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Editorial – Cartel Revolution and Evolution

*Angus MacCulloch**

THE CARTEL REVOLUTION

The control of cartels, and the academic discussion which surrounds those controls, has changed dramatically in recent years. Going back only ten years it would have been difficult to predict that cartel regulation would effectively become a subject in its own right within competition law; but now it is clear that the cartel, and its regulation, is worthy of unique study. This issue of the review, the second in two years to focus on the topic, again seeks to further that debate.

It is interesting to note that the EC was arguably at the centre of the current cartel 'revolution'. While the US has always been seen as the centre of antitrust enforcement, it is potentially falling behind European 'upstarts' like DG Comp and the OFT in the war against cartels. Both the European authorities and the DoJ must however look over their shoulders to keep an eye out for important developments in Australia; where the ACCC is likely to be granted significant now powers to challenge cartel activity in 2009.

Several of the issues of import are canvassed fully by the papers in this issue of the Review, but to place them in some form of context it is useful to take an overview of recent and upcoming developments here.

CARTEL REGULATION OR CARTEL LAW?

The contemporary debate regarding cartels tends to take a very different hue to many debates in competition/antitrust law. As the questions surrounding the economic harm caused by cartels are relatively settled there is a limited role for 'traditional' normative antitrust economics in this debate. Thus the questions worthy of debate fall more squarely into the legal domain. But that is not to say that the lawyers have things all their own way - the debate enjoys a significant contribution from two significant 'extra-legal' sources. The first is the wider academic debate in the growing body of regulatory scholarship. The study of regulation, as a subject in its own right, is relatively new, and while 'regulationists'[1] would accept the law as part of their subject they throw their net much more widely and seek to examine any instruments which seek to 'control, order or influence the behaviour of others'.[2] This wider view of how one might go about controlling cartel behaviour has clearly been an important influence on the

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1 I am not sure if there is an accepted term for a group of regulation scholars, but here I do not refer to the Franco-Marxist school of economic thought or to its usage in the debate over the control of prostitution and communicable diseases.

2 Black, 'Critical Reflections on Regulation' (2002) 27 Aus J of Legal Philosophy 1.

development of the contemporary European cartel regime. Much of cartel policy stems from 'soft law' documents and changes in the practice of enforcement agencies. While there has been little change to the headline legal provisions there has clearly been significant change in practice, and perhaps more importantly, the expectations of the legal and business communities. The understanding and expectations of the public in relation to cartels is discussed in Andreas Stephan's enlightening paper in this issue of the Review.

Regulatory theory has also been used in more direct ways, either where regulation scholars, such as Christine Parker[3] or Karen Yeung,[4] look at competition enforcement as part of their work, or where competition lawyers draw on regulatory ideas, such as deterrence theory, in their work.[5] In their seminal text, *Regulating Cartels in Europe,*[6] Harding and Joshua clearly indicated how the debate had moved on.

The expansive nature of the study of cartels is also indicated by a more recent phenomenon. As cartel behaviour is criminalised in more jurisdictions it brings another branch of scholarship to bear on the debate, that of criminology. Criminologists have long used US antitrust as an example of white collar crime; it is now time for competition lawyers to get insights from wider criminology scholarship to better understand the impact and usefulness of the criminal law in regulating cartels.[7]

CARTEL PENALTIES

A more specific area of development is the increasing level and diversity of cartel penalties. In this issue Connor discusses cartel penalties in the US. In light of cartel regulation's important place in antitrust it is perhaps worrying that it suggests enforcement levels are falling. It is interesting to compare this with the position in the EC where it appears that cartel fines have increased dramatically in recent years.[8] Part of this can be attributed to the DG Comp's 2006 Fines Notice,[9] but there appears to be an increase in the frequency of fines being imposed in addition to the increase in the

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[3] See, for instance, C Parker & V Nielsen, 'How Much Does it Hurt? How Australian Businesses Think About the Costs and Gains of Compliance with the Trade Practices Act' (2008) 32(2) Melbourne University Law Review 554-608.

[4] K Yeung, 'Does the Australian Competition and Consumer Commission Engage in 'Trial by Media'?' (2006) 27 Law & Policy 549-577.

[5] The work of deterrence work of Becker has clearly been of influence in the work of Conner & Lande and Wils. See JM Connor & RH Lande, 'The Size of Cartel Overcharges: Implications for US and EU Fining Policies' (2006) 51(4) Antitrust Bulletin 983, and WJ Wils, 'Optimal antitrust fines: theory and practice' (2006) 29(2) W Comp 183.

[6] C Harding & J Joshua, *Regulating Cartels in Europe: A Study of Legal Control of Corporate Delinquency*, Oxford, OUP, 2003.

[7] See, for example, A MacCulloch, 'Honesty, Morality and the Cartel Offence' [2007] ECLR 355-363 and C Beaton-Wells & F Haines, 'Making Cartel Conduct Criminal: A Case-Study of Ambiguity in Controlling Business Behaviour' (2009) Australian and New Zealand Journal of Criminology, forthcoming.

[8] See DG Comp, 'Antitrust: Commission action against cartels – Questions and answers', MEMO/09/32, 28 January 2009.

[9] Commission Notice, Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ 2006, C210/2.

basic amounts. The recent imposition of the first prison sentences and Competition Disqualification Orders in the UK in the Marine Hoses case also indicates the increasing range of cartel penalties in the UK.[10] Increasing the range of penalties available of the use of cartels is also a matter of controversy in Australia where a new criminal provision aimed at cartels is expected to be enacted in the summer of 2009. While the Australian provision has bi-partisan support in the legislature the wording of the offence itself has been the subject of heavy criticism.[11]

As competition law moves further into criminal territory it raises, as yet unanswered, questions in the UK as to whether juries will be willing to convict in cartel cases where prison terms are a real possibility. Andreas Stephan's paper suggests that the UK public do not yet see cartel behaviour as falling at the serious end of the criminal spectrum. A good deal of public education may be necessary to improve their understanding.

DIRECT SETTLEMENT, LENIENCY & PRIVATE ACTIONS

The recent introduction of DG Comp's direct settlement system,[12] and the OFT's continued use of 'Early Resolution' settlements, indicate the importance of reducing the cartel enforcement burden for antitrust authorities. The incentive for early settlement, for the target undertakings, is a fine reduction and, perhaps, a reduction in the reputational harm caused by the publicity surrounding a prolonged cartel case. One, as yet unanswered, question is the practical impact of such fine reductions on the impact of leniency programmes. Zingales paper in this issue examines the design of leniency schemes and their rationale in detail. The threat to leniency from settlement is arguably small, but that is not the case for private actions seeking damages. Moves are being made to facilitate more compensation claims in relation to cartel cases in Europe by both DG Comp and the OFT.[13] The clear risk is that the increasing threat of private actions, for which a leniency application gives little protection, may discourage cartelists from leniency and have the perverse effect of stabilising cartels. While the authorities are aware of that threat the effect of any increase in compensation claims is still to be seen.

DUE PROCESS AND HUMAN RIGHTS

Another important theme which plays an important part in the recent history of cartel enforcement is the importance of the rights of the defence. Because of the increase in the level of fines Commission cartel decisions are almost always challenged before the European Courts. While challenges are now the norm, those challenges are very rarely

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[10] *R v Whittle & Othrs* [2008] EWCA Crim 2560. It is interesting to note that the CA appeared to be much more lenient in sentencing than the trial judge.

[11] See C Beaton-Wells & B Fisse, 'The Cartel Offences: An Elemental Pathology', LCA-FCA Workshop, 4 April 2009.

[12] See Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, OJ 2008, C167/1.

[13] See Commission White Paper on Damages Actions for Breach of the EC antitrust rules, COM(2008) 165, and OFT, Private actions in competition law: effective redress for consumers and business, OFT916resp, November 2007.

based on the facts. As most cases are based on a number of leniency applications it is difficult for those involved to deny the existence of the cartel. Most challenges are based on the due process issues and procedural failings or the level of the fine. Aslam and Ramsden address the issues surrounding dawn raids in their paper, but there are also numerous issues surrounding the transparency and independence of the decision-making process within DG Comp.[14] The increase in these challenges may explain the Commission's desire to move towards direct settlement, but as that procedure does not allow for an agreed fine or a waiver of the right to appeal challenges look likely to continue to a significant extent.

CONTINUING CARTEL EVOLUTION

While it is clear there has been a 'cartel revolution' in the last years, it is also clear that the process of development is still ongoing. It appears that the revolution was not a one-off event; it merely signalled a longer period of evolution in cartel regulation. The opening up of cartel enforcement to a range of new influences suggests that a second period of innovation could take cartel regulation in interesting new directions. The fact the Review returned to this topic twice in two years indicates the extent of scholarship in this area. The ongoing debates surrounding the developments in criminalisation, settlement procedures and private actions, and their impact on the current leniency system, also indicates that much remains to be resolved during the evolution of cartel regulation.

[14] See, for instance, A Andreangeli, 'The Protection of Legal Professional Privilege in EU Law and the Impact of the Rules on the Exchange of Information within the European Competition Network on the Secrecy of Communications between Lawyer and Client: one step forward, two steps back?' (2005) 2(1) CompLRev 31, and A MacCulloch, 'The Privilege against Self-Incrimination in Competition Investigations: Theoretical Foundations and Practical Implications' (2006) 26(2) Legal Studies 211-237.

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European and American Leniency Programmes: Two Models Towards Convergence?

*Nicolo Zingales**

This paper compares the different approaches that the United States and Europe have embraced in designing their leniency programmes. The analysis first explains the rationale underlying such programmes, sketching the economic principles upon which they rest. It follows by highlighting those crucial features that call for the utmost care in the design of the programme, and giving some recommendations by describing policies that should be embraced by the 'ideal' leniency programme. It recognizes, though, that each of the legal systems considered would need time and effort to adapt to the innovations suggested, and therefore urges that too far-reaching objectives not be set. It concludes, in contrast, that the key driver should be that of gradual harmonization toward the most efficient model. By assessing the ideas about rational consequent behaviour for cartel members and which programme has established better incentives to push these members forward, the article concludes envisioning a gradual shift towards the US model. Discussions throughout the paper make many suggestions, including the inclusion of a restitution obligation and the involvement of individuals, all of which should inspire the future actions of EU legislators.

1. INTRODUCTION

This paper analyzes one particular feature of EC Competition law and US Antitrust law, regarding the set of rules and incentives put in place by each of these legal systems to pursue the goal of fighting cartels. More precisely, our focus will be on the introduction of a very effective tool in these systems, whose extraordinarily successful results[1] have recently inspired other jurisdictions;[2] the so-called 'Leniency Programme'.

* European Policy Centre, Brussels. The views expressed in this paper are the views of the author and do not necessarily reflect the views or policies of the European Policy Centre (EPC), its Board of Directors or its members. The author wishes to thank professors Howard Shelanski and François Lévêque for their Seminar on Comparative Antitrust Law in Fall 2006 at UC Berkeley Law School, without which this paper would have never been produced. I am particularly grateful also to Philippe Gugler, Ashwin Van Rooijen, Oliver Tostevin, Wouter Wils and Marenglen Gjonaj for their useful comments on earlier drafts. All websites were last visited by 6 June, 2008.

1 For such an enthusiastic statement, see Hammond, *The Modern Leniency Programme after 10 years*, Department of Justice Antitrust Division, San Francisco 12 August 2003, text available at <http://www.usdoj.gov/atr/public/speeches/201477.htm.> For a comparable comment made by European competition authorities, see Lowe, 'What's the Future for Cartel Enforcement?', DG Competition, Brussels, 11 February 2003, text available from <http://europa.eu.int/comm/competition/speeches/text/sp2003_044_en.pdf.>

2 The following is a list of Leniency policies of competition enforcement agencies in International Competition Network (ICN) member jurisdictions, as of April 2006 : Austria, Australia, Belgium, Brazil, Canada, Cyprus, Czech Republic, European Free Trade Association, European Union, Finland, France, Germany, Hungary, Ireland, Israel, Japan, Korea, Latvia, Lithuania, Luxembourg, The Netherlands, New Zealand, Poland, Romania, Slovakia, South Africa, Sweden, United Kingdom, United States. For further details visit

In order to provide the reader with a truly comparative view on this programme, however, this paper includes a broader picture of the underlying legal systems. Elaborating on the relevant features of both antitrust frameworks, the paper seeks to suggest which one sets better incentives in its efforts to defeat cartels. To make this assessment, both legal systems will be considered in terms of cartel deterrence and cartel destabilization. The latter is not the primary objective of anti-cartel laws, but is, nonetheless, the main way in which antitrust legislation aims to increase the rate of detection while at the same time notably increases the effect of deterrence. As Gary Becker has argued and demonstrated, deterrence itself is a combination of the penalty and the probability of being caught.[3] Therefore, enhancing the fear of punishment can substantially increase deterrence.

Such an effect can essentially be achieved by the institution of a leniency programme, i.e. a peculiar set of rules foreseeing a more lenient treatment for cartel members that decide to come forward and confess their wrongdoing before the relevant authority.

Leniency programmes, as it will be argued further, are key tools to shorten the time necessary for prosecutors to get the relevant information. However, the concrete effectiveness of these tools depends on the specific features embedded in their design. In this regard, it is extremely important to consider not only the factors taken into account when drafting a leniency program but also the way in which these factors translate into legal rules and economic incentives.

The paper is organized as follows: sections 2 and 4 consider the basic rationale (2) and the key features (4) of the leniency programmes, as a reference for shaping an optimal antitrust enforcement policy. The fourth section also includes an assessment of the complications and the potential improvements of current versions of the Leniency Programme, and concludes by highlighting one particular complication related to the interaction of different systems. Another crucial issue arises from the coordination of different leniency programmes. Perhaps the biggest complication in this respect is the confidentiality of the information disclosed by leniency applicants to the authorities: this amounts to a major concern for potential applicants, especially in light of today's expectations concerning international world-wide cartels and trans-national enforcement of laws.

Section 3, in contrast, contains a brief explanation of the economic principles that should guide authorities according to the science of game theory (3.1). The latter part (3.2), details how the referred situation differs from a typical prisoner's dilemma, and how slightly different strategies should be used in deciding which action to take.

Finally, in its first subsection (5.1), the fifth section will address the 2006 Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases (hereinafter

<http://www.internationalcompetitionnetwork.org/media/library/conference_5th_capetown_2006/FINALFormattedChapter2-modres.pdf.>

[3] See Becker, 'Crime and Punishment: An Economic Approach' (1968) 76 (2) The Journal of Political Economy, at 169-21.

'2006 Leniency Notice')[4]. This notice consists of the latest set of guidelines released by the Commission in its approach towards cooperation in cartel investigations. Its release,[5] together with the recent amendment of the methods for calculating fines,[6] raised a fundamental issue, which will be addressed in the concluding section (5.2): to what extent are the US and EU leniency programmes converging, and being responsive to concerns based on the difficulty of coordinating them? Must it be concluded perhaps that they are not converging at all, but rather developing their own machine and maintaining or even enlarging their distinctiveness?

2. RATIONALE FOR LENIENCY PROGRAMMES: UNRAVELING COLLUSION IN A SHORTER TIME-FRAME

As a preliminary remark, it is of utmost importance to bear in mind that the success of such an approach (i.e., that of adopting a leniency programme) to enforce competition policy is due to the particular nature of cartels. Other violations of the law would not be suitable for a leniency programme, precisely because they do not have the fundamental characteristics of being continuative, collective, and hard to detect.

Cartels, on the other hand, are continuous wrongdoings that involve prohibited behaviour repeated over time. This implies that society will be better off with the operation of a leniency program, since it will get an additional benefit for each collusion that it manages to avoid. This benefit for society cannot be neglected or minimized. On the contrary, we can take it for granted since there is no possible counterargument to the creation of net welfare gain: the use of an additional enforcement tool will only generate an advantage for consumers. There are, however, two types of balancing exercises that a government will have to perform before making any decision on the introduction or the definition of a leniency programme in the competition policy of a particular country.

The main trade-off in introducing this tool is that between detection and deterrence, and, as we sketched above, it is a crucial one. In this regard, two characteristics of cartel prosecution are key-elements: first, the involvement of more than one culpable party in the scene. The leniency mechanism, indeed, would not make sense for personal crimes: the obvious argument is that, if one knows that he will be able to surrender himself to the authorities in order to avoid detection, then he will not be deterred in the first place because he will be aware of the possibility to get around the rule of law which prohibits the conduct. The second element is the difficulty for competition authorities to detect (and to get complete information of) cartels. A cartel can be described as an organization of businesses that is usually hard to detect, but at the same time maintainable in the long run, provided that some strong psychological

[4] OJ 2006, C298/11, at 17.

[5] December 8th of 2006, just when this article was being prepared.

[6] See 2006 - Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ 2006, C210/2, at 2-5.

assumptions exist among cartel's members about their reciprocal behaviour.[7] Consequently, the Leniency programme tries to challenge the strength of these assumptions by pushing for a change in cartel members' sentiments: its aim is the destabilization of the organization, and ultimately, its detection through confession. This is both time and cost-saving for competition authorities, who will then be able to concentrate their efforts on other issues or investigations.

This leads us to highlight the second type of balancing exercise to be undertaken when deciding on the implementation of a leniency programme: that between the costs and time saved by competition authorities and the perspective costs of building up and administering the procedures set for the proper use of this additional enforcement tool. To be sure, this is a balancing test that policy-makers should engage in every time a new enforcement tool or policy option is proposed, and is normally carried out by relying on strong empirical results.[8] But more generally, we can infer that the wide-spread diffusion of this programme stands as a testimony of its success and convenience for the budget of most of the competition authorities.[9] In view of the author, it seems unlikely that governments can offer a sustainable argument to justify the lack of implementation of a Leniency programme: the costs for its draft and administration are fairly low – especially as opposed to the efforts otherwise required for an investigation of that same cartel, in the absence of any confession. It is still conceivable, however, that some countries argue they have no need for such a complement to their antitrust rules: this may be the case for smaller countries, such as Malta for example, where the number of cartels is still not high enough to call for special policy arrangements in addition to the traditional tools deployed by competition authorities.[10]

3. GAME THEORY INSIGHTS

As explained above, the strategy of leniency programmes is quite straightforward: by giving cartel members a reward for confessing, the programmes disseminate distrust

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[7] Namely, the commitment to the cartel's rules and the fidelity to the organization. See Leslie, 'Antitrust Amnesty, Game Theory, and Cartel Stability' (2006) 31 Journal of Corporation Law 453, at 465; and, Wils, 'Leniency in Antitrust Enforcement: Theory and Practice' (2007) 30 (1) World Competition: Law and Economics Review, at 42.

[8] Otherwise, the risk would be that governments waste a lot of resources in expending for the new policies (in this case, the Leniency programme), though their benefits will never be able to make up for losses. For similar arguments, see the recent communication of the European Commission on better regulation published on 20/11/2008: <http://ec.europa.eu/governance/better_regulation/documents/com_2008_0032_en.pdf.>

[9] Meaning 'those competition authorities which most frequently have to fight with cartels'.

[10] The types of actions that can be used for the purpose of detection are basically 3: 1) intensively monitoring the market (so called 'screening'), relying basically on data in the public domain and on economic analysis of those data. 2) Collecting information from third parties (such as customers and competitors, or other volunteers). 3) Collecting information from the same violators: this is precisely the kind of mechanism that the leniency programmes try to develop. For further explanations see Harrington, 'Behavioral Screening and the Detection of Cartels', Proceedings of 2006 EU Competition Law and Policy Workshop European University Institute, Robert Schuman Centre for Advanced Studies, available from EUI Repository 2006 at <http://www.iue.it/RSCAS/research/Competition/.>

within the cartel.[11] This makes their bond weaker, and increases the possibility of having one member withdrawing from the cartel.[12]

This kind of situation, where each subject has a choice of two alternatives whose pay-off depends on an identical choice made by another individual, can be traced back to the well known 'prisoner's dilemma'. This dilemma poses a challenge on the strategy to be adopted by each player, and represents the typical situation used to illustrate the operation of a particular branch of economics called 'game theory'.[13]

According to the insight of this science, each player will pursue his or her own individual interest, acting rationally in a selfish manner, even when they each would have a better pay-off by choosing to cooperate. The wisdom underlying this theory is that each player, considering the stakes to be highly important, decides not to afford the risk of cooperating unless he is sure that the other one will do the same.

The classic example used to illustrate the dilemma is the following: two prisoners who have both committed a crime are interrogated in prison by the authorities. The authorities have enough evidence to convict both suspects for a minor crime, but would like to convict them for a major one for which they need further evidence. For this reason, they will try to obtain a confession from each single suspect by promising a lower sanction for whoever confesses first.

Assuming that the suspects will both pursue their own interest, we have two possible choices per 'player': one that pays better--the confession (i.e., cooperation with the authorities), and one that entails instead, more years in prison (in terms of average expected value)[14] -- the non confession (i.e., the non cooperation with authorities). No doubt, the choice of a rational burglar will be the former. Pairing these two selfish choices on either side individuates what is called 'Nash Equilibrium'. It is implied however, that this model works only with a basic assumption on the rationality of the individuals; cooperating does not prove to be such a wise choice when one player demonstrates to be irrational.

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[11] See Leslie, op cit, n 7, at 462.

[12] This will happen as quickly as the Leniency Programme will be able to prompt their action: whether it is merely 'prompt' rather than 'immediate' will depend on which one of the two leniency programs is concerned.

[13] See Nash, *Equilibrium Points in n-Person Games* (1950) 36 Proc. Nat. Acad. Sci. U.S.A, 48-49.

[14] If in the former hypothesis, the average expected years of prison is (10+0)/2= 5; in the latter, this switches to the higher value of (20+1)/2= 10,5.

		Player 2	
		Confess	Not Confess
Player 1	Confess	(-10,-10)	(0,-20)
	Not Confess	(-20,0)	(-1,-1)

3.1 Substantive difference from the prisoner's dilemma

To be precise however, the situation sketched above does not properly fit into the typical chart of the prisoner's dilemma. In most cartel investigations, the prosecutor does indeed lack the evidence necessary to condemn 'prisoners', either because he has not started any investigations, or because he has not found any concrete evidence substantial enough to allow leverage on a player's decision.

Accordingly, the chart of the strategies available can be drawn as follows:

		Player 2	
		Confess	Not Confess
Player 1	Confess	(-10,-10)	(0,-20)
	Not Confess	(-20,0)	(0,0)

As such, there is no strictly dominant strategy, which is the name attributed by game theory to the strategy that gives a better pay-off, regardless of the strategy chosen by the other player. What is still ascertainable though, is that if there is any risk of one's partner confessing, then one should confess.[15] As both players are indifferent between their possible strategy when their partner is playing 'not confess', this means that the strategy 'confess' is a weakly dominant strategy.

Although 'confess' is a weakly dominant strategy for both players, which makes the pair of strategies [confess, confess] a Nash equilibrium, there is still a second equilibrium in the game: [not confess, not confess]. Thus, in the absence of any leak of information, cooperation between the two parties may actually get both to play 'not confess' and guarantee a better pay off.

Rarely, however, things are as simple as depicted in this hypothetical situation: cartel members usually lack certainty about incriminating information not being disseminated, since that could be obtained not only from the other member's cheating on the cartel

[15] See Leslie, op cit, n 7, at 458.

but also as a result of complaints coming from competitors or consumers,[16] and investigations launched by competition authorities.

The setting is, of course, complicated also by the fact that the cartel is formed and maintained only as long as there is a sufficient level of trust among its members. This particular setting makes the equilibrium described in chart one no longer static, but rather subject to changes over time. And that is exactly what makes the role of a competition authority critical: through its activity, it will have the power to create distrust and construct a more favourable prisoner's dilemma, i.e. one in which confession appears as the dominant strategy. In order to do this, it will often revert to the use of evidence concerning relatively minor crimes (which are often ancillary to a price-fixing scheme)[17] as leverage to spur confession from one of the cartelists. Not always, however, will such evidence be available. Furthermore, authorities are frequently called for a strategic choice in the matter: even in case they do have substantial evidence to convict, they might be able to inflict bigger sanctions by waiting a bit longer so as to collect more information. Making the right choice in the particular cases will prove crucial in determining success in the fight against cartels and in forging the scope of the enforcement action.

Finally, the lack of information on possible minor offences from the cartel members is not the only difficulty for public authorities: another constraint on their ability to 'play' strategically in the basic framework of the prisoner's dilemma can be identified in the limited type of interaction and leverage available to them. Since the authorities do not normally have the occasion to meet personally with cartel members to foster their confession, the situation results in a much more complicated form than the basic prisoner's dilemma: they will be required to take the utmost care in sending signals to the cartelists, in order to get them to play the same 'game' that they are playing: a strategic game theory.

3.2 Factors that complicate the prisoner's dilemma

In order to fully understand the type of game played by the antitrust authority with cartelists, one has to, from the outset, look at things from the perspective of a cartel member who is considering the option of confession. For this reason, given the intrinsic value of Leniency programmes as a tool to construct the prisoner's dilemma,

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[16] These latter two are arguably in the best position for a direct and unbiased observation of the market, and the ones who can react most rapidly when prices in the industry increase steadily -an evident sign of concerted practice, alone or in association with the suspicious circumstance that another supplier is no longer willing to bid for their businesses or even though the other's bid is ridiculously high: see Harrington, op cit, n 10, at 27. For this reason, a suggestion may be for Leniency programmes to provide monetary reward for those who provide following on this point the Korean model. For an overview provided by the Korean FTC's on the key features of the Korean Leniency Programme, see 'Recent Changes to Korea's Cartel Enforcement Regime', available at <http://ftc.go.kr/data/hwp/room_docu.doc.> To view this policy as adopted by the English Office of Fair Trading, see <http://www.oft.gov.uk/advice_and_resources/resource_base/cartels/rewards.>

[17] For example, the crime of mail fraud: see *United States v. Sw. Bus Sales*, 20 F.3d 1449 (8th Cir. 1994), quoted in Leslie, op cit, n 7, at note 12.

its drafters are urged to take properly into account the psychological impact of their choices on cartelists' behaviour.

Accordingly, we will hereby identify four key issues that should capture their attention, and that make the case for a somewhat different strategy than that which is usually pursued in the classic prisoner dilemma.

3.2.1 Discrepancy between individuals and undertakings

First of all, the differentiation between individuals and undertakings -- the fact that decisions are made by the former entities -- indeed suggests that there could be a substantial discrepancy between their interest and that of the firm as a whole.

By also taking into account personal interests, the policy embraced by US antitrust law seems to be substantially more effective, for it includes a powerful incentive to confess: avoiding custodial sanctions. The system however, carefully circumstantiates that such avoidance is possible only for those individuals who come forward before any investigation has started.[18] The only residual possibility to avoid criminal charges after an investigation has started, is in the particular case that the confession comes from an official corporate act which has qualified for immunity, and provided that at the same time, the director, officer, or employee of the corporation admits the wrongdoing 'with candor and completeness'.[19] Finally, the US leniency programme allows confessing firms to request a manoeuvre, allowing them to obtain such immunity for their culpable employees, even where these employees have not confessed the facts as in the hypothesis described above (including this request among the terms of the agreement negotiated by the firm with the Department of Justice -- hereinafter DOJ -- before the application is done). This is, in fact, consistent with some public announcements made by the DOJ, who declared its intention to carve those individuals out of prosecution.[20] To make this mechanism work effectively however, an opposite 'carve out-policy' is also specifically provided by the DOJ for those companies who decide to come forward late: culpable officers, directors and employees will be carved out from the non-prosecution protection of the plea agreement.[21]

The situation is completely different in Europe, where the leniency notice explicitly applies only 'to undertakings'.[22] The possible interpretation of this expression has been highly debated, but at least not so overstretched as to cover merely individuals.[23]

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[18] See The Corporate Leniency Policy, paragraph A.

[19] Ibid.

[20] See Sprattling, 'Making companies an offer they shouldn't refuse, The Antitrust Division's Corporate Leniency Policy- An Update', speech delivered at Washington DC, before Bar Association of the District of Columbia's 35th Annual Symposium on Associations and Antitrust (February 16, 1999), available at <http://www.usdoj.gov/atr/public/speeches/2247.htm.>

[21] Ibid

[22] See Leniency notice 2002, article 8.

[23] In particular, the controversy lies in the interpretation of recital 8 of Regulation 1/2003, which in the last sentence states: '[…] this Regulation does not apply to national laws which impose criminal sanctions on

In this context, one can think of a potential discrepancy in the interests of the firm and the employee, and can well imagine this to weigh against the effectiveness of the incentive to confess: there might be, for instance, some individuals who are determined to abide by the laws, and who will not pursue corporate interests regardless of the financial reward promised by the firm. Those individuals are intrinsically unwilling to act as firm-interest maximizers, when this entails a risk of personal charges. The logical motivation determining such attitude is not entirely explicable without referring to the sense of fairness and justness, or the public shame that a company member would feel in the case of being found guilty of cartel offences. On the contrary, their thinking is immediately understandable when we think of states where such offences are legally considered to be a crime: the employees--or even the managers--may well be keen to pursue the interests of the company, while nonetheless being unlikely to accept jail sentences.

It follows then, that the incentive-effect set by the EU leniency programme contains flaws, particularly in those situations where a cartel member is located in a European country that applies custodial sanctions for cartel offences.[24] This problem, more generally related to the lack of coordination between the national enforcement systems and the leniency programmes themselves, is arguably one of the most critical problems affecting leniency programmes within Europe.[25] This would not be a problem if national legislation regarding leniency and cartels was substantially similar. The reality is however, that while some countries have for long embraced an approach driven by the objective of deterrence and resulting in harsh (criminal) sanctions for cartel members, some others have not yet embraced such a culture: either because they have only

natural persons except to the extent that such sanctions are the means whereby competition rules applying to undertakings are enforced'. See Wils, 'Is Criminalization of EU Competition Law the Answer?' (2005) 28 (2) World Competition: Law and Economics Review, at 122. The same Wils however – in another section of the same article as well in another context: see Wils, 'Does effective enforcement of articles 81 and 82 require fines and individual penalties?', in *The Optimal Enforcement of EC Antitrust Law, Essays in Law & Economics*, Aspen Publishers, 2006, at 233 - notes that given that the article 83 (1) EC empowers the Council to lay down the appropriate regulation or directives to give effect to the principles set out in Articles 81 and 82, it wouldn't be necessary an actual amendment of the Treaty to introduce individual penalties.

[24] See Wils (2005), ibid, at 130, identifying these countries as: England, France, Cyprus and Slovak Republic (only individuals), Ireland, Estonia and Greece, Germany and Austria (both only for bid rigging), Denmark and Malta (but only for undertakings).

[25] See infra, 3.2.3. It is striking, however, noting that Celine Gauer and Maria Jaspers, from unit A-4 of DG Competition, tried to minimize the relevance of this problem in the European Commission's Competition Policy Newsletter, stating that 'The only example of a truly conflicting demand that has so far been detected is where one authority would require the applicant to immediately stop its cartel activities whereas another would request it to continue in order not to endanger the investigation. Should this materialise in an individual case, the ECN members have agreed that the authority that has a discretion would use it in such a way that a conflicting demand would not arise in the concrete case.' See Gauer and Jaspers, 'The European Competition Network Achievements and challenges – a case in point: leniency' (2006) (1) Competition Policy Newsletter 8, at 10.

recently introduced antitrust laws in their legislation,[26] or just because they are more in line with the Commission's pro-detection (as opposed to deterrence) approach.[27]

This conflict is exacerbated by the way in which the criminal system operates; the rule being mandatory prosecution in most of the EU countries. Even if the leniency programme were to be changed to provide criminal immunity in all European countries, then this change would be necessarily taken into account only at a later stage in the proceeding,[28] thus not avoiding the impact of participating in the criminal trial.

Nonetheless, given the increasingly important role assumed by the EU in the last decade in shaping the policies of member states, the possibility of instituting a uniform enforcement system does not seem to be entirely excluded, where custodial sanctions as well as leniency immunity are applied under EC law. While the hypothesis of creating such a system has been debated extensively elsewhere, and largely criticized for its technical and political complications,[29] it seems that this would remain the best solution for the purpose of aligning the interest of undertakings and individuals. In directing the sanction at both of these, the system would indeed bring the 'moral effect' into play as an additional incentive. Such a rule will bring about more effectiveness for a very

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[26] The reference is mainly to Italy (1990), Spain (1991) , Portugal (1993), Netherlands (1997), and Poland (2000).

[27] This is the case for Germany, for example, where an anti-cartel law existed since the late 1940s.

[28] Namely, at the moment of issuing the sentences.

[29] See Wils (2005), op cit, n 23, at 122: mainly, the complications are represented by the difficulty of enacting a 'European common law' in the area of competition law and the need of instituting a separate and independent body to judge on competition cases involving criminal charges. These changes would, in fact, be those necessary for the purpose of eradicating some peculiar features of EC Competition Law. The former innovation would require establishing nearly identical competition rules in all member states. This not only would be convenient -given the current low level of harmonization in the criminal area- for the purpose of aligning with the American model; it would also be required, since the ECJ has recently ruled that in the national context the penalties must be at least equivalent in effectiveness and dissuasiveness to the sanctions they provide for comparable violations of their national competition laws.: see Judgement C-231/96 of 15/09/1998, *Edilizia Industriale Siderurgica / Ministero delle Finanze* [1998] ECR I-4951. The latter innovation, in turn, would be required by the need to comply with article 6 of the European Convention of Human Rights (ECHR), which provides that 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law […]'. That would completely revolutionize the way competition law is enforced in Europe, i.e. causing a shift from an ex-post review of decisions taken by the public authority (DG Comp) to an ex-ante type of enforcement clearly inspired by the American model, but with the substantial drawback of requiring all enforcement actions to be approved by Court: this, among other reasons, is one explanation of why the enforcement system in US is strongly complemented by a robust system of private enforcement. It can be conceded that some steps have already being taken to gradually shift to this model: think, for instance, at the recent 'Modernization' -i.e., Regulation 01/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003, L1/1, and its implementation -which has brought about a soft but significant limitation to powers of DG Comp. Or think about the recent encouragement for private enforcement, addressed elsewhere in this paper. Even in the area of harmonization of criminal law, cooperation among member states is making progress and specific expertise is being acquired by the Directorate within DG Justice, Freedom and Security that is concerned with this highly sensitive area. Nevertheless, much political discussion and social internalization is needed before such a drastic change as the one envisaged will be ready to take place.

simple reason: in contrast to a system which bases deterrence merely on the threat of monetary fines, it will be difficult for companies to over-ride it by offering higher salaries and other kinds of compensation.[30]

3.2.2 Interaction of criminal and civil proceedings

Another factor which complicates the prisoners' dilemma is the frequent interaction of criminal and civil proceedings, including the possibility in the US of being sued by private litigants. Such interaction creates uncertainty about the amount of money that courts can order to be paid for a single violation. For this reason, a leniency programme loses some appeal to undertakings if, in designing the type of immunity offered in exchange for cooperation, it does not account for both proceedings schemes. Therefore, on one hand, it may be possible that the confessor bypasses civil liability, while remaining prosecutable under criminal law. On the other hand, the risk is that even though criminal sanctions will be avoided with the leniency programme, confessors will nonetheless be likely subjected to civil enforcement from private plaintiffs.

This contrast is strongly felt in the US Antitrust System, where civil fines are provided in addition to criminal ones[31] and private litigation is well (perhaps too well) developed. The following subparagraph will address the main complications of such a system, pointing out its shortcomings and suggesting possible solutions. It will also mention recent measures taken by the EU, and best practices upon which the European Union could draw to achieve a more efficient leniency programme.

As it has been stressed above, the American Leniency Programme has recognized the importance of providing immunity from criminal fines in order to align the incentives of individuals with those of the company. The programme does not, however, offer a hard-and-fast solution for the downside effect of such an arrangement: the possibilities for follow-up antitrust lawsuits are still very high, especially considering that the standard procedure for calculation automatically trebles damages. The strength of this argument has been reduced by the Antitrust Criminal Penalty Enhancement and Reform Act,[32] which grants the first confessor a mitigation of the damages awarded[33]

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[30] See Wils (2006), op cit, n 23, at 213.

[31] These fines are to be distinguished from the money awarded to civil plaintiffs in private lawsuits, though sometimes there may be some overlap because citizens that recovered as beneficiary of parens patriae are not automatically excluded from the category of consumers whose class action can be certified: for an accurate description of the role played in antitrust enforcement by the State Attorney Generals in US, see Firat Cengiz, Centre for Competition Policy, University of East Anglia 'The Role of State Attorneys General in U.S. Antitrust Policy: Public Enforcement through Private Enforcement Methods', working paper n. 06-19, available at <http://www.ccp.uea.ac.uk/publicfiles/workingpapers/CCP06-19.pdf.>

[32] The Congress with the Antitrust Criminal Penalty Enhancement and Reform Act created an exception to the rule of treble damages making recoverable only the single damages from a first confessor qualified for amnesty. At the same time, however, the maximum prison sentences were increased (from 3 to 10 years) and fines (up to 1 Million for individuals and 100 for corporations), thus making much more likely the confession of a corporate member. The increase in sanctions was also very important, according to many scholars and practitioners and to both an empirical and econometrical analysis, because otherwise the expected maximum

and a limitation to the operation of the general principle of joint liability.[34] Nonetheless, these limitations only apply to first confessors. Furthermore, it has to be recognized that the overall incentive left by the combination of these rules on cartelists' decisions to apply for leniency is distorted by a substantial drawback: a so-called 'negative externality' stems from the fact that, even if the possibility of treble damages suits is given only by the American system as of yet, this rule has an extraterritorial reach. The US Supreme Court clarified in 2004 that treble damages may ensue also in cartel cases located elsewhere, specifying that it is not necessary that the injury be suffered in US, nor the existence of an adverse effect on US commerce, as long as it is demonstrated that the cartel is closely linked to an injury suffered in US.[35]

Thus, the concern of follow-on civil lawsuits acts as a counter-incentive for leniency applicants not only in the US, but also in the European system: this implies that, especially because of the particularly aggressive American discovery process in civil lawsuits,[36] American lawyers can at least become aware of the existence of the antitrust offences confessed in Brussels. Furthermore, they will most likely be aware of the possibility of relying on particular sources of information used by the Commission that become public, as provided by the directive on public access to documentation produced by EU institutions.[37]

This does not imply, fortunately, that American litigants will be able to use confidential documents in the civil courts in order to prove their case. The importance of not disclosing confidential information has been repeatedly emphasised by the European Council in issuing both the legislation concerning the leniency programme and the so

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punishment –considering also the discretion of prosecutors and courts- is not scary enough for wrongdoers to be deterred from their actions.

33 From treble to single damages: see Antitrust Criminal Penalty Enhancement and Reform Act, sec. 213 (a).

34 Instead of joint and several liability for the conspiracy, the confessing firm will not be deemed liable for the acts undertaken by the other firms in the scope of the confessed cartel: see infra, note 44.

35 See *Hoffman La Roche v. Empagran*, 542 U.S. 155 (2004), where the court excluded the extraterritoriality reach of US antitrust laws for those cases where the foreign anticompetitive conduct and injury were entirely independent of the domestic anticompetitive effects: Id, at 2359, 2366.

