy towards employees sent alarm bells to the cartel defense bar members who had grown up and advised clients about leniency in a much more transparent setting. In addition to the reasons for the decline in criminal enforcement discussed above, these unilateral changes in the Leniency Policy's rules further contributed significantly to the downward spiral of antitrust criminal enforcement.

<sup>9</sup> “US Antitrust Enforcement Falls To Slowest Rate Since 1970s,” *Financial Times*, November 29, 2018.

<sup>10</sup> Robert B. Bell & Kristin Millay, “The Corporate Leniency Program: Did the Antitrust Division Kill the Goose that Laid the Golden Eggs?,” *Antitrust Magazine*, Vol. 33, No. 1 (Fall 2018).

## IV. THREE POSITIVE STEPS TOWARDS A RENAISSANCE IN THE U.S. CORPORATE LENIENCY POLICY

The success of the U.S. Leniency Policy has made the Antitrust Division the preeminent criminal antitrust enforcement agency, and it has brought competition and the rule of law to industries around the world. Neither the Division nor the defense bar can allow these disagreements and alleged breaches to relegate this great Policy to a historical footnote. From its inception, the Leniency Policy was based on trust – on a positive partnership of the Division and the corporate entity and its counsel. The balance has always been a delicate one that was successful over hundreds of attempts for over 25 years. I offer three modest and positive suggestions to renew and revitalize the Policy.

### ***A. Division Leaders and Cartel Bar Leaders Must Communicate Urgently and Positively About the Leniency Policy***

The 2017 revisions of the Frequently Asked Questions provoked a firestorm from the cartel defense bar that has now raged for almost two years. The reaction from the cartel defense bar was immediate and loud, resulting in a large number of unfavorable reviews (some of which are collected in footnote 44 of the Bell-Millay article). The reviews focus on the treatment of corporate employees and the “other crimes” discussion, as well as the Division’s attitude towards leniency applicants. The passage of time has done nothing to resolve the problem and rebuild trust between the Division, potential leniency applicants, and the cartel defense bar. It is clear that few, if any, of the potential applicants will be visiting the Division anytime soon.

The first step is to bring the Division leadership together with the cartel bar leadership in confidential discussions. The ABA Section of Antitrust Law’s International Cartel Task Force is the perfect vehicle to begin such discussions – it worked in the 1990s and 2000s as the DOJ-FTC Working Group (Criminal). It can be confidential, which will lower the temperature and allow for proposals that can establish balance and trust.

After candid input and constructive discussions, the Division leadership can take what it learned in the confidential discussions to propose changes and clarifications to the Frequently Asked Questions and the Policy. The fact that Division and defense leaders worked in good faith to renew the Policy will go a long way towards bringing leniency applicants back to the Division’s door.

### ***B. Make Compliance a Part of the Conditions of Obtaining Leniency***

The Division takes justifiable pride that the text of the Corporate Leniency Policy has not changed in 25 years. While that is commendable, the Policy also must reflect the signs of the times to remain vibrant and effective. This proposed amendment reflects the views of several accomplished criminal practitioners that compliance is today a central element of successful enforcement. This change in the Leniency Policy will, if executed properly, improve the Policy and give the Division a greater certainty that the Policy will work effectively.

Over the past 20 years, defense counsel often have proposed that the Division should give credit or consideration at sentencing for a serious compliance program. The U.S. Sentencing Guidelines for Organizations provide for such consideration. For much of that time, the Division ignored that provision, as well as the practices of the rest of the Department of Justice. It argued that a company should get no credit for its compliance program because, if the company was convicted of cartel conduct, the compliance program did not work. The movement to give companies credit for antitrust compliance programs has gained momentum in recent years with Division leadership acknowledging the debate and the value of compliance. The Division has even proposed appointment of compliance monitors as a condition for probation in certain cases.

Until recently, no leniency regime around the world required compliance programs as a condition of granting leniency. Last June, however, the Hong Kong Competition Commission, with Brent Snyder (who previously led the criminal program at the Antitrust Division) heading its cartel enforcement program, was the first to propose a compliance program requirement. The U.S. should follow this excellent idea.

This added requirement – that the applicant establish and implement an effective compliance program – will have three benefits. First, it will restore compliance to its rightful place as the centerpiece of antitrust criminal enforcement. As many of us who regularly promote serious compliance training know, it is hard to understand why this provision had not been part of the formal policy over the past 25 years. Second, with its implementation, a compliance program will acquaint the leniency applicant’s employees with the contours of cartel behavior and its implications, as well as make them more focused and better informed witnesses in the leniency process, and better sources of possible Leniency Plus evidence. Third, with effective compliance training for employees of the leniency applicant, the Division should be far more comfortable with not prosecuting those employees and with their continued employment. It is certainly a step in the direction of solving some of the issues raised by the 2017 FAQ revisions.



This new provision of the Leniency Policy will supply a spark that will help to revitalize the U.S. Leniency Policy. It will bring the Policy back to the headlines in the antitrust law environment, as well as to the attention of corporate counsel globally. Combining that provision with a return to the “true partnership” and clarification of the policy on employees and other offenses, the Division will see a movement to more leniency applications and a restoration of criminal enforcement to the level of its most productive past.

### ***C. Return the Leniency Policy to a Positive and Enthusiastic Partnership***

The Leniency Policy was not an easy concept to accept. Many Division prosecutors initially bristled at the idea of “giving it away” – some still do. Corporate executives were skeptical of counsel’s recommendations to pursue leniency– at least until the level of fines imposed and damages awarded gained their attention after 1996. It took enormous effort by the Division leadership, particularly Gary Spratling, to promote the Policy with great enthusiasm. In speech after speech, Gary and his successors explained the benefits of the Leniency Policy – ZERO fines, ZERO jail, etc. – and pledged full partnership with the applicant to get it over the goal line. From personal experience, the Division was true to its word. Yet, defense counsel had a very hard job of convincing its clients to apply. The Division’s public pledge and private assistance made the difference – good faith and trust were real.

Over the years, that fervor waned. Division officials scolded leniency applicants to be more forthcoming and to provide information faster. I suspect that the approach of the European Commission, with its more grudging acceptance of leniency applicants in a more impersonal system, unfortunately has influenced U.S. enforcers. I am certain that the Division was justified in complaining about the timing and degree of cooperation of some leniency applicants; the tragedy is that the Division’s rebuke was public and generic – and that caused resentment and inaction and fewer applications.

The business world and its legal counsel must be made aware anew that the Leniency Policy exists and that the Antitrust Division ardently enthusiastically welcomes the partnership with the companies and counsel. If the Division rises to the occasion by helping leniency applicants to succeed rather than setting up more obstacles, there will indeed be a renaissance in criminal enforcement. If not, the greatest antitrust enforcement program ever will be a fading memory.

## **V. CONCLUSION**

It is time for a renaissance in the U.S. Leniency Policy and criminal antitrust enforcement. A renaissance looks back to the wisdom and success of the past and takes inspiration from it. With that wisdom and success, it also develops its own creative ideas. The renaissance is intended to make things better. In an environment of good faith on both sides, it assuredly will.



# WHY ACPERA ISN'T WORKING AND HOW TO FIX IT

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BY JOHN M. TALADAY<sup>1</sup>



<sup>1</sup> John Taladay is Co-Chair of the Antitrust and Competition Law Practice at Baker Botts LLP. This article was originally prepared for the ABA Section of Antitrust Law's 2018 Antitrust Spring Meeting and was co-authored with Special Counsel Evan Werbel and Associate Ashley Eickhof, both with Baker Botts LLP.

# I. INTRODUCTION

The Antitrust Criminal Penalty Enhancement and Reform Act (“ACPERA”),<sup>2</sup> which limits civil penalties for antitrust leniency applicants that cooperate with civil plaintiffs, was intended to encourage corporations and individuals to report antitrust violations under the Department of Justice’s (“DOJ”) leniency program. Prior to its enactment in 2004, leniency applicants, though relieved of criminal fines and potential incarceration, still faced the possibility of exorbitant civil exposure based on the threat of treble damages and joint and several liability for all harm caused by all conspirators. Congress sought to address this potential disincentive to seeking leniency by enacting ACPERA.

The statute as currently drafted and implemented, however, is not serving this purpose. Because a leniency applicant has no indication of whether it will qualify for ACPERA benefits until *after* the liability and damages stages of a trial have been completed — a stage that is rarely reached in civil antitrust litigation today — ACPERA applicants often are not benefitting from the statute. Indeed, civil plaintiffs routinely disregard ACPERA status and attempt to create uncertainty about ACPERA benefits in order to undermine a leniency applicant’s ability to negotiate settlements against the backdrop of ACPERA. As this tactic has become more apparent, it has become a growing disincentive to seeking leniency. But there is a solution.

To make ACPERA benefits valuable and to encourage corporations and individuals to continue to apply for leniency, the statute could be amended in a way that would aid a company’s incentives to seek leniency while maintaining the benefits that flow to plaintiffs from an ACPERA applicant’s cooperation. A rebuttable presumption should be introduced that provides an ACPERA applicant with an early indication that it has satisfied its initial ACPERA obligations. This rebuttable presumption would offer some degree of assurance to an ACPERA applicant regarding its ACPERA status and allow the ACPERA status to play a more prominent role in civil antitrust outcomes (i.e. settlement discussions), as originally intended by the statute.

## II. BACKGROUND ON LENIENCY AND ACPERA

In 1993, the Antitrust Division of the U.S. DOJ created its current version of the leniency policy.<sup>3</sup> The policy is designed to encourage corporations and individuals involved in antitrust crimes to self-report.<sup>4</sup> After full cooperation with the government, the amnesty applicant receives amnesty from the DOJ, avoiding prosecution by the DOJ, and potential criminal fines and incarceration for individuals.<sup>5</sup> The certainty provided by the DOJ’s leniency program made it one of the most successful initiatives in the history of the Antitrust Division.

The leniency policy itself, however, does not provide any protection from the civil ramifications for the same conduct. The Sherman Act provides for civil plaintiffs to recover treble damages, and defendants are also jointly and severally liable for the harm the conspiracy caused.<sup>6</sup> As civil damage actions became more prevalent and more costly — perhaps a natural consequence of the success of the leniency program itself — the threat of significant exposure to civil penalties was viewed as a discouragement to potential leniency applicants from reporting criminal conduct to the DOJ.

Congress decided to address this potential disincentive with the passage of ACPERA in 2004. The statute limits the leniency applicant’s damages on the civil side. If leniency applicants meet the obligations under the statute, they are not liable for treble damages, nor are they jointly and severally liable.<sup>7</sup>

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<sup>2</sup> Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, Tit. II, 118 Stat. 661 (June 22, 2004).

<sup>3</sup> U.S. DEP’T OF JUSTICE, ANTITRUST DIV., FREQUENTLY ASKED QUESTIONS ABOUT THE ANTITRUST DIVISION’S LENIENCY PROGRAM AND MODEL LENIENCY LETTERS 1, n.1 (Jan. 26, 2017), available at [www.justice.gov/atr/page/file/926521/download](http://www.justice.gov/atr/page/file/926521/download) [hereinafter FAQs] (“The Division first implemented a leniency program in 1978. It issued its Corporate Leniency Policy in 1993, which substantially revised the program, and a Leniency Policy for Individuals in 1994. The Division’s Corporate Leniency Policy and Leniency Policy for Individuals are available at [www.justice.gov/atr/leniency-program](http://www.justice.gov/atr/leniency-program).”).

<sup>4</sup> *Id.* at 1.

<sup>5</sup> *Id.*

<sup>6</sup> 15 U.S.C. § 15.

<sup>7</sup> A defendant must provide “satisfactory cooperation” to the plaintiff. The judge presiding over the matter determines whether “satisfactory cooperation” has been provided after considering “any appropriate pleading from the [Plaintiff].” ACPERA § 213(b). A defendant must (1) provide a “full account . . . of all facts known to the applicant . . . that are potentially relevant to the civil action;” (2) furnish “all documents or other items potentially relevant to the civil action that are in the possession, custody, or control of the applicant;” and (3) use “its best efforts to secure and facilitate” interviews, depositions, and trial testimony of individuals covered under the leniency agreement. *Id.*

The legislative history is clear that ACPERA was passed to “address this disincentive to self-reporting” for “corporations and their executives if they provide adequate and timely cooperation to both the Government investigators as well as any subsequent private plaintiffs bringing a civil suit based on the covered criminal conduct.”<sup>8</sup> When the statute was reauthorized in 2009, Congress again reiterated its intent to “address this shortcoming in the criminal leniency program by also limiting the cooperating party’s exposure to liability with respect to civil litigation.”<sup>9</sup>

### III. IS ACPERA WORKING?

In practice, ACPERA is not working as the legislature intended. Leniency applicants are not always receiving the promised benefits of ACPERA, despite cooperation with plaintiffs, and continue to face the threat of treble damages and joint and several liability. Any potential leniency applicant must weigh this threat when it considers reporting conduct to the DOJ, and certainly some potential leniency applicants choose not to report to the DOJ given this risk. As potential leniency applicants see that ACPERA may not be as helpful as Congress intended, corporations may ultimately decide that the risks of reporting criminal antitrust violations are too great given the potential civil exposure.

Although Makan Delrahim, Assistant Attorney General of the Antitrust Division, recently hailed the leniency program as the DOJ’s “most important prosecutorial tool”<sup>10</sup> and the DOJ has long touted the program as a great success,<sup>11</sup> the number of corporations charged by the DOJ with criminal antitrust violations has decreased significantly in recent years.<sup>12</sup> Also, the total dollar value of the fines imposed on corporations by the DOJ has decreased.<sup>13</sup> It is impossible to know whether this reduction in the DOJ cases and fines is tied to ACPERA’s failure to provide certainty to potential leniency applicants regarding civil penalties. Regardless, ensuring that the intentions of ACPERA are satisfied should be a priority of Congress.

Currently, ACPERA provides little guidance to plaintiffs, defendants, or courts about its implementation and scope of required cooperation. For example, leniency applicants and plaintiffs often disagree over the scope of the ACPERA requirement to provide “a full account to the claimant of all facts known to the applicant . . . that are potentially relevant to the civil action.”<sup>14</sup> This debate has also led to great uncertainty for potential leniency applicants as to how ACPERA will limit actual civil exposure, if at all.

This uncertainty is exacerbated further by the very nature of class action antitrust litigation. Plaintiffs’ claims in antitrust civil litigation often far exceed the scope of the DOJ’s criminal investigation. When the DOJ announces an investigation into a certain industry, civil lawsuits immediately follow. These lawsuits, based only on the DOJ’s non-specific announcement, often will allege antitrust violations impacting every major participant in the industry, every conceivable geography, every potential product and variation, and a time frame that is as long as the statute of limitations could possibly allow. The actual scope of the offense being investigated by the DOJ, based on a full accounting of the facts by the leniency applicant, might be a narrow conspiracy involving one or two competitors, limited products, and a short time span.<sup>15</sup> Indeed, the current auto parts cases are a textbook example of this situation. Under these circumstances, plaintiffs will often take the position that an ACPERA applicant has failed to meet its cooperation obligations because it has not provided information on every allegation in its complaint or because an ACPERA applicant challenges the scope of plaintiffs’ claims through a motion to dismiss, an opposition to class certification, or a summary judgment motion.<sup>16</sup> Nothing in ACPERA requires a defendant to provide information to plaintiffs on facts that are *not* “known to the claimant,” nor

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8 150 CONG. REC. S3610-02, S3614 (Apr. 2, 2004) (statement of Sen. Hatch).

9 155 CONG. REC. H.R. 2675 (June 9, 2009) (statement of Rep. Johnson).

10 Makan Delrahim, Assistant Att’y Gen., U.S. DEP’T OF JUSTICE ANTITRUST DIV., GOOD TIMES, BAD TIMES, TRUST WILL TAKE US FAR: COMPETITION ENFORCEMENT AND THE RELATIONSHIP BETWEEN WASHINGTON AND BRUSSELS, ADDRESS BEFORE THE COLLEGE OF EUROPE 4 (Feb. 21, 2018), available at [www.justice.gov/opa/speech/file/1036626/download](http://www.justice.gov/opa/speech/file/1036626/download).

11 James M. Griffin, Former Dep. Assistant Att’y Gen., U.S. DEP’T OF JUSTICE, ANTITRUST DIV., THE MODERN LENIENCY PROGRAM AFTER TEN YEARS, ADDRESS BEFORE THE ABA SECTION OF ANTITRUST LAW ANNUAL MEETING 7 (Aug. 12, 2003), available at [www.justice.gov/atr/file/518851/download](http://www.justice.gov/atr/file/518851/download) (“the Leniency Program is the Division’s most effective generator of international cartel cases”).

12 In 2015 and 2016, fifteen and fourteen corporations were charged, respectively. In the two years prior, 2013 and 2014, twenty-four and twenty-five corporations were charged, respectively. See U.S. DEP’T OF JUSTICE ANTITRUST DIV., ANTITRUST DIVISION WORKLOAD STATISTICS FY2007–2016 11 (2018), available at [www.justice.gov/atr/file/788426/download](http://www.justice.gov/atr/file/788426/download).

13 In 2015, \$985,706,000 in fines were imposed on corporations. In 2016, \$452,935,000 in fines were imposed on corporations. Compare these to 2014, where \$1,904,714,000 in fines were imposed. *Id.*

14 ACPERA § 213(b)(1).

15 Plaintiffs will often note, correctly, that because their burden of proof in a civil case is lower than the DOJ’s burden in a criminal case, they may be able to prove a broader conspiracy. This would not necessarily be evident, however, at the initial pleading stage.

16 Indirect Purchaser Pl.’s Opp’n to Def. Tecumseh Corp. Mot. to Dismiss at 1, n.2, *In re Refrigerant Compressors Antitrust Litig.*, MDL No. 2:09-02042, (E.D. Mich. Oct. 29, 2010) Dkt. No. 187 (Plaintiffs claimed that the filing of a motion to dismiss by the ACPERA applicant was inconsistent with the cooperation provisions of ACPERA).



does ACPERA limit a leniency applicant's right to challenge the scope or legal underpinnings of the plaintiffs' case. There must be a distinction between cooperation and the right to defend against overbroad allegations or exaggerated claims for damages. Nonetheless, in practice, a leniency applicant may face risk that its ACPERA status may be imperiled by exercising its basic rights of defense.

The very limited caselaw interpreting ACPERA further adds to the uncertainty surrounding the statute. In the fourteen years since the passage of ACPERA, fewer than twenty-five cases have dealt with the statute directly. The cases that have addressed ACPERA provide little guidance on how a court will determine if an ACPERA applicant has satisfied its cooperation obligations. In fact, no court has been required to determine whether an ACPERA applicant has satisfied its ACPERA obligations after a trial because all known antitrust matters involving a leniency applicant — and there are a lot of them — have settled before that time.

Caselaw does, however, provide some guidance. First, several courts have reconfirmed that the Congressional intent of the statute was to encourage corporations and individuals to seek leniency.<sup>17</sup> This underlying goal of ACPERA must factor into the way ACPERA is implemented.