36 Which mandates the submission — or a description by category and location — of all the documents and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment (see U.S. Federal Rules of Civil Procedure, rule 26 (a) (1) (ii)), and allows parties to obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense — including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter (see U.S. Federal Rules of Civil Procedure, rule 26 (b) (1)).

37 See EC Regulation 1049/2001 of the Parliament and the Council, of 30 May 2001 regarding public access to European Parliament, Council and Commission documents. In this regulation, 'document' is considered as any content -whatever its medium- concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility. See article 3, Ibid. Access is generally a public right, and can be denied only on certain grounds: 1) the public interest. 2) privacy and the integrity of the individual. 3) unless there is no overriding public interest in disclosure, whenever disclosure would undermine the protection of (a) commercial interests of a natural or legal person, (b) court proceedings and legal advice, or (c) the purpose of inspections, investigations and audits. See article 4, Ibid.

called 'transparency directive' right of access to documents.[38] Nevertheless, for American plaintiffs, the mere fact of having notice of the existence of a proceeding or a cartel elsewhere may already be a significant leap forward.[39] The burden of proof in that context, indeed, is hardly insurmountable: the plaintiff can make his case by showing a preponderance of evidence on the violation and the actual damages. It is not necessary, as it is required by contrast in the criminal context, to corroborate with sufficient evidence so that the existence of the restriction of competition is inferred beyond any reasonable doubt.

Let's now take a moment to step back from overviewing the possible complications for leniency applicants to address the legal and economic principles which underlie the strategy of mixing civil and criminal enforcement. Why is the amount of evidence required to make a case in these two contexts so different? The simple reason is that the consequences stemming from a possible finding of violation is much higher, and the procedural rights embedded in the right of defence are adjusted accordingly[40]. To be sure, such difference is by itself a sign reflecting the gravity of the cartel offence in those systems where criminal penalties are imposed.

The rationale underlying the criminal enforcement of antitrust law can be traced back to the category of a so-called 'instrumentalist'[41] approach to the law: its main objective is to send a strong message to the spontaneously law-abiding, thus reinforcing their moral commitment to the antitrust prohibitions.[42] For this reason, the two kinds of

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[38] See the recitals of both the 2002 Leniency Notice and the Regulation 1049/2001.

[39] In addition to that, private litigants may still find their way to get access to the confidential information: they could make an offer to any of the cartel members who receive the Commission's Statement of Objections, where this information will be clearly illustrated in order to allow them to exercise their right of defense. However, unless the cartel member has already obtained the immunity in the US (thereby benefiting of the de-trebling provision of the FTAIA) or can enjoy some other form of defense in that jurisdiction, such offer will be likely rejected. Alternatively, a strategy a cartel member may pursue is to tempt the lawyer of the confessing company to exercise his right of access to file and violate the obligation of confidentiality imposed on him by the Commission: although such behaviour would result in serious disciplinary consequences in the Bar of the Jurisdiction where that lawyer is registered, the disciplinary action will be taken only ex post and thus will not impede that he receive his compensation for the dissemination of information.

[40] Which is also one of the reasons why the introduction of criminal rules in EC Law would entail a reform of the EU Courts systems and structure, in order to make it possible for criminal defendants to fully enjoy their procedural safeguards: see infra, note 212.

[41] See Tyler, *Why People Obey the Law*, Yale University Press, 1990.

[42] See Wils, 'Is Criminalization of EU Competition Law the Answer?' (2005) 28 (2) World Competition: Law and Economics Review, at note 6 and 139, citing the following authors to support his statement: J. Adenaes, 'The Moral or Educative Influence of Criminal Law' (1971) 27 Journal of Social Issues 17, and 'General prevention revisited: research and policy implications' (1975) 66 Journal of Criminal Law & Criminology 338, at 341-343; K.G. Dau-Schmidt, 'An Economic Analysis of the Criminal Law as a Preference-Shaping Policy' (1990) Duke law Journal 1, C.R. Sunstein, 'On the Expressive Function of the Law' (1996) 144 University of Pennsylvania Law Review 2021, D.M. Kahan, 'Social Influence, Social Meaning, and Deterrence' (1997) 83 Virginia Law Review 349, N.K. Katyal, 'Deterrence's Difficulty' (1997) 95 Michigan Law Review 2385, G.E. Lynch, 'The Role of Criminal Law in Policing Corporate Misconduct' (1997) 60 Law and Contemporary Problems 23, D.M. Kahan, 'Social Meaning and the Economic Analysis of Crime' (1998) 27 Journal of Legal Studies 609, and K.G. Dau-Schmidt, 'Preference shaping by the law', in P. Newman (ed.), *The New Palgrave Dictionary of Economics and the Law* (Macmillan 1998) 84.

fines embody a distinct function: whilst the civil ones embrace a compensatory nature, the criminal ones have the essential goal of achieving deterrence. This is, in fact, the reason why in systems that adopt both types of sanctions (the US and the UK amongst many)[43] the method of calculating their gravity is quite different: whilst civil fines are typically based on the but-for price of the affected goods and services, criminal ones follow a totally different logic (the US relates them to the company's affected commerce,[44] or alternatively to the economic harm inflicted on direct purchasers by the defendant).[45]

This twofold sanctioning system carries the disadvantage that (letting aside the aforementioned problem of inconsistency between the interests of the corporation and the individuals) it might, in certain cases, result in over-deterrence. One suggestion to eliminate -or at least reduce- this disadvantage for an optimal antitrust system would be to grant prosecutors the power to adjust sanctions according to the likelihood of damages that the firm will have to pay in the civil trial; likewise, it is suggested that only a limited amount of damages be awarded (for example, only single or double damages in a system with a treble damages rule) in cases where the criminal sanction has been substantial. If this change is not feasible, at least a good step towards certainty could be taken by basing the criminal sanction on the percentage of turnover or sales (as the Japanese JTFC does)[46] rather than on the affected commerce: this way, the defendant could more easily calculate the reduction he would get and decide rationally whether to aim for it.

This strategy of predictability would be in line, at least in part, with the new Guidelines released by the European Commission on how to calculate fines. These guidelines determine the basic amount of the fine based on the undertaking's sales of goods or services[47] to which the infringement relates. They do, indeed, make it easier for the

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[43] See supra, n 24.

[44] Multiplying it 20% by the actual gain and by a score of culpability: see USSC § 8C2.5.

[45] Simply doubling this amount: see 18 USC § 351. It has been criticized, however, that Courts have not been consistent in applying this statute: most of the times they have done it under consideration of the economic harm inflicted by each defendant. In at least one occasion, however, Courts have accepted to interpret this statute under the principle of joint and several liability, i.e. without discounting the fine according to the pro-rata responsibility of the particular firm subjected to fine. See Connor, 'A Critique of Cartel Fine Discounting by the U.S. Department of Justice: Revised Version', available at SSRN: <http://ssrn.com/abstract=977772> , at 7.

[46] See Takeshima, Japan Fair Trade Commission, 'Japan's Endeavour for Establishing Rigorous Anti-Cartel Enforcement', remarks for the Session on 'Cartels and other anticompetitive agreements', International Bar Association's Global Forum on Competition and Trade Policy Conference at New Delhi, India, November 4, 2006, available at <http://www.jftc.go.jp/e-page/policyupdates/speeches/061104IBAspeech.pdf.>

[47] Calculated from the undertaking's turnover in the last full business year, multiplied by the number of years of participation in the infringement. In addition, the basic amount –that will be in a second phase adjusted by aggravating and mitigating factors- will be multiplied by a percentage which reflects other factors such as the nature of the infringement, the combined market share of all the undertaking concerned and the geographic scope of the infringement.

addressees of fining decisions to understand why the fine was set at the level that it was, thus possibly reducing the number of appeals.[48]

The Court of First Instance however, has recently specified that the objective of the Guidelines is transparency and impartiality, and not the foreseeability of the level of the fines[49]. Perhaps even more surprisingly, Competition Commissioner Kroes, in her 'First Hundred Days' speech on 7 April 2005, opposed that kind of strategy by stating that:

> as a matter of principle, allowing infringers to calculate the cost/benefit ratio of cartel participation in advance would not lead to a sustained policy of cartel deterrence and zero tolerance.[50]

One may question then, if the Commission is really prepared to take advantage of the value and the power of using game theory insights, or if it rather still considers cartel behaviour too irrational to apply these principles. Not only economic theories,[51] but also legal scholars[52] and defense counsels[53] have sustained the opposite argument. One

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[48] See Wils, 'Leniency in Antitrust Enforcement: Theory and Practice' (2007) 30 (1) World Competition: Law and Economics Review, at 12. On this point, note also the following statement from the CFI: ' [The method of calculating the amount] … is capable of ensuring a coherent decision-making practice in relation to the imposition of fines, which in turn guarantees equality of treatment for undertakings which are penalised for infringements of the rules of competition law': see Judgement of the CFI of 25 October 2005 in Case T-38/02 *Groupe Danone v. Commission* (Belgian Beer) [2005] ECR II-4407, par. 523.

[49] See Judgement of the CFI of 15 March 2006 in Case T-15/02 *BASF v Commission* (Vitamins) [2006] ECR II-497, par 250, as well as Judgement of the CFI of 27 September 2006 in Case T-43/02 *Jungbrunzlauer v Commission* (Citric acid) [2006] ECR II-3435, par 84.

[50] See Kroes, 'The First Hundred Days 40th Anniversary of the Studienvereinigung Kartellrecht 1965-2005', International Forum on European Competition Law, Brussels, 7th April 2005 (hereinafter 'First hundred-days Speech'), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/05/205&format=HTML&aged=0&language=EN&guiLanguage=en> (2004).

[51] See Becker, op cit, n 3.

[52] See Joshua, 'That: Uncertain Feeling: The Commission's 2002 Leniency Notice', Proceedings of 2006 EU Competition Law and Policy Workshop European University Institute, Robert Schuman Centre for Advanced Studies, available from EUI Repository 2006 at http://www.iue.it/RSCAS/research/Competition/,> at 24.

[53] See the arguments of Degussa, as reported in par 34 and following of the Judgement of the CFI of 5 April 2006 in Case T- 279/02 *Degussa v Commission (Methionine)* [2006] ECR II-897, appeal pending, in C-266/06 *P Degussa v Commission (Methionine),* and those of Archer Daniels Midland, as reported in paragraph 49 of the Judgment of the Court of First Instance of 27 September 2006 in Case T-329/01 *Archer Daniel Midland (Sodium gluconate)*, [2006] ECR II-3255; and J.R.M. Killick, 'Viewpoint: The 2006 Fining Guidelines: Two Steps Forward and One Step Back? '(November 2006), available at http://eccp.esapience.org/index.php?&id=60&action=907, and The CFI judgments in Cases T-148/89 *Tréfilunion v Commission (Welded steel mesh)* [1995] ECR II-1119 paragraph 142; T-147/89 *Société Métallurgique de Normandie v Commission (Welded steel mesh)* [1995] ECR II-1061 and T-151/89 *Société des Treillis et Paneaux Soudés v Commission (Welded steel mesh)* [1995] ECR II-1195. These citations are taken by Wils, 'The European Commission's 2006 Guidelines on Antitrust Fines: A Legal and Economic Analysis' (2007) 30 (2)World Competition: Law and Economics Review, at 10, 12 , where he argues that this may lead more undertakings to accept settlements, if -as is currently being examined- the Commission were to introduce a settlement mechanism for antitrust cases involving fines. For further considerations, Wils makes reference to his articles 'Settlements of EU Antitrust Investigations: Commitment Decisions under Article 9 of Regulation No 1/2003' (2006) 29 World Competition 345 at 365-366, and 'Leniency in Antitrust Enforcement: Theory and Practice' (2007) 30 World Competition 25.

in particular, emphasizes the decreasing need of complementing the role of fines: the rationale of unpredictability was understandable at a time when fines were not sufficiently high; nowadays by contrast, predictability would only enhance the deterrent effect.[54]

A third issue related to the uncertainty of the amount of the expected sanction in the US is, arguably in line with the conception of zero tolerance and the superior objective of deterrence, that the Supreme Court has legitimatised the legislation of 41 States to allow recovery from damages for indirect purchasers.[55] This means, despite the mentioned de-trebling provision regarding first confessors, that the real amount of an average recovery can be much higher than the sum of actual damages. As an example, we can point at the recent DRAM case,[56] where, besides the criminal indictment with 3 of the 5 highest fines ever charged in price-fixing,[57] the companies are being sued for damages by 34 States, both as direct purchasers and as defendants of citizens (in their role as 'parens patriae').

In such cases, the interaction of one criminal action with at least two different kinds of civil actions causes the game to be 'sequential', and the strategy to confess and plead guilty not to be 'strictly dominant' any more. Concretely, the argument is that if one fears a civil class action ensuing after the criminal case, this will act as a disincentive for confession because the likelihood of success in the civil case strongly depends on the outcome of the criminal one.[58] If this latter statement is true,[59] then each firm that confesses a cartel offence in the criminal context by applying for leniency should rationally prefer settling the civil case rather than litigating.[60] This would imply that all the antitrust civil 'follow-on' cases should end up being settled. There are however, some possible explanations as to why this is not so: in particular, the psychological modelling of preferences will play a substantial role in one's decision. To this extent, it is useful to recall the findings of an economic study,[61] according to which individuals are intrinsically loss-adverse and consequentially risk-seeking in the domain of losses. Another reason might be, as already indicated above, that not all individuals act as rational self-maximizers.

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54 See Joshua, op cit n 52.

55 *Illinois Brick*, 431 U.S. 720 (1977).

56 See the plea agreements related to *US v. Infineon, US v. Hynix and US v. Samsung*, available at <http://www.usdoj.gov/atr/cases.html.>

57 Samsung $300 Millions, Hynix $185 Millions and Infineon $160 Millions.

58 See Zane, 'The price fixer's dilemma: applying game theory to the decision of whether to plead guilty to Antitrust crimes' (2003) 48 Antitrust Bull. 1.

59 Ibid.

60 Ibid.

61 See Kahneman and Tversky, 'Prospect theory: An analysis of decisions under risk' (1979) 47 Econometrica 313-327.

In any case, civil actions following a leniency application are not as common because, as it will be detailed later, the US Antitrust Leniency Programme requires applicants for immunity to restore the public with the undue gain to any possible extent.[62]

To complete the description of the dilemma faced by the cartel members, one should also consider the particular importance of private litigation in the American system. Starting with the assertion that in both systems the cost of lawsuits is a major problem for the limited resources of private citizens, it seems that the American system has taken more of a favourable approach toward the enforcement of their rights. More precisely, allowing for class actions and class representatives has provided citizens with the possibility to create groups and file lawsuits representing each other. This can be seen as a normative solution installed in the US legal system to make up for the high cost of attorneys' fees and the already large amount of litigation, which otherwise would risk choking the proper functioning of the courts.

Reducing the enforcement gap to the US was one of the rationales[63] for the Commission publishing the Green Paper on Private Enforcement,[64] proposing, among other options the implementation in national systems of group actions procedures, and even double damages in order to increase deterrence.[65] It is unfortunate, in the author's view that the Commission has more recently stepped back from this latter initiative in the following White Paper:[66] this does not seem to be helpful for the purpose of avoiding strategic forum-shopping in the global cartels context, or reducing the gap in appeal between American and European Courts for that matter. Nor is the solution of group actions likely to enable private enforcement of anti-cartel law to achieve, in itself, a sufficient level of deterrence: absent concurrent fining inflicted by public enforcement authorities, the amount of money that a cartelist will have to pay is likely to be substantially lower than the amount he has earned through the operation of the cartel. It seems hard to believe, in fact, that all the harmed individuals will be represented in the collective redress mechanism, especially where they would have to opt-in to benefit from the outcome. By contrast, only the existence of some sort of punitive action – as opposed to mere compensation, which is the main objective of private enforcement- would outweigh the benefits of participating in a cartel. Nonetheless, the issuance of both papers and the furtherance of the related consultation, directed to address the issues and pave the way for private enforcement, have created awareness of the Commission's position, and prompted legislative action in those Member States that

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62 See infra, 5.1.

63 Although the Commission in the f.a.q. declares that the purpose is 'to make exercising the right to claim damages for breach of Community competition law easier', and that it does not want to introduce a US-style litigation culture in Europe: see European Commission Green Paper on damages actions for breach of EC Treaty anti-trust rules – frequently asked questions, at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/05/489&format=HTML&aged=0&language=EN&guiLanguage=en.>

64 See <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/05/489&format=HTML&aged=0&language=EN&guiLanguage=en.>

65 Ibid, option n 16.

66 See White Paper on Damages Actions for Breach of EC Antitrust rules, available at http://ec.europa.eu/comm/competition/antitrust/actionsdamages/documents.html#link1.

did not foresee collective procedures to allow recovery of damages.[67] Arguably, the ultimate aim is to spur uniform principles that allow for member States to integrate the level of public enforcement with the complementary and efficient tool of private enforcement. The Commission is probably envisioning a future of less stark contrast with US rules, which would imply also more harmonization on the national enforcement schemes.[68]

3.2.3 Involvement of different jurisdictions

Thirdly, the frequent involvement of different jurisdictions, and thus different legal systems might deter some cartel members from confessing, because they would fear not to receive the same treatment under other States' national standards.

Critics sustaining this argument generally advocate the need for a one-stop-shop provision: this means that, a cartel member, once he has applied for a leniency programme, would not have to apply later for the same treatment in the other legal systems. Such a far-reaching objective could, in theory, be achieved either by measures of positive integration, or by means of an international agreement. However, both solutions are not very feasible in a concrete sense because of the ample range of different requirements set forth to conjoin the benefits of the leniency programmes.[69] For instance, just touching on the aspect of the kind of sanctions involved and just limiting this mention to the European framework, there is a huge difference between member states that impose administrative fines and others who set criminal fines,[70] some of them even applying custodial sanctions. Among other aspects to be highlighted, the different role played by private litigation could be mentioned, as well as the standards used for an action to be deemed illegal.

These inconsistencies are a direct consequence of the history and the development of national antitrust policies. However, these same inconsistencies are nowadays at odds not only with the market-integration approach taken by the European Commission and European legislation, but also with the scope of international cartels and the need to fight them with a consistent and uniform enforcement tool around the world.

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[67] See, amongst many developments, a recently enacted Italian law (L. 24.12.2007 n° 244 , G.U. 28.12.2007) introducing 'class actions' (sic!) into the Italian legal system. For an update on developments of private antitrust litigation across the leading jurisdictions in EU and America, see Mobley (ed.), *Private Antitrust Litigation 2008*, Global competition Review, London 2007.

[68] This is, however, not to be taken as given: EU member States could in fact adapt their policies to the guiding principles formulated by the Commission, while nonetheless maintaining differences in the implementation of their principles or in the actual practice of their enforcement techniques.

[69] As well as, most of the times, in the benchmarks of legality used by the legislations underlying cartel prosecution. This is not only, for example, because of the absence of per se rules in the European legislation (due to the possibility to qualify for a 81(3) exemption), but also to the basic differences between articles framed like Article 81 and a much more vague and imprecise rule as the one contained in Section 1.

[70] See supra, n 24.

Accordingly, what seems to be increasingly called for and invoked (yet still largely unsolved) is the need for an essential harmonization of the antitrust legislations.[71] This might sound like an overstatement to whoever thinks of antitrust as a policy originally meant to cure market failures and thereby accommodate the needs of one nation's economy.[72] This theory is opposed by those arguing that antitrust should be committed to sound economic principles and ultimately focus on global welfare. This issue is still lively debated by antitrust scholars, some of which have not relinquished their hope in advocating for the expansion of the territorial reach of antitrust laws.[73]

Besides the issue of what the policy rationale should be, it is arguable that in the field of leniency, this mentioned need of approximation is more evident than in other fields: the risk of having too much diversity causes not only a fair amount of so called 'shopping' regarding the nation where an application is filed, but also a presumably high rate of un-confessed horizontal conspiracies to remain unpunished. These remarks are doubtless a bad sign from the perspective of achieving that first official goal[74] at the core of the institution of a leniency programme: speeding up the operations of investigations by pulling out relevant information as soon as possible. Looking at it in terms of time-efficiency, such lack of approximation is inherently detrimental to general welfare.

However, one should keep in mind the fact that velocity is the result of a trade off with accuracy, and needs to be balanced with the relevance of the information acquired for the prosecution of the cartel. For these reasons, I am not suggesting a mere harmonization to set low standards to achieve an automatic stop-for-shop among European countries, for example.[75] Here, I am talking more about positive integration, i.e. removing barriers and obstacles to create a harmonized regime of leniency programmes.

A positive signal comes from the circumstance in which the European Commission has recently issued a Model Leniency Programme, to which the competition authorities (CAs) members of the European Competition Network (ECN) have committed as a model for their leniency programmes. In this model, the ECN allows applicants to

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[71] We talk here about harmonization in a broad sense to include not only gradual convergence, but also regulatory action to achieve that same objective, i.e. measures of both negative and positive integration.

[72] The so called 'Colbertian' or 'dirigistes': see Kroes, 'First hundred-days Speech'.

[73] See, among others, David Gerber, 'Antitrust and the Challenge of Internationalization' (1989) 64 Chicago-Kent Law Review 689, 'The US-European Conflict over the Internationalization of Antitrust Law' (1999) 34 New England Law Review 123, 'Europe and the Globalization of Antitrust Law' (1999) 14 Connecticut Journal of International Law 15, 'U.S. Anti-Trust Law and the Convergence of Competition Laws' (2002) 50 American Journal of Comparative Law 263; Guzman, 'The Case for International Antitrust, Competition Law in Conflict: Antitrust Jurisdiction in the Global Economy', Michael Greve & Richard Epstein, eds., reprinted in (2004) 22 Berkeley J. Int'l. L. 355, 'International Antitrust and the WTO: The Lesson from Intellectual Property' (2003) 43 Va. J. Int'l L. 933; Fox, 'International Antitrust and the Doha Dome' (2003) 43 Virginia Journal of International Law 911, at 918–922.

[74] As argued above, the other important aim in the institution of a leniency programme is cartel destabilization.

[75] A point resulting among the objectives of Commissioner Neelie Kroes, who has declared this intent in her 'First hundred-days Speech'.

present a so called 'Summary Application' in order to protect the position as first in queue with the CA concerned, without the need to support the application with substantive evidence.[76] However, while the seriousness of the coordination problem seems to have been perceived by the Commission, at least with regard to its European dimension, this does not hold true for the US. Unfortunately, it still seems to pave the way for the problem to be addressed in the international framework.

3.2.4 Fear of retaliation

Fourthly and no less relevantly, there is the fear of retaliation by the other cartel members. This fear of retaliation, which is obviously immediate and effective when firms with substantial market power participate in the cartels,[77] most likely encompasses cases of oligopolies and markets in which conglomerate firms are involved. In the former case, confessing companies will have to face further dealings down the road with the other cartelists, which may be not particularly kind and accommodating after the applicant has reported them and received the immunity. Similarly, in the latter pattern conglomerates will likely be able to discipline the cheating firms in parallel markets. Thus, in both cases, the structure of the market is conducive to complying with the cartel and thereby acts as a disincentive for confession.

Of course, what is implied here is that retaliation is possible only provided that the reported companies are big enough to maintain healthy finances even after the fine, and that they are willing to undertake these retaliatory actions afterwards instead of focusing exclusively on the recovery of losses. The fear of retaliation however, may still prove substantial for another reason: companies will complement it with the lack of certainty on the issue of whether they have been sufficiently rapid in approaching the authorities. The mix of these sentiments may act as a psychological force to deter confession, which would have otherwise been the most rational choice (i.e., the best self-maximizing move given the prevailing circumstances).[78]

For all these reasons, the policy option of not forcing the firm to terminate participation in the cartel 'immediately' (but rather merely 'promptly') probably makes a leniency programme more appealing -- as opposed to one considering termination as a strict condition to receive immunity. The European leniency programme has preferred this latter approach so far, in contrast with the American one. It is praise-worthy however, that even this former programme has recently given signals of evolution toward more flexibility, adding a specific provision on this issue.[79]

The US programme specifically calls on the cartelist to act promptly, requiring him or her to terminate their part in the activity upon its discovery. This naturally leads to

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[76] See ECN Model Leniency Programme, at 23 and Explanatory notes, at 39-46.

[77] Think for example to the danger of cheating on Microsoft in the operation system market, where it could easily retaliate by completely eliminating or at least considerably lessening the interoperability of its product features with the ones of the competitor.

[78] See Leslie, op cit, n 7, at 4.

[79] Article 12 b: see infra, 4.1.

questioning when an activity should be considered 'discovered', and what is considered as 'termination'. Both issues are addressed by DOJ guidelines: as to the former, they say that an announcement to other participants about the withdrawal from the illegal activity is not specifically required (although 'that would constitute one means of termination'), and that reporting the illegal activity and refraining from further participation can suffice. However, they consider also the possibility of special treatment by adding 'unless continued participation is with Division approval'.[80]

As to the latter, the guidelines state clearly that the discovery happens, 'at the earliest date on which either the board of directors or the counsel for the corporation are first informed of the conduct at issue.'

An objection can be raised that these statements lack binding legal value (differently, for example, from the FTC Commitment decrees, which are binding and not appealable), and thus a firm cannot be one hundred percent sure about the prospective grant of immunity: as an example of the discretion that could be used by the authorities regarding this issue, see the revocation of the conditional amnesty promised to Stott Nielsen Transportation Group Ltd.[81] The truth and the convincingness of this argument seem striking, but it is nonetheless easily rebutted by the public announcement by the government that it will follow a politic of principled fairness[82] in this regard. The DOJ, in fact, declared that it will depart from what was previously agreed on (as it occurred in this specific instance)[83] only when the other party has committed a breach.

It is still remarkable, however, that such a commitment is not solidly grounded on legal basis. The DOJ does not currently have anything but a fiduciary, non-legally enforceable duty concerning the terms agreed upon in negotiating with a prospective

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[80] See Sprattling, 'The Corporate Leniency Policy- Answer to recurring questions', presented at the ABA Antitrust Section at the 1998 Spring Meeting in Washington, D.C. on April 1st, 1998 , text available at <http://www.usdoj.gov/atr/public/speeches/1626.htm,> at 3.

[81] In the opinion released for this case on March 23, 2006, a two judge-panel of the third Circuit reversed the previous finding that prevented the government from indicting a party which had entered an agreement granting immunity. Without going in detail on whether the party had in fact breached the agreement, the Court ruled that 'the executive branch has exclusive authority and absolute discretion to decide whether to prosecute a case.' 2006 U.S. App. LEXIS 7203, at *14.

[82] See the declarations made by Scott Hammond at the Hearings of the US Antitrust Modernization Commission on Criminal Remedies, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/06/499&format=HTML&aged=0&language=EN&guiLanguage=en>

[83] In the case at issue, indeed, the revocation was due to the finding of evidence that the illegal activity had not been terminated in March 2002 but rather continued onto November 2002. However, as above mentioned, the Court did not address whether there had been a breach and the possible consequences. Accordingly, it left uncertainty on this issue when it simply concluded that, despite the DOJ's commitment 'not to bring any criminal prosecution' against the company, the amnesty agreement only protected against conviction, not indictment and trial. See id., at *19-20 (This distinction is grounded in the understanding that simply being indicted and forced to stand trial is not generally an injury for constitutional purposes but is rather 'one of the painful obligations of citizenship').

confessor: the US Supreme Court has declined from determining the existence of an enforceable obligation when it recently had the occasion to rule on this issue.[84]

What seems perfectly arguable though, is that the room left for use of discretionary power on these occasions should be, legally speaking, eliminated or at least attenuated. In this respect, EC law seems to be ahead: in the renewal of the leniency programme enacted in 2006, article 12 specifies that in order to get the immunity, an undertaking must end its involvement in the alleged cartel immediately following its application 'except for what would, in the Commission's view, be reasonably necessary to preserve the integrity of the inspections'. Even if it's undeniable that the Commission holds the discretionary power (i.e., to determine ex post whether or not the integrity has been preserved), it is still appreciable that the New Leniency Notice has provided applicants with the benchmark of 'reasonably'. This will presumably facilitate decisions for the undertaking concerned, which will not have to worry – as long as it acts under this guide of 'reasonability' - about informing the Commission of the way they intend to accomplish their exit from the cartel. It is important however, that the Commission adapts a non-excessively rigid standard to evaluate the reasonability in such context, as the benefit of this amendment would otherwise be minimized.

In conclusion, the improvement of the wording used by the Leniency Notice to regulate this specific matter must be acknowledged; to be proactive, this could even be used as a lesson for further drafts of the American Leniency Programme. What is still criticisable of the European approach though, is the persistence with such an 'immediate' termination requirement, to the extent that it risks stabilizing long-lived cartels. In fact, no firms in such a context would suitably arise to qualify for amnesty: they will have presumably all known about the activity for a long time already, and not acted as promptly as required by a literal interpretation of the guidelines. Thus, the arguable risk stemming from this rule seems to outweigh the purported benefit, i.e. preventing the perpetration of the damage: the company involved in long-lived cartels will just stay in the cartel and accept the odds of being convicted, instead of choosing such a risky confession.

4. RELEVANT FEATURES OF A LENIENCY PROGRAMME

Other implications on the effectiveness of the programme are given by the eligibility for immunity of ring-leaders, promoters of cartels, and second confessors. The extent that a reduction in a fine can be conceded and the importance of the difference between pre- and post- investigation confession will also be examined alongside these implications. Finally, the most crucial complication of the leniency programme – protection of confidentiality - will be presented.

[84] See *Stott Nielsen Transportation Group Ltd* 2006, U.S. App. LEXIS 7203, at *14.

4.1 Key factors for success in a leniency programme

4.1.1 Reward for late arrivals

Given that the convenience of leniency programmes relies on the capability to save time and effort for authorities,[85] and that the leniency programme works mainly by way of an incentive-inducing system, it is very important to create a strong incentive for speeding up the confession. This point has been well addressed by the US Leniency Programme since 1993, asking that the Division not receive information about the illegal activity from any other source or that the corporation be the first one to come forward and qualify for leniency with respect to the illegal activity being reported in exchange for immunity. Such configuration for a leniency programme is laudable because high pressure is put on the potential confessor: he must confess early, otherwise (i.e., if he doesn't precede the authority or rank first) he won't get off. On the other hand, rewarding second arrivals as well has an intrinsic value for a very substantive reason: otherwise, firms would be less likely to confess as time passes, by thinking (and often being actually aware) that someone has already taken that first step. From this point of view, it seems perfectly arguable that this feature of the US leniency programme could be improved by introducing the possibility of receiving a small (yet still consistent) amount of leniency for second arrivals: this would, in fact, eliminate the risk of deterring too many applicants in the first place.[86]

Conversely, the current EU leniency programme has been crafted since its inception to be much more sensitive to this latter advantage: it promises a discount of 30 to 50% to the first firm providing added value, 20 to 30% to the second, and up to 20% to the subsequent cooperating undertakings. This policy arguably shows a focus on detection, giving the bonus of some discount of the punishment in exchange for the facilitation of the investigation.

Such focus on detection is good for the purpose of increasing the appeal of the leniency programme. However, some perplexity may be raised with regard to the risk of providing too much leniency in general: besides the issues of distributive justice and more generally of the acceptability of mercy, this would turn into an incentive for cartels, lowering the effectiveness of the sanctions and thus stabilizing them.[87] Therefore, in order to reach the optimal amount of leniency to be given within a certain leniency programme, the discount accorded to the first-comer must be accounted for in the establishment of how much discount is available for the second and further arrivals.

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[85] See *supra,* par 2.

[86] However, as explained further *infra*, such effect is essentially obtained by the US antitrust system in another way: see *infra*, at 3.2.4.

[87] For an elaboration on this concept of mercy, see Nussbaum, 'Equity and Mercy.' (1993) 22 (2*) Philosophy & Public Affairs,* at 83-125. For a view supporting the need for only a limited amount of leniency, see Spagnolo, 'Divide et impera: Optimal Leniency Programs', CEPR Discussion paper No. 4840, 2004; Buccirossi and Spagnolo, 'Optimal fines in the era of Whistleblowers: Should price fixers Still go to Prison?', in Ghosal and Stennek (eds), *The* P*olitical Economy of Antitrust*, North-Holland, 2007.

The European system initially[88] struck the balance by not granting any automatic immunity, preferring to confer only a 'reduction' of at most 75% to the firm that first handed over decisive evidence of the cartel existence; in addition, this percentage was lowered to between 50 and 75% if the investigation had already started. Such configuration was making the incentive to report arguably less strong than in the US, given its evidently lower appeal. Consider also, in this regard, the fact that a company in the EU could reach a 50% reduction even without having to rush the confession: in practice, this was the result of a discount ranging from 10 to 50% awarded to whoever made some sort of cooperation (including merely 'providing with evidence that materially contributes to establish the existence of the infringement' and 'not substantially contesting what is contained in the statement of objections issued by the Commission').[89]

Given this low threshold of cooperation in order to qualify for a reduction in fine, and provided that the additional reduction of fine in case of active and strong cooperation was not as attractive[90] as in other leniency programmes,[91] one could easily decide that it was not worth making the efforts to provide decisive evidence. Especially if he was feeling that he could succeed in escaping detection, a cartel member would probably have decided not to come forward first but rather wait and see if the Commission would eventually catch him.

It is quite fortunate, in the author's view, that the Commission eventually changed the Leniency notice in 2002 with a key innovation on this point: introducing the concept of automatic immunity to the first applicant, irrespective of whether or not the investigation has already started.[92] This has been an evident step toward harmonization with the US programme. However, doubt can be raised on the desirability of the conservation of the usual method to calculate and confer reductions: that particular method was, in fact, established in a way that was thought of as appropriate to counterbalance the lack of immunity prizes for the first applicant.

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[88] i.e., in the first Leniency notice, issued in 1992.

[89] See 1996 Leniency Notice, the standard for reduction as defined by articles 24-26.

[90] It could actually also lead to the same outcome –50%-, if one compares a poor but decisive post-investigation confession with a high level of cooperation after detection.

[91] Compare with the current Leniency notice, and the US Leniency program: see *infra*, 4.1.7.

[92] Although at the beginning this latter feature was not included: the revision of the draft has arguably been the result of the criticism of some commentators, who pointed at the fact that until 2000 at least half of US leniency applications came in after the Division's investigation had commenced: see Riley, 'Cartel Whistleblowing: Toward an American Model?' (2002) 67 Maastricht Journal of European and Comparative Law at 9 note 39; OECD Report on Leniency Programmes to fight Hard-core cartels, available at <http://www.oecd.org/document/3/0,2340,fr_2649_201185_1890435_1_1_1_1,00.html>, at 14; Hammond, 'When Calculating the Costs and Benefits of Applying for Corporate Amnesty, How Do You Put a Price Tag on an Individual's Freedom?', speech delivered at the Fifteenth Annual National Institute On White Collar Crime (March 8, 2001), available at <http://www.usdoj.gov/atr/public/speeches/7647.htm,> at B1; American Bar Association 'The Observations and Comments of the American Bar Association of Antitrust Law and Section of International Law and Practice on the Draft Commission Notice on Immunity from Fines and reduction of Fines in cartel Cases', available at <http://www.abanet.org/ antitrust/commentseu.html >, at 3.

As it should be clear by now, after the description of the leniency-discounting policy in the EU, a critical comparison on this feature confers a net advantage to the US, related to the efficiency of their Leniency programme: it affords much less overall leniency, thereby setting a more severe system of deterrence against cartels.

It is also true, of course, that another key advantage of the US Leniency programme relates to the threat of severe sanctions. As publicly revealed by Scott Hammond in the 2004 ICN Leniency Workshop,[93] this is the first precondition in order to make a leniency programme work effectively.[94] In this respect, the importance of the role played by criminal sanctions on individuals can hardly be overstated.

It is argued here, however, that to balance the need of keeping leniency at a reasonable level with that of corroborating the evidence brought by first confessors (which also allows authorities to hear more than one side of the story), a good strategy to prosecute cartels should not close the door on leniency to late arrivals (at least for the first one). At the same time, it seems important that the system be strict and rigid as to granting the safeguard of immunity exclusively to the first. Only in this way would it be possible to induce cartel members to the courthouse doors in the so-called 'rush to file'.[95]

The US programme - in stark contrast with the EU one[96] - fully recognizes the importance of this feature, not allowing for automatic immunity to the latecomer (i.e., a cartelist confessing after the start of the investigation). However, to properly understand the relative value of exclusivity on the immunity grant within this context, two key issues must be kept in mind, which represent a safeguard for applicants that happen to be second or third confessors. The first is that the firm may still qualify for a reduction, and the second that in the common-law systems plea-bargaining is allowed. For these two reasons, the sanction eventually inflicted can be milder than expected for whoever confesses, even if it is not in the earliest stage. The subtle but fundamental difference with immunity prizes is that recurring to this sort of reduction is not a type of choice that will provide certainty on the amount of leniency to be awarded. Much will depend, indeed, on the cooperativism of that firm with the government for the purpose of extrapolating additional evidence.

This lack of certainty makes it possible for competition authorities to reap the benefit of late confessions, while at the same time keeping their discretion over the potential leniency to be awarded. Basically, on this point, the US programme seems to kill two birds with one stone. It is thus arguable that the EU should follow the US efficiency, and embrace such an approach to late arrivals in the further process of harmonization. Such a level of approximation may seem far from the current state of divergence on

[93] See Hammond, 'Cornerstone of an effective Leniency Program', presented before the ICN Workshop on Leniency Programs, Sydney, Australia, November 22-23, 2004, text available at <http://www.usdoj.gov/atr/public/speeches/206611.htm.>

[94] The other two, as it will be highlighted below, are the fear of detection and the transparency in enforcement policies.

[95] See Joshua, 'That Uncertain Feeling: The Commission's 2002 Leniency Notice', EUI Repository 2006, at 11.

[96] See supra, at 28.

several principles. Nonetheless, this argument has been partially rebutted by the consultation recently opened by the Commission on its proposal to introduce settlement-decisions in the EU framework.[97]

Finally, an important remark on the 'late confessors' policy is that, regardless of which configuration is chosen, leniency drafters should be aware of possible shortcomings of both the models depicted above. In fact, at least one way companies can make a strategic use of this feature of the Leniency programme is conceivable: this danger is related to companies' possibility to hold the evidence of their illicit activity as much as they can, so as to leave very scant information available for the other cartel members. With this strategy, the same cartelists make it almost impossible for the other members to provide any decisive information to qualify for leniency, and consequently very difficult for the authorities to uncover a cartel.[98] In this way, the main activist member of the cartel could potentially use the leniency programme as an artifice to get away from liability.

To avoid this danger, it seems recommendable to implement this feature with an eye kept on the interaction with feature n.E (eligibility for ringleaders), and in accordance with the general conception that whistle-blowing is appreciable only if it provides valuable information. The argument sustained here, accordingly, is that a convenient policy-choice would be to exclude the ringleader and the promoter of the cartel from eligibility for immunity (so as to prevent them from holding the evidence), while at the same time requiring a reasonably low standard of evidence in order to qualify for leniency (so as to allow a non-activist member to pass the threshold for qualification).

4.1.2 Certainty and transparency

The most appraised feature of the new EU programme (and already part of the US Programme since 1993) is the automatic nature of the immunity in the case that no investigation has started. This is arguably the most important feature, which most strikingly fosters confession: it contributes by giving the strategy of 'confession' a clear advantage when its pay-off is compared to the less assessable probability of not being caught.

To be precise, this is just one aspect of a more general policy guaranteeing transparency, predictability, and fair treatment to the applicants. The rationale of this policy is, if the dynamics and the rules are stated clearly, the strategy of the cartel

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[97] See the Draft Commission Notice on the conduct of settlement proceedings in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, and the Proposal for a COMMISSION REGULATION (EC) No …/2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases, both available at <http://ec.europa.eu/comm/competition/cartels/legislation/settlements.html.>

[98] This is notwithstanding the possibility for the Commission, as well for the national authorities, to use the so called 'dawn raids' tool as provided by articles 20 and 21 of Regulation 01/03. The inquired companies, in fact, will likely try to hide the available evidence so as to make it not easily reachable or detectable in case of dawn raids.

member will be perfectly rational and foreseeable: conceivably, it will be inferable by simply creating a chart evaluating costs and benefits of the available choices for each particular case.

If the cartel member can indeed rely upon a safe and automatic immunity, he or she will probably base their decision on the following calculation: evaluation of the immediate loss of his overcharge and the cost of betrayal, added to the expected amount of money awarded in the civil private lawsuits that they will likely have to face.[99] Ultimately, their choice will be determined depending on whether the total amount to be paid in this way (i.e., after the immunity is granted) is preferable to the expected sanction.

To this extent, it is fundamental that the rules be clear for calculating both the expected sanction and the possible damages that can be awarded to civil plaintiffs. Otherwise, authorities cannot rely on game theory and more generally on the rationality of cartel members' decisions,[100] and will have less control of their choices.

Similarly, this (transparency) principle should be applied with regard to the possibility of getting a reduction in fines, provided for by both the European and the American system. However, as it will be addressed in this paper,[101] the US seems to have adopted a different strategy regarding this specific matter.

In general, evaluating transparency, the first impression is positive for both systems: they appear to have been clear and efficient in complying with their task, issuing guidelines governing fining (which have indeed the objective of providing certainty and fairness),[102] and sending clear messages to highlight that they intend to comply with them (in spite of the lack of binding value of these documents). On top of this, both systems have also tried to be clear as far as the implementation of their leniency programmes is concerned. However, first impressions are destined to be reversed after analyzing these guidelines more thoroughly, and contextualizing them within international cartels (nowadays increasingly widespread).

First of all, the guidelines do not permit a precise calculation: rather, they leave constant a certain amount of discretion for the public authorities. This critique could be neutralized however, by alleging that some room for discretion is in the very nature of this type of sanction: the system would otherwise be too rigid and mechanical, fostering rational calculations and strategic behaviour in cartel engagement, and expunging the most important reason for their critical role in fighting cartels for the prosecutors.

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[99] A value that has to be increased three times, if the US falls within the scope or effect of the cartel. For the case law governing the extraterritoriality reach of US antitrust law, see *Empagran*, supra, n 35.

[100] In this regard it can be noted that most of the times decisions within companies are taken by the board of directors, which usually bases its conclusions on a rational evaluation of expected costs and benefits.

[101] See infra, 4.1.7.

[102] See 'About the US Sentencing Commission', available at <http://www.ussc.gov/general/USSCoverview_2005.pdf> and the 2006 Fining guidelines, available at <http://ec.europa.eu/comm/competition/antitrust/legislation/fines.html>

Secondly, there are some flaws that could undermine one's decision to apply for leniency whenever an international cartel is implicated. This is mostly due to the interaction of different programmes and different requisites to qualify for it,[103] and is certainly highlighted - and worsened in a sense - by the recent 'federalization' of EC Competition Law.

By 'federalization', scholars and practitioners in this field refer to the allocation of decisions contributing to shaping competition policy to the particular member states.[104] Such structure highly resembles the American one, but unlike it, contains flaws: in the EC there is no system of federal courts.[105] This means that the Commission has initially no prominence on the NCAs (National Competition Authorities) for the enforcement of anti-cartel rules: the investigation will be conducted by whichever authority is 'well placed'. The lack of clarity of this wording has even worsened, since the Commission explicitly rejected an effect-based approach, substituting the requirement that 'the effects are felt mainly in that state' with a more generic 'have effects or implementation in that State'.[106]

Thus, the investigation can be conducted at the same time in several States; this seems criticisable for the basic reasons that the European Commission will not interfere unless there is a particular community interest[107] (in which case it would have to use the power of advocating, a possibility that to date has never been used), and will not even start unless the cartel involves at least 3 member States.[108]

Whilst in principle the functioning of cooperation can be appreciated and is substantially analogous to the principles already widespread through the international cooperating agreements,[109] it contains at least one structural flaw: the National Authorities here do not have a duty to inform the Commission (even less of a duty to inform the other NCAs) before an investigation is started, leaving the possibility for this communication to happen 'without delay after commencing the formal investigative measure'.[110] This way, the jurisdiction conflict cannot be identified until a strategy has already been decided, and a National Authority or the Commission has

[103] Ibid, par 1.2 C.

[104] See Regulation 01/03 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, article 3.1.

[105] See Joshua, 'The European cartel enforcement regime post-modernization: how is it working?' (2006) 13 Geo Mason LRev 1247, at 1249.

[106] See Commission Notice on Cooperation Between National Competition Authorities and the Commission in Handling Cases Falling Within the Scope of Article 85 or 86 of the EC Treaty, 1997 OJ, at 44.

[107] Ibid.

[108] Ibid, paragraph 8 of the Commission Notice on Cooperation within the Network of Competition Authorities.

[109] See for instance the agreements between US and Europe: both the 1991 EU/US Competition Cooperation Agreement - Official Journal 95, 27.4.1995 pages 47-52, and that on the application of positive comity principles in the enforcement of their competition laws. Official Journal L 173 of 18.06.1998, at 28-31.

[110] Regulation 1/2003, art. 11.3.

started to implement it. Moreover, even after receiving this notice, there is no obligation to suspend proceedings.[111]

This lack of coordination is dangerously detrimental to the objective of fighting international cartels, given the delicateness of the 'inputs' that authorities use to destabilize cartels' equilibrium. It can surely be imagined that a cartel member may become aware of the existence of an investigation because of a dawn raid carried by one NCA on a firm's subsidiary in another state: he would likely start presuming that the same investigation has also started in other countries where the firm is located. Accordingly, he might reject the hypothesis of applying for leniency in those states where this choice is much less attractive if taken after an investigation has started. This inconsistency illustrates, as already mentioned above, the critical need for coordination in such contexts.

4.1.3 Immunity after the investigation has started

The possibility to award immunity even after an investigation has started is a feature extraneous to the very first leniency programmes: those programmes were concerned about causing cartel members to hurry - merely offering a possible fine reduction for those who cooperated after authorities had started their operations.

This has drastically changed with the renewal of the US Leniency Programme in 1993,[112] which introduced the possibility to get immunity after that moment too, as long as the confessor is the first who brings in substantial evidence (meaning likely to result in a sustainable conviction) regarding the illegal activity, and provided he cooperates continuously and completely.

By contrast, a possibility of late immunity was not provided in the 1996 EU Commission Notice on the non-imposition or reduction of fines in cartel cases,[113] where the only thing one could get after the investigation had started was a substantial reduction (50 to 75%) of a fine.[114] To get this bonus, firms had to provide all the relevant information available regarding the cartel, in addition to not having compelled or instigated other firms to participate or having played a determining role in the illegal activity and providing continuous and complete cooperation throughout the investigation.[115]

The imposition of such strict requirements for a mere reduction, opposed to the less demanding standards adopted by the US leniency programme to confer immunity, inevitably resulted in more applications in the US than in the EU. In addition, by providing for automatic immunity, the US programme prompts cartel members to hurry in a race against each other, which arguably asserts more pressure than the race

[111] Council Regulation (ECC) No. 17., 1962 O.J. (13) Article 9 (3).
[112] Corporate Leniency Policy, available at <http://www.usdoj.gov/atr/public/guidelines/0091.htm.>
[113] Notice on the non-imposition or reduction of fines in cartel cases, OJ 1996/C207/04.
[114] Ibid, section B.
[115] Ibid.

against competition authorities put in place by the EU programme. By embodying this design, the EU programme demonstrated the choice of a detection-oriented kind of approach: its drafters deemed the added value of receiving information when the cartel's detection is imminent (because of the ongoing investigation) incapable of outweighing the importance of coming forward before the authorities, even admitting that the additional information can be crucial.

On the other hand, the US decided to put more emphasis on the level of information submitted and thus to decide on a case-by-case basis whether the value is effectively capable of outweighing the benefit of having the firm taking the first step. In doing this, the US programme certainly did not neglect the matter of timing, circumstantiating that 'the immunity will be given unless the Department of Justice determines that it would not be unfair to others';[116] this parameter allows some discretion, although the DOJ has also specified that 'the primary considerations will be how early the corporation comes forward and whether the corporation coerced another party to participate in the illegal activity or clearly was the leader in, or originator of, the activity' (which suggests that eventually the outcome could be very similar to what the European leniency programme explicitly provides for).[117]

The standard within the EU however, was changed in 2002, coming closer to the American model: as mentioned above,[118] the 2002 Leniency Notice offered immunity also for undertakings confessed after an investigation had started. The policy change also encompassed the threshold set to get the bonus, requiring confessors to pass a higher and specific test: the amount of evidence to be provided had to be such that it enabled the Commission to launch an investigation or to issue a statement of objection for infringement of Article 81.

One might argue that the introduction of such a high barrier for the confession after investigation is not desirable, for the following reasons: 1) the Commission could sometimes decide to pursue the strategy of 'trying' a case, and thus starting the procedure for a conviction ex article 81 notwithstanding the fact it does not concretely have substantial evidence, or that the evidence collected may be not entirely accurate; 2) firms can be sceptical about the subjective view of the Commission for having or having not already collected enough evidence for conviction, whereas in those same situations the Commission might, in fact, need just a small amount of additional evidence in order to bring a winning case. Considering these two procedural issues, one might just argue that any sort of evidence may suffice to entitle an undertaking to a discounted fine, though no evidence can be presumed to be sufficient. For this reason, practitioners have probably appreciated the fact that the 2006 Leniency Notice offered a specification on the type of evidence considered for the purpose of qualifying for

[116] An exception to which should be added, of course, when there is a prosecutable case.
[117] See US sentencing guidelines, available at <http://www.ussc.gov/guidelin.htm.>
[118] See supra, at n 92.

immunity.[119] However, it is still remarkable that this specification is only explanatory, concluding with an open statement such as, '[o]ther evidence relating to the alleged cartel in possession of the applicant or available to it at the time of the submission, [including in particular any evidence contemporaneous to the infringement]'.

To then clarify, someone may go as far as to argue that the best bet in the future would be to have leniency programmes strongly focused on detection, guaranteeing immunity irrespective of whether competition authorities consider the information sufficient to launch an investigation or to issue a statement of objection. This would basically imply that the Leniency programme would become a merely administrative procedure, whose responsibility could even be assigned, in theory, to an administrative agency independent from the executive: no substantial discretion would be involved, nor competition law expertise would be needed. This way, applicants would be provided with a list of documents and would be able to rationally evaluate whether they would qualify for immunity. Because of the political nature of such a choice, the policy comment here is limited to noting that a shift toward unconditioned admission to leniency for late arrivals would in theory benefit the authorities with the added value of otherwise deterred confessions. Such confessions could also prove determinant, having the potential to transform a possible failure into a successful prosecution.

Conversely, the recent approach taken by the Leniency notice on this feature leaves one side open to criticism: a two-sided approach such as that explained above[120] intrinsically disincentives leniency applicants, especially for those cases where the cartel is more easily detectable by the authorities, or where the cartel members can 'smell' their interest in it. In those cases, applicants will often presume that the Commission has already collected enough evidence, and will thus not be willing to run the risk of confession.

Likewise, the US Leniency programme leaves a broad discretion for the DOJ to assess whether the evidence provided is sufficient as to be considered 'substantial' within the terms of the US Corporate Leniency programme of 1993.[121]

Nevertheless, it is recognized that a change in this rule towards unconditioned immunity would be a major shift for both the systems at issue. Such a change, in fact, would entail that the problem of cartels be addressed with a remarkably different approach: one exclusively aimed at increasing the probability of detection, thus inevitably decreasing the certainty of punishment (and the related effect of deterrence).

While this approach could in theory be embraced by an antitrust system such as the EU (notwithstanding the need to contextually adapt some legislation to make it fit for the

[119] 2006 Leniency Notice, at 9.

[120] In the sense that, notwithstanding the laudable objective of setting a benchmark, it leaves the most of the decisions up to the Commission's discretion.

[121] Although it must be appreciated the practice of accepting 'proffers' in order to help companies on their assessment of suitable evidence: see below.

new approach), the American model of leniency seems starkly opposed to such an inquisitorial focus.

For these reasons, the policy recommendation provided here aims to remind us of the importance of consistency and advises against the introduction of features and models that are in contrast with the approach taken in other parts of the legal system. It would take much time and cost for the system to be adapted to each of the amendments, and thus a long time would pass before the shift could actually take place.[122]

Nonetheless, this paper does not give up on the possibility of reaching harmonization between the European and the American leniency programmes. The purpose of the paper indeed is to advocate a new compromise between the mentioned objectives of detection and deterrence whenever such a solution proves more efficient: namely, a compromise consisting of a better regulation that would make authorities reap the benefits of increased detection without impinging too much on the issue of overall deterrence.

Indeed, it is not disputed that cartels are one of the hard-core antitrust offences, and consequentially one of the most detrimental practices for consumer welfare. This is also exacerbated by one basic feature of cartels, namely that their existence can be camouflaged or hidden for quite a long time.[123] Accordingly, it seems logical to infer that a discovery at an early stage, although rarely complete in unravelling the full scope of the cartel, would be extremely beneficial to society: not only for the purpose of demonstrating a severe and frequent punishment of this kind of conduct (thereby giving a lesson to whoever would consider entering into a cartel) but also to avoid long and consistent losses in consumer welfare.

A hurdle for the accomplishment of the early discovery objective can be found in the US antitrust fining guidelines, which indirectly act as a disincentive for early leniency applicants: these guidelines do not, in fact, properly consider the length of the time during which the undue gain was perceived,[124] thereby embracing not reallocating, but instead, a deterring function. Also for this reason, and given the length of the investigations in cases involving big cartels, it is understandable why the US leniency policy tries to complement the guidelines by focusing so much on early discovery:[125] it seems preferable to dispose of cartels as soon as possible, rather than to discover them after some years. In the latter hypothesis, in fact, the wrongdoer could end up having to

[122] This historical bias on the introduction of new policies is a concept well known by economists, called 'path dependency': see Arthur, *Increasing Returns and Path Dependence in the Economy*, Ann Arbor Paperbacks, University of Michigan Press, 1994.

[123] Under the pretext, for example, of price increasing in raw material or labour cost, and frequently using the scheme of industry-standardization practices.

[124] In fact, the duration of the cartel has not necessarily a big value among the considerations made by the Department of Justice in the issuing of sentences: it is left to his discretion what to factor in for the determination of the 'impact' on commerce, which represents the basis taken as starting point for fines according to the American sentencing guidelines

[125] For example by providing automatic immunity to the latecomer, see supra, at 4.1.1.

pay a fine that is lower than the amount of 'undue gain' he has achieved in the past. On top of this, increasing the detection rate will, in the wrong run, have the positive effect of deterring future cartels.[126]

On the other hand, it is, of course, also true and ascertainable that an excessive focus on early detection would cause the authorities to miss important information and to leave important collusions unpunished. For this reason, it seems convenient for a competition enforcement regime not to have any bias against late confessions: the timing of the confession should instead be dealt with at other policy level; more precisely, taking it into account at the moment of establishing the fines. Accordingly, the amendment on the fining calculation method brought about by the European Guidelines in 2006 is most welcome: instead of simply using the basis of the firm's overturn of the previous year, the new Guidelines adjust the basic value through some multipliers which take into account the duration, among other factors.[127] This allows the enforcement activities and the commission decisions in that scope to be practically unbiased from objectives related to the timing of detection.

Moreover, increasing the overall focus on detection does not necessarily imply that the authorities must immediately increase sudden dawn-raids. In fact, a good strategy for the authorities would be to wait some time and give signals to the cartel members, thus making the members understand the approach and pushing them to make the first move by confessing: such a strategy would save time and effort for the Commission, and would most likely lead to obtain more information in a shorter time; which is ultimately the main goal of the leniency programme.

One criticism, however, remains on the concrete effectiveness of the way by which such strategy could be pursued: the right incentive to do so can be given only if the difference between the percentage of discount given prior and after an investigation has started is substantial,[128] which, as mentioned above, is not the case in the EU. Whilst one can argue that this is an extremely valuable strategy and that it would prompt a much higher number of cartels to be uncovered, one can counter that it would result in a much higher number of applications, and would ultimately slow the whole process.

Accordingly, the optimal policy should be one that takes into account the workload of authorities and does not leave the applicants for too long with the so called 'uncertain feeling'[129] which typically affects those cartel members pending for leniency. In fact, by not being sure for a long time after filing, about whether or not they had qualified for immunity, the applicants would rationally prefer running a different and alternative type of risk, which puts them in a more profitable kind of 'uncertain feeling': the uncertainty

[126] Because of the fear of being readily detected and easily destabilized: see supra, at 1, and more generally, Becker, op cit, n 3.

[127] See 2006 Fining guidelines.

[128] e.g. in Japan, where the difference is 70%: see Harrington, op cit, n 10, at 21.

[129] See Joshua, 'That Uncertain Feeling: The Commission's 2002 Leniency Notice', Proceedings of 2006 EU Competition Law and Policy Workshop European University Institute, Robert Schuman Centre for Advanced Studies, EUI Repository 2006.

of being discovered. The logical reason why this uncertainty would be more profitable is because of what economists call the opportunity-cost, i.e. the loss derived by them for not investing their capital: during the decision of whether or not a firm has qualified for leniency, firms will, in the meantime, have to cease their cartel-activity and thus will have to forego higher gains. Conversely, choosing to run the risk of unsolicited detection of the cartel would allow them to continue operating as cartelists, thereby reaping higher profits as well as the additional benefits of being in the cartel.[130]

In resolving this trade-off between the accuracy of the information disclosed and the security of immunity for the applicants, the best system seems to be once again that of the US: an applicant is asked to give a 'proffer' to see whether the evidence can be considered sufficient for a grant of immunity. Once authorities have made a positive determination on this, the applicant can be sure about the immunity, provided he plans to comply with the standard of evidence which he claimed to be able to support in the first place.

4.1.4 No eligibility for ringleaders

Because of the certainty of the immunity, which this paper has discussed and appraised above, a firm could well be the one actively organizing a cartel while having planned to avoid the fine through the leniency programme: this would be possible by simply ensuring to be the first confessor, keeping the relevant evidence away from the other members of the cartel[131] and turning it to the authorities at the moment when the firm considers its objectives achieved. Precisely to avoid this danger, both the American and European systems include an exception to the eligibility for leniency: in the US, for firms that are leaders or originators of the cartel, or those who have pressured others to join it; in the EU, more broadly, for those who took affirmative steps to coerce other undertakings so as to persuade them to join the cartel or to stay with it.

The existence of such a feature provides the benefit – for the principle, once again, that the 'workability' of a fine is more critical than its amount - that it prevents a misuse of leniency: a widespread grant of immunity would, indeed, decrease the fear of punishment, thereby having an adverse effect on deterrence.

In evaluating this point, it is stressed here that the policy examined might not be the best adoptable strategy if one objective is also to allow the detection rate to be high: conceivably, the best solution would simply be that of using bigger penalties for the ringleaders, as the EU Sentencing Guidelines currently suggest.[132] This way, the possibility of gathering relevant information which would otherwise be very difficult to

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[130] The additional benefits meant here are the advantages that are complementary to the undue gain, such as for instance no fear of retaliation in the future: see on this issue supra, par 3.2.4.

[131] See a hypothesis presented supra, 4.1.1.

[132] Indeed, article 28 of the guidelines considers as aggravating circumstance 'role of leader in, or instigator of, the infringement; the Commission will also pay particular attention to any steps taken to coerce other undertakings to participate in the infringement and/or any retaliatory measures taken against other undertakings with a view to enforcing the practices constituting the infringement'.

get[133] wouldn't be ruled out. Considering the existence of both measures within the leniency programme, however, the US approach seems once again preferable, to the extent that it is the one individuating the smallest scope for the interference with the freedom of contract[134] (arguably in line with the conception of minimal interference which characterizes US antitrust laws, particularly after the rise of the Chicago school).

It is also important, however, to pair these rules with the possibility of qualifying for reduction. In fact, the European Leniency programme expressly states that an undertaking, even though it fails to qualify for immunity because of its central role in the formation of the cartel, could still get a reduction in fine (by providing information which adds significant value to what is already known by the commission).[135] Similarly, the US Sentencing Guidelines provide in section 5K1.1 and 8C4.1 that, '[t]he Court may depart from the guidelines to impose a sentence below the minimum guideline range, upon motion of the government that the defendant has provided substantial assistance in the investigation or prosecution of another defendant'.

In addition, the strength of the deterrent effect is backed by the practice of the US DOJ to take as a starting point for the fines the very bottom of the guideline range, a practice from which the DOJ expressly excludes the ringleaders. It is argued here that this kind of practice, or, more generally, the existence of some mechanism to factor leadership into the process of fining, should be used for inspiration and taken as a guiding principle for the European legislation. The final suggestion, however, is that a balance should be struck at some compromising point between the two models considered. If on the one hand, the American system seems preferable because it automatically confers some privileges to the confessing firms who are not leaders of a cartel, on the other, it may be using too drastic an approach towards the immunity for the ringleaders: at the very least because assessing whether or not the firm was a 'leader or originator' at a stage prior to the conclusion of a full investigation does not seem easy nor fair to the applicant. Accordingly, the best strategy for a leniency programme could be a mixed one, which implements a fining practice like the one currently followed by the DOJ, while, at the same time, enacting a rule to exclude not just 'ringleaders' from immunity, but, more generally, whoever takes affirmative steps to coerce others (as provided by the European Leniency Notice).

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[133] This is related – once again - to the argument that leaders are usually the ones who take care of the functioning of the system and who are aware of the most particular and untold details of the operations.

[134] A minor reliance on such feature – as opposed to the EU Leniency Notice - can be inferred by reading at the Corporate Leniency Notice issued by the DOJ in 1993, that under par. C.7 clarifies its general attitude toward confession detailing that, 'the Division determines that granting leniency would not be unfair to others, considering the nature of the illegal activity, the confessing corporation's role in it, and when the corporation comes forward'. On top of that, the programme specifies on the following remarks that 'in applying condition 7, the primary considerations will be how early the corporation comes forward and whether the corporation coerced another party to participate in the illegal activity or clearly was the leader in, or originator of, the activity'. See Corporate Leniency Notice, available at <http://www.usdoj.gov/atr/public/guidelines/0091.htm.>

[135] 2006 Leniency Notice, par. III, (24).

4.1.5 Amnesty plus

A remarkably important incentive included in the American leniency programme and missing in the European one is that of linking the confession of one antitrust offence to another.

This is basically reached using three tools: the first is the Amnesty Plus Programme, which promises some[136] discount in the sanction for the cartel in the market of product A (whenever a firm responsible for a cartel in that product's market and in the context of that cartel's investigation) qualifies for immunity for the confession of a product B's market cartel. Secondly, the US programme provides for an additional, and, in a sense, symmetrical incentive to get this same effect: what is called the 'Penalty Plus' programme. According to this, if a company under investigation participated in a second antitrust offence and did not report it, and provided the conduct is later discovered and successfully prosecuted, the government 'where appropriate, will urge the sentencing court to consider the company's and any culpable executive's failure to report the conduct voluntarily as an aggravating sentencing factor'.[137] Thirdly, a great role is played by the inducement to confess, provided by the so called Omnibus Question: this question, included in the model application for leniency, addresses whether or not there is an involvement in cartels related to other products or another industry.

According to the DOJ,[138] the Amnesty Plus programme has helped to discover more than half of suspected international cartels. However, doubts about the real effectiveness of this feature arise from two basic considerations: firstly, the uncertainty that this is due to the merit of the Amnesty Plus (being possible that the main reason for confessing was just an easy discoverability of the other cartel). Secondly, this

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[136] The size of the additional discount depends on a number of factors, including: (1) the strength of the evidence provided by the cooperating company in the amnesty product; (2) the potential significance of the uncovered case, measured in such terms as the volume of commerce involved, the geographic scope, and the number of co-conspirator companies and individuals; and (3) the likelihood the Division would have uncovered the cartel absent the self reporting, i.e., if there is little or no overlap in the corporate participants and/or the culpable executives involved in the original cartel under investigation and the Amnesty Plus matter, then the credit for the disclosure will be greater. See Hammond, 'Measuring the value of Second-In Cooperation in Corporate Plea Negotiations', speech delivered at the 54th Annual ABA Section of Antitrust Law, Spring Meeting in Washington DC (March 29,2006) and available at http://www.usdoj.gov/atr/public/speeches/215514.htm..

[137] Which for a company would mean that the failure to report would approximately cause a difference between a potential fine as high as 80 percent or more of the volume of commerce affected by the second offence, as opposed to no fine at all on the Amnesty Plus product. See the declarations of Scott Hammond in the Transcript of the Hearings of the Antitrust Modernization Commission related to Criminal Remedies (available at http://www.amc.gov/commission_hearings/criminal_remedies.htm), where he suggests that the Department of Justice in that case asks directly for the higher range of fine that is possible to inflict (and in one case was able to obtain a fine even outside the band).

[138] See Hammond, 'Cornerstone of an effective Leniency Program', presented before the ICN Workshop on Leniency Programs, Sydney, Australia, November 22-23, 2004 , text available at <http://www.usdoj.gov/atr/public/speeches/206611.htm.>

programme could make it more convenient for a company that is in a cartel to join another one, to the extent that it provides more than 100% reduction.

For these two reasons, the best recommendation seems to limit the implementation of additional inquisitorial tools in Europe to the Omnibus Question. This, in fact, could prove to be a sufficiently effective tool simply because the fear of losing the immunity for lack of cooperation is coupled with a constant fear of severe sanctions and a high probability of being detected (which are the two most fundamental cornerstones for an effective leniency programme).[139] On the other hand, taking for granted the assumption that individuals (and especially firms) are risk-adverse in the domain of losses, the Omnibus Question might not seem such a high incentive, as it would be required to push these individuals or firms toward confession. In any case, it seems that an incentive to confess related cartels should also soon be incorporated within the European system: otherwise, one could easily imagine a scenario where the same companies participate in a number of cartels in different markets in Europe and take turns to apply for leniency, so that the level of expected sanctions would be lower.[140]

4.1.6 Clear threshold for Qualification

The threshold for qualification is certainly a feature to be looked at very carefully, in drafting a leniency programme. An inaccurate threshold risks undermining the deterrent effect provided by the sanctions, making cartel members able to use the programme as a strategic resort used to fool the authorities and by-pass penalties. For example, the applicant could confess only a minor part of the activity, hoping that in such a way the authorities will avoid a further investigation, and thus not uncover another important part of their activity. This is very likely to happen in the case that no thresholds are set: a lack of these thresholds would arguably cause many more submissions than the optimal level, which means excessive workload for the authorities. Therefore, cartel members will be eventually able to jeopardize the effectiveness and the accuracy of their investigations.[141]

One commentator counter-argues that the level of evidence required of the first applicant shall be kept low, so as to maximize the number of leniency applications.[142] This however, would also make it necessary to grant substantial leniency to the second applicant, in order to not only corroborate but also to expand the scope of the investigation. To conclude the debate on this issue, recall that it is not necessarily true

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[139] Ibid.

[140] See Wils, 'Leniency in Antitrust Enforcement: Theory and Practice' (2007) 30 (1) World Competition: Law and Economics Review, at 48.

[141] The timing concern is central in the thought of Joshua, 'The European cartel enforcement regime post-modernization: how is it working?' (2006) 13 Geo Mason LRev 1247-1271, who points at the length of leniency application's processing within the European Community as one of the reason why the firms choose to apply in US.

[142] See Wils, 'Leniency in Antitrust Enforcement: Theory and Practice' (2007) 30 (1) World Competition: Law and Economics Review, at 46.

that requiring a high threshold will lead to fewer applications; on the other hand, not doing this could even have an adverse effect on leniency programmes, stimulating the formation and the maintenance of cartels.[143]

The importance of clarifying the type of information that allows qualifying for leniency can never be stressed enough. But while both programmes seem to comply with that requirement by establishing a threshold, the approach used to trace the borderline is completely different: the US focuses on the extension of cooperation,[144] the EU, rather, on the quantity of evidence itself.

The US programme explicitly applies only when the Department of Justice is not in possession of evidence against the company that is likely to result in a sustainable conviction. Further provisions, moreover, request the reporting of the wrongdoing 'with candor and completeness' and to 'provide[s] full, continuing and complete cooperation that advances the Division in its investigation'.[145] This means: first of all, that the applicant can go before the Court and ask in advance whether or not the precondition is met; and secondly, that he or she will be able to give an example of full cooperation and find out whether the threshold is passed.

The EU Leniency Notice of 2002, by contrast, stated that it will grant an undertaking immunity from any fine which would otherwise have been imposed if:

> (a) the undertaking is the first to submit evidence which in the Commission's view may enable it to adopt a decision to carry out an investigation in the sense of Article 14(3) of Regulation No 17(2) in connection with an alleged cartel affecting the Community; or
>
> (b) the undertaking is the first to submit evidence which in the Commission's view may enable it to find an infringement of Article 81 EC(3) in connection with an alleged cartel affecting the Community.[146]

Both the texts under letters (a) and (b) are criticisable, however, for being highly subjective. Practitioners complain about the lack of standard-setting, which could be easily obviated by the same Commission publishing a further notice or issuing a set of guidelines addressing its view. It is remarkable, in fact, that even the most recent Leniency Notice (2006) does not contain any example of what would (or would not) qualify as suitable evidence. The only clear benchmark left by the Notice on the weight of evidence, is the degree of corroboration required from other sources to make the

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[143] Ibid, at 48.

[144] Mainly considering relevant one's cooperation only to the extent that it is offered when the Division does not have information sufficiently detailed as to sustain a conviction. However, it is true that also other factors are considered besides mere evidence: namely self-reporting, cooperation, and acceptance of responsibility. See § 8C2.5(g)(2) of the Guidelines.

[145] Corporate Leniency Program, at A.3.

[146] 2002 Leniency Notice, article 8.

information reliable 'will have an impact on the value of that evidence'.[147] This implies that the amount of unconfirmed evidence has to be much higher than the amount of compelled evidence in order to qualify for leniency, so that it will be very difficult for a firm to invent alleged evidence around some poor amount of information. This provision is certainly useful to deter undertakings from making up stories just to get a bigger amount of evidence to bring about; it does not really help, however, in clarifying where the line has to be drawn.

Yet another critique is concerned with the exclusive reliance on documentary evidence, a standard that was naturally embraced in a system where it is not possible to call witnesses or to take or compel statements under oath.[148] A recent reform of this standard has been accomplished only very recently,[149] in order to (partially) overcome the problem of documental discovery mandated in American private lawsuits.

The biggest difference among the programmes on this feature is that in the EU one cannot rely on the possibility to give some information as a 'proffer', so that, at the same time, the other applicants are maintained in a queue. Instead, a fairly extensive production without any guarantee of immunity is required. As a result, the US procedure appears to be much fairer to the applicant, with no submission of evidence or testimony being required before the immunity is granted. So this seems valuable, at least because people tend to respect the law more if they feel that they can rely on procedural justice.[150] Once again, a gap of transparency seems to be affecting European applications: a flaw which tends to discourage applicants, and which has been only partially adjusted through an automatic condemnation of the information for the purpose of fine reduction.

4.1.7 Possibility to qualify for reduction

The possibility to aim for reduction is another crucial incentive, since it will generate more confessions by promising that the amount of the fine will be adjusted accordingly. This possibility, however, is far from being unqualified in the European Union: Article 9(b) allows it only for those confessions to bring in evidence 'representing a significant added value'. Surprisingly enough, Commission officials have stressed that this reward tends to be the natural consequence of a non-acceptance for leniency.[151] This seems to contrast with the very literal expression of the statute: Article 9(b) requires the provision of 'added-value' evidence, whereas a successful application for immunity in principle needs only the 8(a) 'roadmap' - something less specific. Nonetheless, such an

[147] '[…]so that compelling evidence will be attributed a greater value than evidence such as statements which require corroboration if contested': see 2006 Leniency Notice, at 26.

[148] See Riley, 'Cartel Whistleblowing: Toward an American Model?' (2002) 67 Maastricht Journal of European and Comparative Law, at 23.

[149] See infra, at 4.2.

[150] See Tyler, op cit, n 41.

[151] According to the Commission officials, companies whose applications have been rejected for lack of sufficient evidence have chosen to apply for a reduction in fine: see par. 17 of the Notice.

outcome can be achieved thanks to what could be deemed one of the Commission's 'best practices', precisely committed to convert leniency application into files treated under the reduction procedure. The obvious advantages of such a commitment are allowing applicants not to be too much concerned about a possible letter of rejection, and getting the advantage of a reduction in exchange for the efforts put in (providing the information submitted for the immunity). Ultimately, this procedure can increase the inclination to submit relevant information, and permits simplifying the rational (and consequently, foreseeable) calculations leading the initiatives of potential out-going cartel members.

The case Raw Tobacco Italy[152] has also demonstrated that, in exceptional circumstances, a reduction can also be awarded to a successful applicant for leniency for another cartel. The effect resembles the one obtained by the 'Amnesty Plus' feature. However, the policy itself is not properly part of the leniency programme; rather, it derives from the recently revised Fines Guidelines: particularly when the company has contributed substantially to the Commission's investigation, the Commission 'can take the cooperation into account by granting a reduction of fines for (1) cooperation outside leniency, (2) duration of the cartel and (3) nature of the cartel conduct'.[153] By contrast, the Guidelines list the refusal to cooperate and the obstruction of the Commission in carrying out its investigations among the circumstances that may warrant an increase.[154] On top of this, the Commission also has the power to impose separate procedural fines under Article 23 (1) of Regulation 1/2003 for certain refusals to cooperate.[155]

The framing in the US is completely different: no specific provision within the leniency programme promises a reduction for 'added value' information, nor are similar criteria spelled out anywhere in the programme. Such considerations come into play only through the criteria set forth in the sentencing guidelines[156] to establish the amounting of the fine. These guidelines (intended to guide such determination) do so by linking it to the level of culpability,[157] and consider[158] 'self-reporting, cooperation,[159] and acceptance of responsibility' among the mitigating factors.[160]

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[152] COMP/C.38.281/B.2.

[153] 2006 Fining Guidelines.

[154] Ibid, at 28.

[155] See Wils, 'Leniency in Antitrust Enforcement: Theory and Practice' (2007) 30 (1) World Competition: Law and Economics Review, at 29.

[156] See sections 5K1.1 and 8C4.1, and 8C2.5 (g) of US Sentencing Guidelines (USSG).

[157] Which will establish a culpability score resulting from the sum of a based score (that for price-fixing is equal to 5) and a multiplier ranging from 0.75 to 4.0 according to aggravating and mitigating factors. Among the formers, the USSC enumerates 'involvement in or tolerance of' the crime by the employees of the corporate defendant (ranging from +1 for the smallest responsible units of 10 to 19 employees, to 5 for units with 5000 or more) and recidivism (ranging from +2 for conviction on similar misconduct within the past five years, to +1 if six to ten years previously).

In addition, the guidelines provide a way to factor in cooperation, regardless of the type of calculation the government decides to use, i.e. either the '20% of the gain' statute[161] or the 'double the harm' statute.[162] This is essentially because cooperation is considered by two subsections of federal statutes, as well as a policy statement of the Guidelines. Title 18 U.S.C. (United States Code) § 3553 (e) provides:

> Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

Title 28 U.S.C. § 1994 (n), in turn, states:

> The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.

Finally, the text of §5K1.1 of the Guidelines provides:

> Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines […] The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following: […] the government's evaluation of the assistance rendered.

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158 With the reducing value of 1 to 5 points, 2 points being the standard level for guilty plea: see Connor, op cit, n 45, at 8.

159 More specifically, the forms of cooperation range from: 1) producing all the information that DOJ requests; 2) permit all relevant information to be shared with foreign authorities; 3) secure the coopeation of all employees for interviews or testimony; 4) immediate cessation of collusion. See Sprattling, 'Making companies an offer they shouldn't refuse, The Antitrust Division's Corporate Leniency Policy- An Update', speech delivered at Washington DC, before Bar Association of the District of Columbia's 35th Annual Symposium on Associations and Antitrust (February 16, 1999), available at http://www.usdoj.gov/atr/public/speeches/2247.htm, at 4-9.

160 Together with the existence of an effective internal compliance or ethics program (which entitles to a score reduction of 3 points): see USSC 2005 § 8 C2.5 (b) to§ 8 C2.5 (e).

161 USSC § 8C2.5, which uses the base of 20% of the actual gain and multiplies it by the company's affected commerce and by a score of culpability.

162 18 USC § 351, which uses the base of double of the economic harm inflicted on direct purchaser by the defendant. This statute is more difficult to rely on, since the government will have to prove economic damages beyond a reasonable doubt. Most of the time, however, DOJ enters into a plea agreement and thereby uses this statute as a reference including clauses such as 'the defendant agrees not to contest this negotiated overcharge figure'.

This evidently leaves the DOJ with a broad discretion, which is a good clue to infer that (even though the guidelines were originally issued just to reduce discretion) neither in Europe nor in the US does the decision to aim at reduction seem like an attractive alternative to immunity.

In any case, this feature allows the reader to ascertain once more how different the focus of antitrust policy between the United States and Europe is: the fact that the Commission did not provide (neither in the Leniency nor in the Fines Guidelines) any reward for mere cooperation, but instead decided to give reductions only in exchange for active cooperation which passes a certain threshold, is mere evidence of the European focus on detection. The USSC,[163] in contrast, well aware of the power and the severity of American fines while also conscious of the length and the costs of litigation in the US, rewards the mere recognition of the infringement as well as the acceptance and the cooperation, in order to encourage plea bargaining[164] and thus reducing costs in the fight against cartels. This is precisely a point which the European Commission is considering to amend, thinking not only about a bonus for a 'passive cooperation' but also of the completely extraneous concept of plea bargaining.[165] Following this line, the Commission has recently launched a public consultation on its proposal of settling cartel cases, aiming at considering all the concerns of stakeholders.[166] Turning this proposal into law would be a wonderful solution for decreasing the high rate of litigation, and especially for speeding up the operations (which represent a major problem, due to the increasingly high number of leniency applications received each year).

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[163] Read 'the US Sentencing Commission'.