For example, *Morning Star Packing* confirms that ACPERA must be interpreted to encourage parties to report to the DOJ by limiting civil exposure to leniency applicants.<sup>18</sup> In *Morning Star Packing*, the court reached the novel question of whether the benefits of ACPERA extended beyond Sherman Act claims.<sup>19</sup> The court held that ACPERA's protections applied not only to plaintiffs' Sherman Act claims but also to RICO and other antitrust claims that stemmed from the same conduct as the Sherman Act claims.<sup>20</sup> In reaching this conclusion, the court looked to the statute itself and found it "significant that lawmakers did not limit their statements in favor of limiting liability to Sherman Act actions, but used the more expansive language of 'civil action,' 'civil suit,' and 'civil liability'."<sup>21</sup> The court next looked to the legislative history and concluded "ACPERA should be read with the understanding it was enacted to incentivize stakeholders to report any anticompetitive behavior, and intended to prioritize criminal investigations and limit civil antitrust liability."<sup>22</sup> The court also noted that the DOJ has taken the same position regarding criminal matters in order to protect the leniency program.<sup>23</sup> The DOJ has affirmed that it will not prosecute a leniency applicant for other crimes involving the "acts or offenses integral" to the antitrust violation, such as mail fraud or wire fraud.<sup>24</sup>

Second, courts have reiterated that the cooperation requirement of ACPERA is not limitless. In *In re Sulfuric Acid Antitrust Litigation*, plaintiffs sought to compel discovery from the ACPERA applicant that had entered into a cooperation agreement with plaintiffs that incorporated ACPERA cooperation, but defendants argued that the requests were unreasonable and untimely.<sup>25</sup> Plaintiffs countered by arguing that ACPERA required that the motion to compel be granted. The court disagreed, finding "the [Cooperation] Agreement does not impose on the defendants obligations that preclude them from claiming that the notices of deposition were untimely and unreasonable. In short, the Cooperation Agreement [and implicitly ACPERA] did not require [defendants] to be at the plaintiffs' beck and call."<sup>26</sup>

Finally, courts have found that under the current language of ACPERA an ACPERA applicant is not entitled to a judicial determination that it has met its cooperation obligations until **after** a trial. ACPERA applicants have tried to assert their ACPERA status pre-trial to no avail.<sup>27</sup> So, as ACPERA applicants enter into settlement discussions at an early stage, they are left without a determination of their entitlement to ACPERA benefits. Because a substantial majority of cases never make it to trial, this delay can render the ACPERA benefits meaningless.

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17 *Morning Star Packing Co. v. S.K. Foods, L.P.*, 2015 WL 3797774 (E.D. Cal. 2015); *In re Sulfuric Acid Antitrust Litig.*, 231 F.R.D. 320 (N.D. Ill. 2005); *Oracle Am., Inc. v. Micron Tech., Inc.*, 817 F. Supp. 2d 1128 (N.D. Cal. 2011).

18 *Morning Star Packing*, 2015 WL 3797774, at \*6.

19 *Id.* at \*1.

20 *Id.* at \*7.

21 *Id.* at \*5.

22 *Id.* at \*6.

23 *Id.* at \*7.

24 FAQs, *supra* note 3, at 7.

25 *In re Sulfuric Acid Antitrust Litig.*, 231 F.R.D. 320.

26 *Id.* at 329.

27 See e.g. *Oracle Am.*, 817 F. Supp. 2d at 1133 (noting "[t]he court is thus required to make the substantive determination whether the amnesty applicant has satisfied the requirements of the civil leniency provisions near the end of the litigation, not at the outset."); see also *In re Polyurethane Foam Antitrust Litig.*, 2014 WL 6461355, at \*69 (N.D. Ohio 2014)(finding "definitive determination of ACPERA eligibility cannot, and should not, be made at [class certification] stage of the proceedings").

The earliest time in litigation that a court has opined on ACPERA status was in *In re Aftermarket Automotive Lighting Products Antitrust Litigation*.<sup>28</sup> Here, the court was not being asked to confirm that the ACPERA applicant had met its cooperation benefits, rather the plaintiffs sought determination prior to summary judgment motions that defendants had **not** met their obligations. The court found that defendants had not provided satisfactory cooperation to the plaintiffs largely based on defendants' failure to provide plaintiffs with the same information they had provided to the DOJ on a timely basis.<sup>29</sup> The court thus issued a pretrial ruling that defendants were not entitled to ACPERA's damages limitations.<sup>30</sup>

Thus, what these cases tell us is that while an ACPERA applicant has no certainty that it **has** qualified for ACPERA benefits until after trial, it faces constant risk that it will be found **not** to have qualified for ACPERA benefits. That degree of uncertainty seems at odds with the underlying purpose of giving comfort to parties **at the time they are considering seeking leniency** with the DOJ. ACPERA is not meeting its intended goal as potential leniency applicants may choose not to report criminal conduct to the DOJ given this uncertainty over civil exposure.

## IV. HOW CAN ACPERA BE AMENDED TO ADDRESS THIS PROBLEM?

To encourage continued cooperation in the leniency program, ACPERA should be amended to carry out the statute's original intent. Without some reasonable degree of certainty that a leniency applicant will gain ACPERA benefits, and some ability of the leniency applicant to control its own fate in the outcome of the analysis, a rational actor could conclude that ACPERA does not provide sufficient protection against civil damages to justify a leniency application.

To solve this problem, we propose creating a pretrial presumption of satisfactory cooperation if an ACPERA applicant meets certain specific requirements. Under the presumption, an ACPERA applicant would be presumed to have met its ACPERA obligations if it: (1) provides a timely proffer to plaintiffs that reflects all information provided to the DOJ; and (2) promptly produces all documents to the claimant(s) that were provided to the DOJ in the course of the investigation. In that case, the ACPERA applicant would be presumed to have qualified for ACPERA; however, this presumption would be subject to an important qualification. The presumption could be successfully rebutted if the ACPERA applicant failed to meet any of the other current obligations under the statute, including: "(1) providing a full account . . . of all facts known to the applicant . . . that are potentially relevant to the civil action; (2) furnishing all documents or other items potentially relevant to the civil action that are in the possession, custody, or control of the applicant;" and (3) "using its best efforts to secure and facilitate" interviews, depositions, and trial testimony of individuals covered under the leniency agreement.<sup>31</sup> A court would then determine, as mandated by the statute, whether a defendant has provided satisfactory cooperation.<sup>32</sup>

The presumption would not change the level of cooperation that defendants must provide to plaintiffs. It would simply provide defendants with some assurance that they will receive the benefits intended by Congress when it enacted ACPERA. The legislative history of ACPERA makes clear that a leniency applicant was meant to be protected under ACPERA regardless of whether it proceeds to trial or settles the case pre-trial.<sup>33</sup> Without this presumption, however, defendants cannot have confidence that they will receive the full benefit of ACPERA status during settlement negotiations because courts have declined to reach the issue of whether a defendant has fully complied before trial. The presumption would strengthen the ACPERA applicant's claim for a reduction in potential civil penalties during settlement negotiations, which is where it is most important as so few cases go to trial. Moreover, because joint and several liability exists as to other defendants, it would not limit the plaintiff's potential recovery. At most, it would shift some of the pre-trial risk from the leniency applicant to the other defendants, which is **exactly** what ACPERA intended. More importantly, it would encourage more disclosures to the DOJ by providing assurance to potential leniency applicants that ACPERA will work as anticipated.

There should be no reason for concern that relevant information would be withheld from plaintiffs for two primary reasons. First, leniency applicants have strong incentives to disclose the full scope of potentially illegal conduct to the DOJ in the course of an investigation in order to

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<sup>28</sup> *In re Aftermarket Auto. Lighting Prod. Antitrust Litig.*, 2013 WL 4536569 (C.D. Cal. 2013).

<sup>29</sup> *Id.* at \*4.

<sup>30</sup> *Id.* at \*5.

<sup>31</sup> ACPERA § 213(b).

<sup>32</sup> *Id.*

<sup>33</sup> ACPERA was created to provide "increased incentives for participants in illegal cartels to blow the whistle on their co-conspirators and cooperate with the Justice Department's Antitrust Division" by limiting "a cooperating company's civil liability to actual, rather than treble, damages in return for the company's cooperation in both the resulting criminal case as well as any subsequent civil suit based on the same conduct." 150 CONG. REC. S3610-02, S3614 (Apr. 2, 2004) (statement of Sen. Hatch).

receive complete leniency protection. The DOJ frequently reminds leniency applicants that any gaps could expose them to prosecution.<sup>34</sup> Second, ACPERA specifically requires, and will continue to require, defendants to provide a “full account . . . of all facts known to the applicant,” to turn over “all documents or other items potentially relevant to the civil action,” and to make witnesses available.<sup>35</sup> The presumption would not alter these cooperation requirements.

In addition, the broad scope of U.S. civil discovery requires much of this to be provided regardless of ACPERA, and any failure to produce relevant information would risk the loss of the favorable presumption. Finally, any settlement agreements that are reached at an early stage can incorporate cooperation requirements as broad as ACPERA, or even broader. Creating a pre-trial presumption leaves the scope of ACPERA cooperation unaltered, while encouraging potential leniency applicants to self-report to the DOJ.

## V. CONCLUSION

ACPERA isn’t working, and it shows. The uncertainty surrounding ACPERA’s benefits have limited its impact. The statute is ineffective before trial, when the vast majority of antitrust civil matters are resolved. If the leniency program and ACPERA are to continue to be effective tools in cartel enforcement, an amendment to the ACPERA statute is necessary.

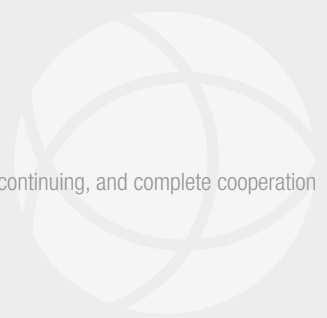
The statute is set to expire in June 2020.<sup>36</sup> Reauthorization provides Congress with the opportunity to ensure that ACPERA succeeds in strengthening the DOJ’s leniency program by encouraging more disclosures of cartels. Creating a rebuttable presumption of cooperation would correct the current ambiguities in the statute that have reduced its potential impact. Both plaintiffs and ACPERA applicants would benefit — plaintiffs will continue to receive full cooperation and ACPERA applicants will receive the reduction in civil penalties anticipated by the statute. Most importantly, more cartel activity will likely be reported to the DOJ, which is the priority of both the leniency program and ACPERA.

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34 FAQs, *supra* note 3, at 23 (requiring leniency applicants to “report[] the wrongdoing with candor and completeness and provide[] full, continuing, and complete cooperation to the Division throughout the investigation”).

35 ACPERA § 213(b).

36 Pub. L. No. 111-190, § 3, 124 Stat. 1275 (June 9, 2010).



# IMPLICATIONS OF REGIONAL COOPERATION ON COUNTRY SPECIFIC CORPORATE LENIENCY POLICIES

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BY MFUNDO NGOBESE<sup>1</sup>



<sup>1</sup> Principal Investigator, Competition Commission of South Africa. The views in this paper are those of the writer and are made in his personal capacity and do not reflect the views of the Competition Commission.



## I. INTRODUCTION

Cartels are notoriously difficult to detect and successfully prosecute due to their conspiratorial nature. However, cartels are also inherently unstable in that there is always a temptation to cheat on the cartel arrangement by each individual member in the hope that sufficient time will pass before other members detect the cheating. At the point of detection, the cheating member would have realized some gains from its actions.<sup>2</sup> It is for this reason that cartel members will need to maintain good relationships, including constant contact and communication, in order to renew their commitments to the cartel and to monitor each other's commercial activities.<sup>3</sup> Corporate Leniency Policy ("CLP") is meant to exploit this inherent temptation to cheat by creating a further uncertainty as to who will break ranks and be the first one to tell on the existence of a cartel.<sup>4</sup> However, the South African Competition Commission ("Commission") has noticed that overtime the efficacy of CLP in uncovering cartel conduct diminishes. In this paper we will demonstrate why this aspect should inform the sharpening of other investigative tools and the timing for implementation of a policy that is aimed at vigorously pursuing regional cooperation.

## II. THE STANDARDS OF BEST PRACTICE WHEN IT COMES TO LENIENCY

The South African corporate leniency policy is in line with the best practices as found in the ICN Checklist for Efficient and Effective Leniency Programmes (2017).<sup>5</sup>

Firstly, it is founded on the "first to the door" principle in that it is the first firm to disclose the existence of a cartel that is eligible to full immunity from prosecution and from payment of the administrative penalty. Secondly, immunity is granted only if there is admission of liability for the cartel conduct. Thirdly, the applicant must provide the Commission with information about the conduct which the Commission did not have and which places the Commission in a position to establish the existence of the cartel. Lastly, in order to foster cooperation going forward, full immunity is not granted on disclosure of information about a cartel but conditional immunity is granted to ensure that the applicant cooperates with the Commission until finalization of the case which could include litigation at the courts.

In addition to these important considerations, there are also procedural factors which the CLP considers in order to ensure the effectiveness of uncovering cartel conduct. Firstly, the CLP has been drafted to provide legal certainty in that the Commission's discretion whether or not to grant the CLP is removed once the substantive criteria set out above has been met. Secondly, the CLP is ambivalent as to who is the applicant for the purpose of qualifying for leniency. Therefore, even a ring leader in the cartel is granted the same status as any other member of the cartel depending only on whether it is first to the door or not. Thirdly, the CLP provides for a marker procedure which enables the applicant to approach the Commission as soon as it realizes that it may be involved in cartel conduct in order for the Commission to reserve its place as the first to the door. The applicant company will then go back and gather the information required for the submission of a full leniency application. Fourthly, the CLP provides for oral submissions. Oral submissions are sometimes preferred by international companies who may fear compellability of written submissions in other jurisdiction once the authorities in those jurisdictions learn of the fact that written submissions have been made elsewhere.

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2 *The Journal of Economic Education* Poncey, C & Roldán, F. (2016), "How a cartel operates. Evidence from Graphite Electrode Cartel from A Social Network Perspective," [http://www.bvrie.gub.uy/local/File/JAE/2016/ponce\\_rolan.pdf](http://www.bvrie.gub.uy/local/File/JAE/2016/ponce_rolan.pdf). The authors note that "The social organization of a price fixing conspiracy is a device of communication among participants, which should have two aims, namely an efficiency and an [sic] secrecy aim against any external menace. The level and the shape of communication will depend on market conditions, and on relationships among competitors involved in the conspiracy project."

3 Poncey, C & Roldán, F. (2016), "How a cartel operates. Evidence from Graphite Electrode Cartel from A Social Network Perspective," [http://www.bvrie.gub.uy/local/File/JAE/2016/ponce\\_rolan.pdf](http://www.bvrie.gub.uy/local/File/JAE/2016/ponce_rolan.pdf). The authors note that "The social organization of a price fixing conspiracy is a device of communication among participants, which should have two aims, namely an efficiency and an [sic] secrecy aim against any external menace. The level and the shape of communication will depend on market conditions, and on relationships among competitors involved in the conspiracy project."

4 Corporate Leniency Policy of the South African Competition Commission, <http://www.compcom.co.za/wp-content/uploads/2014/09/CLP-public-version-12052008.pdf>.

5 [https://www.internationalcompetitionnetwork.org/wpcontent/uploads/2018/09/CWG\\_LeniencyChecklist.pdf](https://www.internationalcompetitionnetwork.org/wpcontent/uploads/2018/09/CWG_LeniencyChecklist.pdf).

### III. TRACING THE TREND IN THE NUMBER OF LENIENCY APPLICATIONS RECEIVED OVERTIME IN SOUTH AFRICA

Chantal Lavoie, in an unpublished article, noted as follows regarding the early years of the South African CLP which was adopted back in 2004 and perfected around 2008:

Since its adoption five years ago, 54 CLP applications have been received by the Commission. Over 68% of these CLP applications have been made in the previous 12 months ending 30 June 2009. A sharp increase in CLP applications has been noted since 2008, notably in 2009 with the receipt of more CLP applications over a 6-month period than in the whole of the year 2008. In addition, the marker procedure has been applied consistently since adoption of the CLP amendments in May 2008, resulting in most CLP applications being preceded by a marker application.<sup>6</sup>

The amendments to the CLP back in 2008 brought about most of the best practices mentioned above including the introduction of the marker procedure. Clearly, one can argue that the apparent surge in the number of leniency applications during 2009 was triggered by these improvements in the text of the policy. However, it is the view in this paper that while these amendments were necessary, they were not sufficient to trigger an influx in leniency applications. A more recent trend that has been observed in South Africa is a decline in the number of leniency applications even though there has been an increase in the number of cartel cases that are being investigated by the Commission. Accordingly, the decline appears to have nothing to do with a decrease in incidence of cartelization.

For a five-year period beginning in 2007 and ending in 2011, the Commission received a total of about 83 leniency applications. The average number of enforcement cases investigated by the Commission during this period was about 80 cases per year (Note that this figure includes all complaints and not just cartels). The Commission was not reporting on cartel cases separately at that time. Therefore, most importantly, this is a period during which the Commission was investigating a number of abuse of dominance and vertical restraints cases in steel, polymers, and car dealerships. These cases could easily have constituted half of the total case load. This means that about 41 cases per year were actual cartel cases.

Now for the more recent five-year period beginning in 2012 to 2016 the Commission received about 20 leniency applications and investigated an average of about 101 pure cartel cases per year.<sup>7</sup> The reporting on cartels at this time had improved due to the establishment of an independent cartels division.

Bearing in mind the difficulties in obtaining accurate data the available data shows that, relative to the average number of cartel cases investigated per year, there has been a significant decline in the number of leniency applications received during the 2012 to 2016 period when compared to the preceding five-year period. This brings us to the ultimate point of this discussion, which is why there was a huge initial uptake by firms of the leniency program and why are we now observing a limited number of leniency applications even though there has been an increase in the number of cartel cases investigated per year.

The uptake of leniency by firms appear to be dependent, not just on the nature of the leniency program, but also on the strength of relationships between firms and ability of competition authorities to independently detect cartels

As noted above, a leniency program that is in line with the standards of good practice is necessary but not sufficient. The conditions in various markets must also be ripe for defection by cartel members and/or the competition authority must be capable of detecting cartels using its own independent means.

In connection with conditions in the markets it must be noted that when the leniency program was introduced it brought a scare in the markets especially in those markets which were characterized by constant cheating on cartel arrangements and less strong relationships. Sometimes, it became a domino effect, as a decision of one company to file a leniency application could trigger other companies in the industry to do the same in respect of other instances of collusion, since belief that the cartel will be maintained is lost. In South Africa, the domino affect played out in respect of the construction industry when a number of construction companies, including large entities such as Group Five Limited and

6 <http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwjroPHkhanfAhWVTRUIHRecBAwQFJAAegQICRAC&url=http%3A%2F%2Fwww.compc.com.co.za%2Fwp-content%2Fuploads%2F2014%2F09%2Fcplp-paper-conference-Chantal-Lavoie.docx&usq=A0vVaw0vSA1JSR2PCd1pUSB2dwFd>.