[164] In the Model Annotated Corporate Plea Agreement, some alternative provisions are suggested to be inserted in the agreement: 1) 'the United States agrees that it will make a motion, pursuant to USSG 8C41,for a downward departure from the Guidelines fine range … because of the defendant's substantial assistance in the government's investigation and prosecutions of violation of federal criminal law'. This, however, applies only to the fines that are calculated according to the USSC § 8C2.5, i.e. from 20% of the actual gain multiplied by the company's affected commerce and by a score of culpability; 2) 'the United States contends that had this case gone to trial, the United States would have presented evidence to prove that the gain derived of the loss resulting from the charged offence is sufficient to justify the recommended sentence'. It does not apply, by contrast, to the fines calculated from the alternative statute (i.e. 18 USC § 351), that hinges upon the double of the economic harm inflicted on direct purchaser by the defendant. 3) 'The United States agree that the recommended fine is appropriate … due to the inability of the defendant to pay a fine greater than that recommended without impairing its ability to make restitution to the victims' or 'without substantially jeopardizing its continued viability'. It is interesting noting that these last two concepts are almost identical to those used by the Guidelines on fines as a factor that might determine a reduction, thereby giving a similar result. In such context, however, the rule is much more specific: it is up to the defendant to demonstrate 'with objective evidence' that the fine would irretrievably jeopardise the economic viability 'and cause its assets to lose all their value': see Guidelines, point 35.

[165] See the speech of Commissioner N Kroes presented at the 11th EUI Competition Law and Policy Workshop, in Florence 2-3 June 2006, available at <http:www.iue.it/RSCAS/Research/Competition /Index.shtml.>

[166] Which can be found as of January 2008 in the DG Competition Website: see <http://ec.europa.eu/comm/competition/cartels/legislation/cartels_settlements/index.html.>

Coming to the specific criteria determining the amount of reduction, the European leniency programme explicitly sets the benchmarks of 50% for the second, 20 to 30% for the third and up to 20% for the fourth. Beyond that, there is some discretional leniency that could be awarded based on the first of the 3 factors mentioned above, i.e for 'cooperation outside leniency'. By its very own wording, this concept implies that no obligation is put on the Commission concerning potential discounts: no rules or policy statements explicitly provide for guidance in this kind of cooperation, and thus no expectation should rest on the cooperating firm. In conclusion, if, on the one hand, the third and fourth-in companies can rely on a rough range of reduction, the certainty of reduction still proves highly controversial: firstly, it is directly dependent on whether evidence of added value will be provided. Secondly, even in the case the Commission deems the amount and the quality of evidence provided to be of a high level, there is no clear possibility of considerably increasing the reward explicitly allotted by the Leniency Notice: 'cooperation outside leniency' seems to be referred more to protect companies that have been disqualified for immunity, or companies who wish to uncover a parallel cartel.[167]

On the other hand, the policy adopted by the Department of Justice is more malleable: while its legal basis are the sentencing guidelines, complemented by some policy comments,[168] in practice, the decisions on the amount of reduction rely fairly heavily on the discretion of the executive agency. Estimates based on previous cases[169] say that the DOJ gives between 30 and 35% (though once it reached 59%)[170] to the second-in cooperator. And as a general benchmark, it normally takes (only when fining the second cooperator)[171] the bottom of the guideline fine range as a starting point for the fine, unless the company was the leader of the cartel.[172]

Overall, the approach in the US seems much stricter, as it seems more unlikely that a substantial discount would be given to the latecomers (especially for those coming after the second co-operator).[173] It appears, once more, that the European system leans

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[167] See 'Competition: revised Leniency Notice- frequently asked questions', available at <http://ec.europa.eu/comm/competition/cartels/legislation/leniency_legislation.html.>

[168] See Hammond, S.D., 'Measuring the Value of Second-In Cooperation in Corporate Plea Agreements', public speech delivered in Washinghton D.C., March 29 2006, text available at <http://www.usdoj.gov/atr/public/speeches/215514.htm>, recognizing those factors in (1) the timing of the cooperation; (2) the value and significance of the information provided; and (3) whether the company brings forward evidence of other collusive activity and receives an additional Amnesty Plus discount.

[169] Ibid.

[170] In *US v Crompton Corporation*, docket nr. No. CR 04-0079 MJJ, concluded with Plea agreement that can be found at DOJ's website: see <http://www.usdoj.gov/atr/cases/f214400/214448.htm.>

[171] See Hammond, op cit, n 168, section II C.

[172] See supra, at 4.1.4.

[173] Nonetheless, this is not to be entirely excluded: the same DOJ, for instance, has provided statements concerning fines that a third or fourth-in firm will likely pay: 'Subsequent cooperators may still qualify for a cooperation discount below the Guidelines minimum if they provide substantial assistance. However, their cooperation discount will be lower, often substantially lower, than the second-in company, unless the

much more towards clemency, thereby being more appealing for the second, the third and the forth confessor.

Although in the US these late comers are undeniably left with a lack of clear benchmarks, it can be argued that the uncertainty is more acceptable in this context: the lack of transparency mirrors their own attitude, and seems a fair consequence of their hesitation at the moment of deciding whether to turn to the authorities for cooperation. This policy choice seems better shaped, in comparison with the European one: it proves harsher toward those firms or individuals which have actually misbehaved twice (once for participating in the cartel and once for the delay in confessing it to the authorities), preferring this effect (i.e. risk of over-deterrence, called by economists 'type 1 errors') rather than being more lenient (i.e. risk of under-optimal deterrence, called 'type 2 errors') toward someone who suddenly repented for previous mistakes and is only willing to cooperate relatively soon.[174]

One may wonder, at this point, to what extent this additional clemency could be useful for the European Commission, given that after the confession of one member, the basic information of the cartel activity is normally acquired or being acquired, and that the Commission will have to, in any case, pursue a complete investigation also into the case initiated after the leniency application. A reasonable counterargument could be that an additional value stems from the possibility of corroboration and the opportunity of hearing another version of the facts. This value, however, is not sufficiently big as to warrant transparent treatment for those who were not transparent in their approach to the authority: at most, this could merely suggest the possibility of increasing the corresponding reduction in fine.

4.2 The protection of confidentiality

Sharing evidence has been recognized as a fundamental tool in order to defeat international cartels, and an area where the antitrust authorities will have to focus their efforts to make a more fluid and efficient cooperation in the future.[175]

In this regard, attention should be given to the European Leniency: it is hard to conciliate this goal with the circumstance that, in Europe, there is no obligation to share evidence. Actually, there is even less of an obligation in Europe than within any

company's cooperation includes the disclosure of undetected violations that warrant extraordinary Amnesty Plus credit'. This is particularly appropriate given that most of the companies that qualify for Amnesty plus are second-in companies that are quick to clean house to determine whether they have antitrust exposure in other markets where they might qualify for Amnesty Plus credit. See Hammond, op cit, n 168, section II E.

[174] This policy option is typical of the American spirit, vastly focused on deterrence and no tolerance towards more serious crimes.

[175] See Guzman, 'The Case for International Antitrust, Competition Law' in *Conflict: Antitrust Jurisdiction in the Global Economy*, Michael Greve & Richard Epstein, eds., reprinted in (2004) 22 Berkeley J. Int'l. L. 355; Gerber, 'Europe and the Globalization of Antitrust Law', (1999) 14 Connecticut Journal of International Law at 135-136.

mutual assistance treaty signed by the European Union: under the condition governing this latter situation, at least the sharing is mandatory if requested.[176]

This is doubtlessly a further complication for the issue of coordinating the investigations; however, it is partially understandable that it is so, given the importance of confidentiality in the process of disclosure made in the context of a leniency programme. The danger emanating from a leniency application is related to a financial threat: the access to the relevant information could be the trigger for consumers to bring about lawsuits from different jurisdictions. The possibility of being sued by US private citizens without even having the chance to invocate the de-trebling-damages rule[177] (this rule being exclusively applicable to the lawsuits originating from the information turned in by US leniency applicants) seems especially dangerous in this regard.

To address this concern, the Commission has recently admitted the oral submission of corporate statements.[178] And even though the statements will be somehow archived by storing the recordings, access to this type of file will be strictly limited to the addressee of the statement of objections, and only upon fulfilment of certain conditions.[179] Some commentators have suggested that this has fixed one of the main drawbacks of the legislation: this procedure should be sufficient for a defendant in order not to reveal the information used in a European leniency application in the context of document disclosure ordered during the civil lawsuits.[180]

To avoid the frustration of this protection, the Commission has also clarified that it will allow access to the records only for purposes related to administrative and judicial

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[176] This regarding the pooling and sharing of information is a very delicate issue . The principles governing these matters are that: 1) the information exchanged can be used only to apply Article 81 or 82 (and also to enforce national competition law in the same proceeding, but only if such use 'does not lead to a different outcome') and in respect of the subject matter for which the authority collected it (see Treaty establishing the European Community, Dec. 24, 2002, 2002 O.J- (C 325) 64-65); 2) the exchange is possible only where they lead to the application of penalties 'of a similar kind'; this means that, given that in some countries there is a criminal prosecution instead of an administrative one, the use of the evidence that leads to the application of a custodial sanction is allowed only where both the jurisdiction may impose jail sentences for the breach of EC competition rules; 3) with regard to the non EU Countries, the information collected under articles 17 to 22 cannot be disclosed independently by the similarity of penalties (and this is because the non EU nations are not part of the European Competition Network).

[177] See supra, n 33 and 34.

[178] 2006 Leniency Notice, article 32.

[179] 'Access to corporate statements is only granted to the addressees of a statement of objections, provided that they commit, - together with the legal counsels getting access on their behalf -, not to make any copy by mechanical or electronic means of any information in the corporate statement to which access is being granted and to ensure that the information to be obtained from the corporate statement will solely be used for the purposes mentioned below. Other parties such as complainants will not be granted access to corporate statements': see Leniency Notice, article 33.

[180] The documents will indeed be considered documents of the Commission, and not of the corporation: see Baer, Frazer, and Gyselen, 'International Leniency Regimes: New Developments and Strategic Implications' (2005) 1 Corporate Counsel's International Adviser, 24602, at 24606

proceedings related to the enforcement of Art 81 of the EC Treaty.[181] To be sure, if any company granted access exceeds the permitted scope for accessing the statements, the Commission will sanction such behaviour by filing a complaint to the national bar of the lawyer who has exercised the access or increasing the fine on the infringing company.[182] In any case, the need of such measure is minimized by another action taken by the Commission, who recently declared in the last paragraph of the 2006 Leniency Notice that it is ready to intervene as *amicus curiae* in any private antitrust proceedings to stress the relevance of corporate statements and the need to ensure their secrecy.[183]

Nonetheless, this artifice contrived by the EC to solve the problem is not a flawless one: in this way, in fact, the effect will not be the complete withdrawal of the information from the evidence; rather, this will only cause the postposition of individuals' access up until the Commission attaches the transcript of the oral application to the Statement of Objections. Although the key incriminating evidence will probably not be included in the public decisions, the aforementioned transcript will be given to every company who had been party of the cartel, which may well decide to use that information as a retaliation for the leniency application by filing a lawsuit to recover from damages (as the so called 'unclean hands' common law defence will not be available, according to both American[184] and European law)[185] or trading that information to private individuals, class representatives or consumer organizations.

On this important issue, it may be suggested that the goal of making effective the protection mechanism sought by this paperless procedure would urge the Commission to use the material only as a roadmap and specifically not as evidence[186] (a criteria similar to the one used by the Attorneys General with the information contained in the DOJ files).[187] In this way, the document would not become official at any stage, and

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[181] 2006 Leniency Notice, article 34.

[182] See Joshua, 'The European cartel enforcement regime post-modernization: how is it working?' (2006) 13 Geo Mason LRev 1247-1271, at 1261-1266.

[183] Ibid.

[184] The Supreme Court has held in *Kiefer-Stewart Co. v. Joseph E Seagram & Sons* 340 US 211 (1951) that such doctrine does not apply to private actions for treble damages, and later established in *Perma Life Mufflers Inc. v International Parts Corp.*, that where a party to an anticompetitive agreement is in an economically weaker position, he may sue the other contracting party for damages: see *Perma Life Mufflers Inc. v International Parts Corp.* 392 U.S. 134 (1968)

[185] See Case C-453/99 *Courage Ltd. v. Bernard Crehan* [2001] ECR I-6297, where the Court held explicitly that a party to a contract which restricts or distorts competition, in violation of European competition law, may nonetheless have the right to recover damages from another party of that contract. However, the Court also specified that in the decision that, 'Community law does not preclude a rule of national law barring a party to a contract liable to restrict or distort competition from relying on his own unlawful actions to obtain damages where it is established that that party bears significant responsibility for the distortion of competition'.

[186] Ibid.

[187] See Zane, op cit, n 58, and Schmidt, 'Keeping U.S. Courts Open to Foreign Antitrust Plaintiffs: A Hybrid Approach to the Effective Deterrence of International Cartels' (2006) 31 The Yale Journal of International Law 211, at 237, outlining that the DOJ protects confessing firms from having their information used against

therefore no one would be able to claim the right of access according to Access directive.

Although Ms Kroes had promised to revise the programme concerning this issue,[188] the criterium mentioned above was not really considered. Nor did the Commission adopt a truly oral procedure for corporate statements (i.e., not to make any transcripts of the declarations of cartel members that may be used as evidence in the proceedings): the 2006 Leniency notice has been in this respect nothing more than a formalization of what was already a common practice in the Commission's investigations. The greatest precaution has been that of establishing that the access to those statements is only granted to the addressees of Statement of Objections (SO), provided they commit not to make any copies and to ensure that they use the information gleaned from the corporate statements only for the purposes of 'judicial or administrative proceedings for the application of Community competition rules at issue in the related administrative proceedings'[189] Note that this does not foreclose the possibility of using that evidence to collect damages, where the addressee was the weak party in the contract or else it can prove it was forced to join the cartel. To prevent this risk for leniency applicants, a suggestion may be to establish a categorical ban on access to corporate statements, applicable exclusively to the information acquired by a successful leniency applicant and extended to the addressee of SO as well.

The proposal issued in early 2006 (Feb 22)[190] by the Commission already showed an inclination towards the formalization of the use of the oral procedure 'not only as a practical means of obtaining a non-discoverable roadmap, but also a means of taking and receiving testimony from immunity applicant and from fine reduction candidates'.[191]

The final draft however, also detailed that information collected by compulsion 'may only be used for the purpose for which it was acquired if it has been collected, in a way which respects the same level of protection of the rights of defence of natural persons

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them in private litigation, and adopted the policy that it does not share the information from amnesty participants with foreign governments (even those cooperating in the investigation). See also Cengiz, op cit, n 31 at 22, pointing out that the Attorney General of United States is by law responsible for communicating with the State Attorney Generals when he is investigating a violation and has reason to believe that the State AGs might be interested in bringing *parens patriae* action against the same conduct. In addition, DOJ is also required upon request to share any investigative files and other materials with them to the extent permitted by the law (and the only exception crafted so far has been for grand jury proceedings, where a 'particularized need' must be shown under the Federal Rules of Criminal Procedure). However, the AGs cannot use as evidence any information that is not public, precisely because of the need to prove before a civil court any conduct which is alleged to be in violation of antitrust law.

[188] See Kroes, 'First hundred-days speech'.

[189] See 2006 Leniency Notice, points 33-34

[190] See Draft Amendment of the 2002 Commission Notice on Immunity from Fines and Reduction of Fines in Cases, available at http://ec.europa.eu/competition/cartels/legislation/2002_amended_en.pdf

[191] Ibid.

as in the receiving authority'.[192] As a natural consequence, exchanged information can only be used by the receiving authority to impose custodial sanctions if the law of the transmitting authority foresees such sanctions for antitrust infringements.[193]

So, it seems clear that besides the impossibility for the EU to conclude treaties by itself, another huge obstacle to the concretization of a hard-core cooperation on evidence (like the US is ready to do)[194] resides on its lack of criminal jurisdiction, which makes extradition impossible (since dual criminality is necessary in order to obtain it). For this purpose, the best solution would be to establish an EU-level criminal competence: a hypothesis whose complications have been discussed above,[195] and for which the road ahead seems extremely long and controversial.[196]

5. BASIS FOR CONVERGENCE

5.1 Recent changes in the EU leniency notice

The conditions of the Leniency Programme have been partially changed under the revised leniency guidelines of December 2006.

First of all, it has specified the type of information that will be considered as relevant. According to the new guidelines, applicants must submit both ('as long as this in view of the Commission would not jeopardize the integrity of the inspections') (1) a corporate statement, providing in it sufficiently detailed and substantial information to qualify for immunity according to the same guidelines[197] and (2) other evidence relating to the alleged cartel, in possession of the applicant or available to him at the time of the

[192] See Regulation 1/2003, article 28.

[193] See Wils, 'Is Criminalization of EU Competition Law the Answer?' (2005) 28 (2) World Competition: Law and Economics Review 117.

[194] See International Antitrust Enforcement Assistance Act of 1994, that allows the US Antitrust agencies to conclude agreement overseas providing the sharing of information that is collected pursuant an Antitrust investigation, and the mutual securing of the other party's assistance to gather evidence in its territory. So far, however, only Australia has signed such an agreement with US.

[195] See supra, n 29.

[196] Ibid.

[197] The corporate statement shall include:
[…] in so far as it is known to the applicant at the time of the submission:
- A detailed description of the alleged cartel arrangement, including for instance its aims, activities and functioning; the product or service concerned, the geographic scope, the duration of and the estimated market volumes affected by the alleged cartel; the specific dates, locations, content of and participants in alleged cartel contacts, and all relevant explanations in connection with the pieces of evidence provided in support of the application.
- The name and address of the legal entity submitting the immunity application as well as the names and addresses of all the other undertakings that participate(d) in the alleged cartel;
- The names, positions, office locations and, where necessary, home addresses of all individuals who, to the applicant's knowledge, are or have been involved in the alleged cartel, including those individuals which have been involved on the applicant's behalf;
- Information on which other competition authorities, inside or outside the EU, have been approached or are intended to be approached in relation to the alleged cartel.

submission, including, in particular, any evidence contemporaneous to the infringement.

The accuracy of the details listed in the leniency notice is, of course, a great help for companies, which will be able to know in advance what they will have to work on if they would like to apply for leniency. In addition, the Guidelines clarify that 'genuine cooperation' requires, in particular, that the applicant provide accurate and complete information which is not misleading, and that the obligation not to destroy, falsify or conceal information covers the period when the applicant was contemplating making an application as well.

Further transparency is added by the explicit statement contained in the new Article 9, according to which 'the company has to disclose its participation in the cartel'. This may seem like redundant information; it is, however, another key element making things clearer to companies which might contemplate the idea of applying for leniency.[198] Nonetheless, this would set a too-high risk if not complemented by the current practice of the Commission of discussing the collection and submission of information and evidence with an applicant.[199]

Moreover, the guidelines take a clear position on what had been a key controversial issue: the standard for evidence. Only the evidence that enables the Commission to find an infringement of Article 81 or 82 or to carry out a 'targeted' inspection in connection with the alleged cartel, will be considered 'decisive', and this is a positive determination that should be made ex ante with respect to the inspection (i.e., without actually having to carry out any inspection). However, the fact that the Commission reserves the right to decide the relevance of the information (as well as the possible effect on the integrity of the inspection)[200] ex post (i.e., after the submission) leaves us with the idea that the 'uncertain feeling'[201] has not completely disappeared.

Another relevant nuance is that the information acquired by the Commission in the context of a leniency application will be protected only 'as long as the applicant does not communicate it to third parties'. This seems like a reasonable complement to the rule that requires an investigation to be started by the European Commission regarding

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[198] See 'Competition: Commission proposes changes to the Leniency Notice – frequently asked questions', available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/357&format=HTML&aged=0&language=EN&guiLanguage=en>

[199] See EU Competition Website, Commission's revised Notice- f.a.q., available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/469&format=HTML&aged=0&language=EN&guiLanguage=en.>

[200] In fact, the Commission is entitled to avoid the submission of information that would jeopardize the inspections.

[201] See Joshua, 'That: Uncertain Feeling: The Commission's 2002 Leniency Notice', Proceedings of 2006 EU Competition Law and Policy Workshop European University Institute, Robert Schuman Centre for Advanced Studies, available from EUI Repository 2006 at <http://www.iue.it/RSCAS/research/Competition/>.

the confessed cartel: disclosure could potentially jeopardize the investigation itself, by making the other cartelists able to foresee the inspection and act consequentially.

To achieve a similar objective, a limitation has been put in place by Article 12b, which requires the undertaking to end its involvement in the alleged cartel immediately following its application 'except for what would, in the Commission's view, be reasonably necessary to preserve the integrity of the inspections'. This circumstantiation is designed to avoid a potential adverse effect of a leniency application on the other members' conduct: in the case of immediate withdrawal from a cartel that has some built-in kind of mechanism to detect cheating (say, for instance, a periodic meeting of the members), the other cartelists will easily foresee a forthcoming inspection and therefore dispose of some evidence fearing dawn-raids. The desirability of a provision addressing this concern is undeniable; even here, however, it is remarkable how the phrasing carries in itself a substantial amount of uncertainty, which eventually makes the proposed solution not so effective. The uncertainty lies not only in the difficulty of inferring when the 'reasonable necessity' could be found (an objective which could be at least partially reached with a more detailed specification, or with the release of some public comments on that), but also in the reason that the undertaking has to initially withdraw from the activity, whereas the possible permission could be given only at a subsequent stage. This issue is particularly critical, given that a considerable amount of time might pass before the permission is granted— and a lag in fulfilling a cartel's obligations, even if followed by full compliance, may well be enough to trigger the suspicion of the other members.[202]

Finally, the Leniency Notice establishes, similarly to the US, a system of markers: this allows the applicant to be sure that in the case that he qualifies, he will be the first (despite the fact that at the time of submitting the application he could not provide concrete evidence, due to timing and logistical problems). This flexibility is certainly appreciable: it will make it possible for firms to rush to the authorities with their good resolution (i.e., the intention to unravel the cartel), without necessarily having to support it with detailed factual information at that time. However, a drawback can once again be perceived from the uncertainty left by this rule: arguably, the boundaries of this flexibility are too vague because it is not defined for how long the marker can be guaranteed, nor when the requirement of revealing enough information can be considered fulfilled. Often this has led to the rejection of requests for markers.[203] Interestingly, the marker does not apply to the reduction in fines (another situation where it would theoretically be a useful artifice, for the purpose of pushing the companies to show that they are willing to confess or cooperate with the authorities).

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[202] Knowing the rules of the Leniency program and the average time needed by authorities to grant permission for staying in the cartel, the other members will likely imagine the lag to be the result of a Leniency application.

[203] According to Commissioner Kroes at San Francisco ABA Conference in 2008, only 10 out of 17 markers have been granted.

This hypothesis however, has probably been considered to be too chaotic. The Commission does typically[204] receive several applications for reduction at the same time, precisely after a cartel has been detected. Accordingly, it would be complicated and would not make much sense to treat two applicants differently, merely because one would have managed to communicate its intention slightly earlier.

The new Leniency notice, nonetheless, has made some other appreciable clarifications regarding the procedure to get reduction in fines. Firstly, it has emphasised the importance of the purpose of the qualification threshold[205] of the evidence originated at the time of the cartel, as well as the degree of corroboration from other sources. Secondly, it has clarified that the obligation of continuous cooperation also concerns applications for the reduction of fines.[206] Thirdly and finally, it has just highlighted that the reduction will be related to the amount of contribution given in terms of quality and timing of the Commission's investigation.[207]

In closing, it can be acknowledged that the Leniency Notice represents a valuable attempt to create transparency. This objective has been accomplished in some areas, such as the procedure to get reductions in fines. In other areas, unfortunately, this has not led to the desired results: often the objective has been pursued in a mechanical way, without considering the underlying implications of the particular rules for the overall programme.

5.2 Closing remarks

Approaching the end of the analysis, let us turn now to the evaluation on the impact of the evolution of the Leniency programmes. Focusing on the amendments and the improvements in the two legal systems considered this section will try to give an answer to the research question presented above: are the American and the European models moving toward convergence and uniformity?

At first sight, it looks like the European Commission has taken the wise decision of changing certain particular features of the European system, thereby aiming at limiting

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[204] See Competition: revised Leniency Notice – frequently asked questions, supra n 166.

[205] See 2006 Leniency Notice, article 25:

> In this assessment, the Commission will generally consider written evidence originating from the period of time to which the facts pertain to have a greater value than evidence subsequently established. Incriminating evidence directly relevant to the facts in question will generally be considered to have a greater value than that with only indirect relevance. Similarly, the degree of corroboration from other sources required for the evidence submitted to be relied upon against other undertakings involved in the case will have an impact on the value of that evidence, so that compelling evidence will be attributed a greater value than evidence such as statements which require corroboration if contested. Such evidence will also be rewarded outside the normal bands for reduction of fines, when it is used to establish any additional facts increasing the gravity or duration of the infringement.

[206] More specifically, the Commission requires that 'the undertaking cooperates genuinely [5], fully, on a continuous basis and expeditiously from the time it submits its application throughout the Commission's administrative procedure': see Leniency Notice, article 12(a).

[207] 2006 Leniency Notice, article 26.

or eliminating the derived uncertainty. It has been seen throughout the paper, however, that this impression is rebutted by the 'uncertain feeling' perceived by the supposed beneficiaries of these changes: while transparency might have been the key objective driving the reforms, implementation is still far from adequate to achieve that objective.

The approach taken in issuing the new Leniency Notice (driven by experience the Commission had with the leniency applications and of the complications it came across in this context) seems to be a proper one. On the other hand, the way that this reform has been translated into legal rules has left substantial issues to be considered for further reform.

First of all, the key issue that the credibility of a leniency programme also depends on its functioning within a reasonable time-frame cannot be neglected. It's a feature which makes the European model immediately less preferable, given that while applicants have already had a closure in the US, they are often still awaiting the decision from the European Commission.

Another big difference which might be worth reflecting on lies in the fact that the US programme, in evaluating the condition to obtain immunity, explicitly mentions 'where is possible,[208] the restitution to injured parties'. The obligation of restitution does not apply if the DOJ finally concludes that the applicant has not engaged in any criminal antitrust conduct, but it does remain if the Division grants immunity and later starts an investigation, even if the investigation ends up being closed without any charge to any company.[209]

This is a quite demanding feature, which has the effect of reallocating the consumer welfare unduly retained by the firm. It could ultimately be seen as a way to reduce the problem of ambulance-chasing lawyers, and more generally to mitigate the eagerness of private parties to file lawsuits at any cost (often resulting in quite a poor amount recovered). In fact, especially since the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 has provided the de-trebling damages rule for the first confessor,[210] this would practically eliminate the utility for individuals to attempt lawsuits for damages.

Should this feature be added to the European system, it would have the effect of suddenly making it all much more similar to the American one in at least two respects. First of all, it would allow for a much more efficient and widespread recovery of damages: the mere existence of such an obligation would in fact prompt firms to act quick and effectively in restoring direct and perhaps even indirect purchasers (the scope

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[208] The Division has clarified that excuses will be accepted when: 1) the applicant is in bankruptcy and is prohibited by Court to take additional obligations; 2) there was only one victim and is defunct; 3) that would jeopardize the organization's continued viability. See Sprattling, 'The Corporate Leniency Policy- Answer to recurring questions', presented at the ABA Antitrust Section at the 1998 Spring Meeting in Washington, D.C. on April 1st, 1998 , text available at <http://www.usdoj.gov/atr/public/speeches/1626.htm>

[209] Ibid.

[210] See supra, n 33.

of the obligation would be dependent on the type of rule applicable in the EU context). This would be a pivotal change, and would make at least partially fulfilled an objective which has been in the Commission's agenda for a long time.[211]

Secondly, notwithstanding the declared objective to achieve the compensation of damages suffered by the injured parties, its introduction would clearly tip the balance in favour of deterrence. This would be starkly in contrast with the more pro-detection philosophy which underlies the rest of the programme, and seems to be the most obvious reason why such a feature was not included in the recent modification of the Leniency Notice. For this reason, it seems unlikely that the Commission will introduce this feature in the next revision of the Leniency Notice: the huge difference in the system of incentives set by the European and the American anti-cartel laws makes it extremely unlikely that such a change will ever be enacted in the near future. Much time and many legislative changes will be required before a harmonization on this point could come about, notwithstanding the recent trends and developments of privatization in EC Competition Law enforcement.

Another huge complication rests in the gap between the double channel of enforcement of US antitrust and the lack of criminal enforcement in EC Competition law.[212] In addition, the enormous obstacles to be overcome in the EC legal system in order to reach a comparable amount of 'federalization' have already briefly been touched upon.[213] Following along this line, one could simply point out the many issues to be solved for the institution of some 'group actions' procedure (as indicated by the Green Paper and by the Staff Working Paper accompanying the more recent White Paper)[214] within the European Union.

All these hypothetical changes currently seem a bit far-fetched. Nonetheless, these far-reaching objectives can in fact be achieved through a coordinated work of harmonious and progressive implementation of the appropriate and most effective changes for the European model: but such progress should be driven by the goal of harmonious and consistent evolution of the system, rather than by disruptive actions that overlook

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[211] See European Commission Green Paper on damages actions for breach of EC Treaty anti-trust rules – frequently asked questions, at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/05/489&format=HTML&aged=1&language=EN&guiLanguage=en> COM/2005/0672.

[212] Namely, this would require European Union not only to enact a common European criminal code (which seems already quite a controversial task, given the strong differences in the conceptions underlying the national criminal regimes), but also to create a separate and independent body in order to comply with the requirements set forth by the ECHR (article 6), according to which 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law […]'.

[213] Mainly, the problem of coordinating NCAs and national judges in a system that does not have federal courts and that was since its origin of an intergovernmental nature: a problem which accordingly makes us hesitate on whether the word 'federalization' could be correctly adopted in this context.

[214] See European Commission Green Paper on damages actions, supra note 213, and .the Staff Working Paper available at <http://ec.europa.eu/comm/competition/antitrust/actionsdamages/files_white_paper/working_paper.pdf>

potential contrasts with the existing legislation and rush the introduction of something that is completely extraneous. The pursuit of this kind of evolution, however, would arguably require more integration and a higher degree of cooperation among member States, an objective which seems in contrast sharply with the recent collapse of the European Constitution (and the possible failure of the Lisbon Reform Treaty), and less feasible and compatible with the trend of expansion demonstrated in the last 5 years.[215] Given that these operations seem unlikely to occur, at least in the near future, the recommended approach to be taken by European legislators to improve the effectiveness of a leniency programme is a different one: that of adding and amending features by merely looking at the improvement of its own model—i.e. only to the extent that these changes will enhance the suitability of the programme itself,[216] thus resisting the temptation of introducing attractive features for which the system is not ready yet. This objective should be looked at by taking into account the overall drawbacks and benefits derived from the introduction of such amendments, their political viability, and the administrative burden to be borne. Accordingly, the final determination should be the result of a balanced impact assessment, and ultimately driven by a mere economic cost-benefits analysis.

While this approach is consistent with the technical improvement of some formal features that were, in fact, poorly drafted (resulting in deterrence for potential applicants), it would be in stark contrast with the plain transposition of extraneous features inspired by the American model (such as, for instance, the introduction of criminal prosecution for cartel cases in EC law). In general, it seems that most of the divergences between the two programmes related more to specific perceptions of antitrust which cannot easily be eradicated in Europe or the United States.[217]

A good example of this has been the lack of implementation of the 'restitution' feature, which, in fact, is not likely to appear in the European Leniency programme for three main reasons: firstly, because such a system has always focused more on detection rather than deterrence; secondly, because such a system has mostly relied on public enforcement, and thus does not have a history of solving the problems of recovery for consumers via antitrust damages actions. Finally, such a system has always seen the conviction as something that should be given with the ultimate aim of instructing and redeeming, rather than as a per se ineluctable consequence of one's wrongdoing.[218]

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[215] See the accession of 4 States (Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia) in 2004 and the negotiations initiated with Croatia, Republic of Macedonia and Turkey.

[216] Thus not addressing other weakness of the anti-cartel system, which will be left to other potential reforms.

[217] As mentioned above, probably much of the difference is due to the different age of the systems: while in United States the first statute was promulgated more than 110 years ago, in Europe the concept of Antitrust was not introduced until the 80s.

[218] This latter kind of approach, in stark contrast with the European model, is a peculiarity that is manifested in several rules of the American system: think about the 'per se' rule of illegality characterizing horizontal and until recent times even vertical price fixing. Or, to show perhaps the most critical consequence of this

Similar reasoning can be followed with the Amnesty Plus and Penalty plus: one of the reasons[219] for the lack of implementation of these mechanisms in the European system is probably related to one difference in the underlying conception of antitrust: namely, a reason could be found in the more consumer-oriented approach that US Antitrust Law has had since the 1970s (particularly in the wake of the so-called 'Chicago school'), as opposed to EC Competition Law which has tended thus far to be more inclined to protecting small and medium enterprises (SMEs)[220] to safeguard the existence of competition as a value in itself.[221] It is arguable, in fact, that the strategy of not creating an additional incentive for firms to confess that they are part of a cartel in two or more markets obtains the effect of equalizing big conglomerates with smaller firms. By contrast, if the design were changed to include such incentives, this would act as a possible disadvantage for small companies who are willing to confess. Since their incentive to confess would be lower than the one set for bigger companies that are concurrently involved in parallel cartels, this could easily result in fewer Leniency applications from small businesses.

In conclusion, throughout the comparison, it has been demonstrated that leniency programmes are simply being responsive to the peculiarities of the underlying antitrust regime, and acting as their natural complement. It is undeniable that an improvement has occurred both in the American and the European drafting of this programme, given the reduction of uncertainty and the added transparency resulting from the latest versions of the programmes. Yet this overview has shed light on the persistence of some undesirable flaws or inconsistencies, which could perhaps be corrected through further amendments to the leniency programmes.

At the same time, the fact that the US still stands in a better position regarding the attractiveness of its programme (at least for the first confessors) cannot be neglected.

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approach outside of the antitrust domain, think about the existence of the death penalty in some states in the US.

[219] Other reasons have been found in the questionability of its efficiency: see Wils, 'Leniency in Antitrust Enforcement: Theory and Practice' (2007) 30 (1) World Competition: Law and Economics Review, at 43-44, and in the fact that such scheme doesn't fit into our administrative system: see Arbault and Sakkers, 'Cartels', in Faull & Nikpay (eds), *The EC Law of Competition*, Oxford University Press, 2007.

[220] For similar arguments, see the first chapter of Motta, *Competition Policy: Theory and Practice*, Cambridge, Cambridge University Press, 2004. For a recent endorsement see the amicus brief submitted in support of Certiorari, *Pacific Bell Telephone Co v linkLine*, 503 F. 3d 876, available at http://www.usdoj.gov/osg/briefs/2007/2pet/6invit/2007-0512.pet.ami.inv.html

[221] This is in line with the so called 'ordoliberalism' which characterized competition policy in the past: for a brief but explanatory summary of the socio-economic theories underlying European competition law, see Giocoli, 'Competition vs. Property Rights: American Antitrust Law, the Freiburg School and the Early Years of European Competition Policy' (May 2007), Available at SSRN: <http://ssrn.com/abstract=987788> . See also Oliver Budzinski, 'Monoculture versus diversity in competition economics', 32 Cambridge Journal of Economics (2008), 295-324. For an overview of the main differences between European and American Antitrust Laws, see Abbott, 'A brief comparison of European and American Antitrust Law', working paper of the University of Oxford Centre for Competition Law and Policy, available at <http://denning.law.ox.ac.uk/lawvle/users/ezrachia/CCLP%20L%2002-05.pdf>

This is due not only to the different approach of the programme (deterrence rather than detection-based), but also to two main features of American Antitrust that have not yet been introduced in the much 'younger' European system: the fear of criminal sanctions and individual responsibility. Such a position is enviable from the efficiency point of view in antitrust enforcement: the effectiveness of the US Leniency Programme will act as a determinant factor in the fight against cartels, thereby minimizing the dependence of competition authorities in long investigations, as well as their employment of other enforcement tools.

A reasonable hope is that in the future both the political integration and the perception of antitrust will evolve in the European Community, so as to provide European legislators with a comparable power in drafting a leniency programme. The ability to factor in the elements mentioned above, thereby increasing the value of immunity and aligning the interests of individuals and corporations, reveals the wisdom of a long-standing and solidly grounded experience.

Nonetheless, it is recognized here that reaching a similar setting would require remarkable start-up efforts: more precisely, establishing a common criminal law and building up a system of independent courts would urge Europe to support high switching costs that would actually risk hampering the efficiency of the system. The final suggestion is that the far- reaching objective of optimal deterrence and detection of cartels can only be achieved through a gradual improvement of the leniency programmes, avoiding the unfit transposition of models taken elsewhere. More importantly, this work of improvement will have to be driven by the role of economic incentives. At the risk of being considered a bit too enthusiastic, I submit that using this as the only benchmark for anti-cartel legislations will lead towards harmonization not only with US law, but also worldwide: despite the many idiomatic and cultural differences, the field of economics only uses one language, which is why this asserts itself as the most suitable solution for effectively fighting cartels in our globalized age.

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EC Dawn Raids: A Human Rights Violation?

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Pursuant to Regulation 1/2003 the European Commission has extensive powers to enforce and regulate competition law within the European Community. This paper examines whether the 'Dawn Raid' procedure, as embodied in the Regulation, is consistent with two rights protected by the European Convention on Human Rights and Fundamental Freedoms: the privilege against self-incrimination (Article 6 ECHR) and the right to privacy (Article 8 ECHR). This paper argues that the protection provided by the European Court of Justice falls far short of protection necessary to undertakings. On this basis, it will analyse what available source(s) of judicial remedy an undertaking has in order to avail itself of ECHR rights.

1. INTRODUCTION

An important role of the European Commission (Commission) is to enforce and maintain competition law within the European Union (EU). Regulation No 1/2003[1] (Regulation), which came into force on 1 May 2004,[2] makes a provision for competition rules pursuant to Articles 81 and 82 of the EC Treaty. In furtherance of European-wide competition, Chapter V of the Regulations enables the Commission to carry out 'dawn raids';[3] it can request information, enter business and private premises, copy and take written information and ask individuals on-the-spot questions. This is often conducted without a warrant and by the means of coercion, compulsion and threats of pecuniary sanctions.

The use of dawn raids by the Commission acts as a powerful tool in finding and eliminating infringements of competition law. With these powers, the Commission can intrusively and forcefully act on its suspicions. In the past year, the Commission have

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1 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty, OJL 1 of 04.01.2003, p 1.

2 This replaced Reg. 17/62. Reference will be made to case-law decided under the old regulation, where this remains good law.

3 Technically, a dawn raid occurs when the Commission arrives at the undertaking's premises and conducts an inspection. For the purposes of this article, the term is used to encompass generally the Commission's powers of investigation under Chapter V of the Regulation.

used their dawn raid powers to investigate pharmaceutical companies,[4] airlines[5] and agricultural businesses, among others.[6] In addition to extensive investigative powers, the Commission can also impose substantial fines on undertakings.[7] In 2007, the Commission accumulated €3.3 billion in fines.[8]

The purpose of this article will be to consider the extent to which these extensive Chapter V powers are consistent with the rights enshrined in the European Convention on Human Rights and Fundamental Freedoms (ECHR). The central question of this article is whether the protection afforded by the European Court of Justice (ECJ) against arbitrary use of Chapter V is equivalent to the protection provided by the European Court of Human Rights (ECtHR). Two ECHR rights will be considered in this context: the Article 6 privilege against self-incrimination and the Article 8 right to privacy.

At the outset, the ensuing discussion must be understood in the general context of the fragmented European legal order primarily based on 'national, supranational and international legal systems'.[9] Only States, and not international organisations such as the EU, can be brought before the ECtHR. Set against this background, it is therefore important that the EU should try as far as possible to equally adhere to ECHR principles, as there may not be any other recourse to justice.

The first section therefore outlines the fragmented European Legal Order and the problem that arises with it. The second section provides for the Commission's investigative powers and section three discusses the main part of this paper: whether the protection afforded to undertakings by the Commission under its dawn raid procedure is compatible with the ECHR. Finally, the last section discusses whether any institutional reform is essential to ensure that the Commission and other EU bodies are subject to the same level of judicial control in the protection of fundamental rights as that found to be the case as a contracting party of the ECHR.

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4 http://www.guardian.co.uk/business/2008/jan/16/pharmaceuticals (last accessed 23 July 2008), http://www.hhlaw.com/files/Publication/17835dd7-e9fe-4ad9a9b3491a19f77ac/Presentation/Publication Attachment/206dba00-76a1-475a-b1ba- 399a06c96805/McDavid.pdf (last accessed 23 July 2008).

5 http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/158&format=HTML&aged=1& lang age=EN&guiLanguage=en (last accessed 23 July 2008)

6 http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/496&format=HTML&aged =0&language=EN&guiLanguage=en (last accessed 23 July 2008)

7 For example, the Commission imposed a €38 million fine on E.ON for breach of a seal during an inspection: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/108&format=HTML&aged=1&language N&guiLanguage=en (last accessed 23 July 2008).

8 http://ec.europa.eu/comm/competition/cartels/statistics/statistics.pdf (last accessed 23 July 2008)

9 Canor, 'Primus inter pares. Who is the ultimate guardian of fundamental rights in Europe?' (2000) 25(1) ELRev 3.

2. THE EUROPEAN LEGAL ORDER

States are not only members of the European Union but, as a condition of their membership to the EU, they also have to be parties to the ECHR.[10] The corollary of this position is that the EU, being an International Organisation (IO), is not party to the ECHR. Only States can be.[11] This creates a legal vacuum whereby no action can be brought against the EU before the ECtHR, nor can one formally rely upon the Convention and ECtHR's case-law before the Luxembourg Courts, as was evidenced in *Mannesmannrohren-Werken*.[12]

In redressing this legal accountability gap, the EU has developed a way for fundamental rights to be part of the *acquis communautaire* through the development of general principles in ECJ case-law and enactment of a number of treaties.[13] Treaties providing some measure of human rights protection include the Single European Act of 1986, Article 6(2) of the EU Treaty and the Charter of Fundamental Rights. The Charter of Fundamental Rights initially held the promise of more extensive protection than the ECHR. As Article 52(3) of the Charter states:

> [I]nsofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection

However, the Charter, like other EU human rights measures, does not go far enough. It is not binding on States; it only has persuasive value. An argument has been made for the EU to accede to the ECHR in order to address the problem.[14] However, in 1996, the ECJ rejected such an approach for the reason that the EU lacked the competence to join the ECHR, which could only be brought by treaty amendment.[15]

However, there have been some recent developments of significance. The Lisbon Treaty was signed and adopted on 13 December 2007.[16] Article 6(1) of the Treaty makes it clear that the Charter of Fundamental Rights will have 'the same legal value as the treaties', and Article 6(2) commits the EU to accede to the Convention. The

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[10] Copenhagen Criteria, available at: http://europa.eu/rapid/pressReleasesAction.do?reference=DOC/93/3&format=HTML&aged=1&language=EN&guiLanguage=en

[11] Article 1 ECHR.

[12] See Section IV

[13] Case C-260/89 *ERT v DEP* [1991] ECR I-2925. See also *Orkem v Commission* [1989] ECR 3283 and *Mannesmannrohren-Werke AG* v *Commission* [2001] ECR II-729.

[14] Witte, 'The Past and Future Role of the ECJ in the Protection of Human Rights', in Alston, *The EU and Human Rights*, at 859 (OUP 1st Edition 1999); Weiler and Alston, 'An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights', in Alston, *The EU and Human Rights*, at 3. (OUP 1st Edition 1999)

[15] *Opinion 2/94 on Accession of the Community to the ECHR* [1996] ECR I-1759.

[16] OJ C 306 Vol 50 of 17/11/2007, p 1.

Charter will now have 'a constitutional basis and render it legally binding'.[17] The ECHR jurisprudence would be directly applicable before the ECJ. Likewise, challenges can be brought before the ECtHR for infringements committed by the EU. From a competition law perspective, this ability of legal persons to access the ECtHR will lead to greater accountability of the European Commission[18].

Whilst these developments are to be welcomed, they are, nonetheless, a longer term project. The future of the Lisbon Treaty, of course, remains in doubt. The Treaty still needs to be ratified, and the no-vote from the Irish populace has further dampened the chances for realisation of the Treaty. Although the Charter will have legal status, the full text does not appear in the Lisbon Treaty, and the British opted-out of the Charter applying to them in cases before the Luxembourg Courts.[19] In other words, there is a considerable way to go before all this happens. As a result of the ever-existing legal vacuum, it is therefore ever more imperative that the EU does not try and act beyond the scope of the ECHR principles.

3. CHAPTER V POWERS

Before assessing the ECHR compatibility of the dawn raid procedure, it is necessary to outline the relevant powers. This article will focus on three powers: the power to request information, the power to inspect and the power to enter private premises.

3.1 Power to request information

Under Article 18 of the Regulation, the Commission can request that undertakings provide all necessary information or written answers to their questions.[20] The Commission may do this either by a simple request[21] or by decision.[22] Where the Commission chooses to send a simple request, the undertaking is under no obligation to respond. The undertaking comes under an obligation not to provide incorrect or misleading information if and when it voluntarily submits to such a request.[23] Failure to uphold this obligation could lead to the imposition of a fine not exceeding 1% of the total turnover in the preceding year.[24]

Where a request is made by a decision, undertakings have an obligation to respond to it.[25] The Commission may impose a fine not exceeding 1% of the total turnover where the undertaking, intentionally or negligently, supplies incorrect, incomplete or

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[17] Ameye, 'The interplay between human rights and competition law in the EU' [2004] ECLR 332 at 335-336.

[18] *Ibid.*

[19] http://news.bbc.co.uk/1/hi/world/europe/6901353.stm (last accessed 23 July 2008).

[20] Art 18(1).

[21] Art 18(2).

[22] Art 18(3).

[23] Art 18(2).

[24] Art 23(1)(a).

[25] Art 18(3).

misleading information or where it refuses to answer the questions.[26] Furthermore, the Commission may impose a penalty payment not exceeding 5% of the average daily turnover *'in order to compel them'* to supply complete and correct information.[27]

3.2 Power to conduct 'all necessary inspections'

Under Article 20, the Commission has the power to 'conduct all necessary inspections of undertakings',[28] and, when doing so, it must specify the subject matter and purpose of the inspection.[29] The Commission can conduct these inspections in one of two ways: either on the basis of an authorisation[30] or pursuant to a decision.[31]

On the basis of an authorisation, the undertaking has the right to refuse the inspection without threat of financial sanction.[32] Where pursuant to a decision, the undertaking is required to submit to inspections and could incur a fine of 1% of their total turnover if it refuses to do so.[33] Further, the Commission could impose a penalty payment up to 5% of the average daily turnover to compel it to submit to an inspection that has been ordered by a decision.[34]

These powers of inspection, either pursuant to an authorisation or a decision, empower the Commission to:

i) enter business premises;[35]

ii) examine and copy business records;[36]

iii) seal business premises and records for a period and to the extent necessary for inspection;[37] and

iv) ask any staff member on-the-spot questions. Failure to answer correctly, truthfully or to respond at all on any facts relating to the subject matter can lead to the imposition of a fine not exceeding 1% of the total turnover.[38]

Additionally, the Commission may be assisted by the Member State (State) in its investigations. National Competition Authority (NCA) officials may assist the Commission, where this is requested either by the Commission or the NCA. Where

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26 Art 23(1)(b).

27 Art 24(1)(d).

28 Art 20(1).

29 Art 20(3), (4).

30 Art 20(3).

31 Art 20(4)

32 Art 20(3).

33 Art 20(4), 23(1)(c).

34 Art 24(1)(d).

35 Art 20(2)(a).

36 Art 20(2)(b), (c).

37 Art 20(2)(d).

38 Art 20(2)(e), 23(1)(d).

they do so, NCA officials act under the Commission's powers of investigation under the Regulation, as opposed to their powers under national law.[39]

Where the Commission conducts an inspection pursuant to an authorisation, it must 'in good time' give a notice of the investigation to the NCA,[40] whereas the Commission must consult with the NCA before conducting an inspection based on a decision.[41] Where an undertaking opposes an inspection to which it is required to submit under a decision, the State 'shall afford them the necessary assistance, requesting where appropriate the assistance of the police or of an equivalent authority, so as to enable them to conduct their inspections'.[42] If judicial authorisation is required for such 'assistance' under national law, then it must be applied for.[43]

Article 20(8), which codifies the *Roquette Freres* judgment,[44] sets out the scope of the review that a national court can undertake in authorising the assistance. It entitles the court to verify that the Commission's decision is authentic and that the coercive measures asked for are neither arbitrary nor excessive. In order to ensure proportionality, the national court may ask the Commission for its reasons for suspecting a breach of competition law, the seriousness of the infringement and the nature of the undertaking's involvement. However, it may neither question the necessity for the inspection nor demand the information in the Commission's file.[45] Only the ECJ can review the legality of the Commission's decision.[46]

3.3 Power to enter private premises

One of the most controversial aspects of the dawn raid procedure is the Commission's right to enter private premises of members of the undertaking. Article 21(1) provides that the Commission may enter 'any other premises, land and means of transport, including homes of directors, managers and other members of staff of the undertakings'. The Commission can only do so if it has a reasonable suspicion that business-related records that may prove a violation of the competition rules are being kept on those premises.[47] The Commission does not have powers equivalent to those when conducting investigations on business premises. Whilst it can enter private premises, examine the records and make copies, it cannot seal the premises or ask on-the-spot questions.[48]

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[39] Art 20(5). Also note Art 22(2), which outlines that the Commission can request the NCA to conduct a dawn raid on its behalf. The NCA and the officials who do so exercise such powers according to national law.

[40] Art 20(3).

[41] Art 20(4).

[42] Art 20(6).

[43] Art 20(7).

[44] Case 94/00 *Roquette Freres SA* v *DGCCF* [2002] ECR I-9011.

[45] Art 20(8).

[46] Ibid.

[47] Art 21(1).

[48] Art 21(4).

Entering private premises must be based on a decision, which can only be made after national authorities have been consulted.[49] The decision must include the subject matter and purpose of the inspection, and it must inform the applicant that it can be reviewed by the ECJ.[50] Most importantly, the Commission cannot execute the decision 'without the prior authorisation from the national judicial authority'.[51] Similar to Article 20(8) above, the national court plays a central role in authorising inspections.[52] However, 'as the measures are more intrusive, it is likely that the proportionality test carried out by the national judge will be stricter'.[53]

4. COMPATIBILITY OF CHAPTER V WITH ECHR

Having provided an introduction to the basic regulatory framework, this article will now address the question of whether these powers comply with fundamental rights as recognised by the ECHR. In this respect, two rights will be considered: the privilege against self-incrimination and the right to privacy.

4.1 Privilege against self-incrimination

The privilege against self-incrimination, which provides for a right to silence and a right not to incriminate oneself, lies at the heart of a fair criminal procedure and underlies the legal principle that a person is innocent until proven guilty.[54]

Looking first at the Commission's power to request information under Article 18 of the Regulation,[55] the ECJ case *Orkem*[56] illustrates the lack of EC recognition of a privilege against self-incrimination. The undertaking in *Orkem* challenged a Commission decision compelling it, via the threat of sanctions, to produce documents that would confess infringements of competition rules. The ECJ held that the privilege against self-incrimination did not exist under the Regulation. The privilege was available 'only to a natural person charged with an offence in criminal proceedings' as opposed to 'legal persons in the economic sphere'.[57] In considering Article 6 ECHR, the ECJ found that neither the wording of the article nor ECtHR decisions provided for the privilege.[58]

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[49] Art 20(2).

[50] *Ibid.*

[51] Art 21(3).

[52] Art 20(3).

[53] Dekeyser and Gauer, 'The New Enforcement System for Article 81 and 82 and the Rights of Defence', in *2004 Annual Proceedings of the Fordham Corporate Law Institute*.

[54] C Ovey and R White, *Jacobs & White European Convention on Human Rights* (Oxford, 3rd edn, 2002), at 174.

[55] Some of the old case-law will refer to Article 11 under the old Reg 17/62. Art 11 preceded Art 18, so references to Art 11(2) and 11(5) are equivalent to Art 18(2) and 18(3) of the new Regulation respectively.

[56] Case 374/87 *Orkem v Commission* [1989] ECR 3283.

[57] *Orkem* at 29.

[58] *Orkem* at 30.

In *Orkem*, the ECJ did, however, develop a limited form of the privilege against self-incrimination. A distinction was made between compulsion to provide factual information and compulsion directly admitting a violation of competition law.[59] With respect to the former, the ECJ held that the Commission could 'compel an undertaking to provide all necessary information concerning such facts as may be known to it and to disclose to it, *even if the latter may be used to establish, against it or another undertaking, the existence of anti-competitive conduct'* (factual/indirect incrimination).[60] The ECJ concluded that 'the Commission may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement' (direct incrimination).[61]

Subsequent developments by the ECtHR have cast doubt on the *Orkem* court's reasoning. In *Funke,*[62] French customs officers, having raided the applicant's domicile, asked the applicant to produce further documents. The French authorities imposed a fine for his failure to do so. The applicant argued that his right not to incriminate himself under Article 6 had been violated - he either produced the documents or he faced being fined. The Court was in total agreement with the applicant:

> The special features of customs law cannot justify such an infringement of the right of anyone 'charged with a criminal offence' … to remain silent and not to contribute to incriminating himself. There has accordingly been a breach of Article 6(1).[63]

The ECtHR further elaborated on the scope of the privilege in *Saunders.*[64] This case concerned a takeover investigation by the Department of Trade and Industry ('DTI'). During investigations, the DTI inspectors took witness statements from individuals at the company concerned. These statements later 'formed a significant part of the prosecution's case'.[65] The applicant challenged the case before the ECtHR.

In deciding the case, the ECtHR noted that, even though it is not explicitly mentioned in Article 6, 'the right to silence and the right not to incriminate oneself are generally recognised international standards that *lie at the heart of the notion of fair procedure under Article 6'*.[66] This was because it protected the accused against improper compulsion and miscarriages of justice, and it was for the prosecution to prove its case against the accused without resorting to finding evidence through the use of compulsion and oppression in criminal cases.[67]

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[59] Jones and Sufrin, *EC Competition Law: Text, Cases and Materials* (OUP 3rd Edition 2007) at 1174.

[60] *Orkem* at 34 [Emphasis Added].

[61] *Orkem* at 35.

[62] *Funke v France* [1993] I CMLR 897.

[63] *Funke* at 44.

[64] *Saunders v United Kingdom* (1997) 23 EHRR 313.

[65] *Saunders* at 61.

[66] *Saunders* at 68. Confirmed in *Murray* v *UK* (1996) 22 EHRR 29.

[67] *Saunders* at 68. Confirmed in *Serves* v *France* (1999) 28 EHRR 265.

The ECtHR held that the applicant had been subject to compulsion to give evidence because, had he refused to answer the questions, he would either have been fined or sanctioned to two years' imprisonment.[68] In addition, the Court added that the right not to incriminate oneself:

> [C]annot reasonably be confined to statements of admission or wrong doing or to remarks which are directly incriminating.[69] Testimony obtained under compulsion which appears on its face to be of non-incriminating nature – such as *exculpatory remarks or mere information on questions of fact* – may later be deployed in criminal proceedings in support of the prosecution case, for example to contradict or cast doubt upon other statements of the accused or evidence given by him during the trial or to otherwise undermine his credibility.[70]

This is a clear rejection of the *Orkem* principle. *Orkem* established that only direct incrimination was unlawful; questions concerning facts that could establish an infringement were permissible. *Saunders* rejects this proposition. The ECtHR noticed that extensive use was made of the oral statements during the criminal proceedings, and, in these circumstances, there was a breach of Article 6(1) regardless of whether the statements made were directly incriminating or not.[71]

The ECtHR confirmed that the *Saunders* principle applied equally to documents as to oral explanations in *JB v Switzerland.*[72] In that case, the tax authorities had compelled the applicant, with the threat of a criminal sanction, to submit certain tax documents. The ECtHR held that this infringed the applicant's privilege under Article 6 ECHR.[73] This would not have been the case if the information coerced had an existence independent of the individual involved.[74]

EU case-law subsequent to ECHR developments

In 1989, the ECJ in *Orkem* could be forgiven for taking the view that there was neither a right to silence nor a privilege against self-incrimination. At that time, neither *Funke*, *Saunders,* nor *JB,* had been delivered. Consequently, if the ECJ continued to apply the *Orkem* principle, this would imply acceptance of a situation that is not compatible with the ECHR.[75]

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[68] *Saunders* at 70.

[69] i.e direct incrimination.

[70] i.e. indirect incrimination. *Saunders* at 71 [Emphasis Added].

[71] *Saunders* at 72. Riley remains critical of the Court's judgment, on the basis that too much respect is given for human dignity and autonomy; see: Riley, 'Saunders and the power to obtain information in Community and United Kingdom Competition Law' (2000) *ELR* 264 at 278.

[72] *JB v Switzerland* (App. No.31827/96), Judgment of 3/05/2001.

[73] *JB v Switzerland* at 66.

[74] *Ibid.*

[75] Van Overbeek, 'The right to remain silent in competition investigations: the Funke decision of the Court of Human Rights makes revision of the ECJ's case law necessary' (1994) *ECLR* 127 at 132.

The Court of First Instance (CFI) in 2001 was asked to rectify the conflict that existed between the two institutions in *Mannesmannrohren-Werke.*[76] In this case, the applicant refused to answer questions put to it under a request for information pursuant to a decision. As a result, the Commission imposed a daily penalty of €1,000. The applicant argued that this breached Article 6 ECHR.

Rather than relying on the ECtHR case-law under Article 6 ECHR, as *Orkem* implicitly said it could, the CFI denied itself the jurisdiction to apply the ECHR when reviewing investigations under competition law on the grounds that 'the Convention is not part of community law'.[77] As Willis said, '… the CFI has moved the goalposts: before the ECHR held that Article 6 of the Convention conferred a right of silence in *Funke* and *Saunders*, the ECJ was prepared to concede that Article 6 applied to competition proceedings; once the ECHR held Article 6 to include that right, the Court of First Instance held that Article 6 did not apply'.[78] No reasons were given by the CFI for moving the goalposts, but Willis suggests that 'the CFI appears to have made a conscious policy decision not to extend to Commission investigations the safeguards against self-incrimination provided by Article 6 of the ECHR'.[79]

Overall, the EU's standard of protection is not equivalent to the ECHR, and it is urged that it should be. In spite of such objections, the ECJ finally confirmed its approach in *SGL Carbon.*[80] The argument that the ECtHR's standard of protection would 'constitute an unjustified hindrance'[81] to the Commission's powers of investigation fails to take into account ECtHR's jurisprudence. The privilege, contrary to what the EU Courts believe, is not absolute. As *Saunders* pointed out, an individual can be compelled to hand over documents if they are requested under a warrant.

The problem at the moment is that a Commission decision is not a warrant, as it is not granted by judicial authorisation. The Commission, not being a court, grants itself a decision. Therefore, the 'unjustified hindrance' would no longer exist if the EU were to change their system so that the Commission's decision was pre-authorised by a judicial court granting it a warrant.[82]

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[76] Case T-112/98 *Mannesmannrohren-Werke AG* v *Commission* [2001] ECR II-729.

[77] *Mannesmannrohren-Werke, at* 60 [Emphasis Added].

[78] Willis, 'You have the right to remain silent ...or do you? The privilege against self-incrimination following Mannesmannrohren-Werke and other recent decisions' (2001) *ECLR* 313 at 319.

[79] *ibid* at 313.

[80] C-308/04 *SGL Carbon* v *Commission* CMLR [2006] 10. In Cases C-238, 244-245, 247, 250, 251-252 and 254/99 P, *LVM v Commission* [2002] ECR I-8375 (*PVC II*), the ECJ opened up the possibility that a challenge to an Article 18(3) request 'must take in account' the jurisprudence of the ECtHR under Article 6 ECHR (para 274). However, the ECJ in *SGL Carbon* held the ECJ in *PVC* II 'had not reversed its previous case-law on the point' and that *Orkem* remained good law (para 45). The ECJ in *PVC II* also had to determine whether Article 11(2) breached the privilege. But it held, correctly, that as a simple request for information was voluntary, it could not be contrary to the privilege.

[81] *Mannesmannrohren-Werke* at 66

[82] Riley, 'The ECHR Implications of the Investigation Provisions of the Draft Competition Regulation' (2002) *ICLQ* 51 1 (55) at 64.

Legal persons in the economic sphere

The *Orkem* objection to applying the privilege on the basis that it does not apply to corporate entities involved in the economic sphere is no longer valid. It is now settled by the ECtHR that the ECHR applies to undertakings and individuals alike.[83]

According to the Regulation, the dawn raid procedure is regarded as civil and administrative in nature.[84] It would follow that the privilege under Article 6 ECHR would not apply.[85] However, it does not follow that classifying the dawn raid procedure as a civil sanction will be decisive for the purpose of the ECHR and Article 6.[86] The ECtHR's criterion for deciding whether a measure is civil or criminal for the purpose of Article 6 was enunciated in *Bendenoun* v *France*:[87]

(i) the applicable law must be 'imposed by a *general rule*…and applicable to *everyone';*

(ii) there must be '*penalties* in the event of non-compliance' with the law;

(iii) the act must be seen as 'punishment to *deter* re-offending'; and

(iv) the penalties/sanctions must be '*substantial*'.[88]

Applying these criteria, 'the inescapable conclusion is that, for the purposes of the ECHR, the procedures and penalties are criminal in nature.'[89] First, competition law is imposed as a general rule applicable to all.[90] The aim of competition law is 'to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers'.[91] Second, non-compliance with the procedure leads to

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[83] See, for example, *Societe Stenuit* v *France* (1992) 14 EHRR 509, para 66; *Church of X* v *United Kingdom* (App. No.3798/68) Decision of 17/12/1968; *Niemietz* v *Germany* (1993) 16 EHRR 97; *JA PYE (Oxford)* v *UK*, (App. No.44302/02) Judgment of 30/08/2007; (1994) 18 EHRR 1; *Demuth* v *Switzerland* (2004) 38 EHRR 20; *Comingersoll SA v Portugal* (2001) 31 EHRR 772.

[84] Art 25(3) of the Regulation, which states that fines imposed due to the dawn raids 'shall not be of a criminal law nature.'

[85] Benjamin, 'The application of EC competition law and the European Convention of Human Rights' (2006) *ECLR* 693 at 695-696 argues that there is no need to classify the dawn raid procedure as criminal as, according to the words of Article 6, the privilege against self-incrimination also applies to civil obligations. However, this is a misinterpretation of Article 6. The whole notion of the right to remain silent 'applies only within the context of *criminal proceedings* […] There can be no doubt that the privilege does not apply outside the criminal law – a fact evidenced by the very term self-in*crim*ination.' For this view, see Trechsel, *Human Rights in Criminal Proceedings* (OUP 1st Edition, 2005) at 349. This has been confirmed in *Funke* and *Saunders* and discussed below.

[86] *Engel* v *The Netherlands* 1 EHRR 647; *Neumeister* v *Austria* (1979-80) 1 EHRR 971; *Ozturk* v *Germany* (1984) 6 EHRR 409, para 49; *Jusilla v Finland* (App. No.73053/01) Judgment of 23/11/2006, para 43.

[87] (1994) 18 EHRR 54.

[88] *Ozturk* and *Engel* used similar but not identical criteria, restated in Wils, 'Is Criminalization of EU Competition Law the Answer?' (2005) 28(2) *World Competition* 120-121.

[89] Riley at 63; Waelbroeck and Fosselard, 'Should the Decision-making power in EC Antitrust Procedures be left to an Independent Judge? – The impact of the European Convention of Human Rights on EC Antitrust Procedures' (1994) *Yearbook of European Law* 14 at 111.

[90] *Ibid* at 63.

[91] C-136/79 *National Panasonic* v *Commission* [1980] ECR 2033 at 20.

the imposition of financial sanctions. Third, as the Commission guideline has outlined,[92] this penalty is intended to deter and punish the perpetrators.[93] Fourth, the fines that the Commission can impose can amount to anything up to 5% of the company's turnover. In *Societe Stenuit,*[94] this amount was considered substantial enough to be considered a criminal sanction. In this case, the French Economic Minister imposed a fine of FF50,000 on the applicant company for violating competition law. The company argued that the fine was a breach of its right to a fair trial, as it amounted to a criminal charge under Article 6. The Court found that the fine imposed was criminal: it was a substitute for a criminal court judgment, the amount imposed was not in itself negligible, and the Minister could have imposed a fine up to 5% of the company's takeover which was intended to act as a deterrent.[95]

Therefore, the dawn raid procedure is criminal for the purposes of Article 6. The natural consequence of this is that those legal persons who are charged with a criminal offence under Article 6(1) should be able to avail themselves of the privilege.

However, instead of using this argument to deny the application of the privilege to the undertakings, some commentators argue that the scope of protection should be different depending on whether legal or natural persons are involved. Wils notes that, since 'all judgments of the ECtHR concerned questions put to *natural persons*' as such, 'it is not obvious that the ECtHR would grant the same scope of protection under the privilege against self-incrimination to *legal persons*'.[96] Traditionally, criminal sanctions were seen only to be imposed on natural persons. Corporate entities rarely felt the stigma of criminality attached to them, and this is why there is a lack of case-law before the ECtHR.[97] However, today this is no longer the case. Corporate entities cannot only

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92 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003, OJ C 210 1/9/2006, pg 2.

93 Riley at 63.

94 *Societe Stenuit v France* (1992) 14 EHRR 509.

95 *Societe Stenuit* at 62-64. The case was settled out of court and it never reached the ECtHR.

96 Wils, 'Self-Incrimination in EC Antitrust Enforcement: A Legal and Economic Analysis' (2003) 26(4) *World Competition* 567-588 at 577. This line of argument stems from the cases such as *Markt Intern Verlag GmbH & Klaus Bermann* v *Germany* [1990] 12 EHRR 161 and *Casado Coca* v *Spain* [1994] 18 EHRR 1 where the ECtHR suggested that where commercial information is involved the member states have a far greater margin of appreciation to interfere with restricting such information under Article 10 ECHR than if it were other ideas and information. However, this objection – that the protection afforded under the ECHR can be of a lower standard to legal persons than to natural persons – has no value in relation to the main discussion of this paper. These cases dealt with the type of commercial information a legal person could or could not provide i.e. it is a positive act that the Court is interfering in. Whereas, in the case of the Commission's investigative powers it is an interference with an omission on behalf of the legal person. It is where the undertaking fails to do something in a certain way that the Commission imposes its intrusive and coercive powers on the undertaking. Moreover, it is the criminal sanctions that come attached with the failure to act in a way that is problematic: refusal to cooperate could bring fiscal and criminal sanctions. With such invasive powers it is unconvincing to argue that the lower standard of protection ought to prevail.

97 Benjamin at 695.

be imposed with criminal responsibility, but they can also claim the rights of defence when criminally charged.[98]

Furthermore, this approach fails to understand properly the notion of corporate personality, where individual shareholders form the company. If the company is unable to avail itself of the full protection of the privilege, it will just seek out a shareholder to challenge its sanctions before the ECtHR, thereby avoiding the rule.[99] More importantly, this view fails to take into consideration single-individual-operated entities. In these cases, the single professional can either bring a claim in his name or on behalf of the company. Where he does so as a natural person, there is no reason why he should not be granted the full set of rights.[100]

Article 20(2)(e) and oral questions

According to Wils, the fact that, under Article 20(2)(e) of the Regulation, the Commission can ask questions to staff members of the undertaking or association being investigated does not appear relevant, given that the Regulation does not allow any penalty to be imposed on such staff members.[101] On its face, this approach seems correct: as the individual does not incur a pecuniary sanction, no element of compulsion exists. However, it fails to account for the intricate relationship between the individual and the company. A better view is that, where individuals are 'authorised to speak' on behalf of undertakings, their acts can then be 'imputable to the undertaking,' so, when an individual responds to a question, it is as though the undertaking is 'speaking'. Where a fine is imposed on the undertaking for refusing to 'speak', the undertaking should avail itself of the privilege.[102] Van Gerven believes that the privilege as pronounced in *Orkem* for documents will apply by analogy.[103] However, those principles do not conform to ECHR rights. The privilege as defined by *Funke, Saunders* and *JB* should apply equally to Article 20(2)(e). *Saunders* makes it clear that

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[98] See generally A Ashworth, *Principles of Criminal Law* (OUP 4th Edition 2003). Also see the English case of *Rio Tinto Zinc* v *Westinghouse Electric* [1978] AC 547, where the court held that companies could rely on the privilege.

[99] The shareholder must show that he is directly affected by the government interference (*Eckle* v *Germany* (1983) 5 EHRR 1). However, this is a very difficult threshold to overcome when the interference is aimed at a company. Where the threshold is not met, only the Company can bring a challenge before the ECtHR (*Agrotexim Hellas SA v Greece* (1996) 21 EHRR 250). See generally Emberland, *The Human Rights of Companies: Exploring the Structure of the ECHR Protection* (OUP 1st Edition 2006) at 67.

[100] Venit and Luoko, 'The Commission's New Power to Question and Its Implications on Human Rights. Recent Developments and Current Issues' (2005) *2004 Annual Proceedings of the Fordham Corporate Law Institute, International Antitrust Law & Policy* at 675.

[101] Wils at 577-578.

[102] Vesterdorf, 'Legal Professional Privilege and The Privilege Against Self-Incrimination in EC Law: Recent Developments and Current Issues' (2005) 2004 *Annual Proceedings of the Fordham Corporate Law Institute, International Antitrust Law & Policy* at 724.

[103] Van Gerven, Regulation 1/2003: Inspections (Dawn Raids) and the Rights of Defence at 337/338, http://www.wilmerhale.com/files/Publication/df146630-ba12-49ed-b112-2f997c80c2c4/Presentation/PublicationAttachment/642e3f0e-8a30-437e-ae6a-339b8e1d37e4/VanGerven_Regulation1_2003InspectionsDawnRaids.pdf

those principles equally apply to oral remarks. In that case, Article 20(2)(e) is another example of the Commission's powers being contrary to the ECHR.

4.2 Right to privacy

Article 8(1) ECHR states that 'everyone has the right to respect for his *private and family life*, *his home* and *his correspondence'*, unless interference is justifiable under Article 8(2), where a measure is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others.

Business premises

As was the case for the privilege against self-incrimination, it was the ECJ who first addressed whether Article 8 ECHR could extend to business premises.[104] In *Hoechst,*[105] the applicant challenged a decision imposing a penalty upon it for failing to submit to a Commission investigation, arguing that the search was contrary to Article 8 ECHR as it was not carried out under a judicial warrant.[106] Using similar language to that in *Orkem,* the Court denied that Article 8 applied to the business premises.[107] It found that Article 14 of Regulation 17/62 (now Article 20 of the Regulation) could not be construed in such a way as to run contrary to fundamental rights.[108] Despite this, the ECJ held that Article 8 did not apply to business premises, only private dwellings of natural persons.[109] Furthermore, the ECJ refused to extend the protection to businesses because there was no ECHR case law on the matter.[110]

As with the development of the privilege, subsequent developments in this context have been made by the ECtHR. In *Niemietz,*[111] the ECtHR extended Article 8 to apply to business premises. The applicant argued that the search of his office was contrary to Article 8. Teleologically the applicant seemed to have a weak case. Article 8 ECHR deals with respect for one's privacy for his home and family life. However, the ECtHR stated that:

> [R]espect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings … there appears, furthermore, to be no reason of principle why this understanding of this notion of

[104] This section only applies to an Article 20(4) Commission decision to enter business premises, as it is mandatory. It does not apply to an Article 20(3) authorisation, as that method is voluntary and therefore can be refused by the undertaking.

[105] *Hoechst AG* v *Commission* [1989] ECR 2859 at 10.

[106] *Hoechst* at 10.

[107] Cf. Case 85/87 *Dow Benelux v Commission* [1989] ECR 3137.

[108] *Hoechst* at 13.

[109] *Hoechst* at 17 [Emphasis Added].

[110] *Hoechst* [Emphasis Added].

[111] *Niemietz,* op cit, n 83.

> 'private life' should be taken to exclude activities of a professional or business nature since it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest opportunity of developing relationships with the outside world. This view is supported by the fact that … it is not always possible to distinguish clearly which of an individual's activities form part of his professional or business life and which do not.[112]

The ECtHR confirmed that *Niemietz* also applied to legal persons in *Societe Colas Est.*[113] According to the Court, the Convention is a 'living instrument',[114] and it must be given a 'dynamic interpretation'.[115] On this basis, the Court concluded that 'the time has come to hold that in certain circumstances the rights guaranteed by Article 8 of the Convention may be construed as including the *right to respect for a company's registered office, branches or other premises*'.[116] It then held that the French NCA (DGCCRF), which undertook dawn raids on 56 companies and seized thousands of documents under French legislation allowing them to do so without any judicial authorisation, breached Article 8(1).

As a result, the Court had to decide whether the interference was justified. First, the Court concluded that, as the DGCCRF was granted its power under French legislation, the interference was in accordance with the law as it has 'some basis in domestic law'.[117] Secondly, the DGCCRF was pursuing the legitimate aim of 'the economic well-being of the country' and 'the prevention of crime'.[118] However, the Court could not be persuaded that the DGCCRF dawn raid procedure was necessary in a democratic society, as it did not provide for adequate and effective safeguards against abuse. This was because 'the relevant authorities had very wide powers which, pursuant to the 1945 ordinance, gave them *exclusive competence* to determine the expediency, number, length and scale of inspections. Moreover, the inspections in issue took place *without any prior warrant being issued by a judge* and *without a senior police officer being present*'.[119]

The argument that Article 8 does not apply to business premises is no longer tenable. Following *Niemietz* and *Societe Colas Est*, an exercise of the Commission's power to enter premises under Article 20 would be an infringement of Article 8(1). The crux of the matter is whether the dawn raid procedure is justifiable under the criteria of Article 8(2), and, more centrally, whether it can be said to be proportionate within the meaning of its being necessary in a democratic society.

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[112] *Niemietz* at 29. In addition, the Court added that in the French version of the ECHR, the term 'domicile' is used, which has a broader meaning than the word 'home' and includes a professional office.

[113] *Societe Colas Est* v *France* (2002) ECHR 421. See *Buck* v *Germany* (2006) 42 EHRR 21 for a recent confirmation.

[114] *Societe Colas Est* at 41.

[115] *Ibid.*

[116] *Ibid* [Emphasis Added].

[117] *Societe Colas Est* at 43.

[118] *Societe Colas Est* at 44.

[119] *Societe Colas Est* at 49 [Emphasis Added].

Is it in accordance with the law?

Under Article 8(2), the Regulations must meet a three-part test:[120] (i) the measure must have some basis in domestic law; (ii) it must refer to the quality of the law; and, (iii) its consequences must be foreseeable and compatible with the rule of law. Applying the criteria to the dawn raid procedure, the following can be concluded:

a) The procedure is in accordance with the law as it is 'carried out on the basis of Article 81 EC … and on the basis of the Regulation'.[121] Whilst this test is formulated with 'domestic law' in mind, given that EU law forms part of domestic law[122] and is constitutionally supreme,[123] EU law can be said to fit into this category. This has been confirmed in *Bosphorus Airways,* where the ECtHR confirmed that an EU Regulation is law for these purposes as it is 'generally applicable' and 'binding in its entirety' on the Member States.[124]

b) Case-law from the Community is published shortly afterwards in the Official Journal of the EU, which is accessible to all.

c) The test for foreseeability requires that the law be 'sufficiently clear to give citizens an adequate indication as to the circumstances in and the conditions on which public authorities were empowered to resort to such measures'.[125] A clear reading of the Regulation shows the clarity of when and where the Commission can act.

Does it pursue a legitimate aim?

The procedure pursues the legitimate aim of protecting free competition in the European Union.[126] As in *Colas,* this falls within the public interest exception of 'economic well-being of the country'.[127]

Is it necessary in a democratic society?

The key question that needs to be addressed is whether the EC dawn raid procedure is necessary in a democratic society. In other words, whether it corresponds to a 'pressing social need' and is 'proportionate to the aim pursued'.[128] According to Rizza and Lang, 'the Commission's practice appears unlikely to be distinguished from the procedure

[120] *Huvig v France* (1990) 12 EHRR 528.

[121] AG Mischo in *Roqutte Freres* at 39.

[122] Case 6/64 *Costa v Enel* [1964] ECR 585.

[123] Case 26/62 *Van Gend en Loos v Nederlandse Administratie* [1963] ECR 1.

[124] *Bosphorus Airways* v *Ireland* (2005) 42 EHRR 1 at 145.

[125] *Kopp* v *Switzerland* (1998) ECHR 18 at 55.

[126] C-185/95P *Baustahlgewebe v Commission* [1998] ECR I-8417. Cf. *National Panasonic.*

[127] More precisely 'the economic well-being of the EU'.

[128] *Silver* v *UK* (1983) 5 EHRR 347.

followed by the DGCCRF in the *Colas* case, which the ECtHR found to violate Article 8'.[129]

It is difficult to disagree with their conclusion. First, the Commission enjoys broad powers under Article 20. The Commission, not a judicial authority in its own right, grants itself powers to conduct on-the-spot investigations under Articles 20 and 20(4)(a).[130] Second, the Commission conducts dawn raids without prior judicial authorisation.[131] Dekeyser and Gauer argue that there is no problem in this respect as (i) the undertaking can oppose the dawn raid, and, when that occurs, national judicial authorisation is required; and (ii) the EU Courts can, nonetheless, review the legality of the Commission's decision permitting the dawn raid.[132]

The first point does not appreciate that, up to and until the point where the undertaking does not oppose the dawn raid, the Commission's inspection remains invalid due to its not being authorised by an independent judicial authority. In addition, as Article 20(8) provides, the national court authorising a judicial warrant cannot call into question the legality of the Commission's decision; it should rather concern itself with whether the Commission's decision is 'authentic and the coercive measures are neither arbitrary nor excessive'.[133] This clearly is not a true grant of a real judicial authorisation.[134]

Their second point seems to neglect the fact that Community Courts can only review the legality of the inspection *after* the search takes place. This is contrary to *Societe Colas Est,* where the ECtHR stated that a *prior* judicial warrant is required.[135] Finally, whilst officials of the relevant NCA may accompany the Commission, this does not equate to having a senior police officer present.[136]

In light of the conflict between the ECHR and the EU, the ECJ finally decided, in *Roquette Freres*, to endorse Strasbourg's position.[137] However, the triumph was short-lived because the Regulation adopted in 2004 superseded the case-law.

Private dwellings

It is clear from both the wording of Article 8(1) and jurisprudence of the ECtHR that private homes fall within the scope of this Article.[138] Against this background, it was

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[129] Rizza and Lang, 'Case Comment: Stes Colas Est v France' (2002) ECLR 413 at 415.