7 Information obtained from various sources including internal case management documents of the Competition Commission and Annual Reports at <http://www.compc.com.co.za/annual-reports/>.

Murray and Roberts Holdings Limited filed leniency applications. A more recent domino effect also surfaced in respect of the chemicals market, in particular in the market for resin used in various applications. The dominant player in this market is a South African company and the next big player is a foreign entity. Attempts to enter this market have always been hindered by gate keeping actions of the South African entity which caused bad relations in the industry and an atmosphere of mistrust may have led to the filing of the first leniency application, but certainly the filing of the second leniency application.

It has thus been argued that in more recent times the competition authorities will see less cartels being uncovered due to leniency applications.<sup>8</sup> Those companies which are still colluding must have developed such strong ties with each other that they realize the danger of reverting to competition in the event that one of them blows a whistle on the cartel.

The only other available manner of stimulating fear among firms that either of them might disclose the cartel is for the competition authorities to strengthen their independent cartel detection and evidence gathering tools. In this regard it should be noted that a leniency application serves two kindred purposes. Firstly, it reveals a cartel which the Commission would otherwise have not known about and secondly, it provides evidence which the Commission can use to prosecute the other members of the cartel. Accordingly, strengthening other investigative tools such as dawn raids, (and especially dawn raids since they do not provide an opportunity for the firms to manipulate the information that they give to the commission) could go a long way in instilling uncertainty in firms if the Commission will not be able to obtain information about the cartel through its own proactive means.

## **IV. THE IMPACT OF REGIONAL COOPERATION ON THE EFFECTIVENESS OF A LENIENCY PROGRAM**

There are other “don’ts” when an authority has just adopted a leniency program. However, overtime as the leniency program is starting to wane in effectiveness the authority can start embarking on such actions. This includes pursuing vigorous cooperation with regional partners which may include disclosures of information obtained by way of leniency applications. Obviously natural decline in leniency applications, discussed above, will be exacerbated by disclosure of information to other authorities. However, firms that intend to file leniency applications will normally do so in multiple jurisdictions almost simultaneously. Accordingly, disclosure through cooperation instruments is unlikely to have a huge chilling effect provided the leniency programs of the cooperating jurisdictions are not too incompatible. Divergence in the requirements of leniency programs by jurisdictions is thus the main consideration. Nonetheless, even in circumstances where there is divergence, given the diminishing role of a leniency program in uncovering cartels, the costs of cooperation may no longer be significant.

Experience world-wide has shown that adoption and harmonization of leniency programs is important for jurisdictions seeking to cooperate with each other. This is a significant benefit to firms since it means the same documentary evidence used to file a leniency application with one jurisdiction can be used in another jurisdiction without more or less compliance requirements and the same criteria for qualifying for leniency will apply. This reduces the risk that a firm will become a successful leniency applicant in one state and not in another due to being pre-empted by another firm as a result of delays in preparation of sufficient applications for the second state or for failure to meet a criterion unique to that state’s leniency program. This will in turn discourage the filing of the leniency application in the first state, especially if the states are known to have a strong cooperation regime.

A good leniency program is one of the best tools for the detection and combating of cartels. Among the eight jurisdictions within the Southern African Development Community (“SADC”) charted in Table 1 below, five (63 percent) had an operational leniency program (Botswana, Mauritius, South Africa, Swaziland, and Zambia).

While there are widely-accepted views as to what a good leniency program should include, there are divergent approaches to leniency programs in different SADC Member States. Table 1 below provides some details about leniency programs in the SADC region.

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<sup>8</sup> Ysewyn, J & Kahmann, S. (2018), “The decline and fall of the leniency programme in Europe,” *Concurrences Review* N° 1-2018, Art. N° 86060, pp. 44-59.

**Table 1: Leniency programs in the SADC region<sup>9</sup>**

SADC member	Leniency program
<b>Botswana</b>	<ul style="list-style-type: none"> <li>• Total immunity is available for an applicant who discloses information prior to an investigation being launched</li> <li>• First applicant to disclose information after the investigation is launched is eligible for a reduction of up to 100% of the penalty</li> <li>• Subsequent applicants are eligible for deductions up to 30% of the penalty</li> <li>• Leniency is not available to the initiators of a cartel</li> </ul>
<b>Malawi</b>	No leniency program
<b>Mauritius</b>	<ul style="list-style-type: none"> <li>• Total immunity is available for an applicant who discloses information prior to an investigation being launched</li> <li>• First applicant to disclose information after the investigation is launched is eligible for a reduction of up to 100% of the penalty</li> <li>• Subsequent applicants are eligible for deductions up to 50% of the penalty</li> <li>• Leniency is not available to the initiators of a cartel</li> </ul>
<b>Namibia</b>	No leniency program
<b>South Africa</b>	<ul style="list-style-type: none"> <li>• Conditional immunity to first through the door in exchange for cooperation.</li> <li>• Total immunity is given at end of the prosecution if s/he is found to have complied fully with all requirements as set out in the CLP including: <ul style="list-style-type: none"> <li>○ Full disclosure of information relating to the cartel</li> <li>○ Undertaking to testify on behalf of the Commission</li> <li>○ Stopping the cartel behavior</li> <li>○ Not discussing anything relating to the matter with the other respondents</li> </ul> </li> </ul>
<b>Swaziland</b>	<ul style="list-style-type: none"> <li>• Immunity from fines for the first applicant to submit evidence which will enable the Commission to carry out targeted inspections in connection with the alleged cartel, where the Commission did not already have sufficient evidence</li> <li>• The applicant must also meet the conditions attached to the leniency policy. Where a party does not qualify for immunity as set out above, s/he may still qualify for a reduction of any fine which might have been imposed</li> <li>• A party that coerced another party to participate in the cartel is not eligible for immunity</li> </ul>

<sup>9</sup> Except for South Africa, the information contained in this Table was obtained from interviews with representatives from competition authorities of respective countries.



<b>Zambia</b>	<ul style="list-style-type: none"> <li>• An applicant that is first in line to self-confess may be guaranteed immunity from prosecution and imposition of full fines</li> <li>• Where the information provided by such an applicant requires further investigation to reasonably conclude the case, immunity from prosecution will be coupled with imposition of partial payment of a fine/s</li> <li>• An applicant that is second in line and provides corroborative evidence that significantly adds value or exhausts the need for further investigations will get immunity from prosecution and a partial fine</li> <li>• An applicant must satisfy the conditions for leniency including: <ul style="list-style-type: none"> <li>○ Cooperation with the Commission throughout the process</li> <li>○ Willingness to appear as the principal witness for the Commission in the hearing or trial</li> <li>○ Cartel conduct should have ceased except where otherwise requested by the competition authority to persist with the conduct so as not to alert other cartel members resulting in loss of evidence.</li> </ul> </li> <li>• No leniency for the party that is considered as the leader of the cartel</li> </ul>
<b>Zimbabwe</b>	No leniency program

Competition authorities internationally recognize the need for the universal adoption of, and harmonization of, formal leniency policies in all jurisdictions. In recognition of sovereignty, harmonization is sought rather than standardization. Leniency programs need not be identical but ought to aid and not hinder each other. As can be seen from Table 1 above, there is quite a high degree of harmonization among those SADC competition authorities that have leniency programs. In this respect, joint cartel investigations would be facilitated. The work of the SADC Cartels Working Group in cataloguing the legislation and policies relating to cartels in SADC Member States is a good first step towards clarifying where areas of difference exist and in making proposals for harmonized provisions in key areas.

## V. CONCLUSION

The corporate leniency program of the Commission remains an important tool for detection of cartels. However, the dwindling number of leniency applications in recent times has led to the conclusion that there is a probability that existing cartels are more stable. This has then provided an opportunity to strengthen other investigative tools in the hope that they will stimulate the filing of leniency applications. The current environment also provides an opportunity for the Commission to pursue other important goals such as intensifying cooperation with other regional competition authorities.





# 25 YEARS OF LENIENCY PROGRAMS: A TURNING POINT IN CARTEL PROSECUTION

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BY JOAN-RAMON BORRELL, CARMEN GARCÍA, JUAN LUIS JIMÉNEZ  
& JOSÉ MANUEL ORDÓÑEZ-DE-HARO<sup>1</sup>



<sup>1</sup> Joan Ramon Borrell is Associate Professor at Universitat de Barcelona, Secció de polítiques públiques - Dep. d'Econometria, Estadística i Economia Aplicada and Research Affiliate at University of Navarra, IESE Business School, Public-Private Sector Research Center, [jrborrell@ub.edu](mailto:jrborrell@ub.edu); Carmen García is Post-Doctoral Researcher at Universidad de Las Palmas de Gran Canaria; Juan Luis Jiménez is Associate Professor at Universidad de Las Palmas de Gran Canaria, Departamento de Análisis Económico Aplicado, [juanluis.jimenez@ulpgc.es](mailto:juanluis.jimenez@ulpgc.es); José Manuel Ordóñez-de-Haro is Associate Professor at Universidad de Málaga, Dep. de Teoría e Historia Económica - Cátedra de Política de Competencia, [jmoh@uma.es](mailto:jmoh@uma.es).



# I. INTRODUCTION

This contribution reviews what we know about the effectiveness of leniency or amnesty programs in cartel prosecutions. Leniency programs have gradually been adopted by as many as 53 competition policy jurisdictions around the globe during the last 25 years. We show that the available evidence supports that the leniency programs have had a strong impact on anti-cartel policy design and effectiveness. The introduction of leniency programs has offered in most jurisdictions a short-term impact in the discovery of existing cartels, but in the long-term the number of discovered cartels faded down. This is not because cartels become more secretive and remained under cover, but otherwise we show that after leniency is introduced, a strong destabilization and dissuasive effects prevail.

## II. LENIENCY PROGRAMS AND CARTEL PROSECUTION

Leniency or amnesty programs for destabilizing and discovering secretive cartels were effectively introduced 25 years ago. Although the programs have been so popular for law and policy makers, there have always been some doubts regarding their efficacy in discovering existing cartels, and even more doubts regarding their efficacy in deterring cartel formation.

As stated by Joseph Harrington, the general understanding of the theoretical literature is to support leniency programs. The assumption is that cartels allow firms to obtain supra-normal revenues and profits, and that by offering a lenient treatment to the whistleblower among the firms breaching antitrust law, cartel stability may be reduced. Harrington claims that “it is well-documented that many firms have used the amnesty program and it has provided valuable evidence in support of the prosecution’s case.” However, he also states that “it is unknown how influential leniency programs have been in inducing cartels to collapse or in deterring them from forming.”<sup>2</sup>

Indeed, we also do not have a precise measure of how much firms benefit from participating in cartels. The existing literature has analyzed the drivers of collusion and the determinants of cartel formation, stability and breakup.<sup>3</sup>

Scholars have also studied the overcharges applied by cartelists and implications for fining policy<sup>4</sup> and the deterrence attained due to the antitrust authorities’ activity or the existence of effective competition policy.<sup>5</sup> There are some papers that also analyze the impact of competition policy and antitrust authorities’ actions on firms’ profits and firms’ stock market prices.<sup>6</sup> However, the existing papers studying the effect of cartels on profitability either lack a good counterfactual, or do not properly address the problem of causality.

Our research in the last years has focused precisely on offering new and sound evidence of the causal effect of the introduction of leniency in the efficacy of competition policy, in general, and in particular in cartel detection, destabilization, and deterrence.

## III. LENIENCY ACROSS THE WORLD

Figure 1 shows when leniency programs have been gradually adopted as part of antitrust enforcement reforms across developed and developing economies. The first effective antitrust leniency program was created in the United States 25 years ago, in 1993. Its apparent success in obtaining evidence to prosecute cartel members, destabilizing existing cartels, and deterring cartel formation was quickly noted by antitrust authorities elsewhere.

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2 Harrington Jr, J. E., “Optimal corporate leniency programs,” *The Journal of Industrial Economics*, 56(2), 215-246, (2008).

3 See Levenstein, M. & Suslow, V. Y., “What Determines Cartel Success?,” *Journal of Economic Literature*, XLIV, 43-95, (2006); Levenstein, M. & Suslow, V. Y., “Breaking Up is Hard to Do: Determinants of Cartel Duration,” *Journal of Law and Economics*, 54(2), 455-492, (2011); Herold, D. & Paha, J., “Cartels as Defensive Devices: Evidence from Decisions of the European Commission 2001–2010,” *Review of Law & Economics*, 14(1), (2018).

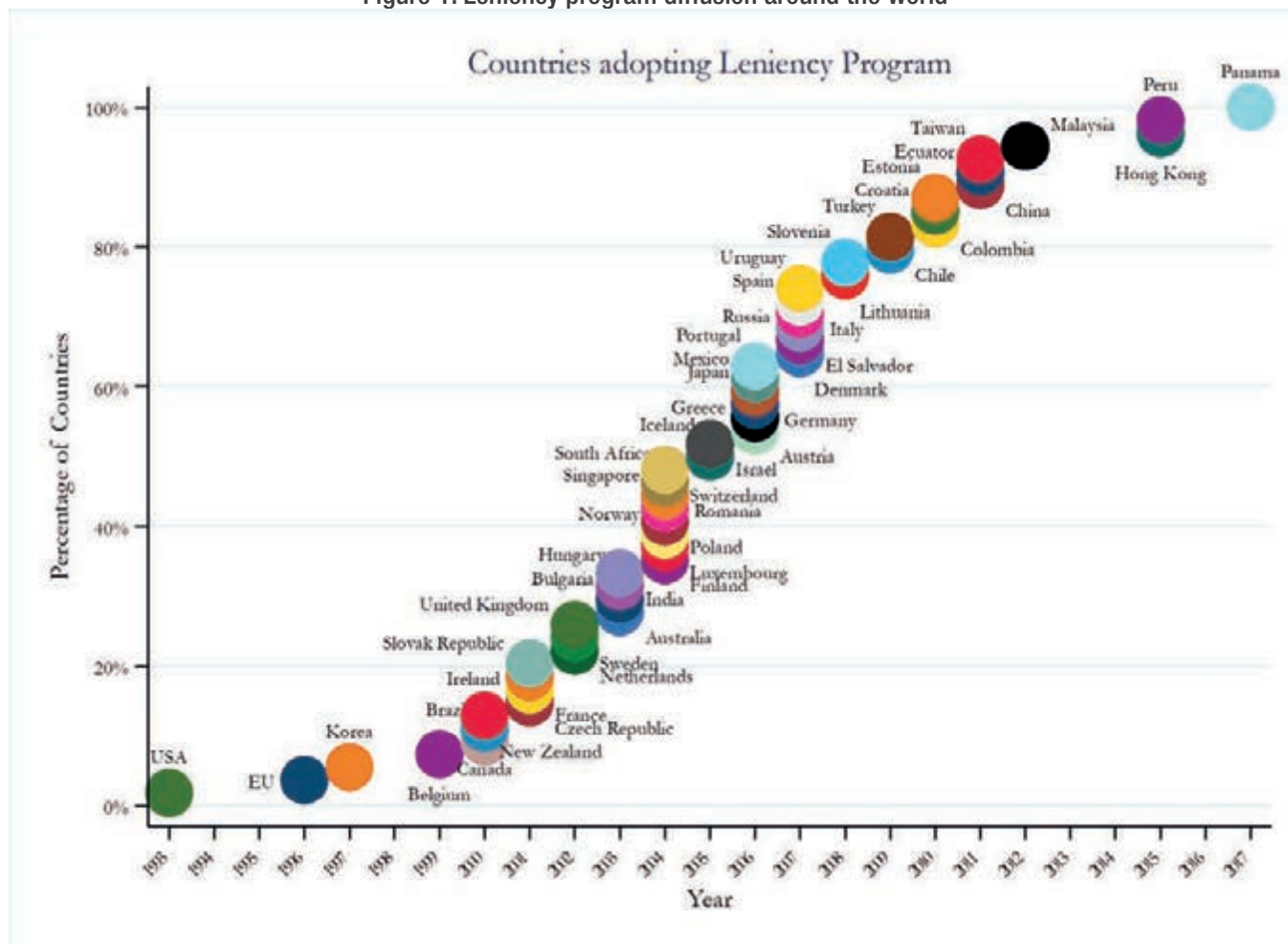
4 See, for instance, Connor, J.M. & Lande, R.H., “Cartel Overcharges and Optimal Cartel Fines,” 3. *Issues in Competition Law and Policy* 2203 (ABA Section of Antitrust Law), (2008); Boyer, M., & Kotchoni, R., “How much do cartel overcharge?,” *Review of Industrial Organization*, 47(2), 119-153, (2015); Connor, J. M., & Bolotova, Y., “Cartel overcharges: Survey and meta-analysis,” *International Journal of Industrial Organization*, 24(6), 1109-1137, (2006).

5 See, for instance, Smuda, F., “Cartel overcharges and the deterrent effect of EU competition law,” *Journal of Competition Law and Economics*, 10(1), 63-86, (2013); Bos, I., Davies, S., Harrington Jr, J. E., & Ormosi, P. L., “Does enforcement deter cartels? A tale of two tails,” *International Journal of Industrial Organization*, 59, 372-405, (2018).

6 See, e.g. Bosch, J. C., & Eckard Jr, E. W., “The profitability of price fixing: evidence from stock market reaction to federal indictments,” *The review of Economics and Statistics*, 309-317, (1991); Thompson, J. S., & Kaserman, D. L., “After the fall: Stock price movements and the deterrent effect of antitrust enforcement,” *Review of Industrial Organization*, 19(3), 329-334, (2001); Aguzzoni, L., Langus, G., & Motta, M., “The effect of EU antitrust investigations and fines on a firm’s valuation,” *The Journal of Industrial Economics*, 61(2), 290-338, (2013).

In Europe, the European Commission (“EC”) passed the first leniency program as early as 1996 (a program that was overhauled in 2002 and 2006) and most European countries adopted their programs after this date. Korea was also an early adopter of the program in 1997, the first of the Asian countries. Australia adopted the leniency program for cartel prosecution in 2003. A leniency program was to be found on all five continents by 2004 when South Africa passed its leniency program.

Figure 1: Leniency program diffusion around the world



Source: Updated from Borrell et al., (2014).

In Borrell, Jiménez & García<sup>7</sup> we found that leniency programs have had a significant impact, increasing the average perception of a country’s antitrust policy among business people by an order of magnitude from 10 percent to 21 percent.

We also found that countries self-select: the one with higher income per capita with more effective antitrust policies have been the ones that have adopted leniency programs earlier. However, controlling for the self-selection problem (i.e. “good” countries adopted “good” policies), we show that leniency programs have had a significant positive impact on the perception of a country’s antitrust policy among the business community, especially in those countries whose antitrust enforcement is least credible.

<sup>7</sup> Borrell, J. R., Jiménez, J. L., & García, C., “Evaluating antitrust leniency programs,” *Journal of Competition Law and Economics*, 10(1), 107-136, (2014).



## IV. LENIENCY PROGRAM AT THE EUROPEAN UNION

At the European Union (“EU”), the leniency program was not only a weapon of mass discovery of cartels, but also a turning point in a critical juncture. Soon after the introduction of the program in 1996, the EC identified a large number of cartels, obtained hard evidence of the breaching of the cartel prohibition which was a key driver for sanctioning collusion. This success was a key determinant for deepening the EU integration in competition policy.

While the prohibition of cartels was enshrined in the EU's founding treaties, the fight against cartels showed neither the same determination in enforcement nor the same outcomes before and after the introduction of the leniency program.

In Ordóñez-de-Haro, Borrell & Jiménez,<sup>8</sup> we show that anti-cartel policy has evolved according to what supra-national theorists predict in a successful process of integration. It has been the outcome of a process by which EU institutions have been able to broaden and deepen the policy areas in which they were entitled. Unexpectedly, it was the leniency program, the key policy innovation, that led to a significant improvement in anti-cartel policy effectiveness and the expansion of the EU cartel policy domain.

The leniency program was passed in 1996 just starting the deep EU competition policy reforms adopted in the early 2000s. The origins of such reforms have been little analyzed. Between 1993 and 1995, the EC was highly criticized. The main argument adduced in support of this criticism was based on the increasing politicization of EC competition policy. There was a growing discomfort with how the EC was handling anti-cartel policy.

We find that there was an unexpected interplay between the success of the leniency program in the fight against cartels and the new reform momentum that led to the 2004 modernization of competition policy. The success in the fight against cartels completely changed the position of the Commission and offered the chance to lead a new phase of supra-national integration in the competition policy domain.

This shift in legitimacy strongly reinforced the bargaining position of the EC in front of some Member State governments, particularly that of Germany, that were highly critical of the previous discretionary political enforcing of cartel policy in particular, and competition policy in general.<sup>9</sup> The recurrent claims of transferring competition policy to an independent European authority separate from the EC were no longer raised again. So, the inter-governmental prediction that competition policy would be transferred to the EC as long as the Member State governments would agree do not seem to hold in the case of the centralization of competition policy in the EC.

Also, contrary to what we would expect from the critical political economy interpretation of the course of actions that led to an increasing enforcement of cartel policy at the hands of the EC, the paradox is that as many as 61 percent of the founding firms in the European Round Table of Industrialists (11 out of 18 founding members in 1983), which were supposedly promoting the enforcement of a “more liberal” competition policy, have been sanctioned and fined as members of cartels by 2014 by the EC. In fact, as many as 48 percent of the current members of the European Round Table of Industrialists (24 out of 50 members in 2016) have got a cartel fine. Additionally, as many as 80 percent of the members of the Competitiveness Advisory Group named by the President of the Commission in February 1995 have been fined already.

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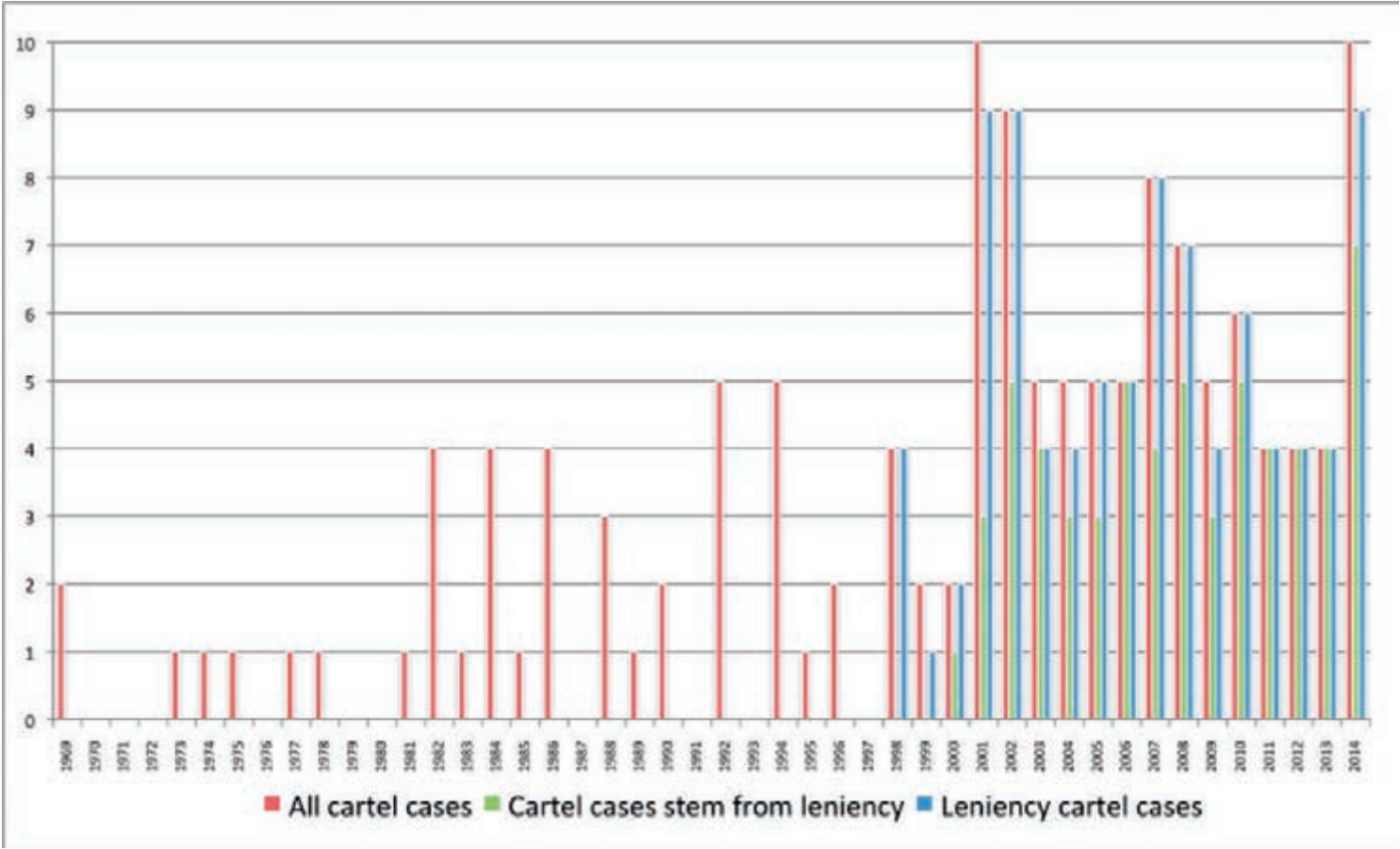
8 Ordóñez-de-Haro, J. M., Borrell, J. R. & Jiménez, J. L., “The European Commission’s Fight against Cartels (1962–2014): A Retrospective and Forensic Analysis,” *JCMS: Journal of Common Market Studies*, 56(5), 1087–1107, (2018).

9 In 1993, Germany again proposed, as in 1960, the establishment of a European Cartel Office or European Competition Office taking responsibility for all duties delegated to the Commission on cartels, abuse of dominant position, mergers and state aid at that time. There was a widespread perception in 1995 that some reform of European competition law and policy was unavoidable. However, the German authorities were not able to maintain sufficient momentum to build the required alliances with other Member States and the proposal of the European Cartel Office was lost.

V. PATTERNS OF CARTEL DISCOVERY AFTER LENIENCY

Since 1998 onwards, the leniency program has been broadly applied in nearly all the uncovered cartels sanctioned by the EC as it can be seen in Figure 2. EU leniency notices have proven to be the EC's most effective tools in uncovering and fining cartels. It was applied in 94 percent of the cases between 1998 (the first decision) and 2014. Moreover, the EC initiated an investigation into a cartel case following a leniency application in 70 percent of the cases (60 out of 89 cases). And that after the introduction of the leniency program, the number of sanctioned cartels per year shifted significantly up.

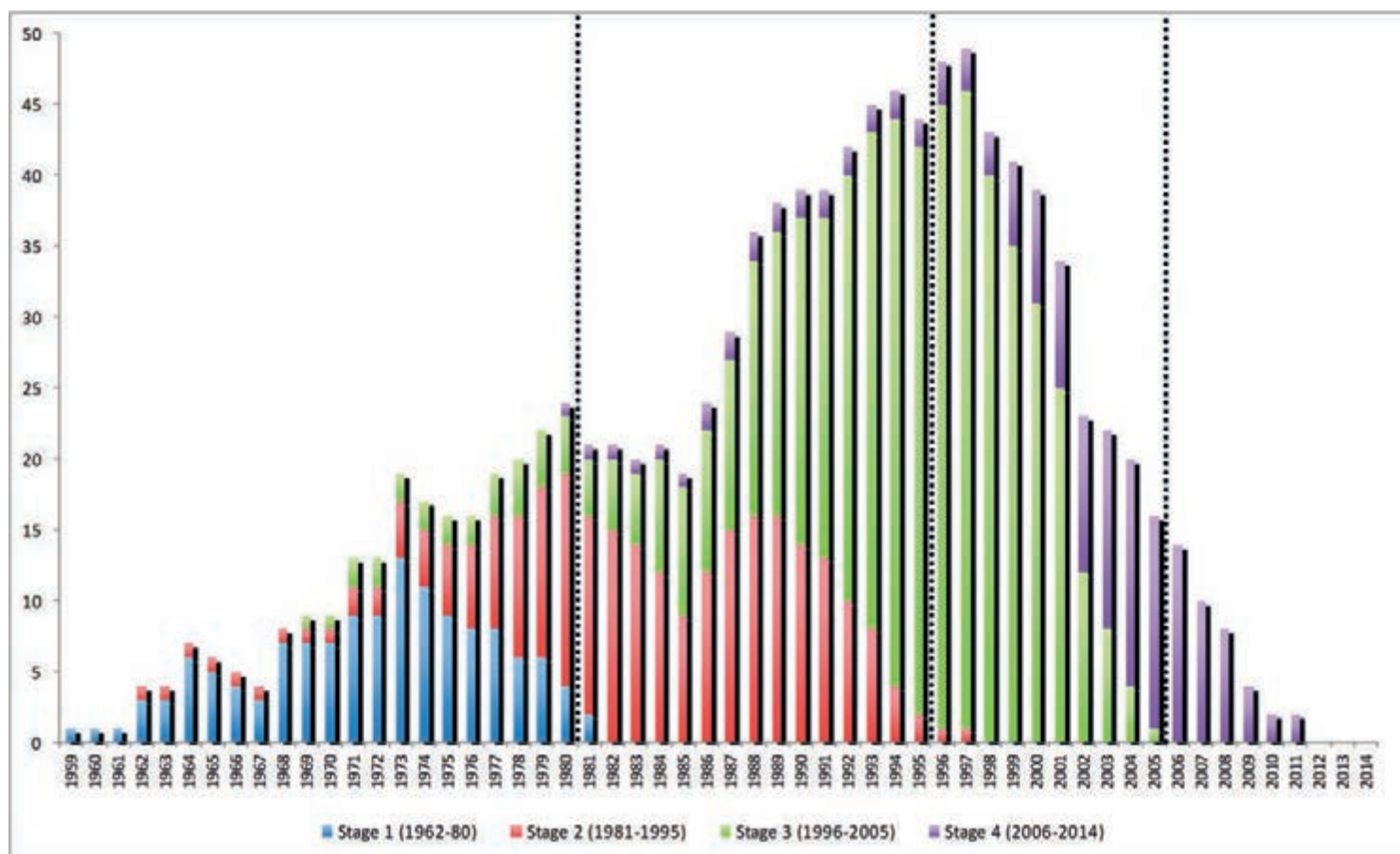
Figure 2: Sanctioned cartel cases by year (1962-2014)



Source: Ordóñez-de-Haro et al., (2018).

Regarding cartels which we know now were active at each stage, Figure 3 shows how most of the cartels that remained undetected, have finally been discovered after the introduction of the leniency program. As many as 47 cartels were active in the EU in 1996, the historical peak in active cartels effective discovery. This figure also shows what has been shown to be a regular pattern of cartel discovery after the introduction of leniency: there is always a short-term effect of leniency sharply increasing the number of cartels discovered, but then it seems that the long-term effect of the leniency program is not to increase the discovering rate, but to deter cartel creation.

Figure 3: Number of cartels that were active by year and stage at which the cartel was detected (investigation started)

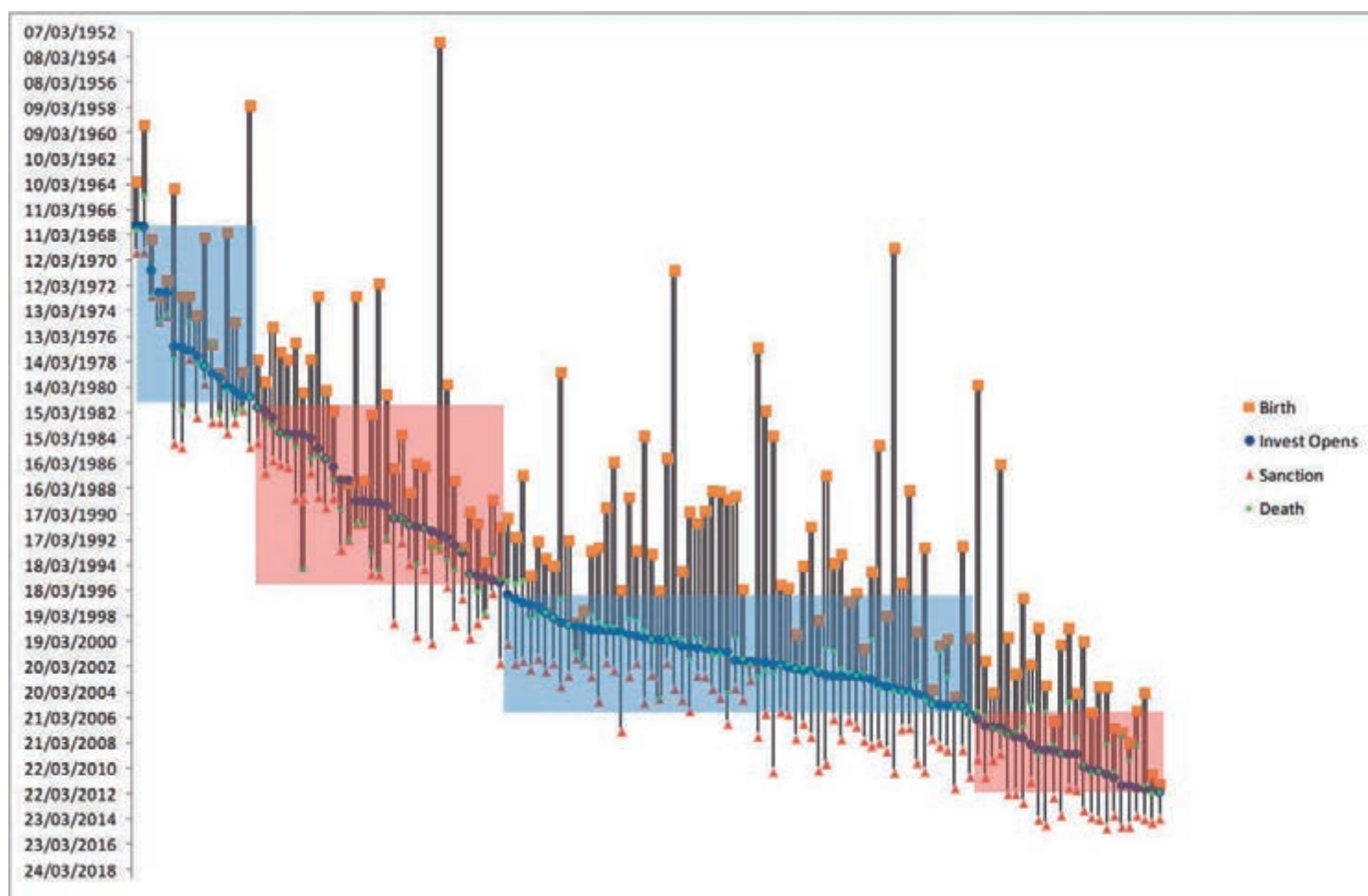


Source: Ordóñez-de-Haro et al., (2018).

Figure 4 shows the time of birth, death, detection, and sanctioning of all cartels sanctioned until 2014. It clearly shows the reduction of the duration of the cartels discovered across time: the length of the arrows in the figure diminishes across time.

It also shows how detection rates increase across time: in particular in stage 2 (1981-1995) the cartels discovered went unnoticed in previous stage 1 (1961-1980), and also in stage 3 (1996-2005), once the EC leniency program was open for potential whistleblowers, the Commission was able to detect many cartels that went unnoticed in previous stages 1 and 2 (1961-1980 and 1981-1995).

Figure 4. Birth, death, investigation opening and sanction dates per cartel



Source: Ordóñez-de-Haro et al., (2018).

As is observed in these figures, the introduction of the leniency program marked a crucial turning-point in the EC's fight against cartels: it drove the number of detected cartels and the sanctions imposed upon them to increase substantially.

It is striking that uncovered and sanctioned cartels were increasingly formed by a smaller number of parent international companies that are using subsidiary firms to take part in many different sanctioned cartels. And, that the EU was increasingly able to detect those parent international companies' wrongdoings and sanction them.

## VI. DESTABILIZATION EFFECT OF LENIENCY PROGRAMS

In Borrell, García, Jiménez & Ordóñez-de-Haro,<sup>10</sup> we investigate the effect of the leniency programs on cartel duration. For this purpose, we use detailed information of all cartel decisions taken by the EC between 1980 and 2015, and by the Spanish Competition Authority between 1995 and 2015.

In that period there have been 196 cartel decisions (129 cases in EU and 67 cases in Spain), only 182 if we exclude 14 decisions involving only business associations but not actual firms (7 EU cases, and other 7 Spanish cases). There have been 89 decisions with leniency fine reductions since the introduction of the leniency program in the EU in 1996 (60 cases with leniency application), and in Spain in 2008 (15 leniency cases).

<sup>10</sup> Borrell, García, Jiménez & Ordóñez-de-Haro, "Cartel destabilization effect of leniency programs," In García Galindo, C. Essays on cartels and competition policy. European University Institute, PhD Thesis (2018). Department of Economics. URI: <http://hdl.handle.net/1814/59224>, DOI: 10.2870/13080.

Our main identification source comes from the fact that the date of implementation of the program is exogenous, and that it has been implemented in the different geographic areas at distinct periods of time. A limitation of working with cartel cases is that we can only observe discovered cartels, and results may not be inferred to the whole population.

Harrington & Chang<sup>11</sup> develop a model of cartel creation and dissolution that allows inferring the impact of the competition policy on the population of cartels by measuring the impact on the duration of discovered cartels.