[130] *Ibid.*

[131] *Ibid.*

[132] AG Mischo in *Roqutte Freres* advocates the same position.

[133] Article 20(8) of the Regulation.

[134] Rizza at 416.

[135] *Ibid.*

[136] *Ibid.*

[137] The ECJ held 'for the purposes of determining the scope of that principle in relation to the protection of business premises, regard must be had to the case-law of the ECtHR subsequent to the judgment of Hoechst'. *Roqutte Freres* at 29.

surprising when Commission powers were extended to the private premises of the members of the undertakings.[139] As with business premises, the issue is whether interference with an individual's home is 'necessary in a democratic society'.

Inspections conducted in private homes are in accordance with the law and pursue legitimate aims for the same reasons mentioned above. However, whether a measure in this context is 'necessary in a democratic society' involves a slightly different analysis. In N*iemietz,* the ECtHR said that the interference under Article 8(2) 'might well be more far-reaching where professional or business activities or premises are involved than otherwise be the case'.[140] By contrast, the private home is probably accorded greater protection.[141]

In *Funke*, the ECtHR established that a Contracting State has the right to conduct house searches and seizures in order to obtain evidence of offences, provided that these measures are proportionate.[142] The first aspect of proportionality requires that the legislative measures enforced must afford 'adequate and effective safeguards against abuse'.[143]

The absence of a judicial warrant is of particular concern in this respect.[144] In *Funke* and *Camezind,* the ECtHR was 'particularly concerned about the absence of a judicial warrant'.[145] In itself, this factor is not decisive. For example, in *Niemietz,* the ECtHR was unable to justify interference, even where the authorities were granted a warrant pursuant to a prior judicial authorisation, because:

> 'the warrant was drawn in broad terms, in that it ordered a search for and seizure of "documents", without any limitation, revealing the identity of the applicant … The search impinged on professional secrecy to an extent that appears disproportionate in the circumstances'.[146]

The second aspect requires that the ECtHR must consider the particular circumstances of each case in order to determine whether the interference was proportionate to the aim pursued.[147] The ECtHR takes into account a number of criteria when determining proportionality:

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[138] *Gillow* v *UK* A.109 (1986) 11 EHRR 335; *Buckley* v *UK* (1996) 23 EHRR 101.

[139] Art 21 of the Regulation.

[140] *Niemietz* at 31. Cf. *Societe Colas Est,* para 49 and *Verein Netzwerk* v *Austria* (App. No.32549/96) Admissibility decision of 29/06/1999, to the same affect.

[141] Buyse, 'Strings Attached: the concept of 'home' in the case law of the European Convention of Human Rights' (2006) *European Human Rights Law Review* 294 at 304.

[142] *Funke* at 56; Confirmed in *Cremieux* v *France* (1993) 16 EHRR 332 and *Miahille* v *France* 16 EHRR 357.

[143] See *Camenzind* v *Switzerland* (1997) 28 EHRR 458 at 45.

[144] *Cronin* v *UK* (App. No.15848/03) Admissibility decision of 06/01/2004, 6.

[145] *Ibid.*

[146] *Niemietz* at para 37. The opposite is also true. In *Camenzind* the ECtHR found that the measure in that case was justifiable under Article 8(2) even though no warrant had been produced (at 45-47).

[147] *Camenzind* at 45.

> [T]he severity of the offence in connection with which the search and seizure was effected, the manner and circumstances in which the order had been issued, in particular further evidence available at that time, the content and scope of the order, having notably regard to the nature of the premises searched and the safeguards taken in order to confine the impact of the measure to reasonable bounds, and the extent of possible repercussions on the reputation of the person affected by the search.[148]

It follows from this that Article 21 of the Regulation seems to provide the necessary safeguards. First, before a dawn raid can be conducted, a judicial authorisation from a national court, based on a Commission decision, is required.[149] Second, the Commission can only make such a decision where it has a reasonable suspicion that business documents may be found in the private home concerned. Third, the Commission's decision must also state the reasons that have led the Commission to conduct an inspection, pursuant to Article 20(8) of the Regulation. Fourth, the Commission's powers to inspect documents are restricted to business records[150] and are subject to legal professional privilege. Fifth, whilst the national court has a similar review power as mentioned above, it has some additional powers as well. According to Article 21(3) of the Regulation, in reviewing a Commission decision to enter private premises, the national court can also consider 'the importance of the evidence sought … and the reasonable likelihood that business books and records relating to the subject matter of the inspection are kept in the premises'.

Whilst the extension of the safeguards in respect to private premises is a welcome improvement, it does not go far enough. First, in granting authorisation for the Commission to conduct inspections on private premises, the national court cannot 'call into question the necessity of the inspection nor demand that it be provided with the information in the Commission's file'.[151] In this regard, it cannot be said that the national court gives an *authentic* authorisation for the Commission to enter private homes. Second, there is no requirement for a 'police officer',[152] 'independent observer',[153] or 'public officer'[154] to be present to ensure that the Commission officials act within its powers.

Moreover, it is likely that the ECtHR would find excessive the Commission's inspection powers of the 'homes of *directors, managers and the other members of staff*'.[155] The

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[148] *Buck v Germany* at 45.

[149] Art 21(3) of the Regulation.

[150] Art 21(4) of the Regulation. Cf. *Niemietz* at 37 and *Camenzind* at 46.

[151] Art 21(3) of the Regulation. Cf. *Cronin,* where the court implicitly concluded that were the police to withhold information or fail to provide the judges with fuller information when requested, such actions would be disproportionate in the circumstances.

[152] *Societe Colas Est* at 49.

[153] *Niemietz* at 37.

[154] *Camenzind* at 46.

[155] Art 21(1).

extension of the Commission's powers stretches the limit of what competition investigations are about: finding infringements of competition law committed by undertakings. It could be argued that to extend these powers to apply to the senior officials of the undertaking is permissible, but to extend them to anyone who works for the undertaking is too broad in scope.

5. REMEDY

This article so far has highlighted two human rights concerns facing the dawn raid procedure. It has stated that the ECtHR would provide a greater level of protection than the ECJ in this respect. The problem, of course, is that those undertakings that have been subjected to arbitrary and intrusive treatment cannot claim redress before the ECtHR. The fragmented European legal order hinders legal persons from challenging the compatibility of Commission acts with fundamental rights.[156] A legal person cannot challenge the European Commission before the ECtHR, nor can he formally rely on ECHR jurisprudence before the ECJ.[157] So what can the undertaking do?

5.1 Individual State responsibility: attribution, *ratione personae* and *materiae*

As change to the fragmented European legal order is unlikely to be forthcoming, it is instructive to assess other avenues for undertakings to take in challenging the legality of the Commission's acts. In this respect, the international rules on state responsibility and attribution can, tangentially, provide undertakings with an indirect method by which to challenge the ECHR-compatibility of the Commission's acts. The separate question dealt with here, therefore, is whether the undertaking can take action against a State (individually or collectively), as a member of the ECHR, for complying with its EU obligations that are contrary to the Convention.[158]

The case-law on whether the ECtHR has competence to entertain cases against individual States, as opposed to an international organisation, 'is not straightforward'.[159] According to *Behrami,*[160] the ECtHR must first decide whether an act is attributable to the international organisation or the State before it can determine whether it has competence, *ratione personae* and *materiae*, to adjudicate the matter. According to the Court, an act can only be attributable to the international organisation where it 'retained ultimate authority and control' so that it can only be said that the international organisation delegated its powers.[161] This case arose out of challenges issued by the

[156] A prime example of the fragmented European legal order is evidenced by the fact that to accede to the European Union, States must be a party of the ECHR (Copenhagen Criteria, available at: http://europa.eu/rapid/pressReleasesAction.do?reference=DOC/93/3&format=HTML&aged=1&language=EN&guiLanguage=en. However, the EU is not party to the ECHR. Only States can secede to the ECHR.

[157] As evidenced in *Mannesmannrohren-Werken.*

[158] Willis at 319.

[159] Craig and De Burca, *EU Law: Text, Cases, and Materials* (OUP 4th Edition 2008) at 242.

[160] *Behrami and Behrami v France* and *Saramati v France*, *Germany and Norway* (2007) 45 EHRR SE10.

[161] *Behrami* at 133. For an application of this test, see the UK case of *Al-Jedda* v *Secretary of State for Defence* (2007) UKHL 58.

applicants against UN-mandated peace maintenance operations in Kosovo. In this case, the ECtHR held that the failure of UNMIK (a subsidiary UN organ responsible for civil affairs) to remove cluster bombs and the act of KFOR (a NATO-led security force) in detaining one of the applicants were attributable to the UN, as opposed to the States involved in UNMIK and KFOR. This was because KFOR was operating under powers delegated to it under Chapter VII of the UN Charter and UNSC Resolution 1244.[162] UNMIK's acts were already attributable to the UN because it was the UN's subsidiary organ.[163] Since the acts were attributable to the UN, as opposed to the States, the ECtHR did not have any competence *ratione personae* to adjudicate on that matter.

Whether the ECtHR will apply a detailed test of attribution in the EU context is debatable. The case-law suggests that there is an automatic presumption of attribution to States that act because of their EU obligations. Early case-law of the ECtHR confirms this approach. Although the ECtHR did not have the *ratione personae* to consider challenges taken directly against the EU because it is an international organisation, it nonetheless had the *ratione personae* to take action against the States, for, when they transferred their powers to the EU, it did 'not necessarily exclude a State's responsibility under the Convention with regard to the exercise of the transferred powers. Otherwise the guarantees of the Convention could wantonly be limited or excluded and thus be derived of their peremptory character'.[164] The ECtHR here did not apply a substantive test of attribution as it did in *Behrami*. Rather, it was assumed that acts arising out of States' EU obligations could be attributed to the States themselves, because the underlying rationale in the EU-State relationship is that:

> [T]he institutions of the EC/EU exercise powers which are delegated to them … and are comparable to certain powers traditionally exercised by the legislative, administrative and judicial authorities of the Member States. Without such attribution of powers to the EU/EC, the exercise of these powers by the authorities of the Member States would have been subject to review by the ECtHR for its conformity with the ECHR.[165]

In the early cases, the issue turned on whether the ECtHR had competence *ratione materiae*. In determining this, the case-law suggests that the ECtHR focused on the discretion the State had in implementing the EU act.[166] In the case of no discretion, such as where the State implements an ECJ judgment,[167] the ECtHR had no *ratione materiae* to adjudicate on the matter. If the States had discretion, such as in

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[162] *Behrami* at 132-141.

[163] *Behrami* at 142-143.

[164] *M&CO* (1990) DR 138. See also *Matthews* v *UK* (1999) 28 EHRR 361, para 32.

[165] Van Dijk, 'European Commission for Democracy Through Law (Venice Commission): Comments on the Accession of the European Union / European Community to the European Convention of Human Rights', CDL (2006) 096, 12 October 2007, Strasbourg at 3. Available at: http://www.venice.coe.int/docs/2007/CDL(2007)096-e.asp

[166] *Craig and De Burca* at 424.

[167] *M&Co*, op cit, n 164.

implementing primary law, into which States are free to enter,[168] or where they have discretion to implement a directive,[169] then the ECtHR had *ratione materiae* to entertain the case on its merit.

The case of *Bosphorus*[170] implicitly confirms that there is an automatic presumption that acts arising from States' EU obligations can be attributed to the States themselves, and it adopts a 'more systematic approach' in dealing with whether the ECtHR has competence to adjudicate such matters.[171] *Bosphorus* concerned the seizure of the applicant's aircraft pursuant to an EC Regulation implementing a UN Security Resolution obliging States to confiscate all aircraft belonging to or operating from Yugoslavia. As the planes were bought from Yugoslavia, the Irish Minister of Transport had them impounded. Under a test of attribution, it cannot really be said that the acts were attributable to the Irish Minister because in reality he was only acting in the manner in which he was obliged to under the EC Regulation.[172] In reality, these acts were attributable to the EU. However, the ECtHR did not apply a test of attribution. Rather, it assumed that the acts were attributable to Ireland.

Instead, the ECtHR focused on whether it had the competence to entertain the case. In determining whether the case was admissible, the ECtHR deemed that the notion of 'jurisdiction' under Article 1 of the Convention 'is considered primarily territorial'.[173] In this case, as the seizure of the plane was implemented by the Irish State in Ireland pursuant to a decision made by the Irish Minister, the 'primarily territorial' test was satisfied. Consequently, the elements of *ratione loci, personae* and *materiae* had been satisfied.[174] This approach allowed the ECtHR to overcome 'the practice of the ECtHR to declare applications that are connected to Community acts inadmissible *ratione materiae'*.[175] By adopting the 'primarily territorial' test, the ECtHR in effect allowed all challenges against States' acts arising from their Community obligations as admissible because it would not be incorrect to say that all such acts will occur in the territorial jurisdiction of the State through some act of a State organ. In the case of a dawn raid, this will be equally so. The dawn raid only takes place in the territory of the State with the knowledge or the co-operation of the NCA,[176] and, where the dawn raid is

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[168] *Matthews v UK*, op cit, n 164.

[169] *Cantoni* v *France*, (App. No.17862/91) judgment of 15/11/1996.

[170] *Bosphorus*, op cit, n 124.

[171] *Hoffmeister, Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirket v Ireland,* App. No. 45036/98*, AJIL,* Vol 100, No 2 (Apr, 2006), 442-449 at 446.

[172] Costello, 'The Bosphorus ruling of the European Court of Human Rights: fundamental rights and blurred distinctions in Europe' (2006) *HRLR* 87 at 100.

[173] B*osphorus* at 136.

[174] B*osphorus* at 137.

[175] Kuhnhert, 'Bosphorus – Double Standards in European Human Rights Protection?' *Utrecht Law Review*, Vol 2, Issue 2 (December 2006) at 184 - http://www.utrechtlawreview.org

[176] Art 20(3) and (4) of the Regulation.

opposed, it is the national court that has the final decision in authorising the procedure in its territory.[177]

Despite *Behrami*, it is argued here that the correct approach to be adopted in the EU-State obligations is the one outlined in *Bosphorus*. It is important to remember that the EC Regulation adopted in *Bosphorus* was adopted pursuant to a UNSC Resolution. The ECtHR could have ruled that the case was inadmissible because it was adopted under a UNSC Resolution, but it did not. Rather, it side-stepped that issue, seemingly on purpose, to create a systematic test that could be applied in the EU context. Moreover, the ECtHR itself in *Behrami* distinguished *Bosphorus* in this way. The ECtHR in *Behrami* confirmed that the Court in *Bosphorus* had competence *ratione personae* because the seizure of the aircraft had been carried out by the Irish Authorities in Ireland following a decision of the Irish Minister. In *Behrami,* the acts and omission of UNMIK and KFOR could not have been attributed to the States, did not take place in their territory and were not undertaken pursuant to a decision of one of its authorities,[178] thereby re-affirming the 'primarily territorial' jurisdiction test. The ECtHR made this distinction even more explicit when it stated 'there exists, in any event, *a fundamental distinction* between the nature of the international organisation and of international cooperation with which the Court was there concerned [in *Bosphorus*] and those in the present cases'.[179] *Bosphorus* concerned a case arising out of the EU context, whereas *Behrami* arose out of the UN, 'an organisation of universal jurisdiction fulfilling its imperative collective security objective'[180] under Chapter VII and Article 103 of the UN Charter. It would not be stretching too far to say that whilst the ECtHR regards itself as equal to the EU, and therefore deems itself able to oversee acts flowing from the EU, it does not hold the same opinion of the UN. It is as though it regards the UN as being of a higher status, as though it sits at top of a pyramidal structure in the international legal system because of Article 103[181] and the political implications that flow from this. *Behrami* and *Bosphorus* should be seen in this light.

Equivalence

Adopting a *Bosphorus* approach poses little problem concerning whether the ECtHR has the competence to adjudicate a case against an individual State. Rather, the focus will be on whether the second part of the *Bosphorus* doctrine is satisfied. According to *Bosphorus*, acts undertaken pursuant to the States' international legal obligations will have to be reviewed to determine whether the substantive guarantees and judicial supervision

[177] Arts 20(6), (7) and (8) of the Regulation. In the case of private premises, it is the national court that gives the final judicial authorisation.

[178] *Behrami* at 151.

[179] *Ibid.*

[180] *Ibid.*

[181] Which states 'in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'.

offered can be considered at least equivalent to that of the ECHR.[182] By equivalence, the Court meant 'comparable'[183] as opposed to 'identical'.[184]

In case the international organisation does provide for equivalence, there will be a presumption that the State complies with the Convention. However, this presumption can be rebutted if 'in the circumstances of a particular case, it is considered that the protection was manifestly deficient'.[185]

In *M&CO*, the applicants challenged the execution of an ECJ judgment by the German authorities on the basis that it breached the principle of presumption of innocence under Article 6(2). The ECtHR concluded that no infringement would occur if the international organisation provided for rights with equivalent protection. In this case, the Court concluded as such without going into detail concerning whether that was the case. The difference in *Bosphorus* was that the ECtHR undertook a substantially detailed analysis of the EU's system for protecting human rights as a whole. In particular, it noted that case-law and subsequent treaties took into account fundamental rights. More importantly, the EU's mechanisms of control are very substantial and include annulment actions, actions against the Community and the possibility of bringing action in damages for non-contractual liability. Moreover, national courts played a significant role in protecting individual rights through the concepts of supremacy, direct effect, state liability and the Article 234 preliminary reference. In this light, the ECtHR concluded that the protection was equivalent, and the presumption arose that Ireland did not infringe its Convention rights.[186]

It is difficult to see how the result will be any different in the context of EC competition proceedings. Undertakings have recourse to the very same EU system that the ECtHR declared equivalent. As a result, States will be presumed to have acted in accordance with the ECHR, unless they can somehow bring the case through the 'back door'[187] by alleging that, in their particular case, the rights afforded were manifestly deficient. What this means is unclear. No guidelines were given by the court. If 'manifestly deficient' is taken to mean that the EU must apply substantially the same standards of human rights as enshrined in the ECHR, then the preceding chapters are evidence of manifest deficiency. This was the view taken by several of the concurring Judges. In defining 'manifestly deficient', they concluded that 'it seems all the more difficult to accept that Community law could be authorised, in the name of 'equivalent protection', to apply standards that are less stringent than those of the ECHR when we

[182] B*osphorus* at 155.

[183] *Ibid.*

[184] *Ibid.*

[185] B*osphorus* at 156.

[186] B*osphorus* at 159-165.

[187] Hoffmeister at 447.

consider that the latter were formally drawn on the Charter of Fundamental Rights of the EU'.[188]

However, if manifestly deficient is understood to mean deficiencies in the *procedural* mechanism of control that provide for the protection, then undertakings will seem to have relatively little chance of success. This is the view taken by *Bosphorus* and previous case-law. In *Bosphorus*, the ECtHR held that no manifest deficiency had occurred because it was clear that 'there was no *dysfunction of the mechanisms of control* of the observance of the Convention rights'.[189] Previous case-law also suggests that where there is a lack of or an ineffective judicial remedy, an infringement may be found.[190] In *Matthew*s, the court relied heavily on this fact when concluding that there had been an infringement of Article 3 of Protocol 1 – the right to vote. This was because the UK, pursuant to an EU treaty, denied people in Gibraltar from voting in European Parliament elections. The Court reached this conclusion because the Treaty that was entered into could not have been challenged before the ECJ because it was not an act of the Community, but rather a Treaty of the Community.[191] In other words, in this case there was a *dysfunction of the mechanism of control* (i.e., of the judicial remedy) that was established to protect the ECHR rights.

5.2 Collective State responsibility

It has been argued that an undertaking involved in a dawn raid procedure should sue States collectively for self-executing acts.[192] As all States have transferred their powers to the EU, they should, as 'the authors of the act',[193] be collectively responsible for all subsequent acts committed by the EU. However, an undertaking seeking to challenge the Commission's power is unlikely to benefit from this approach. The doctrine of equivalence that was adopted in *Bosphorus* will almost certainly apply *mutatis mutandis*. As was illustrated above, in the EU context, the ECtHR will presume that the EU/EC system of human rights protection is compatible with the ECHR.

5.3 National courts

The only other possibility for undertakings to avail themselves of their rights is to hope that the national court, in allowing investigations to take place on its territory, takes into

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[188] B*osphorus* at 53.

[189] B*osphorus* at 166 [Emphasis Added].

[190] King, 'Ensuring Human Rights review of Intergovernmental acts in Europe' (2000) *ELR*79 at 85. See generally Canor, 'Primus inter pares. Who is the ultimate guardian of fundamental rights in Europe?' (2000) 25(1) *ELRev* 3.

[191] Para 33-34. Compare to *M & CO* and *Waite and Kennedy* v *Germany* (App. No.26083/94) Judgment of 18/02/1999, where judicial remedy existed and therefore the cases were dismissed.

[192] Hoffmeister at 448; Wellens, 'Fragmentation of International Law', *Michigan Journal of International Law* (2004) Vol 25 at 11-16. Also see *Senator Lines* v *15 EC Member States* (2004) 39 EHRR SE3, where an undertaking challenged a Commission decision against all 15 States before the ECtHR. The case never reached Strasbourg, as the applicants won their original appeal before the ECJ.

[193] Craig and De Burca at 242.

account the ECHR. According to Article 20(6) of the Regulation, the State should provide the Commission with the necessary assistance, including a police officer, where an undertaking opposes a Commission investigation pursuant to an authorisation. Article 20(7) further provides that if *authorisation* for the assistance is required *from a judicial authority,* then it should be applied for *according to national rules*. However, as argued above, it was the lack of a police officer and of judicial authorisation that were contributing factors concerning why the Commission's powers infringed Article 8 ECHR. Accordingly, if legal persons want to avail themselves of procedural rights lacking in the dawn raid procedure, this may be one method of doing so.

From a substantive law perspective, Article 53 ECHR provides that 'nothing in this Convention shall be construed as *limiting or derogating* from any of the human rights and fundamental freedoms which may be ensured under the laws of any *High Contracting Party or under any other agreement to which it is a Party*' [Emphasis added]. This supports the proposition that the national court, in providing its judicial authorisation under national rules, must ensure that the undertaking's ECHR rights are not infringed.[194] As Callewaert confirms, 'in respect of the rights of defence, this means that the Strasbourg standards are to be applied also by domestic courts in the field of community law'.[195] Besselink goes further and suggests that the rights afforded by national law can only be of a higher standard.[196]

Willis, however, contends that the scope of Article 20(8) of the Regulation limits the extent to which the national court can review a Commission decision to investigate.[197] Article 20(8) only allows the national court to determine whether the Commission measures are neither excessive nor arbitrary with regard to the subject matter of the inspection. In *Roquette Freres*, the ECJ outlined that the arbitrary element of the test meant that the national court could not question the need for the investigations, but the Commission should illustrate to the national court that it has evidence of an infringement, from which the Court can decide whether a reasonable suspicion exists that the undertaking violated competition law.[198] As for the excessive element, the ECJ said that the national court must ensure that the 'measures *do not constitute … a disproportionate and intolerable interference'*.[199]

Contrary to what the authors advocate above, could the national court not, when determining the proportionality elements of its review, take into account Convention case-law (as Article 53 ECHR states it should) and come to the same conclusion as the

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[194] Besselink, 'Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union' (1998) 35 *CMLRev* 629 at 656-657.

[195] Callewaert, 'The Privilege against Self-Incrimination in European Law: An Illustration of the Impact of the Plurality of Courts and Legal Sources on the Protection of Fundamental Rights in Europe' *ERA FORUM*, 4/2004, 2004 Issue 4 at 497, p 497.

[196] Besselink at 657.

[197] Willis at 320.

[198] *Roquette Freres* at 60-61.

[199] *Ibid* at 76.

ECtHR that such investigations are disproportionate under Article 8 ECHR? Whether the national court has the courage to go against the doctrine of EC law supremacy and apply ECHR principles, even armed with Article 53 ECHR, is another matter. As O'Neill notes, a State acting in this manner 'is arguably acting in breach of Community law (and may conceivably open up the governments to claims of *Francovich* damages)'.[200]

6. CONCLUSION

A tension exists in the jurisprudence between the ECJ and ECtHR, which has cast a major shadow of doubt on the legitimacy of the Commission's powers of investigation. This is quite unfortunate, considering that it would only require a small amount of tinkering with the Commission's powers of investigation to bring them into conformity with the ECHR. For example, if a request for information under an Article 18(3) decision were adopted pursuant to a judicial warrant, the Commission would be standing on a firm legal base to compel the undertaking to produce documents. However, the EU remains staunch in its approach, and the fact that EC Regulation 1/2003 was adopted with full knowledge of the potential infringements on human rights law tells its own story. Whilst human rights in Strasbourg evolve, human rights in Luxembourg remain tied to an outdated and outmoded vision from the 1980s. This is quite unfortunate for undertakings that have no recourse to a judicial remedy for their legitimate human rights grievances against the EU. The sooner the EU accedes to the ECHR, the sooner equality amongst all people (and undertakings) can be attained.

[200] O'Neill, 'Fundamental Rights and the constitutional supremacy of Community law in the United Kingdom after devolution and the Human Rights Act' (2002) *PL* 724 at 732 and may conceivably open up the governments to claims of *Francovich* damages.

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Anti-Cartel Enforcement by the DOJ: An Appraisal

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This article evaluates the effectiveness of the Antitrust Division of the U.S. Department of Justice with respect to criminal enforcement of Section 1 of the Sherman Act during 1990-2007. Evidence suggests that cartel penalties are sub-optimal. By all measures, the size of US fines imposed on corporate cartelists has risen since 1990, though relative to other jurisdictions and to private recoveries of damages, the Division is falling behind. Where the Division has no peer is in imposing prison sentences of individual cartel managers. However, in view of the surge in corporate leniency applications, a matter of some concern is the falling numbers of criminal price-fixing cases filed, corporations indicted and fined, and the number of cartel managers charged and fined. In part, these trends may be ascribed to a policy shifts in the early 1990s, but falling numbers may also reflect constrained resources.

The objective of this article is to describe and assess the performance of the Antitrust Division the US Department of Justice (hereinafter 'the Division') with respect to its enforcement of Section 1 of the Sherman Act. I focus on information about the Division's performance since about 1990, largely using traditional indicators that have been employed by academic scholars and the Division itself.[1]

WHAT'S THE PROBLEM?

Private cartels are a form of business conduct that, in a memorable metaphor, has been compared to economic cancer.[2] The Antitrust Division of the U.S. Department of Justice ('the Division') is the sole agency of the federal government empowered to criminally prosecute such cartels. Published studies of the Division's cartel enforcement

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* This article summarizes a 2007 Working Paper by the author, Connor , 'The United States Department of Justice Antitrust Division's Cartel Enforcement: Appraisal and Proposals', SSRN Working Paper, Revised April 26 2008 (with assistance of an AAI Task Force), available at SSRN: http://ssrn.com/abstract=1130204., which was developed over nine months with the assistance of a large and broad-based committee of antitrust experts established by the Directors of the American Antitrust Institute (AAI). The data on enforcement indicators upon which this article is based can be found in that Working Paper. The views and conclusions in this article are the author's own. The author presented many of the contents of this paper at the June 2007 annual meeting of the AAI in Washington, DC. Mr. Scott Hammond, Deputy Assistant Attorney General for Criminal Enforcement of the Antitrust Division, offered a spirited response to the presentation at that meeting, Hammond, speech 2008, http://www.antitrustinstitute.org/archives/files/20080618_pv_aai061808panel2_062320081620.mp3.

[1] This paper also integrates the published and private views of a committee, which I chaired, established by the American Antitrust Institute. Many of the committee's members have had years of experience tracking the activities of the Division from positions inside and/or outside the agency.

[2] M Monti, 'Fighting Cartels: Why and How?' Speech at the 3rd Nordic Competition Policy Conference, Stockholm, 11-12 September 2000 at 1 ("Cartels are cancers on the open market economy…cause serious harms to our economies [and] also undermine the competitiveness of the industry involved.").

are dated.[3] The final report of the Antitrust Modernization Commission spent relatively little space on the Division's anti-cartel efforts and offered few cartel-related recommendations.[4]

Considerable evidence supports the observation that the number, size, and injuriousness of discovered cartels are high.[5] This is particularly true for international cartels, which for decades prior to the mid-1990s were rarely detected by the Division but which since 1995 have comprised the vast bulk of the Division's prosecutions.[6] Rates of annual discovery of international cartels worldwide were five times higher in the mid-2000s compared to the early 1990s.[7] The increasing numbers of cartels being discovered can be attributed to an increase in the number of antitrust authorities effectively enforcing tougher laws against hard-core cartel conduct,[8] in the collective probability of cartel detection by the world's antitrust authorities,[9] or in the total number of cartels in existence.[10] Admittedly, little is known about trends in the total

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[3] See JC Gallo, *et al.* Department of Justice Antitrust Enforcement, 1955-1997: An Empirical Study. *Review of Industrial Organization* 17 (2000) 75-133; see also GAO. *Justice Department: Changes in Antitrust Enforcement Policies and Activities*. Washington DC, the U.S. General Accounting Office (October 1990).

[4] AMC, *Final Report and Recommendations*, April 2007, Washington, DC: Antitrust Modernization Commission.

[5] OECD, *Report on the Nature and Impact of Hard Core Cartels and Sanctions against Cartels under National Competition Laws* DAFFE/COMP (2002) 7, Paris: Organization of Economic Co-Operation and Development, 2003.

[6] See RW Davis, 'International Cartels: Who's Liable? Who's Not?' *Antitrust Source* (May 2002) 1-8, at 1, 'For about half a century antitrust did not concern itself with international cartels – either they were not there, or the enforcers could not find them'. See also SJ Evenett, MC Levenstein, and VY Suslow, 'International Cartel Enforcement: Lessons from the 1990s'(2001) 24 *The World Economy* 1221-1245 at p 1221, 'The enforcement record of the 1990s has demonstrated that international private cartels are neither relics of the past nor do they always fall quickly under the weight of their own incentive problems'.

[7] The 'rate of discovery' is the total number of international cartels reported in the world's press for which a formal investigation, an indictment, or a guilty decision is announced by an antitrust authority divided by the number of years. JM Connor, 'The United States Department of Justice Antitrust Division's Cartel Enforcement: Appraisal and Proposals' SSRN Working Paper, 2007 (version revised April 26, 2008) at Figure 1, shows that the worldwide rate of discovery of cartels with international membership rose from six per year in 1990-95 to 33 per year in 2004-07.

[8] See JM Connor, *Global Price Fixing (2nd ed)* Studies in Industrial Organization No. 26. Berlin and Heidelberg, Germany, Springer Verlag (2007) at pp 56-59 (citing reports documenting the rise of such agencies from one in 1950, to three in 1960, to 20 by 1989, and nearly 50 by 1996).

[9] This is the ratio of the number of cartels detected and prosecuted in a jurisdiction to the total number of illegal cartels in existence in the jurisdiction over some specified time period. A 2008 revision of JM Connor, 'Optimal Deterrence and Private International Cartels', SSRN Working Paper, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=787927 (April 2007) at Table 1, surveys 21 scholarly publications of studies or opinion surveys about the rate of clandestine cartel discovery p; nearly all estimates of p fall within the range of 10% to 20%, and no rigorous studies suggest that p is rising. However, one new study of the effects of the 1993 U.S. Corporate Leniency Program finds evidence from hard-core cartel convictions by the Division that detection levels have increased and formation levels have declined – both by about 60%, see NH Miller, 'Strategic Leniency and Cartel Enforcement', unpublished, University of California, Berkeley, November 2007. Also, Hammond, op cit, n 1, asserts that the increase in p due to leniency programs in beyond debate.

[10] That is, the sum of the number detected and the number that operated in a clandestine fashion throughout their lives.

number of modern prosecutable cartels.[11] However, even if detection rates have risen, it is highly doubtful that they have quintupled. If so, it follows that the number of annual cartel formations is also up since the early 1980s.[12]

There is a paradox here. Monetary penalties, government and private, US and non-US, became much higher after the mid-1990s.[13] Contrariwise, the number of cartels being discovered each year and the number of firms that are price-fixing recidivists continues to rise.[14]

ENFORCEMENT PERFORMANCE

Top officials of the Division profess satisfaction in public statements about the agency's performance with respect to all of its missions.[15] Legal commentators also

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[11] However, Levenstein and Suslow, see M Levenstein and V Suslow, 'What Determines Cartel Success?' Working Paper 02-001, Ann Arbor, Michigan, University of Michigan Business School, January 2002, and M Levenstein and V Suslow, 'What Determines Cartel Success?' Journal of Economic Literature 64 (March 2006): 43-95, note that US government antitrust prosecutions in the 1940s accounted for only 10% of some of the known cartels operating in the interwar period (p 16). Around 200 such cartels have been identified, none of them intentionally clandestine and most of them based in Europe and legally registered with their home governments. The majority of these cartels were composed entirely of firms that were domiciled outside the United States. Consequently, their contracts and management frequently were matters of public record, and they were formed with a detection probability of zero.

[12] The causes of rising cartel conduct are not known with certainty, but the trend is contemporaneous with rising globalization and falling barriers to trade since the 1960s or so.

[13] JM Connor and G Helmers, 'Statistics on Modern Private International Cartels' (January 2007) Working Paper 07-01. Washington, DC. American Antitrust Institute (showing that government and private penalties in all antitrust jurisdictions are increasing and that the number of cartel recidivists is in the hundreds).

[14] There are differences of opinion about the degree of cartel recidivism, but these differences do not account for rising numbers since 1990. For example, SD Hammond, 'Statement of the Department of Justice on Criminal Remedies before the Antitrust Modernization Committee', November 3, 2005, at p 6, takes the view that 'there is relatively little recidivism among corporate antitrust offenders'. Hammond is very likely applying the DOJ's standard definition, viz., a company is a recidivist only if Section 1 of the Sherman Act was violated within ten years of the current charge. JM Connor, 'A Critique of Partial Leniency for Cartels by the U.S. Department of Justice', SSRN Working Paper, revised May 26 2008, [at Table A3,] calculates that at least 34% of a large sample of convicted corporate cartelists during 1995-2007 were recidivists by this definition: 3.2 per year during 1995-99 and 3.7 per year during 2000-07. It is possible that the Division's Amnesty-Plus Program may account for some of the observed US recidivism. Another careful study by Veljanovski, C Veljanovski, 'European Commission Cartel Prosecutions and Fines, 1998-2007: A Statistical Analysis' London: Case Associates (September 2007), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1016014, of EC prosecutions since 1998 only finds that about 30% of all decisions contain recidivists, narrowly limited to prior EU Article 81 infringements.

[15] SD Hammond, 'When Calculating the Costs and Benefits of Applying for Corporate Amnesty, How Do You Put a Price Tag on an Individual's Freedom?', speech at the 15th Annual National Institute on White Collar Crime, San Francisco, California, March 8, 2001; SD Hammond, 'Cornerstones of an Effective Leniency Program' (2004) speech downloadable at the U.S. Department of Justice website www.usdoj.gov; SD Hammond, 'Statement of the Department of Justice on Criminal Remedies before the Antitrust Modernization Committee', November 3 2005; SD Hammond, 'Recent Developments, Trends, and Milestones in the Antitrust Division's Criminal Enforcement Program', address before the Cartel Enforcement Roundtable, ABA Section of Antitrust Law, 2007 Fall Forum, Washington, DC (November 16, 2007); GR Spratling, 'International Cartels', speech before the American Conference Institute's 7th National Conference on the Foreign Corrupt Practices Act. Washington, DC (December 9, 1999) and GR Spratling,

perceive there is little to criticize about federal cartel enforcement.[16] Indeed, for decades the Division has largely been lionized for its aggressive campaign to rid the nation and the world of cartels.[17] Moreover, many of the Division's cartel traditional practices and innovations, such as its leniency program, have been imitated by foreign antitrust authorities.[18]

From time to time, scholars have undertaken empirical studies of antitrust enforcement in the United States.[19] Various measures of enforcement effort and performance supplied by the Division have been employed by these authors: Division budgetary resources, case handling, and corporate and individual penalties. Attention to multiple dimensions of enforcement over a long period ought to lead to a more balanced assessment than reliance on only a few indicators covering a short period. A

'Detection and Deterrence: Rewarding Informants for Reporting Violations', *George Washington Law Review* 69 (December 2001) 798-823.

16 'The …enforcement records of the [DOJ and FTC] – outside the cartel area – are less activist now than at any time in recent years...[T]here is continued vigor of cartel enforcement…' see MG Whitener, 'Editor's Note: The End of Antitrust?' *Antitrust Magazine* 22 (Fall 2007) 5. Whitener is Editorial Chair of the American Bar Association's *Antitrust* magazine. Similarly, WE Kovacic, 'The Modern Evolution of U.S. Competition Policy Enforcement Norms'. *Antitrust Law Journal* 71 (2003) 377-478 at pp 415-425, views the 1990s as the culmination and intensification of an upward linear trend in harsh treatment of cartels that began at least as far back as 1959 ('Modern U.S. experience with criminal enforcement presents a pattern of progressive, cumulative development of competition policy' p 423). The absence of negative criticism may in part be traced to an ideological consensus on the wisdom of anti-cartel enforcement between the so-called Harvard and Chicago Schools of antitrust (S Martin, 'Remembrance of Things Past: Antitrust, Ideology, and the Development of Industrial Economics', in V Ghosal and J Stennek (eds.). *The Political Economy of Antitrust.* Amsterdam, North-Holland (2007)).

17 An early panegyric is a book by Berge (W Berge, *Cartels: Challenge to a Free World (1st ed)* Washington, DC, Public Affairs Press (1944). More recent optimistic assessments of U.S. cartel enforcement may be found in D Klawiter, 'After the Deluge: The Powerful Effect of Substantial Criminal Fines, Imprisonment, and Other Penalties in the Age of International Criminal Enforcement', *George Washington Law Review* 69 (2001) 745-765, DA Balto, 'Antitrust Enforcement in the Clinton Administration', *Cornell Law Journal and Public Policy* 9 (1999) 61 and RE Litan and C Shapiro 'Antitrust Policy during the Clinton Administration', Working Paper CPC01-22, Berkley, Competition Policy Center, University of California (July 2001) at 3 ('… the Division had unprecedented success during the Clinton years … in prosecuting price fixers').

18 GR Spratling and D Jarrett Arp, 'The Status of International Cartel Enforcement Activity in the U.S. and Around the World', address at the American Bar Association Section of Antitrust Law, Fall Forum, Washington, DC (November 16, 2005).