According to their model, if the probability of discovering and convicting cartel members increases due to a change in the policy, then the least stable cartels collapse immediately. Thus, the surviving cartels have longer durations, and there is a significant rise in average duration of discovered cartels in the short-run. In the long-run, average duration of observed cartels could go up or down, since less stable cartels do not form in the first place (rise in duration) but the formerly stable cartels break up earlier (decrease in duration).

We distinguish between the short-run and long-run impact of the leniency program on cartel duration in the sense of those cartels that were formed before the implementation of the leniency policy and died after (partial treatment or short-run effect) versus those cases that were formed under the existence of the leniency program (full treatment or long-run effect).

Results show a short-run effect of leniency program: the detected cartels have longer duration than the ones in the control group. This result is consistent with the one of Harrington & Chang and Zhou.<sup>12</sup> These authors conclude that the average duration of discovered cartels rises in the short-run in response to a more effective anti-cartel policy. The reason is that if the policy is efficacious, then its adoption will immediately cause the marginally stable cartels to collapse, and they will exit the cartel population, which means that they will not come up as discovered cartels later on.

The duration of the cartels after the introduction of leniency is lower than the duration of the cartels born and dead before the implementation of the program. Harrington & Chang find that the effect of the leniency program on cartel duration in the long-run is ambiguous; it could go either up or down. On the one hand, those cartels at the margin that are less stable will not form under this policy, which entails a rise in the observed durations. On the other hand, the formerly stable long-running cartels break up earlier, reducing observed cartels durations. Our results are consistent with the second explanation: the long-run effect of the leniency program is a decrease in cartels duration.

A last question to be analyzed is whether the leniency program brings shorter or less stable cartels to light, or whether it does really deter collusion by means of the formation of shorter cartels or the formation of fewer cartels.

Harrington & Chang<sup>13</sup> claim that in response to a policy that alters the likelihood of detection and conviction, the effect of leniency program on the rate of cartels formation can be inferred by observing the duration of discovered cartels in the short-run. If average cartel duration goes up, then the policy has caused the probability that firms are discovered and convicted to rise, and thus we can conclude that it will result in fewer cartels forming in the new steady state.

Our results prove this last point: the leniency program is effective in deterring the creation of cartels, or in reducing cartel overcharges, that is, constraining the prices set by those cartels that are not deterred in the line of the results obtained by Bos et al.<sup>14</sup>

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11 Harrington Jr, J. E., & Chang, M. H., "Modeling the birth and death of cartels with an application to evaluating competition policy," *Journal of the European Economic Association*, 7(6), 1400-1435, (2009).

12 Zhou, J., "Evaluating leniency with missing information on undetected cartels: Exploring time-varying policy impacts on cartel duration," Mimeo, (2015), available at <https://ssrn.com/abstract=1985816>.

13 Harrington & Chang, *supra* note 11.

14 Boss, Davies, Harrington & Ormosi, *supra* note 5.

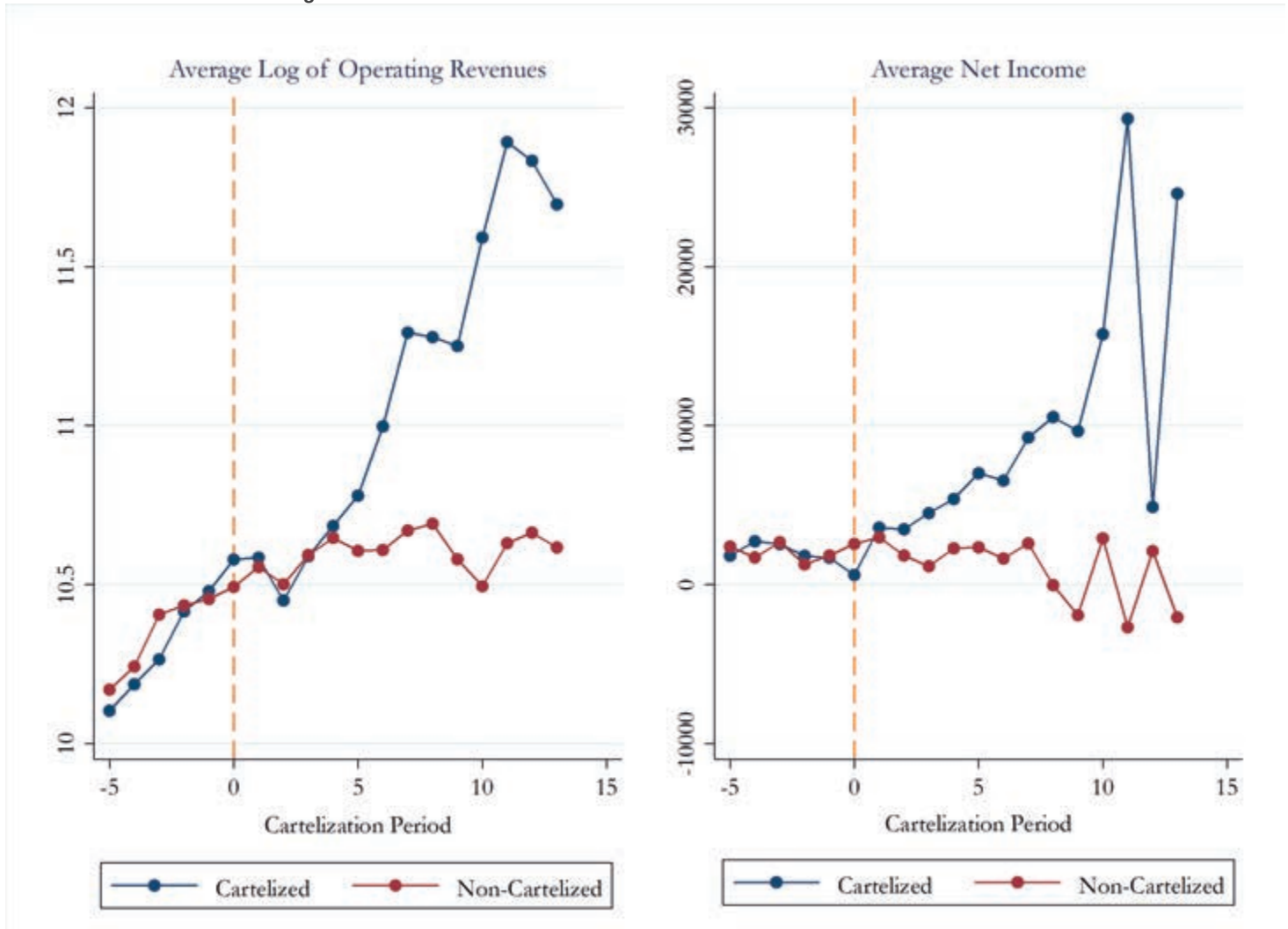


## VII. IMPACT OF LENIENCY ON CARTEL REVENUES AND PROFITABILITY

García<sup>15</sup> estimates the causal effect of being a cartel member on the revenues and profits of cartelized firms. For this purpose, she uses a panel data of cartelized and non-cartelized Spanish firms for the period 1992-2014. She identified which firms have participated in a discovered cartel case and could be designated as cartelized firms (treatment group), and which of them have not been cartelized in principle (non-cartelized firms, control group). She estimates the effect of belonging to a cartel on firms' revenues and profits by using the difference-in-differences estimator.

She shows that firms increase their revenues between 19 percent and 26 percent due to the collusive agreement on average, while no significant effect is found on profits on average. This result may reflect the fact that managers are the ones making the decision of colluding or not. If their reputation or salary bonuses are based on the performance of the firm, which can be measured with firms' sales, then getting involved in a cartel may be beneficial for their own interests. However, these personal interests may not always be aligned with shareholders' interests.

Figure 5. Revenues and Profits of Cartelized versus Non-Cartelized Firms



But when results by cartel duration are considered, she finds out that members belonging to a cartel that lasted for a long duration (8 years or more), not only do they increase their revenues by 29 percent to 50 percent, but also increase their profits by around 82 to 91.5 percent when compared to the average net income of the firms involved in these types of cartels. The firms taking part in these long-lived cartels appear to increase profits with respect to non-cartelized firms since the initial periods.

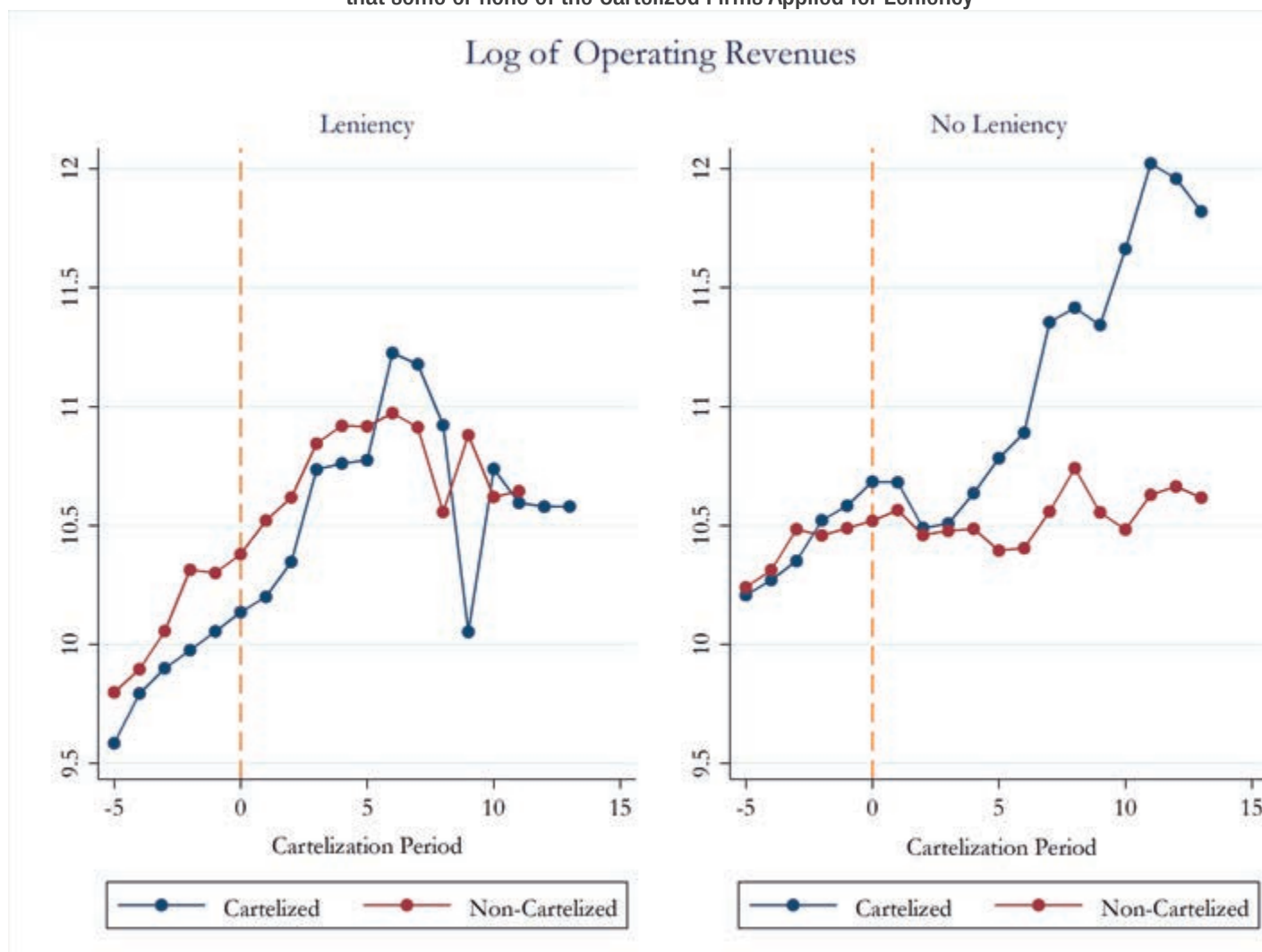
<sup>15</sup> García, C., "Cartelization: Is it worth it?," In García Galindo, C. Essays on cartels and competition policy. European University Institute, PhD Thesis (2018). Department of Economics. URL: <http://hdl.handle.net/1814/59224>, DOI: 10.2870/13080.

García<sup>16</sup> analyzes whether there is any difference between the profitability of cartels that applied for the leniency program and those that were discovered due to complaints or a competition authority's own initiative. This analysis is relevant because it helps us studying whether this program incentivizes the breakup and discovery of all types of cartels, or only of those that are not profitable and would have broken up anyway.

The main result is that cartels in which no member applied for the leniency program increased revenues compared to the control group of non-cartelized firms. However, the firms belonging to cartels in which a member applied for the leniency program did not experience this increase.

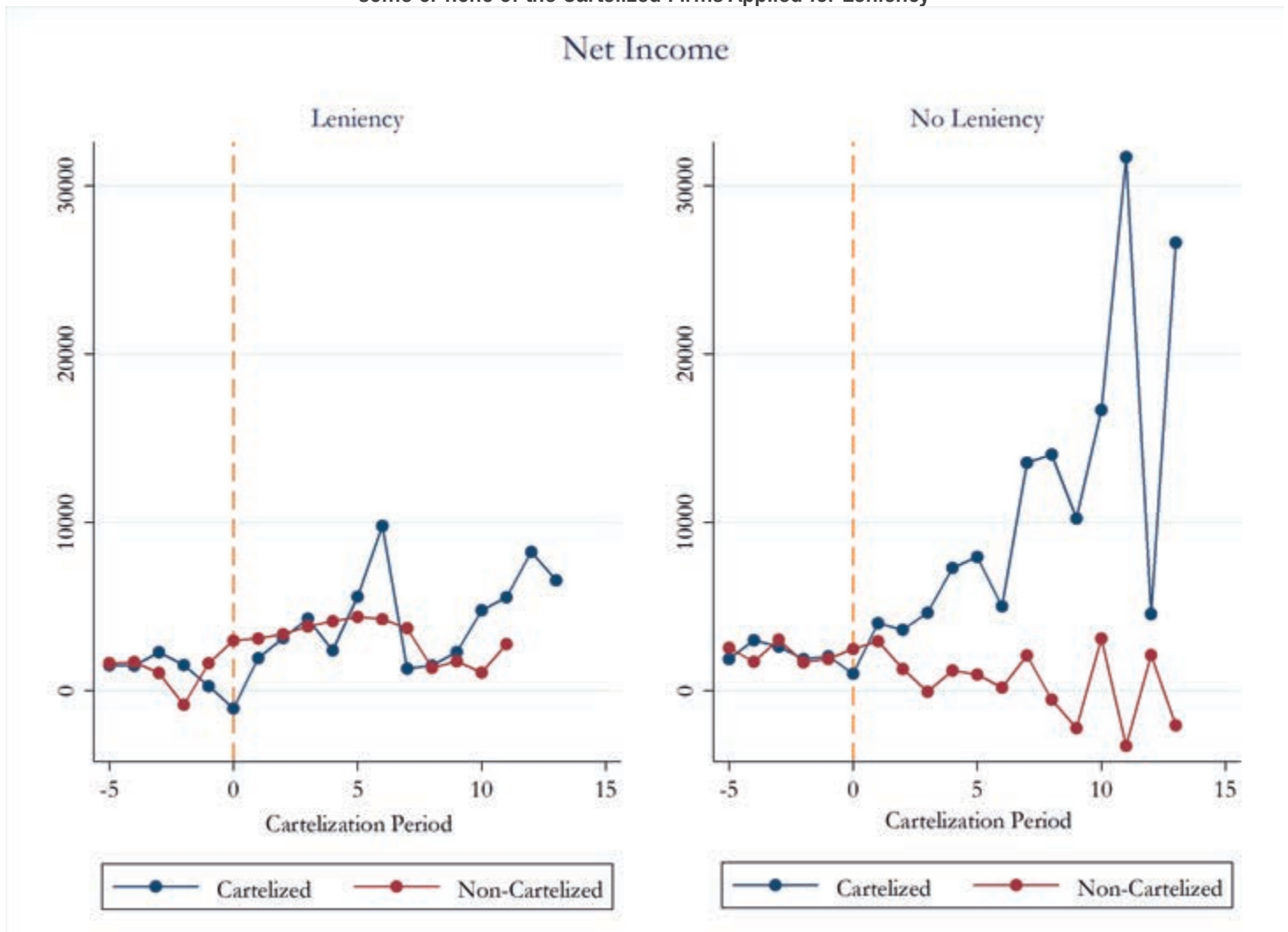
The evidence is weaker when profits, measured as net income, are considered. However, there are also significant differences in the evolution of firms' profits belonging to cartels that benefited from the leniency policy and those that did not. Again, firms belonging to cartels in which no member applied for the leniency program did have an increase in profits with respect to the non-cartelized firms. By contrast, this was not the case in the cartels in which some member applied for the leniency program.

**Figure 6. Revenues of Cartelized versus Non-Cartelized Firms in the cases that some or none of the Cartelized Firms Applied for Leniency**



16 *Id.*

Figure 7. Profits of Cartelized versus Non-Cartelized Firms in the cases that some or none of the Cartelized Firms Applied for Leniency



These results may be consistent with one or both of the following effects of leniency programs: (1) whether firms that take part in cartels which are not providing their members with extra revenues and profits are more prone to be whistleblowers and apply to a competition authority for lenient treatment; or (2) the mere existence of the program is constraining cartel members overcharging, and cartel members over-revenues and supra-normal profitability.

## VIII. CONCLUSION

Leniency programs have become weapons of mass destabilization, discovery, and dissuasion in the hands of antitrust enforcers against the most damaging forms of explicit collusion among rival firms.

The success achieved by pioneering countries in implementing the leniency program to fight cartels has promoted its rapid adoption by most other countries around the world, having a significant shift-up effect on perceived efficacy of competition policy not only in the more advanced jurisdictions but also for those lagging behind in competition policy enforcement.

In the EU, the introduction of the leniency program was additionally a critical point to consolidate the EC as the main supra-national body in charge of the public enforcement of competition policy, once the program became the main driver in detecting, sanctioning, and deterring cartels, and also for the development of follow-on private damages lawsuits.

The evidence and analysis we have carried out during the last years highlights that leniency programs have had a clear destabilization effects on cartels, that cartels last for a smaller time periods, and that the uncovered cartels have difficulties to overcharge and obtain supra-normal profits.

Future research is required to specify how the leniency program has been so effective, and to what extent its effectiveness in uncovering and deterring cartels will be reinforced or otherwise diminished in the EU by the full use of the new settlement mechanisms by the EC and the alleged cartel members, and the full transposition and national enforcement of the provisions contained in the Damages Directive. It remains to be seen whether new inter-governmental forces are trying to pull back some of the integration and centralization driven by the EC since the introduction of the leniency program.



# LENIENCY CARROTS AND CARTEL STICKS – A PRACTITIONERS' VIEW ON RECENT TRENDS AND CHALLENGES PRESENTED BY THE EU LENIENCY PROGRAM

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BY CHRISTIAN RITZ & DR. LORENZ MARX<sup>1</sup>



<sup>1</sup> Christian Ritz, LL.M. (USYD) is a Counsel and Dr. Lorenz Marx, LL.M. (King's College London) is an Associate in Hogan Lovells' German antitrust and competition team based in Munich. The authors thank Konrad Schäfer and Catherine Hegarty for their valuable contributions to this article.



# I. INTRODUCTION

To file, or not to file: giving the right answer in the right moment to this crucial question, can, at least at first sight, save a company a significant amount of money. € 1.2 billion was the sum apparently saved by the truck manufacturer MAN by submitting its leniency application to the European Commission, thereby uncovering the so-called truck cartel. While MAN benefited from full immunity from fines for being the first company to blow the whistle on the truck cartel, other truck manufacturers involved were fined a total of € 2.93 billion.

The German freight company DHL Express had less luck: Due to unfortunate circumstances and a lack of harmonization among European leniency programs, it was fined € 6.6 million by the Italian competition authority, despite benefiting from full immunity from fines at the European Commission level.

After the U.S. substantially revised their leniency program (which had originally been established in 1978) in 1993, the European Commission adopted its own leniency policy in 1996 (EU Leniency Program). Four years later the German Federal Cartel Office (“FCO”) introduced its own leniency program. Today leniency programs are established in more than 80 jurisdictions across the globe.<sup>2</sup> Having been hailed by competition law enforcers in Europe as a great success, especially in late 1990s and early 2000s, leniency applications have declined in recent years. The EU Commission’s director of the cartel enforcement unit, Eric Van Ginderachter recently stated that competition authorities need to send the message that “leniency carrots are sweet, and cartel sticks are heavy” if they want the success of leniency programs to prevail.<sup>3</sup>

The overall purpose of leniency programs is to create a sufficient level of incentives for companies involved in cartel activity to blow the whistle on an alleged cartel and to fully cooperate with the authorities to uncover and sanction the cartel. The effect of leniency programs so far has been significant: in Germany about half of the cartels that have been sanctioned to date have been uncovered by leniency applicants;<sup>4</sup> and more than 90 percent of European Commission decisions in cartel cases so far have been preceded by a leniency application.<sup>5</sup>

Leniency programs are a very important tool in the fight against cartels. However, such programs are currently facing mounting challenges coming from various directions:

- First, private enforcement has gained steam across Europe and leniency applicants are a popular first target of follow-on damages claims, while competition authorities are no longer trusted to protect the confidential information provided in leniency applications;
- Second, a lack of harmonization of leniency programs across the European Union and the absence of a European one-stop-shop system creates uncertainties for companies considering applying for leniency; and
- Third, as leniency applications usually trigger large-scale internal investigations, companies face the risk of “spillover effects,” i.e. of investigations affecting other business areas and other regulatory risks (e.g. such as the risks resulting from the new data protection laws introduced under the Global Data Protection Regulation (“GDPR”)). These developments threaten the success of leniency programs worldwide, as applicants are hoping to suffer as little harm as possible.

This article is intended to give a practitioner’s overview of the EU Leniency Program, to trace recent developments challenging the success of leniency programs, and to highlight current efforts to solve these issues, as well as to provide a practical outlook on the factors to take into account when considering a leniency application.

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2 See Leah Nylen, “After 25 years, is leniency still a bargain?,” MLex Comment, October 9, 2018.

3 See MLex Report of October 16, 2018 from the “Cartel Workshop” of the International Competition Network in Tel Aviv.

4 See German Federal Cartel Office, Annual Report 2017, p. 39.

5 See Wouter P. J. Wils, “The Use of Leniency in EU Cartel Enforcement: An Assessment after Twenty Years,” Kluwer Law International 2016 (Vol. 39 Issue 3), p. 327 et seqq.

## II. KEY ASPECTS OF THE EU LENIENCY PROGRAM

There is no specific “leniency act” at the European Union level. The only legal basis for the EU Leniency Program is the *Commission’s Notice on Immunity from fines and reduction of fines in cartel cases*.<sup>6</sup> Additional guidance can be found in the *Commission’s Antitrust Manual of Procedures*.<sup>7</sup>

To obtain full immunity from fines, a leniency applicant must be the first to submit sufficient information and evidence which will enable the Commission to carry out a targeted inspection or find an infraction of competition law committed by the alleged cartel. In order to do so, the leniency applicant must provide a detailed description of the alleged cartel arrangement, including for instance its aims, activities and functioning, the products or services concerned, and the geographic scope. Furthermore, the name and address of all legal entities and individuals involved in the alleged cartel as well as all competition authorities to which a leniency application has been or will be submitted must be provided.

The focus of this section should be on the Commission’s marker system and its expansive interpretation of the duty to fully cooperate.

### A. “First-come First-served” – The Setting Down of Markers by the European Commission

Timing and pursuing the right strategy are crucial when considering whether to apply for leniency. The opportunity for full immunity from fines puts high pressure on companies to file their application before other companies involved in the cartel do so. Although it is possible that a leniency applicant who applies as the second or third, or even later, will also receive a reduced fine, full immunity will only be granted to the first applicant. The first applicant alone will benefit from additional specific advantages, e.g. in civil damages proceedings. Thus, there exists a “winner takes it all” and “first-come first-served” principle of sorts, which means that speed is definitely one of the most important factors to consider when preparing a leniency application.

Companies involved in cartel activity therefore have a strong interest in submitting their applications as quickly as possible. The European Commission is accommodating towards companies in this respect: It is possible to apply for a so-called marker before the actual application for leniency.<sup>8</sup> This has a rank-securing function, so that the subsequent application is deemed to have been filed at the moment the marker is applied for. Meanwhile, the formal and content requirements for the marker are relatively easy to manage.

According to the Commission’s Leniency Notice, applying for a marker is only possible with regard to the granting of full immunity, whereas the procedure for the reduction of a fine does not provide for the application for a marker. It is possible to set a marker before, during or after a targeted inspection by the Commission. Full immunity from fines is still possible, as long as the Commission does not have sufficient evidence to prove the infringement. However, applications for a marker after the Commission has conducted a targeted inspection are rarely seen in practice.

The application for a marker may be filed either by e-mail or, after giving 24 hours’ notice, orally to the Commission. In terms of content, the applicant must provide the Commission with information concerning its name and address, the parties to the alleged cartel, the affected products and territories, the estimated duration and the nature of the alleged cartel conduct. The marker should also contain a justification for not submitting the leniency application right away. In practice, it is not sufficient to simply justify the marker by the fact that the applicant’s rank will be secured. Rather, it should be clear from the marker that the violation has just been discovered and that further time is needed to fully clarify it.

If these conditions are met, it is up to the Commission to decide whether or not to grant a marker. If the Commission grants a marker, it will set a deadline for the applicant to submit a complete leniency application. This deadline is determined on a case-by-case basis.<sup>9</sup> In practice, however, this deadline is often only three weeks long and can – if at all – only be extended by a few days. During such a short period it will be almost impossible in practice to completely review the facts and submit a complete leniency application.

If the Commission is not yet aware of the cartel, the company should already have a nearly complete picture of the facts before it applies for a marker. Otherwise, the applicant risks letting the deadline elapse and ending up without full immunity or without a reduction of fines.

6 See Commission Notice of Immunity from fines and reduction of fines in cartel cases, Official Journal (OJ) of December 8, 2006, C 298/17 (*Leniency Notice*), available at [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52006XC1208\(04\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52006XC1208(04)&from=EN).

7 See European Commission, Antitrust Manual of Procedures, Internal DG Competition working documents of procedures for the application of Articles 101 and 102 TFEU, March 2012, available at [http://ec.europa.eu/competition/antitrust/antitrust\\_manproc\\_3\\_2012\\_en.pdf](http://ec.europa.eu/competition/antitrust/antitrust_manproc_3_2012_en.pdf).

8 See Leniency Notice, paras. 14 et seqq.

9 See European Commission, December 7, 2006, MEMO/06/469, “Revised Leniency Notice – frequently asked questions,” p. 6.

## ***B. The European Commission's Expansive Interpretation of the Duty to Fully Cooperate***

Following a leniency application, the applicant has to cooperate fully and continuously from the submission of its application throughout the entire administrative process. In general, it has to end its involvement in the alleged cartel immediately following its application and must not destroy, falsify or conceal evidence of the alleged cartel nor disclose the fact or any of the content of its contemplated application.

The European Commission interprets the duty of full cooperation expansively, leaving leniency applicants, but also applicants for a reduction of fine, with an onerous burden of cooperation. This usually requires the applicant to conduct an in-depth internal investigation, including extensive document review and the interviewing of a significant pool of employees at different levels of seniority. The duty to fully cooperate also usually requires the applicant to respond to extensive requests for information by the Commission which are costly and always bear the risk of widening the scope of the investigation.<sup>10</sup>

Applicants who disclose their participation in an alleged cartel and do not meet these conditions, especially where they are not the first applicant, may be eligible for a reduced fine. In order to qualify for such reduction, an applicant must provide the Commission with evidence of the alleged infringement which represents significant “added value” to the evidence already in the Commission's possession. The Commission can still grant reductions of up to 50 percent for the second applicant, up to 30 percent for the third and up to 20 percent for the fourth applicant.

## **III. RECENT DEVELOPMENTS CHALLENGING THE SUCCESS OF EUROPEAN LENIENCY PROGRAMS**

While it is true that the EU Leniency Program has been a huge success in the fight against cartels, recent years have seen a growing number of developments challenging the success of global leniency programs, especially in Europe. Main challenges derive from (1) a significant increase in private enforcement through civil follow-on damages claims; (2) practical risks for leniency applicants resulting from non-harmonized leniency programs and ambitious authority expectations in Europe; (3) potential spill-over effects of leniency triggered investigations from one business area into another; and (4) potentially limiting effects for internal investigations resulting from new data protection laws.

*Swaak & Wesseling*<sup>11</sup> have provided a comprehensive overview of potential factors for leading companies to reconsider their leniency options where they are not the first applicant. This section in turn mainly focuses on the challenges caused by the rise of civil follow-on litigation and the need for a harmonization of European leniency programs, both of which are the main deterrents affecting companies in practice.<sup>12</sup> The section concludes with some remarks on the current efforts by the European Union to empower national competition authorities (“NCA”) to be more effective enforcers in the so-called ECN+ Directive,<sup>13</sup> which aims to resolve some of the issues mentioned by harmonizing aspects of competition law enforcement and granting additional powers to the NCAs.

### ***A. The Effects of Rising Private Enforcement Activity on Leniency Applications***

Private enforcement of competition law is on the rise, especially in Europe. Injured market participants are encouraged by recent legislative developments to claim damages from the alleged cartel participants. Follow-on damages claims may result in far higher financial risks than the fines originally imposed by the authorities. Leniency programs only grant immunity in administrative proceedings before the respective competition authority and do not protect against private damages actions. The incentive to participate in leniency programs may therefore be, at least partially, jeopardized by an excessive risk of liability in subsequent follow-on damages claims, especially as the leniency applicant is likely to be the easiest target of such claims.

<sup>10</sup> See Christof R. A. Swaak & Rein Wesseling, “Reconsidering the leniency option: if not first in, good reasons to stay out,” (2015) 36 E.C.L.R., Issue 8, p. 346 (351).

<sup>11</sup> See Christof R. A. Swaak & Rein Wesseling, “Reconsidering the leniency option: if not first in, good reasons to stay out,” (2015) 36 E.C.L.R., Issue 8, p. 346 et seqq.

<sup>12</sup> The issue of the GDPR as a limiting factor in internal investigations and leniency applications has recently been considered by practitioners, but should be reserved for a different paper. See MLex Report of October 16, 2018 from the “Cartel Workshop” of the International Competition Network in Tel Aviv.

<sup>13</sup> See Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market as adopted by the Council on December 4, 2018 (*ECN+ Directive*), available at <http://data.consilium.europa.eu/doc/document/PE-42-2018-INIT/en/pdf>.

These reasons lead potential leniency applicants to shy away from making an application. In practice, discussions usually center around the question of whether it may be better to keep quiet and hope that the cartel will not be discovered, rather than become a potential target of follow-on damages claims as the leniency applicant. Even if the cartel is discovered, companies hope to get off comparatively cheaply or to at least lengthen the administrative process by denying the accusations and thereby deterring potential claimants.

Since a leniency application as well as a potential subsequent settlement in practice amounts to an admission of guilt, appeals against the Commission's fining decision before the European courts are regularly waived by the leniency applicant. Usually cartel proceedings against the leniency applicant are the first to be launched and concluded. This leads to the leniency applicant also being the first to be targeted by cartel damages claims. In addition, since the leniency applicant has already more or less admitted to the alleged competition law infringement and the courts, in general, are bound by the findings of the competition authority, the question raised in these proceedings is usually (only) the exact amount of the damages rather than whether the damages have occurred in the first place.

## 1. Protection of leniency applicants

It was clearly one of the main objectives of the European legislator, when adopting the EU Damages Directive,<sup>14</sup> to prevent such consequences as much as possible. The EU Damages Directive, which was required to be transposed into national law by the EU Member States by December 27, 2016, contains three central points to protect the leniency applicant: First, by keeping the application secret and not granting potential plaintiffs access to the leniency application; second, by exempting in principle the leniency applicant from joint and several liability; third, by limiting the leniency applicant's direct liability to damages caused to its direct and indirect customers.

Consequently, other injured parties must first try to collect damages from the other cartelists. Only if these cartelists are insolvent or the damages cannot be collected from them, can claimants then seek damages from the immunity recipient. The immunity recipient is therefore effectively only liable for his "own share" of the responsibility, i.e. the damage caused to his direct and indirect customers. The rationale for this is that the immunity recipient should not be overburdened as the first target of follow-on damages claims.

## 2. Balancing of interests threatens trust in protection of leniency files

The access of potential damages claimants to the leniency files has long been a controversial issue. The legitimate interests of leniency applicants need to be balanced with the interests of potential plaintiffs to enforce their damages claims. According to the European legislator, private enforcement strengthens the overall effectiveness of antitrust enforcement and must therefore not be made excessively difficult. This balancing act has been left to the national courts in each individual case.<sup>15</sup> With the coming into force of the EU Damages Directive, at least as far as the actual leniency applications are concerned, the leniency applicant is given more favorable treatment. However, this does not completely rule out the possibility that information from the leniency application may become public. In *Akzo Nobel*, the General Court held that the inclusion of information from a leniency application in the non-confidential version of a cartel decision is not synonymous with a disclosure of the leniency application itself to third parties.<sup>16</sup>

Although the EU Damages Directive relieves the burden on the immunity recipient to a considerable extent, it should be noted that the aforementioned privileges only apply to the immunity recipient, and not to later applicants for leniency that received only a reduction of fines. Potential leniency applicants should therefore bear in mind, when weighing the advantages and disadvantages of an application for leniency, that information contained in their application may become public. When balancing the opportunities and risks of filing an application, a particularly important factor to consider will be whether full immunity or at least a significant reduction of fines is to be expected. In particular, if no immunity or first or second rank reduction of fines is on the table, an application for leniency – on balance – may not be worth pursuing.<sup>17</sup>

<sup>14</sup> See Directive 2014/104/EU of the European Parliament and of the Council of November 26, 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (*EU Damages Directive*).

<sup>15</sup> See CJEU, judgment of June 14, 2011, EU:C:2011:389, C-360/09 – *Pfleiderer*, para. 32.

<sup>16</sup> See General Court, judgment of January 28, 2015, EU:C:2015:50, T-345/12 – *Akzo Nobel and others v. EU Commission (Akzo Nobel)*, paras. 87, 114.

<sup>17</sup> See Andreas Kafetzopoulos, 36 E.C.L.R., Issue 7 2015, p. 295 (296).

## B. The Lack of Harmonization in European Leniency Programs Creates Legal Uncertainty and Practical Hurdles

Although the substantive competition law framework is largely harmonized across the European Union, there still exists a rather fragmented administrative structure at the national competition authority level. In addition to the European Commission, each EU Member State has its own NCA. NCAs mainly work independently from one another. Practice has revealed several issues resulting from this fragmented situation in cartel and leniency cases, in particular, and such issues appear to deter companies from lodging leniency applications.

### 1. The absence of a European one-stop-shop for leniency applicants

As competition authorities can take on cases independently from one another, it is sometimes unclear which authorities have (potentially even parallel) jurisdiction. This is particularly problematic when planning and filing for leniency in relation to an international cartel, as the absence of a European one-stop-shop may lead to a situation where a leniency application must be unexpectedly filed with NCAs that had not been previously considered. Finally, full immunity is only granted if the applicant is the first to apply, i.e. the first undertaking to submit an application and to provide the authority with comprehensive information which it did not previously have. As there is no European one-stop-shop for leniency applications, it is not enough to apply for leniency with just one authority, e.g. the European Commission. However, applying for leniency with all potentially concerned authorities may tip off competition authorities who might not have otherwise dealt with the case.

Furthermore, the potential leniency applicant must not only ensure that the application is submitted to all relevant authorities, but they must also indicate all possible competition law infringements. This also applies in situations where it is expected that the Commission will declare itself competent to assess several specific infringements. The *DHL Express case*<sup>18</sup> in particular acts as a deterrent. In this case, the logistics company DHL Express applied for leniency to the European Commission. DHL Express stated that it was involved in prohibited cartel agreements in the air, sea and road transport sectors. The undertaking also placed an almost identical marker with the Italian competition authority, but without mentioning the road transport sector. While the Commission granted DHL Express full immunity from fines in the air transport sector, it did not pursue the other two sectors. The Italian competition authority, however, later took on the case and imposed a fine against DHL Express for its dealings in the road transport sector, which the company had omitted in its application to the Italian authority.

In its appeal heard before the CJEU, DHL Express argued that it had submitted a comprehensive application to the European Commission covering all three transport sectors, including road transport. It stated that the Italian authority should have taken this into account as the marker submitted to the Italian authority was based on the leniency model established by the ECN<sup>19</sup> – a forum composed of the European Commission and the NCAs of the European Union. The CJEU dismissed the appeal. It held that agreements made in the ECN framework have no binding effect on NCAs. Instead, they were free to organize their leniency systems independently. According to the court, there was “no legal link” between the application submitted to the Commission and the one made in Italy. The Italian competition authority was therefore neither obliged to assess the Italian summary application in light of the application made in Brussels, nor was it required to contact the Commission in order to obtain information on the facts or results of the application made to the Commission.

While this result can be viewed as legally sound, it is unsatisfactory for the practical user and reveals the problems resulting from the absence of harmonisation in the field of leniency programs.<sup>20</sup> From a practitioner’s point of view, the simplicity and transparency of leniency programs would be enhanced by establishing a central office for leniency applications in the European Economic Area. This would remove some of the uncertainty surrounding potential leniency applications, simplify the process for such applications, and possibly lead to a revival of the European leniency program.