19 A massive study of the years 1955-1997 appears in Gallo *et. al.*, op cit, n 3; it is an elaboration of a classic study of RA Posner, 'A Statistical Study of Antitrust Enforcement', *Journal of Law and Economics* 13 (1970) 365-419. RH Lande, and JP Davis, 'Benefits From Private Antitrust Enforcement: An Analysis of Forty Cases', paper presented at the AAI Symposium *Future of Private Antitrust Enforcement* Washington, DC (December 10, 2007) focus on large private settlements resolved since 1990. Connor, John M, 'Global Antitrust Prosecutions of Modern International Cartels' The J of Industry, Competition, and Trade 4 (September 2004): 239-267, and Connor, op cit, n 9, examines antitrust enforcement with respect to international cartels 1990-2007 by the Division, all other antitrust authorities, and private plaintiffs. A GAO report, op cit, n 3, covering 1970-1989 uses most of the same indicators.

supplementary approach is to compare the Division's performance with other active antitrust authorities, such as the European Commission (EC).[20]

Agency Resources

The Antitrust Division is one of the smaller agencies of the federal government, with a budget of $148 million in 2007, which is only 0.8% of the Justice Department's budget.[21] Measured by the growth in agency funds, Congress and the Bush I and Clinton Presidential administrations have been supportive of the Division's mission. Corrected for inflation, the Division's annual budgets increased every year but one; during 1990-2002.[22] However, during the years 2002-2007 of the Bush II Administration, the agency's real budget was essentially flat at a level 5% below its 2002 peak. While the 1990-2007 budget trend is overall favourable, combined with federal civil service limitations, it may be insufficient to attract and retain the best and the brightest professionals.[23]

In terms of personnel, the Division grew very slowly since 1990 and is still below levels authorized in the late 1970s.[24] With the major share of the Division's budget devoted to employee compensation, the slow rise in positions implies that budget increases have gone mainly to try to attract and hold professionals. Employee compensation rose about 2% faster than inflation during 1990-2007.[25]

Focusing solely on the Division's own employees misses the investigatory support provided by the FBI in criminal cases, a practice that dates back to at least the 1970s. For criminal investigations, a large number of FBI investigators may be employed to

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[20] Unless otherwise noted, all the indicators cited in this article may be found in Tables 1 and 2 of Connor, 'The United States Department of Justice Antitrust Division's Cartel Enforcement: Appraisal and Proposals', SSRN Working Paper, Revised April 26 2008 (with assistance of an AAI Task Force), available at SSRN: http://ssrn.com/abstract=1130204. To better capture true trends, the data are grouped into four periods: three semi-decades from 1990 to 2004 and the last three years 2005-07.

[21] See AG Reports FY2004-FY2007 Performance and Accountability Report of the Attorney General. Washington, DC (1994-2007) (which in most years contain no references to the Division activities, often lumping antitrust under such broad categories as "Combat Fraud" or "White Collar Crime"; in FY 2000 the first mention of antitrust appears on pp 44-46 in a discussion of prosecuting international cartels).

[22] The deflator is the Producer Price Index (PPI), which tends to rise more slowly than the Consumer Price Index (CPI). The Division budget fell by 28% in real terms from 1980 to 1990. For the whole period from fiscal 1990 to 2007, the budget rose on average 4.9% per annum. From the 1990 low point, the average real rates of increase were 8.1% per year to 1992, 11.6% to 1995, and 7.3% to 2002.

[23] Adjusted for inflation, the Division's budget per person fell in 2004-07 from 2000-03. In 2007, the compensation of third-year associates reached $380,000, which is more than double the average Division's lawyer's salary (Table 1) and exceeded the salary of every employee of the DOJ (*ABA Journal* 12/3/07).

[24] In 2007 there were 880 budget-authorized positions, an increase of 2.5% per year since 1990's 578 positions. Some of those positions are part-time and others are unfilled. In 1980, there were 939 authorized positions.

[25] In real dollar terms, the average compensation per employee rose faster than 2.0% per year from 1990 to 2002, but has fallen slightly since the 2002 peak.

assist the Division personnel.[26] However, the number of FBI agents available for antitrust work has apparently dwindled since 2000.[27]

Price fixing is one of three general enforcement areas. Numerous public statements by the Division leaders emphasize that price-fixing matters are the Agency's number-one goal.[28] However, the 2000s cartel matters absorbed about 29% of the Division's budget share. Moreover, employment data also suggests that cartels are a significant, but far from dominant, preoccupation of the Division.[29]

An important feature of federal criminal cartel prosecutions in the US is that the Division seldom brings large corporate price-fixers to trial.[30] Rather, the Division relies almost exclusively on grand jury investigations,[31] the threat of indictments by those juries, plea negotiations, and guilty-plea agreements to secure corporate prosecutions.[32] While these procedures are time consuming and laborious, they result in a much larger number of completed cases per employee than would result from larger numbers of labour-intensive trials or commission-type hearings.

Detection of Cartels

One of the most important tasks facing the Division involves the detection of normally clandestine cartel activity. Before the 1990s, the Division mainly relied on complaints from suspicious buyers for initiating investigations. There is no public information on whether the number of cartel investigations that may have been launched from internally generated suspicions or from complaints from external parties are still significant.[33] Litan and Shapiro assert that information brought to the antitrust agencies by private litigants and state attorneys general assisted cartel prosecutions in the

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[26] The FBI had 27,000 employees and a budget of $4.8 billion in FY 2004. In some cartel raids as many as 100 FBI agents have been assembled to assist prosecutors. However, the number of agents seconded to antitrust duties cannot be determined from public documents.

[27] See The FBI Strategic Plan, 2004-2009. Washington, DC (showing that of the FBI's eight strategic priorities, fighting white collar crime was seventh) and AG Report 2007, op cit, n.21, at Table 2, stating that the DOJ created a new number-one priority for Terrorism and reduced other criminal-law enforcement expenditures by 6%. See the next section for further supporting details of FBI resources for antitrust investigations. Defense Department investigators also occasionally assist in bid-rigging cases involving the Department of Defense.

[28] See Hammond (2005), op cit, n 15, at 1 ('[General deterrence of cartels is] … the highest priority of the Antitrust Division …').

[29] According to Division workload statistics, in the 1990s less than 20% of its FTE's were devoted to Section 1 (price fixing) enforcement. In the 2000s the cartel-employment share increased, but was slightly below 30%.

[30] There are no official statistics on numbers of antitrust trials or their outcomes, but see Connor, op cit, n.8. The major exception during 1990-2007 was Mitsubishi, which was found guilty at trial in 2001 for its role in the *Graphite Electrodes* cartel. In the early 1990s, Appleton Papers was prosecuted at trial in the *Fax Paper* case and General Electric in the *Industrial Diamonds* case; the Division lost both cases. Some small partnerships and proprietorships have been prosecuted at trial, often by indicting the sole or principal owner.

[31] In a study of several hundred formal hard-core international cartels investigations, only 6% failed to result in a prosecution within about five years, see Connor and Helmers, op cit, n 13.

[32] Every year the Division brings a few individual cartel managers to trial.

[33] The published decisions of the EC almost always mention what initiates a cartel investigation.

1990s.[34] The genesis of the landmark *Vitamins* case is believed to lie with plaintiffs' information.[35] Referrals from the Defense Department and other US government agencies about suspected bid rigging still account for a modest number of investigations.

A problem with a passive approach to cartel detection is that buyers of cartelized products often are unaware they are being injured, particularly when the cartel operates internationally.[36] Another problem with relying on tips is that considerable industry expertise is required to decide on which tips reasonably could apply to markets with structures likely to harbour cartels. Speeches by the Division officials sometimes hint at the existence of internal models developed to help filter reasonable allegations of antitrust violations from unreasonable ones on the basis of industry structure or other market characteristics.[37]

As far as can be known, tips of these kinds have become largely supplanted by corporate leniency applications as the initial events that kick off investigations. In terms of the number of applications, the 1993 revision of the Corporate Leniency Program has been a roaring success in attracting applications,[38] primarily because of nearly automatic approval once the first applicant meets a short list of easily predetermined conditions.[39] More recent improvements, Amnesty Plus and Penalties Plus, have further aided cartel detection.[40] A 2004 amendment to the Sherman Act increased the monetary incentives to be an amnesty applicant by de-trebling maximum private damages; it also

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[34] RE Litan and C Shapiro, 'Antitrust Policy during the Clinton Administration', Working Paper CPC01-22, Berkley: Competition Policy Center, University of California (July 2001), at p 5, available at http://129.3.20.41/eps/le/papers/0303/0303003.pdf

[35] Connor, op cit, n 8 at 230-364. Hammond, op cit, n 1, vehemently objects to the idea that the private bar has assisted the Division in detecting or convicting even one international cartel since 1994.

[36] When a cartel fixes prices in most geographic markets around the world, it often engages in conduct that suppresses international geographic arbitrage, see JM Connor, and D Bush, 'How to Block Cartel Formation and Price Fixing: Using Extraterritorial Application of the Antitrust Laws as a Deterrent', 122 *Pennsylvania State University Law Review* ("Winter 2007"/ March 2008) 813-855. Another frequent characteristic of modern international cartels is that the cartelized products are such minor ingredients for the buyers that they have little economic incentive to invest in expert procurement managers.

[37] The use of filters for cartel enforcement is discussed in RM Abrantes-Metz, and LM Froeb, 'Competition Agencies are Screening for Conspiracies: What Are They Likely to Find?' *The American Bar Association Section of Antitrust Law Economics Committee Newsletter* (March 2008). Knowledgeable former Division personnel believe that filters are no longer being used by the DOJ. In any event, to avoid gaming strategies by potential violators, it may be best for the Division not to reveal the features of filtering models.

[38] Litan and Shapiro, op cit, n 17 at 3-4 (attribute the policy as the major reason for the successful anti-cartel record of the Clinton administration). Hammond, op cit, n 1, calls it 'the greatest investigative tool in [the Division's] arsenal'. The precise number of applications and approvals is not reported by the DOJ.

[39] They include ceasing collusion, full cooperation with the investigation, and no ringleader role.

[40] Amnesty Plus was instituted in the late 1990s after the Division found that some defendants were engaged in cartelizing multiple markets. To discover additional cartels, subject to full cooperation in both matters, the Division offers amnesty to a company already under investigation if it confesses to a *second* cartel about which the Division was unaware; it also offers a large discount on fines for the first cartel. Penalty Plus is a policy that promises to impose unusually large fines on companies that neglect to apply for the Amnesty Plus program.

obligates amnesty recipients to cooperate with private plaintiffs.[41] Finally, joint international raids and information-sharing with foreign authorities provide additional potential tips about secret cartels and help preserve incriminating documents that may reside abroad.

However, whether leniency and related programs have succeeded in their ultimate purposes is unclear. The true standards of success – reductions in cartel formations and durations compared to a no-leniency regime – are most difficult to measure. Economic models are ambiguous and empirical support is absent:

> In reviewing the body of theoretical work, the general conclusion is one of strong support for leniency policies in that they show that leniency can reduce cartel stability. What is much less clear is whether there is evidence in support of this hypothesis … it is unknown how influential leniency programs have been in inducing cartels to collapse or in deterring them from forming.[42]

The Corporate Leniency Program involves a trade-off that may adversely affect general deterrence.[43] Amnesty recipients pay no fines, and since 2004 are liable for only single rather than treble private damages. The routine approval of qualified amnesty applicants means that the total amount of fines collected for price-fixing is reduced compared to a no-leniency regime. Potential defendants are likely to incorporate these reductions when forming conjectures about the size of future penalties.[44] The identity of US amnesty recipients is not normally revealed by the Division, so the foregone fines cannot accurately be computed. Moreover, hiding their identities means that measures of US recidivism will be underreported. However, because the EU does identify amnestied defendants and the fines they would have paid, absent the EU Leniency Program, one can calculate precisely the reduction in fines in a comparable jurisdiction.[45] An analysis of all EU cartel decisions that resulted in fines during 1998-

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[41] JM Griffin, 'The Antitrust Criminal Penalty Enhancement and Reform Act of 2004', speech at the ABA Section of Antitrust Law 2006 Fall Forum, Washington, DC, November 16-17, 2006, at 9. Time will tell, but plaintiffs' attorneys are sceptical that the law will significantly improve cooperation.

[42] JE Harrington, 'Optimal Corporate Leniency Programs', *Journal of Industrial Economics* 41 (June 2008) 215-246 at pp 237-238.

[43] In addition there are some game-theoretic models of leniency that suggest that the U.S. policy is inferior to a program that gives a reward to the first firm and no fine reductions to the remaining conspirators, see G Spagnolo, Leniency and Whistleblowers in Antitrust, prepared for P Buccirossi (ed.), *Handbook of Antitrust Economics*. Cambridge, Mass. MIT Press, 2007. This hypothesis has recently received empirical support, see Hamaguchi, Yasuyo, Toshiji Kawagoe, and Aiko Shibata, 'Group Size Effects on Cartel Formation and Enforcement Power of Leniency Programs', unpublished paper, 2008.

[44] That is, when joining a cartel a company factors in the possibility that it may be the first to qualify for amnesty.

[45] The EU instituted its first Leniency Notice in 1996, but there were few applicants because full leniency was not offered, the benefits for partial leniency were not generous, and acceptance was highly discretionary, see C Veljanovski, 'Penalties for Price Fixers: An Analysis of Fines Imposed on 43 Cartels by the EC Commission', Casenote 41, London: Case Associates (May 2006) at 511. The revised 2002 program (EC Commission Notice on immunity from fines and reduction of fines in cartel cases, 2002/C45/03) was much closer to the US program, almost nondiscretionary, and attracted large numbers of applications.

2004 finds that 90% of the cartels had firms that were granted leniency of some sort, and 31% had amnesty recipients.[46] Partial and total leniency discounts by themselves[47] reduced the fines called for by the EU's Guidelines by an astonishing 40.5%. Concludes the author:

> [T]he leniency program appears generous … The Commission's leniency program is essentially in the business of 'buying' convictions by discounting penalties.[48]

Is the Division also in the habit of 'buying' cooperation in order to secure relatively easy convictions? This is an important question that bears on deterrence in two ways. First, if would-be cartelists form their expectations from the recent past practices of antitrust authorities, then it is the net discounted fines (after leniency discounting) that will form their expectations about the size of probable penalties.[49] In other words, the Sentencing Guidelines may be almost irrelevant as a direct deterrent. As will be seen below, there is evidence that the leniency practices of the Division result in very generous – more generous than the EU's – fine discounts. Second, there is the question as to whether the leniency discount's billions are optimal financial incentives for the discovery of additional cartels (those not already identified by amnesty recipients) or for revealing more evidence for convictions (beyond that given by amnestied firms). At least one respected observer of the EU cartel scene is of the opinion that for the high costs of the leniency program (i.e. the foregone fines) private law firms and economic consultants would be more efficient at discovering hidden cartels than the EC is itself.[50]

The Division has an individual leniency program, but it is rarely mentioned and evidently little used. One proposal to increase discovery of cartels that merits serious consideration is to expand the existing Civil False Claims Act to encourage greater whistle-blowing by individuals about suspected hidden cartel activity.[51] From 1986 to

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[46] See Veljanovski, op cit, n 45 at 511.

[47] Because of the manner in which the EU's fines are computed, none of the reductions can be attributed to a defendant's ability to pay or to breaching the EU's fine cap (10% of the firm's global sales in the year prior to the decision).

[48] See Veljanovski, op cit, n 45 at 512-513. Even more damning is Veljanovski's, op cit, n 45 at 512, finding that leniency was unnecessary for detection of 19 of the 26 cartels (73%), because they had been detected by other antitrust authorities (mainly the Division) or in parallel EU investigations *prior to the first amnesty application*! Even in the case of full amnesty, one-third was deemed superfluous. However, amnesty also provides prosecutors with valuable information that may be necessary to secure convictions.

[49] Part of this calculus is a conjecture about the likelihood that one of the other members of the cartel might seek amnesty as well as the possibility that the would-be conspirator itself might seek amnesty first. For an ambitious synthesis of the logic of leniency programs see Spagnolo, Giancarlo, 'Leniency and Whistleblowers in Antitrust', prepared for P Buccirossi (Ed), *Handbook of Antitrust Economics*, Cambridge, Mass.: MIT Press (April 2008).

[50] Veljanovski, op cit, n 45, wryly asserts that, '… I am sure several law firms assisted by economists would be prepared to detect and prosecute cartels for a fraction of the €2.5 billion 'cost' of the leniency program'. In a follow-up study of 1998-2007 EU decisions (39 decisions and 50 cartels), the foregone fines attributed amnesty and leniency rose to €3.8 billion (approximately $5 billion) or 38.2% of the Commission's fines.

[51] WE Kovacic, 'Private Monitoring and Antitrust Enforcement: Paying Informants to Reveal Cartels', *George Washington Law Review* 69 (2001) 766-797.

2000 more than $3.5 billion was recovered by the US Treasury from *qui tam* actions, of which $500 million went to individuals.[52] A bounty program for individual whistle-blowers would probably spur more cartel discoveries. The Korean FTC has had a successful bounty program since 2006 that rewards tipsters with a small share of the cartels' fines imposed, and the UK's Office of Fair Trading adopted a cartel-tip program in March 2008 that awards up to £100,000 to individuals.

Numbers of Investigations and Cases

The Division has opened on average almost 100 formal Section 1 investigations annually during 1990-2007, with no trend in these openings evident. Roughly one-third of the Section 1 investigations involve setting up grand juries to consider criminal indictments. About 25 to 35 grand juries were opened or closed each year during 1995-2007; the number of pending grand juries averaged less than 100 before 2003 but rose to 126 during 2003-07. Thus, there is a considerable backlog of cartel cases at the Division.

Division officials often mention that the 1993 changes to the Corporate Leniency Program and the introduction of the Amnesty-Plus and Penalty-Plus programs in the late 1990s greatly increased the number of leniency applications.[53] Amnesty applications have averaged about two per month since the late 1990s.[54] However, the number of cartel investigations has not risen appreciably since then. Moreover, the number of all Section 1 cases and the number of criminal Section 1 cases[55] filed annually has actually fallen during 1990-2006.[56] The number of all Section 1 cases during 1990-2006 fell by 60% from the early 1990s to the most recent period 2004-2006; similarly, the number of criminal Section 1 cases filed fell by 68%.

In parallel to the number of cases, the number of guilty parties charged with criminal offenses also shows a declining or constant trend. The number of corporations charged annually averaged 68 in 1990-1994 and dropped continuously throughout 1995-2007 to a low of only 20 during 2004-2007. Similarly, the number of individuals charged with criminal price fixing averaged 40 per annum during 1995-2007 from a high of 59 per annum in the early 1990s.

One reason the number of cases filed fell from the early 1990s to the late 1990s was an overt policy shift from the Bush I to the Clinton administrations. The change in emphasis was from prosecuting large numbers of localized bid-rigging cases to fewer cases involving fewer companies and larger multi-state affected commerce; in addition,

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[52] Ibid, at 767.

[53] Hammond (2007), op cit, n 15.

[54] As of September 30, 2007, there were 135 sitting grand juries investigating price fixing, of which more than 50 focused on international cartel activity, see Hammond (2007), op cit, n 15 at p 2. More than half of all international cartel convictions are the result of leniency applications.

[55] These are cases by and large that correspond to hard-core cartel allegations.

[56] By contrast, Gallo *et al,* op cit, n 3 at p 98, find 50 (CCH) horizontal per se cases per year during 1990-97 and 43 per year for 1955-89. Of these, 57% involved bid rigging.

there was a shift from prosecuting professional organizations for civil violations to targeting corporations for criminal violations.[57] However, it should be noted that the decline in number of cases filed continued to decline after the late 1990s, albeit at a slower rate. These trends suggest that limited professional resources may be constraining the Division's ability to charge guilty parties and obtain guilty-plea agreements.

A second explanation may be that cartel investigations have become more complicated and labour-intensive in the past 15 years because the range of investigative tools has broadened. The Division makes regular use of consensual covert taping, serving search warrants ('raids'), secret informants, INTERPOL Red Notices, border watches, and foreign assistance requests.[58] In 2006, Congress authorized court-approved non-consensual wire tapping. Internationally coordinated raids have occurred in most years since the first one for Graphite Electrodes in June 1997.[59] The demands on professional prosecutors' time are likely to be greater than before.

An important trend adding to resource demands per case is the sharp turn in the late 1990s[60] toward investigating and prosecuting international cartels.[61] Investigations became more complicated because of the increasing geographic size and increasingly international character of cartel investigations.[62] The Division has formally investigated or convicted approximately 135 international cartels since 1996. During 1980-95, virtually no foreign firms or individuals were punished for criminal price-fixing.[63]

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[57] Gallo *et al,* op cit, n 3 at p 98-99, show that the proportion of localized bid-rigging schemes against governments was far higher in 1980-1989 than at any other time before or after; nationwide conspiracy cases were averaging 7 per rear, except during the early 1960s; cases with trade associations averaged 16.7% in 1955-84 but dropped to 0.6% thereafter; and, in real dollar terms, affected sales per case in 1955-79 were several times above the whole period average but well below average in 1985-94.

[58] Hammond (2007), op cit, n 15 at p 4.

[59] These numbers include only publicly announced joint investigations. Many US-Canadian joint investigations were handled quietly out of public view. Press sources have noted 15 more joint international raids since 2001, see JM Connor, *Private International Cartels Spreadsheet* (December 2007).

[60] See Connor, op cit, n 8 at pp 72-77 and pp 347-357, recounting the shift in U.S. antitrust investigation priorities toward greater emphasis on international price-fixing conspiracies in 1993 and the payoff in prosecutions that began in September-October 2006.

[61] A price-fixing case is categorized as international if one or more of the corporate co-conspirators is headquartered outside the United States or if one of the cartel managers is a foreign national. An indicator of the rising importance of international cartel enforcement for the Department of Justice comes from the annual reports of the Attorney General. See AG Reports, op cit, n 21, in which no mention is made of any antitrust activities from FY1994 to FY1999; suddenly with the successful prosecution of the Vitamins cartels in 1999; from FY2000 to FY2003 these reports contain a page or two highlighting international-cartel prosecutions; but references disappear after FY2004. Litan and Shapiro agree, op cit, n 17 at p 4.

[62] Many foreign parents will keep their internal records in languages other than English. Moreover, additional time was spent on coordination between the Division and other cooperating foreign antitrust authorities. Large corporate defendants are likely to be defended by attorneys from leading law firms who will have the resources to vigorously defend their clients.

[63] Gallo *et al,* op cit, n 3 at pp 98-99, show that the proportion of international cases prosecuted generally ranged from 2% to 5% in 1955-79, fell to 0.2% in 1980-94, and then rose to 12% in 1995-97.

Although mounting cases against foreign price-fixers is risky, there are good public-policy reasons for pursuing international cartels.[64] They tend to have large affected sales compared to domestic schemes, are more durable, and have higher percentage overcharges.[65] For the international cartels discovered during 1990-2007 with known sales, total US affected sales were $1.5 trillion.[66] More importantly, the US overcharges generated by these discovered cartels are projected to be approximately $375 billion.[67] The size and injuries of these cartels dwarfs all cartels sanctioned by the Division prior to 1990.[68] Nevertheless, the disparity between a rising number of cartel-amnesty applications coupled with rising Division budget resources to investigate the resulting allegations and a falling number of price-fixing cases filed since the 1990s is puzzling.[69] Some changes during this period ought to have increased the Division's efficiency.[70]

Justice Department resources devoted to cartel-busting may have peaked in the early 2000s. Data on trends of federal criminal referrals supports the view that the attack of September 11, 2001 caused FBI resources to be diverted from antitrust matters to counter-terrorism probes. The number of federal referrals on immigration and terrorism matters increased 129% from 2000 to 2007, whereas referrals for white collar crimes (a category that includes antitrust) declined 27%.[71] Responding to the TRAC report, Senator Patrick Leahy, Chairman of the Senate Judiciary Committee, said, 'we must reverse the trend of shifting importing resources away from violent crime and white collar crime'.[72] Investigations and case development may be further constrained

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[64] Among such cases brought by the Division, but were abandoned, dismissed, or lost are *Uranium (1975), Industrial Diamonds (1994),* and *Appleton Papers (1997).*

[65] Connor and Helmers, op cit, n 13, and JM Connor and Y Bolotova, 'A Meta-Analysis of Cartel Overcharges', *International Journal of Industrial Organization* 24 (2006) 1109-1137.

[66] Connor, op cit, n 7 at Table 2. These sales data include a few international cartels not yet indicted, though the probability of future indictments is above 90%. Public statements of Division officials have mentioned much smaller sales.

[67] JM Connor and RH Lande. 'How High Do Cartels Raise Prices? Implications for Optimal Cartel Fines', *Tulane Law Review* 80 (December 2005) 513-570.

[68] Cf. Gallo, JC, et al, 'Department of Justice Antitrust Enforcement, 1955-1997: An Empirical Study', Review of Industrial Organization 17 (2000): 75-133.

[69] In economic terms, the amnesty applications are analogous to demand for antitrust services, and the real budget or employees is representative of supply. As both demand and supply shift 'to the right', the quantity supplied should increase.

[70] For example, discovery increasingly depended on the delivery of electronic records, which makes searching and extracting for key words, dates, and names much easier than in the 1980s when discovery involved mostly printed documents. Also, the increasing proportion of corporate leniency applications that began in the later 1990s, which was followed by loads of inculpatory evidence supplied by the applicant, meant that less time was needed by the staff to decide whether a conspiracy had occurred. The speed-up in investigation time due to the information received in leniency applications is also noted in the EU, see Carree, Martin, Guenster, Andrea Maria and Schinkel, Maarten Pieter, 'European Antitrust Policy 1957-2004: An Analysis of Commission Decisions' Amsterdam Center for Law & Economics Working Paper No. 2008-06 (July 17 2008).

[71] TRAC, 'Federal Enforcement Data Show Major Changes in How the Bush Administration Has Enforced the Law', Transactional Records Access Clearinghouse Report 184, Syracuse University (March 6 2008) at p 2.

[72] P Yost, 'FBI Criminal Referrals Plummet', *Associated Press* (March 6 2008).

by the slow growth in professional positions in the Division. Perhaps the Division has enough resources to investigate, but not enough to take large corporate defendants to trial.

Cartel Plea Negotiations, Winning and Losing

The Division wins criminal cases through negotiating a guilty plea, negotiating a consent decree, or obtaining a guilty verdict at trial. It loses cases by dismissals, acquittals, hung juries, dropped cases, or verdicts of not guilty. A third 'neutral' category applies to successful amnesty applicants; these firms, though guilty, are not criminally indicted and their employees are immune from prosecution.[73]

Win rates are important indicators of performance for the Division.[74] During 1955-64 the Division won more than 80% of all its criminal cases, and during 1965-1995 the win rate was well above 90%.[75] After 1994, the Division won 99% of its criminal Section 1 cases. About 90% of criminal convictions are obtained by securing guilty pleas.[76] The high rate of successful criminal prosecutions can be attributed to several factors: improved investigation tools, greater use of FBI resources, the clarity of hard-core cartel violations, and the routine nature of plea negotiations.[77]

Whether high conviction rates for cartels are an appropriate measure of prosecutorial success and whether any particular rate is optimal is difficult to judge. First, the percentage of wins is extremely high for all federal felony cases – 96% in 2003.[78] Second, higher rates could be obtained by following practices not in the best interests of justice, for example, by selecting to prosecute the softest targets and avoiding defendants with inclinations to engage in prolonged and expensive legal battles. That is, high win rates could be evidence of an abundance of prosecutorial caution.

One factor responsible for the high rate of resolution of cases by means of guilty pleas is that prosecutors have substantial discretion to offer monetary or incarceration-time incentives to negotiating defendants. Recommended penalties for price-fixing are

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[73] This partition follows Gallo *et al*, op cit, n 3. Perhaps acquittals also should fall into a neutral category.

[74] Perusal of the Department's annual reports confirms this statement (AG Reports).

[75] Gallo *et al,* op cit, n 3, at Table XIV. The win rate for civil price-fixing prosecutions was lower in 1955-1997 (77%), but also has increased since 1990.

[76] See Gallo *et al,* op cit, n 3 at pp 108-109. In the past, the Division generally recommended and the courts accepted that price-fixing defendants be allowed to plead *nolo contendere.* In 1978, the Division policy changed; a DOJ memorandum instructed US Attorneys who sought *nolo* pleas would require the AAG's approval. The memo derided the use of *nolo* pleas because of 'shockingly low sentences and insufficient fines which are no deterrent to crime' (Gallo *et al*, op cit, n 3 at note 36). After that date, straight guilty pleas increasingly became the standard. From 1980 to 1989, 80% of all pleas were guilty pleas, and during 1990-97 99% were (*ibid.* Table XII).

[77] Gallo *et al*., op cit, n.3 at pp.116-118

[78] Bureau of Justice Statistics, *Compendium of Federal Justice Statistics*, 2003, Washington, DC: U.S. Department of Justice, at Table 5.1.

spelled out in great detail in various editions of the US Sentencing Guidelines.[79] These Guidelines specify a minimum and maximum penalty range for price-fixing violations; the range is determined by the company's affected commerce and several objective culpability factors. If the top end of the range exceeds the statutory cap, then an alternative sentencing provision for federal felonies may be employed;[80] for corporations the alternative fine may reach double the harm or double the gain from the conspiracy. Fine determination on the surface seems logical and objective.

Once the Guidelines' fine range is determined, up to two downward adjustments are made. I call these adjustments partial leniency, because they are not available to full leniency (amnesty) recipients. First, the Division offers discounts for cooperation with its investigation. Nearly all corporate defendants receive these 'cooperation discounts' for their value-added inculpatory information. Second, defendants with a limited ability to pay are given additional discounts or are allowed to pay their fine in instalments. About one-third of all corporate defendants get special ability-to-pay treatment.[81]

Partial amnesty results in very large fine discounts. From a sample of 86 plea agreements of corporate price fixers during 1995-2007, the average discount from the maximum Guidelines' fine is 69% to 76%.[82] Put another way, without partial leniency discounts, the Division fines would have been three time higher than the actual fines imposed.

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[79] USSG, *Guidelines Manual,* 1987, Washington, DC, US Sentencing Commission. The guidelines themselves may contribute to under-deterrence. The ABA, *Comment Submitted to the Antitrust Modernization Commission re Criminal Remedies* (November 2005) at p 8, contends that the Guidelines' presumption (crafted in the mid 1980s) that the typical cartel achieves a 10% overcharge was unsupported by empirically sound research. However, the most comprehensive study of the subject concludes that the typical (median) overcharge is about 22-25%, and the mean average overcharge is probably 31%-49% (Connor and Lande, op cit, n 67, and JM Connor, 'Price-Fixing Overcharges: Legal and Economic Evidence', Chapter 4, pp 59-153 in JB Kirkwood (ed), *Research in Law and Economics (Volume 22),* Oxford, Amsterdam and San Diego, Elsevier, January 2007). Thus, cartel price effects are *two to five times as high as* the USSC assumed, which is one reason for under-deterrence. The Division itself agrees that the 10% presumption may be too low. See Hammond's testimony, (2005) op cit, n 15 at p 9, before the Antitrust Modernization Commission, 'Several recent empirical studies show that the [Sentencing] Commission's original estimate of a 10-percent overcharge…may in fact be too low'. In early 2005 in *U.S. v. Booker (543 U.S. 220),* the Supreme Court made the Guidelines advisory rather than mandatory. Most judges still tend to refer to the Guidelines when making sentencing decisions.

[80] It is important to note that the double-the-harm standard has been applied to ascertain fines in only a handful of cartel cases. Therefore, nearly all the Division fines are in principle based on the USSGs that incorporate an unrealistically low overcharge assumption.

[81] By contrast, the EU offered culpability adjustments to only 56% of the companies fined for price fixing in 1998-2007; ability-to-pay reductions affected 6.0% of fined companies, Veljanovski, C, 'European Commission Cartel Prosecutions and Fines, 1998-2007: A Statistical Analysis' London: Case Associates (September 2007), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1016014, 11-12).

[82] Connor (2008), op cit, n 14. Naturally, the sample excludes amnesty recipients and a small number of fines above the maximum USSG fine.

Consummated plea negotiations make trials superfluous. The Division only rarely goes to trial in corporate price-fixing cases when the defendants are large corporations.[83] The Division does not report statistics on trials involving hard-core price-fixing, but in the 1990s only about four trials of a large corporate price-fixer occurred and only one since then.[84] However, the Division has brought more than a dozen individuals to trial for hard-core price-fixing since 1990.[85] The win rate in cartel cases resolved at trial is well below 90%. Trials require teams with large numbers of the Division staff who often must prepare for a year or two before getting a chance to argue the case. It is doubtful that the Division has sufficient resources to prepare for, and argue, more than about five price-fixing cases per year.

Too Generous Fine Discounts?

The weight of the evidence suggests that historical and current price-fixing penalties substantially under-deter cartel violations.[86] Under-deterrence arises from flaws in the design of the US Sentencing Guidelines for price-fixing, from the generous Division discounts from the Guidelines, and from relatively weak government and private anti-cartel enforcement abroad.[87] Two AMC Commissioners agree that tougher fines are needed for international cartels:

> Commissioners Carlton and Garza believe further consideration should be given to increasing treble damages in international price-fixing conspiracies where certain victims of the conduct may not seek compensation in US courts through operation of the Foreign Trade Antitrust Improvements Act.[88]

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[83] The criminal justice system in general relies less and less on trials, see JW Keker, 'The Advent of the "Vanishing Trial": Why Trials Matter', *The Champion* 29 (September/October 2005) 32.

[84] Connor, op cit, n 8 at pp 72-77. The Division successfully prosecuted scores of international cartels in 1943-49, and for 50 years thereafter detected and prosecuted only about four such cartels; in the 1990s, the Division won two international-cartel cases at trial and lost two others, *Appleton Papers* and *Industrial Diamonds* (Connor, op cit, n 8 at pp 73-77). Mitsubishi was convicted in a jury trial in 2001 for its role in the huge *Graphite Electrodes* global cartel. The Division's fine recommendation in this case, which was accepted by the jury and the court, resulted in a penalty very close to the maximum USSG fine. Defendants' counsel, being aware of the Division's reluctance to go to trial, would find it strategically advantageous to exaggerate their degree of seriousness about going to trial in the expectation that the Division will offer lower penalties to avoid court.

[85] In a few cases (almost all of them domestic, small-scale bid-rigging schemes), the individuals owned small proprietorships or small family-operated corporations that were indicted along with the individuals.

[86] Connor, op cit, n 9.

[87] An analysis of 1998-2004 EU cartel decisions likewise concludes that deterrence is not being served: 'Finally, the fines imposed by the EC Commission are not based on estimates of the offenders' gain or victims' losses … [T]he Commission makes no attempt to estimate the overcharges or to concede that it is possible to do so. As a result … it would seem doubtful that the fines, even at their present historically high levels, deter price fixers.' See also JM Connor, 'The Great Global Price-Fixing Conspiracy: Sanctions and Deterrence', *Concurrences: Revue des droits de la concurrences* (October 2006) 4 at pp 17-20, on optimal deterrence and the vitamins cartels.

[88] See AMC op cit, n 4 at p 245.

The Division's 1993 Corporate Leniency Program has resulted in the forgiveness of many tens of millions of dollars in potential fines for immunized corporations, but the anonymity of all the recipients prevents an accurate assessment of the amounts. In the EU, the amount of forgiven fines for amnestied defendants (which is low by US standards) can be precisely calculated. Amnesty reductions have accounted for a very substantial 25% of actual 1998-2007 cartel fines.[89] Additionally, the EU granted discounts for cooperation (partial leniency) to 144 defendants that were worth 37% of the pre-discounted fines.

In the case of US defendants that received partial leniency for cooperation, the Division fine partial-leniency discounts are estimated to be $2 to $3 billion, or 50 to 70% of the actual total fines imposed. Forgiveness on such a scale has resulted in a significant decline in the deterrence power of expected fines.

Corporate Cartel Fines

Although the Division is bringing fewer Section 1 cases, the monetary penalties imposed on convicted price fixers have grown. In part, this growth is due to rising legal upper limits.[90] The total amount of cartel fines imposed since 1990 is $4.2 billion.[91] There is a strong upward trend. Corporate fines averaged $28 million per annum in the early 1990s; since 1994 the mean annual fines have exceeded $300 million, and in the most recent period 2005-2007 corporate fines averaged $560 million per year.[92] Corporate fines per company have also escalated during 1990-2007. The average corporate fine rose 26-fold from the early to the late 1990s, fell slightly during the early Bush II administration, and then resumed its climb in the past four years.

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[89] Veljanovski, op cit, n 81, 13. Fines that would have been imposed by the EU but for amnesty and other leniency were €9,935 million; the actual total fines imposed by the EC after leniency discounts were €6,133 million. Thus, amnesty and other leniency discounts of €3,802 million were 62% of actual fines imposed.

[90] Gallo *et al,* op cit, n 3 at p 127, show that each time the statutory limit was raised in 1974, 1985, and 1990, real average corporate fines subsequently increased several-fold. The statutory maximum 'organizational' (i.e., corporate) fines was raised from $1 million to $10 million in 1990 and to $100 million in 2004 (Appendix B). Recommended corporate fines may exceed these maxima if the 'alternative fine provision' (18USC §3571) is invoked by the Division. The alternative fine must be less than double the harm or double the gain that can be proved was generated by the cartel conduct, but there is no absolute dollar limit. By convention, the Division restricts the computation of the gain or harm to the *company's* gain or harm, but it appears possible to hold each member of a cartel jointly and severally liable for the *entire cartel* harm.

[91] Prior to 1960 corporate price-fixing fines were very small, see RA Posner *Antitrust Law (2nd ed)* Chicago, University of Chicago Press (2001). Gallo *et al*, op cit, n 3 at pp 122-123, calculate the total 1955-1989 fines on 2708 corporations to be about $215 million, or $80,000 per company (we have converted the study's 1982 dollars to 2007 dollars). The courts may also award restitution as part of a guilty finding, but the Division recommendations for restitution in addition to a fine are unusual because prosecutors are normally aware of parallel private damage suits. However, restitution is sometimes negotiated in the case of bid rigging against federal or local governments.

[92] Average annual fines rose to $297 million in fiscal years 1995-1999, dipped to $178 million in 2000-2004, and then rose to $558 million in the four most recent years 2005-07. The peak year for cartel fines is 1999 ($972 million).

This escalation in corporate fines also can be ascribed to the willingness and ability of the Division to impose fines above the statutory limit of $10 million in effect from 1990 to 2004.[93] The first $10-million fine was imposed in the Explosives case on September 6, 1995.[94] By the end of 2007, 55 companies had joined the Division's '$10-million club'. Although these heavily fined corporate cartelists account for only 10% of all such companies, beginning with FY1995 corporate fines of at least $10 million have accounted for 94% of total criminal price-fixing fines.

The increase in corporate price-fixing fines can be attributed to a renewed tendency of the Division to indict non-US firms. No foreign firms were fined before 1995, but as of mid-2007 about 100 foreign companies have been fined by the Division. Since 1995, foreign firms from at least 10 nations have come to comprise the major source of U.S. fines paid by convicted price fixers. In fact, 80% of all corporate fines of at least $10 million have been imposed on non-US companies.

In its prosecutions of international cartels, the Division compares well with other antitrust authorities around the world, but it is no longer the paragon it once was. Prior to 1990, the Division had no peer in imposing cartel fines. The Division's only rival in fining cartels was the EU.[95] Up to 1989, the EU's cartels fines amounted to only $30 million,[96] compared to US fines of more than $400 million.[97] After 1994, US cartel fines greatly accelerated.[98] From 1990 to 2007, the Division collected a very impressive $4.1 billion on corporate members of international cartels.[99]

However, from a global perspective, Division-secured cartel fines now represent a modest share of the total. For the 1990-2007 period, U.S. fines are only 17% of all such fines worldwide.[100] After the late 1990s, the EU Commission (EComm) and its Member

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[93] $10 million was the Sherman Act maximum corporate penalty for violations committed between July 1990 and April 2004. Since then the cap has been $100 million.