As the ECN+ Directive, which is intended to streamline the NCA’s enforcement practice, will not introduce such a Europe-wide one-stop-shop, this issue is unlikely to be solved in the near future. As long as this remains the case, leniency applicants must be very careful when formulating their international leniency strategy. In particular, they should be advised to arrange parallel global filings of leniency applications in all jurisdictions where individual competition law infringements may be considered by NCAs.

<sup>18</sup> See CJEU, judgment of January 20, 2016, EU:C:2016:27, C-428/14 – *DHL Express (Italy) and DHL Global Forwarding (Italy) v. Autorità Garante della Concorrenza e del mercato (DHL Express)*.

<sup>19</sup> See ECN Model Leniency Programme as revised in November 2012, available at [http://ec.europa.eu/competition/ecn/mlp\\_revised\\_2012\\_en.pdf](http://ec.europa.eu/competition/ecn/mlp_revised_2012_en.pdf).

<sup>20</sup> See Daniel Mandrescu, “One Stop Shop Leniency: The case of DHL Express v Autorità Garante della Concorrenza e del Mercato (C-428/14),” (2016) 37 E.C.L.R., Issue 10, p. 397 (400).



## 2. The impracticality of the European Commission's marker system

In practice, the marker system under the EU Leniency Notice is impractical as it does not do justice to the interests of potential leniency applicants. The period of three weeks for an applicant to submit a complete leniency application will generally be too short to comprehensively clarify the facts. Although the Commission has the discretion to extend this period, it is generally advisable for the applicant to have clarified almost all the facts before applying for a marker.

In comparison, e.g. the German FCO's leniency program demonstrates that there are other, more practicable ways to implement a marker system. The German FCO regularly grants a period of eight weeks to the marker applicant before the complete leniency application must be submitted. In addition, the FCO does not have the discretion to decide whether it grants the marker or not. From a practitioner's perspective, these two points already make the German leniency program more transparent, practical and thus also more effective with regards to markers.

### ***C. ECN+ is only a First Step; Further Leniency Carrots must be Provided to Potential Applicants***

The European Commission aims to provide further incentives for undertakings to apply for leniency. On March 22, 2017, the Commission published a proposal for the ECN+ Directive which seeks "to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market."<sup>21</sup> The ECN+ Directive adopted by the Council on December 4, 2018 and is intended to replace the non-binding "ECN Model Leniency Programme."

Chapter VI of the ECN+ Directive focuses on "Leniency programmes for secret cartels." In particular, Article 17(1) stipulates that all Member States shall ensure that NCAs have in place leniency programs which enable them to grant immunity from fines to undertakings which fulfil the conditions in subsequent provisions. This should provide cross-border legal certainty and should put an end to the different outcomes of leniency applications caused by current national divergences.<sup>22</sup> In order to provide a level playing field, the leniency provisions now provide a greater level of detail and leave the Member States less leeway for implementation.<sup>23</sup>

The ECN+ Directive in Article 21 provides for the harmonization of marker rules. However, the proposal still seeks to give NCAs discretion as to whether they should grant a marker or not and provides them with the flexibility to set deadlines on a case-by-case basis.<sup>24</sup> In order to achieve the envisaged harmonization, it would be preferable to have uniform standards throughout the European Union. This would simplify the application of the law and further increase the effectiveness of leniency programs.

The new ECN+ Directive is heading in the right direction insofar as it standardizes the marker system throughout Europe. This is a step forward as so far not all EU Member States have such a system in place. However, if discretionary deadlines continue to be set on a case-by-case basis, there will continue to be significant differences in the application of the various marker systems. The ECN+ Directive has been adopted by the Council on December 4, 2018. Following its entry into force, EU Member States will have two years to incorporate the new provisions into their domestic law.

## **IV. PRACTICAL CONCLUSIONS AND FUTURE OUTLOOK**

Leniency programs are a very important tool in the competition enforcers' fight to uncover cartels. Their key to success over the past two decades has been the significant financial incentives they offer to cartelists who blow the whistle on their co-cartelists at the right moment (in particular full immunity from fines and specific privileges in possible follow-on damages claims). However, as these incentives have been somewhat diminished by the increase in potential deterring consequences for leniency applicants (especially in the context of the rise of private cartel enforcement) the decision to apply for leniency has, in many cases, become a complex balancing exercise taken under immense time pressure.

Orchestrating leniency applications to the European Commission and different NCAs, as well as managing the onerous cooperation process with competition authorities around the globe, is key if a company intends to benefit from a leniency application. However, given the current global rise of competition litigation, there are several risks that have to be considered when deciding whether to apply for leniency. An incorrect

<sup>21</sup> See ECN+ Directive, available at <http://data.consilium.europa.eu/doc/document/PE-42-2018-INIT/en/pdf>.

<sup>22</sup> See ECN+ Directive, p. 6.

<sup>23</sup> See ECN+ Directive, recital 10.

<sup>24</sup> See ECN+ Directive, Art. 20.

or incomplete leniency application can easily ruin an applicant's chances of obtaining the privileges offered by such an application and may tip off authorities who were not previously aware of the existence of the cartel.

It should also be noted that the first applicant alone gains benefits from both full immunity in the public cartel proceeding as well as certain privileges in civil damages proceedings. There is also no guarantee that information provided in leniency applications will not, in certain circumstances, become public (even if such applications benefit from a high level of protection). In addition, leniency applicants are popular first targets of cartel damages claims. These risks should not be underestimated, but should be carefully balanced, on a case-by-case basis, against the potential advantages that may result from the leniency application.

Leniency applications are essential in uncovering secret cartels and much has already been done to protect them. The new ECN+ Directive aims to ensure a uniform application of leniency programs in Europe and represents a further step in this direction. As leniency programs benefit from simplicity and transparency, they will be strengthened by such unification. However, a true EU-wide one-stop-shop system remains a long-term objective at best, which is unsatisfactory from a practitioner's perspective.

Companies faced with the decision of choosing whether or not to file should above all remain calm, despite the significant pressure they are likely under. The decision whether to apply for leniency or not is a crucial one and may in some circumstances lead to a bet-the-company situation. Such a decision must be made following an in-depth analysis of the advantages and disadvantages for the company, taking into account the specific facts of the case, the general strategy of the company in such situations, and will usually require the unanimous approval and firm commitment of the company's board of directors.



# LENIENCY PROGRAMS IN ANTITRUST: PRACTICE VS THEORY

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BY EVGENIA MOTCHENKOVA & GIANCARLO SPAGNOLO<sup>1</sup>



<sup>1</sup> Department of Economics, Vrije Universiteit Amsterdam, TILEC and Tinbergen Institute, De Boelelaan 1105, 1081 HV Amsterdam, The Netherlands. Email: [emotchenkova@feweb.vu.nl](mailto:emotchenkova@feweb.vu.nl); SITE-Stockholm School of Economics, University of Rome 'Tor Vergata,' SITE, EIEF and CEPR. Email: [spagnologianca@gmail.com](mailto:spagnologianca@gmail.com).

# I. INTRODUCTION

Antitrust policy instruments (such as monetary fines, leniency programs, and private damages) are designed and implemented in order to deter collusion, protect consumers and compensate the harm caused by the price-fixing activities of cartel members.

There has been much discussion by both academics and policy makers over the most appropriate design and combination of public antitrust penalties, leniency programs and private damages to impose on firms infringing antitrust law.<sup>2</sup> Academics and policy makers also admit that legal, financial, and informational restrictions imply that the first-best design of these instruments according to theory may neither be feasible nor optimal.<sup>3</sup> In practice, public antitrust fines, private damages, as well as leniency programs, have to be designed given the existing constraints and legal restrictions. As has been discussed by several academics this can sometimes cause additional distortions and imperfections in the form of even higher cartel prices, more stable cartels and more profitable collusive strategies.<sup>4</sup>

Indeed, there are several policy features in practice, both in the U.S. and the EU, which contradict predictions of theoretical models and seem to be sub-optimal. In particular, both the U.S. and the EU systems feature distortive fines based on revenues and insufficient legal ceilings.<sup>5</sup> The EU system, in addition to the above-mentioned problematic aspects, features multiple fine reductions<sup>6</sup> and weak protection from follow-on private damage claims in cases of application for leniency. Furthermore, the information provided in leniency statements is “protected” by the EU 2014 Damages Directive from being used in follow-on private damage claims litigation.<sup>7</sup>

The disadvantages of sub-optimally designed policy instruments are numerous. For example, poorly designed monetary fines based on revenue may induce cartels that are not deterred to set higher prices than those that would be set in the absence of antitrust enforcement.<sup>8</sup> Poorly designed leniency programs may in turn enhance *ex-ante* collusion due to reduced expected fines. Likewise, giving fine reductions to several self-reporting firms reduces their incentive to “race to the courthouse,” which undermines the effectiveness of the leniency policy.<sup>9</sup> Sub-optimal procedures for recovering private damages, where leniency applicants are in no way protected from follow-on private suits, make leniency applications unattractive. Using the right method of damage calculation is also important. If damages are wrongly calculated, they can amplify the adverse price effects of wrongly designed revenue-based fines.<sup>10</sup>

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2 The theoretical literature analyzing most appropriate design and combination of antitrust policy instruments began around 2000 with contributions by Massimo Motta & Michele Polo (2003), “Leniency programs and cartel prosecution,” *International Journal of Industrial Organization* 21, 347-379; Patrick Rey (2003), “Towards a Theory of Competition Policy.” In *Advances in Economics and Econometrics: Theory and Applications*, Cambridge University Press, 82–132; and Giancarlo Spagnolo (2004), “Optimal Leniency Programs,” Centre for Economic Policy Research, Discussion paper series, 4840. Other key contributions include Joe Harrington (2008), “Optimal corporate leniency programs,” *The Journal of Industrial Economics* LVI(2), 215-246, Chen, Z. & P. Rey (2013), “On the design of leniency programs,” *Journal of Law and Economics* 56, 917 -957. See also ICN Report (2008), *Setting Fines for Cartels in ICN Jurisdictions*, Report to the 7<sup>th</sup> Annual Conference, Kyoto.

3 See, Harrington, J. (2010), “Comment on Antitrust Sanctions,” *Competition Policy International* 6, 41-51, Katsoulacos, Y., E. Motchenkova & D. Ulph (2015), “Penalizing Cartels: The Case for Basing Penalties on Price Overcharge,” *International Journal of Industrial Organization*, 42: 70-80 and Houba, H., E. Motchenkova & Q. Wen (2018), “Legal Principles in Antitrust Enforcement,” *The Scandinavian Journal of Economics*, 120: 859-893, or Spagnolo, G. & C. Marvao (2018), “Cartels and leniency: Taking stock of what we learnt,” in: *Handbook of Game Theory and Industrial Organization*. Ch. 29.

4 See for example, Bageri, V., Y. Katsoulacos & G. Spagnolo (2013), “The Distortive Effects of Antitrust Fines Based on Revenue,” *The Economic Journal*, 123 (572), 545-557; Chen, Z. & P. Rey (2013), “On the design of leniency programs,” *Journal of Law and Economics* 56, 917-957; Houba, H., E. Motchenkova & Q. Wen (2015), “The Effects of Leniency on Cartel Pricing,” *The B.E. Journal of Theoretical Economics*, 15(2), 351-389; or Bos, I., S. Davies, J. Harrington & P.L. Ormosi (2018), “Does enforcement deter cartels? A tale of two tails,” *International Journal of Industrial Organization*, 59, 372-405.

5 See e.g. Schinkel M.P. (2007), “Effective Cartel Enforcement in Europe,” *World Competition* 30 (4), 539-572; or Buccirossi, P. & G. Spagnolo (2007), “Optimal Fines in the Era of Whistle blowers - Should Price Fixers Still Go to Prison?,” in *The Political Economy of Antitrust*, by V. Goshal & J. Stennek (Eds.), Elsevier: Amsterdam.

6 The U.S. leniency program allows only complete immunity for the first reporting firm and no reductions for subsequent applicants. On the other hand, in the U.S. plea bargaining does something similar to the EU multiple reductions. See <http://www.usdoj.gov/atr/public/guidelines/0091.htm> or DOJ (1993), U.S. corporate leniency policy.

7 In the U.S. Leniency recipient pay single damages instead of triple damages paid by those firm which did not get leniency and are not jointly liable. Information in LP statements is available for private damages litigation.

8 See Bageri, V., Y. Katsoulacos & G. Spagnolo (2013), “The Distortive Effects of Antitrust Fines Based on Revenue,” *The Economic Journal*, 123 (572), 545-557.

9 See, for example, Spagnolo, G. (2004), “Optimal Leniency Programs,” Centre for Economic Policy Research, Discussion paper series, 4840 and Harrington, J. (2008), “Optimal corporate leniency programs,” *The Journal of Industrial Economics* LVI(2), 215-246.

10 As shown in Katsoulacos, Y., E. Motchenkova & D. Ulph (2018), “Cartel penalties and private damage actions: An integrated assessment,” *mimeo*, paper presented at CRESSE 2018 conference.



In this piece we zoom into the issues related to the design of leniency programs and damage claims and the differences between the regimes implemented in the EU and U.S. We provide a systematic overview of costs and benefits for both designs and what the theory and empirical/experimental literature says about them. We identify a number of “sub-optimal” features in the design of the existing leniency programs, which may hinder the effectiveness of antitrust enforcement. We compare the two structures to the design derived from the theoretical literature and show that the EU design could be improved by modifying a number of features such as multiple fine reductions, limits to disclosure, and weak protection for immunity recipients from liability to follow-on private damage claims.

## II. CURRENT RULES FOR LENIENCY PROGRAMS AND DAMAGE CLAIMS IN THE U.S. AND EU

### A. The U.S. Legal Regime

The first Corporate Leniency Program in the U.S. was introduced in 1978, and modified in 1993. Currently, the U.S. leniency program allows for full amnesty for the first reporter and no fine reductions for subsequent reporters.<sup>11</sup>

Furthermore, in the U.S. victims of antitrust law violations are entitled to treble damages and cartel members are jointly and severally liable for these damages. Also, claimants in damages actions can obtain all relevant documents, including those contained in leniency statements.

In order to prevent the incentives to apply for leniency from being undermined by the possibility of follow-on private enforcement, the U.S. Antitrust Criminal Penalty Enhancement and Reform Act of 2004 removes joint and several liability from firms granted immunity under the leniency program and in addition reduces the liability of that firm to single damages. The Antitrust Criminal Penalty Enhancement and Reform Act of 2004 did not change the rules concerning the disclosure of relevant documents, so that claimants in a civil action still can rely on the evidence contained in leniency statements.

Finally, the Antitrust Division of the U.S. Department of Justice has a long history of settling cartel cases with plea agreements. Ann O'Brien (2008)<sup>12</sup> stresses that over 90 percent of the hundreds of defendants charged with criminal cartel offenses during the last 20 years have admitted to the conduct and entered into plea agreements with the Division. Scott Hammond (2006) characterizes the U.S. model of negotiated plea agreements as “a Good Deal With Benefits For All.”<sup>13</sup>

### B. The EU Legal Regime

In Europe, the first leniency programs were introduced in 1996. The modified leniency program adopted by the EC in 2002 (and revised in 2006) gives complete immunity from fines to firms that were first to submit evidence about the cartel to the antitrust authority, and partial immunity to the subsequent applicants.<sup>14</sup> The Commission encourages companies that are involved in a cartel to come forward with evidence to help the Commission detect cartels and build its case (Leniency Notice (OJ C298, 8.12.2006, p.17). The first company to provide sufficient evidence of a cartel to allow the Commission to pursue the case can receive full immunity from fines; the next applicant can receive reductions of up to 50 percent on the fine that would otherwise be imposed. 20-30 percent reductions are available for the third applicant and up to 20 percent for others.<sup>15</sup>

The EU 2014 Directive on private damages (Directive 2014/104/EU) contains provisions aimed at facilitating private actions and compensation for victims of EU competition law infringements.<sup>16</sup> With regards to liability, the Directive provides “*that an immunity recipient is jointly and severally liable as follows: (a) to its direct or indirect purchasers or providers; and (b) to other injured parties only where full compensation*

11 See OECD Report (2002) “Fighting Hard-Core Cartels: Harm, Effective Sanctions and Leniency Programs” or US corporate leniency policy rules at <http://www.usdoj.gov/aatr/public/guidelines/0091.htm>.

12 See Ann O'Brien (2008), Cartel Settlements in the U.S. and EU: Similarities, Differences & Remaining Questions, available at <https://www.justice.gov/aatr/file/519681/download>.

13 See Scott D. Hammond, “The U.S. Model of Negotiated Plea Agreements: A Good Deal With Benefits For All,” address before the OECD Competition Committee, Working Party No. 3 (October 17, 2006) (hereinafter “The U.S. Model of Negotiated Plea Agreements”), available at <http://www.usdoj.gov/aatr/public/speeches/219332.pdf>.

14 Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, Official Journal of the European Commission, C 45, 2002, 3–5.

15 Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, Official Journal of the European Commission, C 298, 2006, 17–22.

16 Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union. *Official Journal of the European Union*, Ch. PE-CONS 80/14; RC 8, 2013/0185 (COD).

cannot be obtained from the other undertakings that were involved in the same infringement of competition law” (Art. 11(4)).<sup>17</sup> Which implies that leniency applicants are not protected from private damage liability to the extent that they are in the U.S.

The 2014 Directive also changes the rules concerning the disclosure of relevant documents. It states that national courts cannot at any time order a party or third party to disclose neither leniency statements, nor settlement submissions. As a result, the information in leniency statements becomes unavailable for claimants in private damages actions.

The system of settlements was introduced in the EU in June 2008 (Regulation 622/2008). It enables the EC to close investigation faster by eliminating or reducing several procedural steps. Firms that admit liability and waive these procedural rights receive a discount of 10 percent on the final fine imposed.

Table 1 gives a summary of the legal rules described above

The U.S. regime	The EU regime
100% immunity for first applicant, no reduction for subsequent applicants (apart from plea bargains)	100% fine reduction for first applicant, up to 50% reduction for second, 20-30% reduction for third and up to 20% reduction for others
Immunity recipients pay single damages instead of triple	Leniency applicants are not protected from private damage liability
Joint and several liability removed for immunity recipients	Partial joint and several liability, where full compensation cannot be obtained from other undertakings
Information in leniency statements is available for private damages	Information in leniency statements is “secreted”
Plea bargaining system	Settlements: 10% reduction

### III. THEORY AND EMPIRICAL EVIDENCE

#### A. Number of Fine Reductions, Exploitability, and Litigation Costs

The majority of theoretical contributions argue in favor of single reduction system (the U.S. system). The theoretical literature generally finds that restricting leniency to the first informant is strictly better than granting leniency to all or many informants.

The aim of introducing a leniency program is to destabilize the cartel. Under leniency programs, firms who broke the law are allowed to report their illegal activities in exchange for reduced fines. While leniency programs introduce additional incentives for the firms to break the cartel agreement, they also broaden the range of cartel strategies. Specifically, the cartel may exploit these programs if they are too generous. As discussed in Spagnolo (2004) and Chen & Rey (2013), this may manifest itself in the form of a “collude and report” strategy that generates adverse effects.<sup>18</sup>

These contributions show that allowing more than one firm to benefit from amnesty makes a “collude and report” strategy more attractive, which reduces the effectiveness of the leniency program. Leniency programs thus perform less well in the absence of a first-informant-wins rule. Houba, Motchenkova & Wen (2015) extend this result and show that granting full immunity to single-reporting firms achieves the largest reduction in the maximal cartel price.<sup>19</sup> These results may explain why the original version of the U.S. leniency program did not contribute much to defeating cartels before the 1993 revision, which introduced the first-informant rule. This is also in line with previous insights discussed by

<sup>17</sup> See Buccirosi, P., Marvao & C., Spagnolo, G. (2015), “Leniency and damages,” *CEPR Working Paper* DP 10682.

<sup>18</sup> Chen, Z. & P. Rey (2013), “On the design of leniency programs,” *Journal of Law and Economics* 56, 917 -957.

<sup>19</sup> Houba, H., E. Motchenkova & Q. Wen (2015), “The Effects of Leniency on Cartel Pricing,” *The B.E. Journal of Theoretical Economics*, 15(2), 351-389.

Giancarlo Spagnolo (2004) and Joe Harrington (2008). Furthermore, Giancarlo Spagnolo shows that the "first informant rule" maximizes deterrence through strategic risk and the fear of being betrayed by somebody else,<sup>20</sup> and Joe Harrington shows that the rule generates a "race to the courthouse effect" in the case of investigations, which increases the expected sanctions inflicted on cartel members.<sup>21</sup>

Empirical work by Miller (2009), based on DOJ data of between 1985 and 2005, shows that the pattern of cartel discoveries around the revision in 1993 of the U.S. leniency program is consistent with enhanced cartel detection and deterrence capabilities.<sup>22</sup> By contrast, using European data Brenner (2009) shows that the introduction of a leniency policy in Europe in 1996 (without a first-informant rule and full leniency) had no effect on deterrence.<sup>23</sup>

The arguments in favor of the EU structure, with its multiple fine reductions, have been articulated in Blatter et al. (2018) and Charistos & Constantatos (2016),<sup>24</sup> who point out that in the setting where firms possess asymmetric evidence, information provided by a single firm may not be sufficient to convict the entire cartel, while obtaining additional information from other applicants can increase the likelihood of convicting the entire cartel. Theoretical analysis presented in these papers shows support for the European practice of allowing multiple informants to benefit from lenient treatment. Similar opinions have been articulated in the OECD 2012 Policy roundtable report on "Leniency for subsequent applicants." The problem then is how many subsequent applicants obtain leniency and whether too many of them obtain leniency before the whole cartel is convicted. The large reduction in fines can make such conviction counterproductive: firstly, because it would be ineffective from the point of view of deterrence and, secondly, because it would be distortive due to the way how fines are currently designed.

Another related issue is that litigation costs are obviously higher under the U.S. structure compared to the EU. So, a plausible explanation for keeping the EU structure could be that allowing for lenient treatment of several applicants helps save on litigation and enforcement costs, as otherwise CA would have to investigate (carry out dawn raids) and prosecute (take to court) every cartel participant except of the one applying for leniency and admitting their wrongdoing. Having several other cartel participants admitting wrongdoing in exchange for partial fine reductions allows for savings in the above-mentioned costs. However, this reduces the amount of fines paid by the cartel in a situation of already very weak sanctions compared to the U.S. (no jail time, no treble damages). If this further reduces deterrence, it will increase the number of cartels, the distortions in the economy, the number of cartel cases to prosecute, and thereby again enforcement costs. A better way to reduce prosecution costs is to deter cartels, so that there will be very few of them to prosecute.

One may argue that the plea bargaining system in the U.S., in a sense, compensates for a lack of information due to the absence of subsequent immunity recipients and helps to reduce litigation costs. But one should not forget that a similar system of settlements was introduced in the EU in June 2008 (Regulation 622/2008). It enables the competition authority to close investigation faster by eliminating or reducing several procedural steps. The obvious benefit of settlements is related to the conservation of economic resources, i.e. saving time and costs for the CA.<sup>25</sup> However, an important argument against both European settlements and the U.S. plea bargaining system is that they can reduce expected fines and deterrence.<sup>26</sup> Catarina Marvao & Giancarlo Spagnolo (2018) also point out that multiple leniency reductions in the EU could be used as a substitute for plea bargaining.<sup>27</sup>

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20 Spagnolo, G. (2004), "Optimal Leniency Programs," Centre for Economic Policy Research, Discussion paper series, 4840. Giancarlo Spagnolo also acknowledges that in a richer environment when the information held by the first applicant is not sufficient to lead investigations and convict the whole cartel, then partial leniency to a second applicant could be optimal.

21 Harrington, J. (2008), "Optimal corporate leniency programs," *The Journal of Industrial Economics* LV(2), 215-246.

22 Miller, N. (2009), "Strategic leniency and cartel enforcement," *American Economic Review* 99, 750-768.

23 Brenner, S. (2009), "An empirical study of the European corporate leniency program," *International Journal of Industrial Organization* 27(6), 639-45.

24 Blatter, M., Emons, W. & Sticher, S. (2018), "Optimal leniency programs when firms have cumulative and asymmetric evidence," *Review of Industrial Organization* 52, 403-427 and Charistos, K. & C. Constantatos (2016), "On Leniency and Markers in Antitrust: how many informants are enough?," Discussion Paper No. 2/2016, University of Macedonia. See also OECD, 2012, Leniency for subsequent applicants. Policy roundtable report.

25 See e.g. Landes, W. (1971), "An Economic Analysis of the Courts," *Journal of Law and Economics*, 14, 61-108.

26 See e.g. Miceli, T. J. (1996), "Plea Bargaining and Deterrence: An Institutional Approach," *European Journal of Law and Economics*, 3, 249-264 and Ascione & Motta (2010), "Settlements in cartel cases," *MPRA Paper* No. 24416, posted September 22, 2010.

27 See Marvao, C. & G. Spagnolo (2018), "Should price-fixers (finally) go to prison? — leniency inflation, Damages directive and Criminalization in the EU," *mimeo*. Based on Data from Marvao (2015b) and Connor (2008), Marvao & Spagnolo (2018) estimate that in the U.S., pleas account for 30 to 35 percent of the fine reduction in over 90 percent of cases. In the EU, the average LP reduction (excluding the first reporting firm) is 30 percent, which corresponds to 296 fines reductions in a total of 708 fines imposed between in 1998-2014. In the cases where settlements were also in place, this number increases to 32 percent, in addition to a 10 percent fine reduction from the settlement. Although the numbers are comparable, it is unlikely that this is the intention of the EU legislator.

In addition, the same authors (Marvao & Spagnolo, 2018) document the “leniency inflation” phenomenon in the EU. They estimate that the average leniency reductions granted per year increased over the period between 1998-2014, reaching 60 percent higher in some years. This may indicate a trend towards an excessive use of leniency in the EU as a substitute for investigative efforts. CA authorities have to be cautious as this may not be just an innocent substitution. In fact, in a recent paper Marvao & Spagnolo, 2018 stress that:

While the information obtained from the first or second leniency applicant may help increase sanctions for the whole cartel, further leniency does not. Excessive leniency reduces expected sanctions and thus, potentially, deterrence. ... Ideally, one and only one firm should be granted leniency in exchange for important information to be used against other cartel members. Every additional firm receiving leniency tends to further reduce overall sanctions and – most importantly – reduce the push to rush and report first, as firms may think that they do not need to be first to “run” to the antitrust authority.

Saving enforcement costs is not optimal if it comes with a substantial loss of deterrence, as that would then increase the number of cartels, the number of cases, and with them, again, prosecution costs, not to mention increasing the size of distortions and the number of victims.<sup>28</sup>

## **B. Interaction with Private Damages**

In 2014 European Commission introduced the Directive on private damages (Directive 2014/104/EU). The Directive aims at improving deterrence by facilitating damage claims by cartel victims, which are added to antitrust fines in terms of expected sanctions. The way the directive is implemented is different from the legal rules on damages in the U.S. Firstly, in the EU damages are limited to the harm caused, while the U.S. has treble damages. Secondly, in the EU the information provided by the leniency applicant is “secreted” (i.e. leniency statements are not available for civil law suits) so cannot be used by the claimants in the damage action to prove the existence and effects of the infringement. Combined with the EU practice of multiple leniency applications this implies that there will be very little information available for damage claimants. This is not the case in the US, where the evidence contained in leniency statements is available for claimants. Finally, in the EU leniency applicants are not protected from future civil liability. In the U.S. there is partial protection as leniency recipients have to pay only single damages, instead of the usual triple.

The recent legal debate stresses the conflict between Leniency Programs and the new Damages directive in Europe. It is argued by several scholars<sup>29</sup> that private action for damages may jeopardize leniency programs, since a leniency application increases the risk of a successful damage claim by the cartel’s victims. Moreover, leniency applicants who do not challenge the decision in court become the preferred target of the damages action and due to joint and several liability may end up paying even higher damages than those in the absence of leniency application. This poses a problem for a firm requesting immunity as any benefits from reduced fine may be outweighed by the additional private liability. This reduces (or may even remove) the incentives to apply for leniency in the first place. In the view of this legal debate it may seem logical that the 2014 EU Directive tries to protect the effectiveness of a leniency program by restricting access to information contained in leniency statements in subsequent actions for damages. But is this policy optimal?

The theory states that this policy is suboptimal, as it hinders both deterrence and the ability of victims to obtain compensation. Furthermore, it increases private litigation costs. Recent theoretical work by Buccirosi, Marvao & Spagnolo (2015) shows that “protecting” the information in leniency statements from being available for follow-on private damages actions is not necessary to preserve the effectiveness of a leniency program.<sup>30</sup> Their analysis shows that a legal regime in which the immunity recipient’s liability is minimized (even eliminated), and which grants victims full access to all files held by the competition authority, including leniency statements (as it is done in the U.S.), maximizes the effectiveness of public antitrust enforcement in terms of deterrence. The ability of victims to obtain damages compensation is also maximized in this regime, provided that other cartel members (those who did not receive immunity) are able to jointly cover the private damages caused by the cartel. Since the cartelists are jointly and severally liable, victims who have access to all the information can claim their loss from other cartel members (non-leniency applicants).

28 Note also that if instead extending leniency to many or all cartel members would not reduce deterrence, for example because sanctions are already too small to produce deterrence then the best solution to save enforcement costs would be to give leniency to everybody, that is, not prosecuting anybody and saving the full costs of the competition authority.

29 See e.g. Cauffman, C. (2011), “The interaction of leniency programs and actions for damages,” *The Competition Law Review* 7 (2), 181–220; Komninos, A. (2011), “Relationship between public and private enforcement: quod dei deo, quod caesaris caesari,” 16th Annual EU Competition Law and Policy Workshop, European University Institute, Florence, 17-18 June 2011, p. 18; MacCulloch, A. & B. Wardhaugh (2012), “The baby and the bathwater - the relationship in competition law between private enforcement, criminal penalties, and leniency policy,” *Working paper*; or Buccirosi, P., Marvao, C. & Spagnolo, G. (2015), “Leniency and damages,” *CEPR Working Paper* DP 10682.

30 Buccirosi, P. C. Marvao & G. Spagnolo (2015), “Leniency and damages,” *CEPR Working Paper* DP 10682.



Their results also help compare the EU and U.S. systems. Buccirossi, Marvao & Spagnolo (2015) show that the U.S. system is superior to the EU system. The U.S. design does not limit the information available to the victims, and so does not increase private litigation costs and also maximizes deterrence. Further, it protects immunity recipients from follow-on civil liability to a larger extent compared to the EU 2014 Directive as it removes joint and several liability from a firm granted immunity and immunity recipients pay lower damages compared to a situation with no leniency (only single damages instead of triple). This stronger protection for immunity recipients enhances incentives to deviate and apply for such programs (compared to those under the EU structure). While the 2014 EU Directive aims to protect the effectiveness of a leniency program by restricting access to leniency statements in subsequent actions for damages, the move actually harms the effectiveness of leniency programs in terms of deterrence.

As we discussed above, under the EU's design and its multiple opportunities for fine reductions, "collude and report" strategies can become very attractive. Combining this with the EU phenomenon of "leniency inflation" (when almost all cartel members can get some partial immunity and all the leniency statements are "secreted") can result in a situation where it becomes very hard for claimants to recover damages, making exploitative "collude and report" strategies even more attractive. Likewise, protection for immunity recipients from follow-on civil liability is almost absent in the EU, which undermines the effectiveness of leniency programs in the first place. Modifying the design of the EU leniency programs (moving towards the U.S. structure characterized by the "first-informant rule," availability of information and partial protection from civil liability) could not only help to enhance deterrence and consumer benefits from LPs in Europe, but also help to avoid the conflict between private damage actions and leniency programs, the idea of which culminated in Europe with the introduction of the 2014 Damages Directive.

## IV. SUMMARY OF COSTS AND BENEFITS

In Section 3 we identified several criteria on the basis of which the benefits and costs of various designs can be assessed. These criteria are related to Cartel stability (race to the courthouse); Welfare implications in terms of deterrence and pricing; Level of private litigation costs and availability of information for victims in private law suits; Amount of evidence obtained by competition authority through leniency applications; Level of public (competition authority) litigation costs.

Table 2 summarizes the performance of both (U.S. and EU) designs on each of the criteria.

Criteria	Performance U.S. design	Performance EU design
Incentives to race to the court house	High	Low
Cartel deterrence	High	Low
Avoiding high cartel overcharges	High	Low
Availability of information for victims' compensation	High	Low
Private litigation costs	Low	High
Public litigation costs	High	Low
Evidence obtained through leniency applications	Low	High

There are numerous reasons (legal, cultural, historical) which may explain why the design of the EU and U.S. leniency programs differ. In this article we discussed the welfare and deterrence implications of both designs as well as the costs associated with each. The analysis implies that the U.S. system performs better in terms of deterrence and welfare enhancement, as well as in terms of increasing victims' ability to obtain compensation. The EU system allows for more evidence to be obtained through multiple leniency applications, which increases the likelihood of conviction of the entire cartel and allows for savings on investigation and litigation costs required by each conviction.

The question is whether obtaining additional evidence and saving on litigation costs is so much more important that it outweighs the four other arguments (race to the courthouse, welfare implications due to improved deterrence, pricing, and higher damages recovered)? Remember that if saving litigation costs per conviction by awarding leniency reduces sanctions and deterrence, it will increase the number of cartels, the number of cases, and thereby the total amount of prosecution costs, besides undermining the very reason why we do prosecute cartels: to prevent their formation.

It is probably an empirical matter to estimate whether the costs saved on information collection and enforcement or litigation activities on behalf of the competition authority are higher than improvements in consumer welfare achieved due to higher deterrence and consequently fewer cartels, lower prices set by existing cartels, and higher compensation obtained by consumers in private law suits. But let us keep in mind that there are no criminal sanctions nor triple damages in the EU, so there is a risk that extended leniency will undermine deterrence completely, in which case the optimal solution would be to save all prosecution costs by not prosecuting any cartel, and forgoing the cost of operating a cartel division within the competition authority.

## V. HOW TO ENHANCE THE EFFECTIVENESS OF ANTI-CARTEL ENFORCEMENT

The above overview of theoretical and empirical contributions shows that the preferable combination of leniency programs, fines and damages claims would have the following features:

- (i) It allows only the first applicant to get 100 percent immunity. As a rule, subsequent applicants get no reductions in fines. Exceptionally, a limited number (the fewer the better) of additional applicants may receive a fine reduction if the information provided in addition to the first applicant is essential to convict other cartel members.
- (ii) Information in leniency statements is available for private damages
- (iii) The immunity recipient's liability for private damages is eliminated, while other cartel members remain jointly and severally liable for the entire cartel damages.

There are, unfortunately, substantial gaps between this design and the way the main antitrust policy instruments are designed in practice. And it is not clear whether policy makers see the need to close these gaps.

Nevertheless, the above overview shows that current knowledge in antitrust economics and competition policy provides a number of recommendations on how each of the main instruments (leniency programs, fines, damages procedure) can be modified in order to minimize the corresponding costs and distortions. Several contributions also analyze the interaction between different antitrust policy instruments, and propose modifications which would allow their joint performance to be enhanced.<sup>31</sup> The analysis in the above contributions allows us to conclude that these main dimensions of antitrust policy can be harmonized in a way which would reinforce each other's positive effects, while reducing negative effects if properly and jointly designed.

In particular, the U.S. design for leniency programs and damages seems to be closer to the design implied by theoretical and empirical studies. Yet a modification, which would provide more protection from follow-on private damages to leniency recipients, could be an improvement. While the EU design seems less advanced, the effectiveness of its leniency programs in terms of improved deterrence, lower cartel prices and higher victims' compensation can be enhanced if:

- (i) only the first reporting firm is granted leniency, and this is strictly obeyed. This will enhance incentives to "race to the courthouse" and further destabilize cartels. At the moment it is not clear what prevents the EC from implementing this policy.
- (ii) leniency programs, fines and rules for damages (victims' compensation) are designed in such a way that possibilities for exploitability are minimized. Namely, avoiding too generous fine reductions for many applicants, making information in leniency statements public, or designing both full and reduced fines in a way which does not make collusive strategies more attractive and does not lead to upward price distortions.

<sup>31</sup> The recent examples are Buccirosi, P., Marvao, C. & G. Spagnolo (2015), "Leniency and damages," *CEPR Working Paper* DP 10682; Katsoulacos, Y., E. Motchenkova & D. Ulph (2018), "Cartel penalties and private damage actions: An integrated assessment," *mimeo, paper presented at CRESSE 2018 conference*.

- (iii) if sufficient protection from follow-on private damage claims is promised to leniency applicants. In the U.S. it is guaranteed by allowing claim for only single damages from the leniency recipients, as opposed to triple damages from non-cooperating firms. Furthermore, according to Buccrossi, Marvao & Spagnolo (2015) the optimal solution is to limit as far as possible (or eliminate) the damage liability of the immunity recipient. Their proposed regime is close to what is done in the U.S. and it is practically the same regime that has been valid in Hungary since 2011. There, an immunity recipient is only liable to pay his (direct only) damages in the very unlikely event that all other cartel members go bankrupt.

In this paper we provide an overview the welfare and deterrence implications of the EU and U.S. design of the leniency programs and damage claims as well as costs associated with each of the designs. The analysis indicates that there are substantial gaps between the design implied by economic theory and the way the main antitrust policy instruments are implemented in practice. We argue that the US system performs better in terms of deterrence and welfare criteria as well as in terms of increasing victims' ability to obtain compensation. The EU system allows prosecutors to obtain more evidence through multiple leniency applications not disclosed to victims. The EU design may increase the likelihood of conviction of the entire cartel and helps to save on investigation and litigation costs, at the price of lower fines and much lower expected damages, which casts doubt on the possible deterrence effects.



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