[94] The first firm to plead guilty and pay a $10-million fine was Dyno Nobel, a US subsidiary of Norsk Hydro. A second firm, Mine Equip. & Mill Supply, pled guilty and paid a fine of $1.9 million on the same day. A somewhat confusing historical foot note is that Mine Equipment, recipient of the first above-ten-million-dollar fine, was 50%-owned by Norsk Hydro, so in a sense Norsk Hydro could claim the ignominious distinction of being the first to break the $10-million-fine barrier. However, the Division chose to list these two guilty pleas as separate pleadings, so most observers give the title to ICI Explosives.

[95] C Harding and J Joshua, *Regulating Cartels in Europe: A Study of Legal Control of Corporate Delinquency,* New York, Oxford University Press (2003).

[96] Carree *et al*, op cit, n 70, report a total of €42 billion in EU fines for all violations up to 2004, of which about two-thirds or €30 billion was for cartels.

[97] See Gallo *et al,* op cit, n 3 at Table XIX, report U.S. criminal fines imposed during 1950 to 1989. These dollars are converted to nominal figures; in 1982 dollars the total is $261.2 million. The amounts of fines prior to 1950 are negligible.

[98] From 1955 to 1994, average annual US criminal fines were $13.6 million. During 1995-2007 such fines have averaged $318 million per year, see Connor op cit, n 14 at Table 15.

[99] In this article fines are updated through December 2007 from JM Connor, 'Global Antitrust Prosecutions of International Cartels: Focus on Asia' 31(4) World Competition (2008) 575-605 at Table 15. Note that 96% of all US cartel fines were international.

[100] Although these data refer to international cartels only, the ratios for all cartels are likely to be very similar.

States overtook the Division in the size of such fines. In 2000-2004, EU fines exceeded the Division's cartel fines for the first time – and by a wide margin (200% higher). The EComm running total[101] surpassed federal US total fines in 2005. Cartel fines by all EU authorities have reached $11.6 billion, or 77% of the global total.[102]

The main reason that the Antitrust Division is falling behind the EU is because EU authorities are tackling more and more cartels each year,[103] not necessarily because EU fines are more severe. Evidence for this assertion comes from sanctions on global cartels.[104] Both the Division and the EC had almost the same opportunities to fine most of these cartels, yet EU fines were higher than US fines on global cartels. A careful study by van der Hooft of 26 companies in global cartels fined by both the EU and the Division up to June 2006 concludes that there is no difference in the size of the fines per company imposed by the two authorities.[105] However, a new set of EU fining guidelines implemented in September 2006 suggests that the EU will soon pull away from the Division in the severity of its fines.[106] Veljanovski predicts that relative to the 1998 EU cartel-fining guidelines the average absolute size of EU cartels fines for comparable violations will increase by 130% under the 2006 guidelines.[107] No similar increase in the severity of US fines is expected.[108]

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[101] By running total is meant the sum of all fines imposed since 1954. See Connor, op cit, n 99 at Table 15.

[102] See Connor, op cit, n 99 and JM Conner, 'Latin America and the Control of International Cartels', in *Competition Law and Policy in Latin America*, DD Sokol (ed), Hart Publishing (forthcoming 2009), showing that fines by antitrust authorities in Asia, Oceania, and Latin America are increasing the fastest, albeit from very low initial amounts. Up through the end of 2007, cartel fines from these regions accounted for almost 5% of world fines.

[103] To be more precise, the 25 National Competition Authorities in the EU are increasingly active in opening and deciding cartel cases – 120 international cases alone, see Connor, op cit, n 99 at Table 5. The EC itself is able to decide on only about five or six hard-core cartel cases per year; it ended about one probe each year during 1990-2007; and in 2007 it had 24 known investigations in process, see JM Connor, Private International Cartels Spreadsheet (December 2007), Russo, F, Schinkel, MP, Guenster, AM and Carree, MA, 'European Commission Decisions on Competition: Landmark Antitrust and Merger Cases from an Economic Point of View' (2007), Amsterdam Center for Law & Economics Working Paper No 2007-04. Available at SSRN: http://ssrn.com/abstract=1004048: Figure 1 find that the number of EC antitrust decisions of all types averaged 15 per year in 1990-2004. The number of decisions concerning infringements alone averaged 9.1 annually, *ibid,* Figure 2. From July 2008, the EC's capacity for making cartel decisions is expected to ramp up because it will implement a settlement procedure akin to US plea bargaining, see Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases, Official Journal L 171/3 (July 1, 2008).

[104] The typical global cartel fixed prices or output on three continents (Europe, East Asia, and North America), see Connor, op cit, n 8.

[105] M van der Hooft, 'Cartels: US fines v. EU fines: Are fines really higher in the US than in the EU?', unpublished paper, University of Baltimore Law School, 2007.

[106] For example, in the EU's *Flat Glass* decision announced on November 29, 2007, the four defendants were fined $720 million for a cartel that lasted only one year and that had $2.5 billion in affected sales.

[107] C Veljanovski, 'New EU Penalty Guidelines: Will the 2006 penalty guidelines decrease fines?' Casenote 43, London: Case Associates (July 2006).

[108] The AMC, op cit, n 4, voted to retain the current structure of the US Sentencing Guidelines. One recommendation of the American Antitrust Institute is to double the 'base fine' for cartelists, which is currently 20% of the firm's affected sales, see AA Foer, (ed), *The Next Antitrust Agenda: The American Antitrust*

Moreover, since the 1970s, government cartel fines have begun to shrink relative to private settlements. Damages recouped by private plaintiffs, which total more than $21 billion, are now almost as high as fines from all the world's antitrust authorities. The vast majority of private damages settlements occur in North America. Settlements in the United States (reportedly at least $18.5 billion) are much higher than the Division fines.[109] The fine-settlement disparity has widened over time.

Thus, in recent years both the number of cartels discovered globally and the size of the penalties imposed has been rising. Together these facts might strike some as being contradictory, even a paradox, yet these facts can be reconciled by evidence that today's high penalties are still lower than most cartels' expected illegal profits.

The AMC report praises the assistance of foreign antitrust authorities to the Division in anti-cartel enforcement:

> Today, more than 100 countries have adopted competition laws ... [T]his development has helped the United States in its fight to stamp out international cartels.[110]

Specific evidence of the value of such assistance is scanty and anecdotal. The Division has participated in about a dozen joint international raids on suspected global cartels with the EU, Canada, Australia, Japan, South Africa, or Korea, a development that probably has reduced the destruction of inculpatory documents in some cases. However, sharing of information useful for prosecutions appears limited to a few countries that have signed Antitrust Mutual Assistance Agreements (AMAAs). Moreover, outside of the EU and Canada, there is little evidence of significant multiple-jurisdictional fining of cartels.[111]

In most parts of the world outside North America and the EU, government enforcement of cartel laws is weak.[112] Although increasing, less than 3% of all cartel fines in 1990-2007 were imposed there. Even in Japan, which has an old and well-

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Institute's Transition Report on Competition Policy to the 44th President, Lake Mary, Florida, Vanderplas Publishing (September 2008) at pp 43-44. Which option will be chosen by the US Sentencing Commission is highly uncertain at this time.

[109] These settlements data are from Connor, op cit, n 59, and are incomplete because of non-reporting of most of the smaller opt-out settlements; most of the largest opt-out settlements are reported publicly, but these press reports might exaggerate the non-cash portions of the settlements. Settlements are at least four times as large as the Division fines for international cartels alone. Lande and Davis, op cit, n 19, report private cartel settlements of $8.2 to 9.6 billion for both domestic and international hard-core cartels for the same period, but their data are also incomplete because they omit settlements below $50 million, see RH Lande, Private communication dated January 16, 2008.

[110] AMC, op cit, n 4.

[111] JM Connor, 'Global Antitrust Prosecutions of Modern International Cartels', *Journal of Industry, Competition, and Trade* 4 (September 2004) 239-267.

[112] M Levenstein, VY Suslow, and L Oswald, 'International Price-Fixing Cartels and Developing Countries: A Discussion of Effects and Policy Remedies', Working Paper 9511, Cambridge, Massachusetts, National Bureau of Economic Research (February 2003).

staffed antitrust agency, cartel enforcement is weak.[113] The populations of countries with ineffective or no antitrust laws suffer proportionately higher injuries from global cartels than do the citizens of countries with strong antitrust enforcement.[114]

Private settlements in North America are important components of the global effort to deter cartels. Worldwide, private settlements comprise almost half of total monetary penalties on international cartels. While private antitrust suits provide much needed supplementary deterrence for North American conspiracies, they are by and large absent in other jurisdictions. As a result, the relatively high monetary penalties seen in North America are not duplicated abroad. This in turn has an adverse effect on deterrence of international cartels that operated in North America and other jurisdictions.

Private treble-damages suits against cartels in North America yield monetary penalties that are on average several times US and the Canadian government fines. Most Division prosecutions spark follow-on US private suits, and the same phenomenon has occurred in Canada since the late 1990s.[115] As previously noted, about one-third of a sample of large private antitrust suits are successful in obtaining large payouts even when no Division or CBC fines have been levied.[116] When one sums both cartel fines and private settlements, total corporate penalties, while still sub-optimal, marginally improve optimal punishment levels.

While a few nations other than the US and Canada have laws permitting recovery of private damages, there are no known examples of significant awards in practice. For example, Taiwan permits treble damages in theory, but because so many other impediments exist, such suits seem not to exist.[117] Other jurisdictions, such as Japan, allow damages suits, but only after its Fair Trade Commission imposes fines, which it rarely does. A few other jurisdictions, such as Australia and the UK, permit single-damages private actions. However, only the Vitamins case has so far resulted in damages being paid in Australia. In the UK during 2000-2005, there were about 19 private suits directed against price-fixers, of which 18 resulted in modest monetary payments to the plaintiffs.[118] For many years, all the cartel-fining decisions of the EU

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[113] SM Chemtob, 'Antitrust Deterrence in the United States and Japan', remarks at a conference, Competition Policy in the Global Trading System, Washington, DC (June 23, 2000).

[114] JL Clarke and SJ Evenett, 'The Deterrent Effects of National Anticartel Laws: Evidence from the International Vitamins Cartel', *Antitrust Bulletin* 48 (2003) 289-726.

[115] DM Low & O Wakil, 'Cartels/Criminal Enforcement: Canadian Developments', Paper presented at the Fall meeting, Section of Antitrust Law, American Bar Association (2004) and CS Goldman *et al,* 'Private Access to Antitrust Remedies: The Canadian Experience', address before the Section of Antitrust Law, American Bar Association (April 2-4, 2003).

[116] Lande and Davis, op cit, n 19.

[117] Connor, op cit, n 99.

[118] These data come from a working paper, Rodger, Barry J, 'Private Enforcement of Competition Law, the Hidden Story: Competition Litigation in the UK, 2000-2005' unpublished paper (2007). In Denmark several municipalities obtained a large settlement from members of the *district heating pipes* cartel, the first such suit in that country. In Germany a private suit for substantial cartel damages in the cement industry is in court.

have carried statements exhorting injured parties to seek compensation from the just-fined defendants.[119] Now, the EU seems to be well along in developing rules for private single-damages suits.[120] While substantive changes are in the offing in the near future, the absence of discovery, the inability to form class-actions, rules against contingency fees for counsel, and other conditions militate against large damages resulting from private rights of action in the EU and most other jurisdictions.

Individual Cartel Penalties

> 'The Division has long emphasized that the most effective way to deter and punish cartel activity is to hold culpable individuals accountable by seeking jail sentences'.[121]

The Division depends almost entirely on fines and prison sentences to punish individual price fixers. It is the Division's creed that individual penalties are far more efficacious than corporate fines.[122]

The total number of individuals charged for Section 1 violations averaged 45 per year during 1990-2006.[123] That number was highest (59) during the early 1990s and dropped to an average of 39 per year in the subsequent years 1995-2006. This pattern may be attributed in part to the shift in the Division prosecutions from bid-rigging conspiracies to classic price-fixing cartels; the former tend to have larger numbers of both

[119] The November 2007 EU press release announcing fines imposed on the Nitrile Rubber cartel had the following language: 'Action for damages: Any person or firm affected by anti-competitive behaviour as described in this case may bring the matter before the courts of the Member States and seek damages, submitting elements of the published decision as evidence that the behaviour took place and was illegal. Even though the Commission has fined the companies concerned, damages may be awarded without these being reduced on account of the Commission fine'.

[120] An EU White Paper was issued in April 2008, see EC, White Paper on Damages actions for breach of the EC antitrust rules COM (2008) 165 final, Brussels: European Commission (April 2 2008).

[121] Hammond (2007), op cit, n 15 at p 2. Gallo *et al,* op cit, n 3 at pp 105-107, show that during 1955-97 an average of 10% of all price-fixing cases had individuals as defendants; 81% had corporations as defendants. A fascinating finding, still true today, is that 60% of the individuals convicted during 1955-97 were directors, owners, or other corporate officers. Given the large average size of companies prosecuted since 1990, one can reasonably infer that the incomes of cartel defendants are quite high also. For an analysis of the value of imprisonment, see GJ Werden and MJ Simon, 'Why Price Fixers Should Go to Prison', *Antitrust Bulletin* (Winter 1987) 917-937. Hammond, op cit, n 1, opines that the deterrence superiority of prison fines over company fines is so obvious that no empirical verification is needed.

[122] It is difficult to interpret this belief in precise, measurable terms. The principle seems not to apply so much to owner-operated partnerships or proprietorships, but rather to large companies with a small cadre of professional managers with small stakes in the firm. Clearly, a $10-million fine for a large corporation with $100 million of cash on hand 'hurts' the stockholders less than the same fine hurts an executive with $1 million in assets, but individual fines of this magnitude are extremely rare. What the Division seems to imply is that the expectation of a possible felony conviction with substantial jail time has more deterrent power than a typical fine for a large corporation; or, put another way, executive's value avoiding a month in prison at millions of dollars. This hypothesis is believed to be untested. Hammond, op cit, n 1, avers that the present US mix of corporate fines and individual imprisonment makes the overall deterrence power of American sanctions higher than the admittedly higher EU cartel fines.

[123] In the first 64 years of the Sherman Act, only 21 individuals were incarcerated for price fixing, see Posner, op cit, n 19 at pp 389-391.

companies and managers involved than do the latter type. During 1995-2006, the number of cartel managers charged trended slightly upwards: in 2005-07 the annual numbers charged were 22% higher than in 1995-99. Being indicted for a federal felony ought to have a deterrent effect apart from any subsequent penalties because of its negative implications for future employment opportunities.

The number of individuals fined for criminal price-fixing violations averaged 26.6 per year during 1990-2006. Just like the number of corporations, the number of individuals fined peaked at 34 per year in 1990-1994 and has been much lower (averaging 23.5 per year) since then. Moreover, there is a strong downward trend in the annual number of fined persons during 1995-2006. Approximately 61% of all persons charged with criminal price-fixing were subsequently fined; this proportion was highest (79%) in the early 1990s and has declined in each subsequent sub-period since then; in 2005-07 only 41% of those charged were fined. This decline in the frequency of fining individuals is explained in part by an increasing share of charges being levelled at foreign residents, many of whom become fugitives.[124]

While a notable escalation in corporate fines is undeniable, individual fines are miniscule, and fines per person constant or declining. Total fines on individuals are modest. During 1990-2007, 478 individuals paid criminal fines totalling $70.3 million, or a mean of $147,100 per person (Table 1). The mean average is distorted by a few very high personal fines. The median fine imposed has been $50,000 or $100,000.[125] With two exceptions,[126] no individuals have paid more than the 1990-2004 statutory maximum of $350,000 for price fixing alone.[127] In light of the wealth and high corporate positions of the majority of convicted cartel managers, personal fines are an insignificant potential source of deterrence.[128]

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[124] Fines are typically imposed in the same year as the date of the charge, but in some cases fines are delayed while the defendant's extent of cooperation with prosecutors is assessed. Thus, because of such lags one cannot precisely compare the number of fined individuals in any given year with the number charged in that year; however, comparisons involving multiple years are much less distorted by lags in sentencing. Another reason for the decline in the fined/charged ratio is that the Division is charging more and more foreign residents for cartel crimes, and many of these choose to remain fugitives. There are no data on the number of fugitives.

[125] Connor and Helmers, op cit, n 31.

[126] As for corporations, there is a rarely used 'alternative sentencing provision' available to the Division that can result in individual fines of up to $25 million, see Connor, op cit, n 8. In 2000-2003, a guilty German graphite-electrodes manufacturer paid a $10-million personal fine for its convicted CEO (who received no prison sentence); the other high personal fine of $7.5 million was paid by the Chairman of Sotheby's auction house who also was sentenced to 366 days in prison (this remains the first and only litigated cartel fine above $350,000). Individual fines for price fixing can go as high as $25 million under the 'alternative sentencing' statute (18 USC §3571). Higher fines for some individuals are due to multiple counts, such as mail fraud or obstruction of justice. In mid 2004, the Sherman Act maximum individual fine was raised to $1 million.

[127] Higher fines for some individuals are due to multiple counts, such as mail fraud or obstruction of justice. In mid 2004, the Sherman Act maximum individual fine was raised to $1 million. The two highest individual price-fixing fines were $10 million in *Graphic Electrodes* and $7.5 million in *Auction Houses*.

[128] See Gallo *et al*, op cit, n 3 at pp 104-107 who find that 69% of all criminal price-fixing defendants in 1955-1997 were top corporate officers – secretary-treasurer or above – and 31% were lower-level employees.

Division policy statements place great weight on the deterrence value of predictably high prison sentences for convicted cartel managers. The Division secured prison sentences for a total of 284 individuals during 1990-2007. Since 1999, 29 foreign defendants from nine nations have been sentenced to prison, or about 16% of all such sentences.[129] Moreover, the average number of individuals receiving prison sentences per year has been rising during 1990-2007. The annual average number of individuals incarcerated for price fixing rose from 13 in the 1990s, to 17 in 2000-2004, to a high of 24 in 2005-2007.[130] Public Division Workload Statistics indicate that the proportion of defendants imprisoned during 1990-2006 has averaged 37% and has risen in each sub-period: 25% in 1990-94, 31% in 1995-1999, 46% in 2000-2004, and 54% in 2005-07.[131] An alternative data series developed by the Division shows a much higher ratio of defendants sentenced to jail.[132] It shows that this ratio rose from 37% in the 1990s to 52% in 2000-2004 and to a high of 74% in 2005-2007.[133] This trend is a positive development for cartel deterrence.[134]

Not only the frequency but also the severity of prison sentences has increased. Consistent with stated Division policy, individual sentences measured by aggregate days in prison have mushroomed. During 1990-1994 the number of prison-days imposed averaged 3609 per year; the average rose in each sub-period to its highest level of 16,644 in 2005-2007. More importantly, the number of days of imprisonment per person imprisoned more than doubled, from 238 days in 1990-94 to 623 days in 1995-2007. In some cases, longer jail sentences have been procured by bringing multiple counts for collateral federal offences. Fraud and kickback schemes are often found together with bid-rigging offenses. A few cases have involved obstruction of justice charges; during 2000-2007 the Division indicted 11 corporations and 23 individuals for obstructing cartel investigations.[135]

It must be noted that the trends in imprisonment of cartelists noted in the previous paragraph are affected by the Division's leniency and plea-bargaining policies. It is

Given the large size of most corporate cartel members, their corporate officers are likely to be reasonably affluent persons, most with compensation in the $500,000 to $1,000,000 range.

[129] Hammond (2007), op cit, n 15.

[130] The high average for 2005-2007 depends heavily on the record number of 34 incarcerations in FY2007, see Hammond (2007), op cit, n 15 at pp 2-3. Without the 2007 number, a strong upward trend might not be evident.

[131] Prison sentences are typically imposed in the same year as the date of the charge, but in some cases sentencing is delayed while the defendant's extent of cooperation with prosecutors is assessed. Thus, because of such lags one cannot precisely compare the number of sentenced individuals in any given year with the number charged in that year; however, comparisons involving multiple years are much less distorted by lags in sentencing. One reason for a lower imprisoned/charged ratio is that the Division is charging more and more foreign residents for cartel crimes, and many of these choose to remain fugitives.

[132] See Hammond (2007), op cit, n 15 at p 3.

[133] The discrepancy between the two data series is inexplicable.

[134] For a contrary view see ML Denger, 'Too Much or Too Little, a summary of discussion, American Bar Association's Antitrust Remedies Forum', Washington, DC (April 2003).

[135] See Hammond (2007), op cit, n 15 at p 4.

obvious that each of firms convicted had at least one and usually several managers responsible for operating the cartel.[136] Yet it is clear that the Division does not indict all guilty individual price-fixers in a company convicted for price-fixing. Moreover, in a large proportion of cases, no individuals are charged.[137]

The majority of all cartels prosecuted by the US since 1993 contain a corporate amnesty recipient. Subject to an admission of guilt and complete cooperation with the Division's investigation, cartel managers who are employees of a successful amnesty applicant are granted immunity. Because the typical price-fixing cartel is comprised of roughly four firms, it follows that up to one-fourth of all guilty cartel managers are neither charged nor sentenced as a matter of policy. Moreover, among the guilty firms that are the second or third to apply for leniency, a significant share qualifies for Amnesty Plus, which also gives a pass to all of its guilty cartel managers (in this instance, managers of two cartels). Finally, plea bargaining with the remaining firms that do not qualify for either type of amnesty limits the number of managers that will be carved out[138] of the plea agreement.

With sufficient promises of cooperation in a prosecution, a deal may result in no carve-outs. Since the *Vitamins* prosecutions, the Division has suggested that its policy will be to carve out at least two or three officers, and that that number will increase over time.[139] However, this goal seems to apply only to a couple of the ringleaders in selected high profile cases. In an analysis of a sample of 117 sentencing memorandums on non-amnestied firms culled from the Division Web site, Connor found that 54% of all corporate guilty pleas had zero carve-outs.[140] For firms with carve-outs, the mean number was 2.2 executives, and there is no clear evidence of an upward trend over time.

To some extent, in order to conserve prosecutorial resources, it is impractical to charge all the underlings involved in a conspiracy; from the point of view of general deterrence, charging the leaders may suffice. However, it is evident that the Division does not indict all the leaders either.

U.S. courts are nearly alone in the world in regularly sentencing individuals to jail for price-fixing.[141] Several countries have individual penalties written in their laws,[142] but

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[136] In one famous case, ADM, one of the ringleaders of the *Lysine* cartel, had three officers carved out, but at least 12 employees helped further the conspiracy. In the *Vitamins* case, less than 10% of the 200 cartel managers were indicted, see Connor, op cit, n 8.

[137] In 1990-2007, the Division secured guilty pleas from companies involved in 53 international cartels, but in 47% of those cartels, no individuals were indicted, See Connor, op cit, n 59.

[138] This is the term used to indicate that when a firm is offered partial leniency, some of the most culpable managers will still be subject to criminal indictments. For amnestied firms there are no carve-outs.

[139] In the *DRAM* international-cartel case, 14 officers of the top three corporate defendants were sentenced to prison in 2003-2004.

[140] Connor, op cit, n 14. It is possible that in a few such cases a retired or dismissed rogue employee was responsible.

[141] The EU imposes only corporate civil fines.

only Canada, Australia, Germany, and Israel have regularly imposed fines on individual price-fixers. And only Israel has imprisoned significant numbers of cartel managers.[143] The Division has made efforts to encourage the criminalization of antitrust abroad, with some success.[144]

Many of the individuals imprisoned for cartel offenses have been foreign residents, but many others indicted are fugitives abroad because of difficulties associated with extradition.[145] There are few countries with which the US has extradition treaties that can apply to criminal antitrust violations by individuals. In most cases extradition is not possible because the foreign country has not criminalized antitrust. In other cases extradition treaties exist but cannot be activated. Beginning in 1996 with a top executive of Ajinomoto, one of the two ringleaders of the Lysine cartel, the Division has indicted dozens of Japanese citizens for criminal price-fixing. All but a few have chosen to remain fugitives residing in Japan rather than submit to US court jurisdiction. Japan, which has itself not imprisoned price-fixers since the early 1950s, remains a haven for these fugitives; the same can be said for most of Europe.

Progress is being made in the UK. When the US successfully prosecuted the Auction House cartel, two US officers of Sotheby's received jail sentences. The highly culpable Chairman of Christie's, a UK citizen and resident, got off scot-free because the Division determined that extradition was not feasible. Subsequently the UK criminalized its competition law and passed the Extradition Act of 2003. In a more recent UK case that generated a great deal of press attention, Ian Norris, CEO of a UK defendant in the global Graphite Electrical Products cartel, was about to be extradited to the US. However, a 2008 decision appealed to the House of Lords turned down the government's attempt to extradite him. Finally, in December 2007, a deal was

[142] Examples are France, Brazil, Japan, and the UK.

[143] Japan imprisoned a few cartelists in the early 1950s, but none since. One Canadian prosecution resulted in a nine-month sentence, which was commuted to community service.

[144] In late 2007 the Division made an unprecedented deal with Britain's Office of Fair Trading that resulted in the imprisonment of three individuals for criminal price fixing for the first time in UK history, see M Peel 'Repatriation to Create Legal Landmark', *Financial Times* (December 12, 2007) and R Bell, 'United Kingdom: Nowhere to Hide: First Criminal Cartel Convictions Under The Enterprise Act 2002', *Mondaq Business Briefing* (August 28, 2008). The Division transferred to UK custody three British nationals who were arrested and indicted for price fixing in the *Marine Hose* cartel in the United States. The three voluntarily agreed to plead guilty in a British court, and each received prison sentences of 30 to 36 months. Hammond, op cit, n 1, is convinced that the failure of non-US jurisdictions to criminalize antitrust is the major reason that global penalties are sub-optimal.

[145] Extradition from countries without criminal antitrust statutes or without extradition treaties is unlikely. Countries like Japan, which have both necessary laws and large numbers of cartel fugitives, have not cooperated thus far with the DOJ. The DOJ in effect lost an appeal on this question in a closely watched case before the UK House of Lords in March 2008, see J Crompton, 'Norris: price-fixing not a common law crime but extradition still possible', 13 March 2008 and JM Joshua, 'Implications of *Norris* for UK-U.S. Extradition and Future Cartel Prosecutions', *The Antitrust Source* (June 2008) 1-11. However, it appears that future extradition requests to the UK will likely be successful if the cartel conduct extends after June 19, 2003, the date that the UK's criminal cartel statute came into force, or if obstruction of justice or making false statements are elements in the charges.

announced between the US and the UK concerning the incarceration of three UK citizens arrested for price-fixing in the US.[146] The three will be transferred to the UK, plead guilty in a UK court, and serve their prison sentence in the UK – the first incarceration for price-fixing in UK history.[147]

Informing the Public

Transparency in decision-making assists third parties in making well informed assessments of those decisions. The Division is not fully transparent, and this is nowhere more apparent than in the decisions to open, not to open, and to close formal investigations.[148]

The Division does not release information on the number of amnesty applications, the number accepted, the identity of the applicants, the industries of the applicants, or the disposition of these applications. The Division only publishes a small share of all plea and sentencing agreements, and most of those published do not contain sufficient information to calculate with precision the maximum liability facing a defendant.[149] Even with all the sentencing data needed to calculate the fine range, it is not uncommon for the Division to offer reduced affected commerce or a shorter duration than could be proven at trial.[150] More importantly, prosecutors are in a position to offer 'downward departures' from the USSG fine range to any defendant if it deems that the defendant is cooperating with the Division's prosecution. The 'degree of cooperation' is an elastic concept with a high degree of subjectivity that seems to be available to virtually all defendants that agree to negotiate.[151]

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[146] Peel, op cit, n 144 at p 4.

[147] It is reported that the United States reserves the right to extradite should the UK court issue a prison term less than the Division wanted.

[148] Informal investigations begin in response to tips or complaints from 'the public' (organizations or individuals), from information received from foreign antitrust authorities, and from amnesty applications; less commonly these days, investigations may be internally generated. In criminal cartel matters, these decisions are formally made by a grand jury.

[149] Connor, op cit, n 79. In theory, one could visit the files of every District Court in which a cartel cases had been conducted, examine their public files, and retrieve copies of all such memoranda. However, not only would this be prohibitively expensive, many courts do not retain paper copies at all because they lack the storage space. An assiduous search of the Division's Web site turned up less than 130 published sentencing agreements dated from 1995 to the present, see Connor, op cit, n 14; as the Division has fined 268 corporations and 309 persons (577 parties) over the same period (Table 1), about one-fourth of the agreements prepared and submitted to the courts have been published.

[150] The Division officials are quite open about this practice. In some cases, the shortened collusive periods stem from a concern about defendants' rights to non-self-incrimination, especially when a defendant is one of the first to apply for leniency.

[151] Cooperation is already included as a mitigating factor when prosecutors compute the offense level of the crime. If a company is 'self reporting', the offense level is reduced by five points; for 'full cooperation', the reduction is two points; and for 'acceptance of responsibility', one point is deducted. That is, cooperation is usually reflected *twice* in fine determination, once in the offense level and once for downward departures.

Similar comments apply to plea bargains.[152] The Division must adhere to procedures that protect alleged but innocent wrongdoers from the stigma of being investigated. In addition, investigatory decisions, plea bargaining, and sentencing agreements are doubtless complex deliberations full of nuances. Nevertheless, the Division does little to enlighten interested observers about the factors that determine these outcomes. Accurate predictions of plea bargaining seem to be restricted to a relatively small number of defense counsel, many of whom are experienced former Division prosecutors.

Unless witnesses choose to reveal it, the existence of a grand jury investigation of a suspected cartel is confidential, as are its deliberations. Grand jury investigations must be kept secret by the Division employees and members of the jury. As a matter of public policy, secrecy may be justified by the element of surprise that would prevent interference by other units of government. Moreover, there are due process concerns. Early release of information about a criminal violation might hurt defendants' privacy rights or give the government an unfair advantage by using adverse publicity.[153]

Approximately half of corporate cartel indictments for price-fixing are announced on the same date as the guilty pleas are revealed in the Division press releases; the absence of public warning about an on-going investigation is demonstrated by the stock-price reactions for target companies to the news.[154] However, about half of all cartel prosecutions are no surprise. Prior information on investigations sometimes leaks out when a subpoenaed company issues an SEC report to its stockholders (an event not always reported by business media) or when a witness before a grand jury makes its existence public.

While aggregate annual information on the number of investigations and their disposition is made available in the Division's Workload Statistics, such information about individual cases is spotty. The identities of some targets of search warrants are often secret; the dates when grand jury investigations open are sometimes known only to those subpoenaed; and fines for many smaller members of cartels are unannounced, either by the Division itself or by the press. There may be good reasons for secrecy on such matters. However, many formal cartel investigations are closed by the Division without publicly known sanctions. The Division customarily treats as confidential the

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[152] WS Grimes, 'Transparency in Federal Antitrust Enforcement' *Buffalo Law Review* 51 (2003) 937-1027. RP Adelstein, 'The Plea Bargain in Theory: A Behavioral Model of the Negotiated Guilty Plea', *Southern Economics Journal* 44 (1978) 488-503 at p 488, says of plea bargaining, '… perhaps no other aspect of the criminal process is so hidden and so little understood'. See also RD Cooter and DL Rubinfeld, 'Economic Analysis of Legal Disputes and Their Resolution', *Journal of Economic Literature* 27 (1989) 1067-1097 at pp 1082-1084, a classic synthesis of the legal-economic literature on legal disputes that covers plea bargaining at a high level of generality.

[153] Other reasons for secrecy are to make witnesses comfortable, reduce the risk of flight of defendants, and prevent corruption of grand jurors.

[154] See Connor, op cit, n 111. The extent of confidentiality of the Division investigations is higher than in the EU, where raids tend to be reported by the press. Canada maintains the highest degree of confidentiality of its cartel probes, though a high share of its cases closely follow the Division probes.

dates and reasons for closing probes, even when an investigation is public knowledge. It is difficult to imagine what public benefit flows from this policy. Rather, it prevents outsiders from assessing the quality of the Division decision-making about 'false positives'.

In a large sample of international cartels, about 6% of all formal Division probes ended without fines or civil penalties.[155] When this happens, public notification normally occurs only when a target of the investigation issues a press release. In other cases notification of the end of investigations may remain buried in the footnotes of a firm's financial reports; unlisted firms may never reveal a probe or its closure. The Division rarely, if ever, issues a public explanation for closing particular cases. As a result of this pattern of secrecy, valuable information is unevenly distributed.[156]

Ignorance about closing standards can lead to needless speculation about the causes. Perhaps most occur because the investigation exonerated the suspects, because remaining members of the cartel refused to provide evidence, because of inability to pay, or because other investigations were deemed to be of a higher priority. These reasons are defensible ones, but other reasons may reflect unfavourably on the Division. Objective, disinterested analysis could help pinpoint or rank the causes, but the present lack of information does not permit such research.

CONCLUSIONS

The Division generally receives good marks for its criminal cartel-enforcement activities. The Congress is generally pleased with the Division's surge in cartel enforcement since 1995; it cites the large cartel fines, increased detection of cartels, and leadership among international antitrust authorities as evidence of success; criticism by the current oversight committees is largely directed at the Division's merger and monopoly activities.[157]

By all measures, the size of US fines imposed on corporate cartelists has risen since 1990, though relative to other jurisdictions and to private recoveries of damages, the Division is falling behind. Changes based on the Division's current legal authority would permit the agency to move closer to the kinds of penalties that would better serve the deterrence objective of Section 1 of the Sherman Act. Minor changes in the US Sentencing Guidelines would also advance the deterrence value of monetary fines.

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[155] Connor and Helmers, op cit, n 13.

[156] News of raids sometimes makes it into press sources, but targets may not confirm their status; publicly listed firms may mention an investigation in their financial statements, if they believe the monetary impacts are material; most often news that an investigation was closed without indictments arises from company press releases; private firms, including subsidiaries of foreign defendants are not obligated to reveal such information. Leading antitrust law firms 'inside the Beltway' in Washington, DC seem to be better informed than other law firms, potential plaintiffs, or investors.

[157] Judiciary Committee, 'Oversight on the Enforcement of the Antitrust Laws: Hearing before the Subcommittee on Antitrust', Competition Policy and Consumer Rights of the Committee on the Judiciary of the United States Senate, Washington, DC (March 7, 2007).

Where the Division has no peer is in imposing prison sentences of individual cartel managers: it is the Cartel Jailer for the World.

In view of the fact that the Division receives about 25 corporate leniency applications per year, a matter of some concern is the falling numbers of criminal price-fixing cases filed, corporations indicted and fined, and the number of cartel managers charged and fined.[158] In part, these trends may be ascribed to a policy shift that redirected its efforts away from smaller, domestic, bid-rigging schemes with limited economic injuries and toward large international cartels. The Division is to be commended for its obvious expansion of prosecutions of large domestic and especially large international cartels that have caused serious injury to the US economy. Falling numbers may also reflect constrained resources.

The Division is the oldest and largest antitrust authority in the world, but given the scope of its responsibilities it may not have sufficient resources to carry out its main missions.[159] Less than 30% of the Division professionals are earmarked for cartel enforcement. The large backlog of cases, the reluctance to litigate, and the tendency to offer what appear to be excessive concessions in order to quickly settle plea agreements – all additional signs of an organization trying to stretch a smaller labour pool than is optimal. To carry out a more aggressive anti-cartel campaign, the Divisions resources will require significant bolstering.[160]

Relative to the size of the US economy, many other foreign antitrust authorities are actually better endowed.[161] A substantial increase in the Division positions and budget seems justified, perhaps a doubling of professional positions to handle criminal matters in the next decade or less.

[158] The proportion of applications accepted is not known, but even if only half, that ought to generate at least 50 corporate and 100 individual indictments annually. The actual numbers since 2000 are 20 and 40 respectively.

[159] One might add that the reputation for honesty and impartiality in the Division is above reproach. The temptations for abuse are evident, as a recent scandal in the Greek antitrust authority shows, see A Carassava, 'Bribery Scandal Puts Strain on Greek Leader', *The International Herald Tribune* (October 13, 2006) 3.

[160] This is but one of 22 cartel-enforcement recommendations made to the 44th President of the United States by the Board of Directors of the American Antitrust Institute, see Foer, op cit, n 108 at pp 22-27.

[161] The EC's DG-COMP has about 500 employees for a slightly larger market, but over the past several years the EU's National Competition Agencies with more than a thousand additional employees have begun to shoulder much of the burden of cartel enforcement, see Connor, 2008, op cit, n 20. For example, both the German and Dutch antitrust authorities have about 300 employees. Some overseas antitrust authorities combine the work of the Division and US FTC, which together have about 2000 employees. In general, these combined foreign authorities have more employees relative to the size of their economies. For example, the Canadian Competition Bureau and the Korean FTC each have more than 300 employees for economies 9% the size of the United States' economy.

TABLES FOR REVIEW PURPOSES ONLY

Table 1. US DOJ Antitrust Division Enforcement Statistics, Annual Averages, Fiscal Years 1990-2007

	1990-94	1995-99	2000-04	2005-07	1990-2007
Resources:					
Budget (current $ mil)	59	92	126	144	100.8
Budget (1982$ million):	47.8	70.4	88.5	89.7	72.4
Cartels %	--	--	28	29	29
Mergers, monopoly %	--	--	51	53	52
Compet. advocacy %	--	--	4	3	
Positions budgeted [a]	615	815	843	880	778.3
FTEs/budgeted %	--	93	97	97	95
FTEs on cartels %	--	24	28	28	26.4
Budget/position (thousand 1982$)	77.7	86.4	105.0	101.9	93.0
Case Handling:					
Prelim inquiries pending	127	138	139	118	132
Investigations opened	96	94	95	100	95.6
No. §1 cases filed:	83	71	45	34	62.5
Criminal cases	72	55	35	25	49.0
Criminal cases %	95	83	95	89	90.8
Grand juries opened	43	27	29	37	33.8
Grand juries closed	55	29	24	30	35.2
No. appeals filed	15	17	6.2	1.7	10.8
Cases won, number	67	46	27	36	45.4
Cases won %	94	97	99	99	97
Cases pending end FY [b]	--	19	35 [e]	16	26.1 [e]
Corporate sanctions:					
Corporations charged	68	28	22	20	36.3
Number corps. fined	59	27	17	16	31.5

% above $10 mil.	0	20	25	22	9.7
Corp. fines ($ mil.) [c]	28	317	174	560	237.7
% above $10 mil.	0	88	97	97	90.6
% foreign $10 mil.+	0	81	91	87	79.8
Fines/corporation $ mil.	0.5	12.9	10.2	36.8	7.5
Individual sanctions: [d]					
Persons charged	59	36	40	44	44.7
Persons fined	34.4	27.8	22.6	18.0	26.6
Total fines ($ mil.)	1.62	4.39	3.40	7.75	3.91
Fines/person ($ '000)	47	135	150	475	171
No. imprisoned	14.6	11.4	16.6	23.7	15.8
Prison days	3609	3017	7512	16,644	6701
Prison days/person	238	298	458	646	384

-- = Not available

a) Highly correlated with FTEs, which are generally 85 to 95% of budgeted positions.

b) There are no cases pending shown prior to 1997, because this is a new statistical series.

c) The respective sub period cartel fines for the EU are $83.3, $21.2, $338.2, and $1717.1 million; for all 18 years, the annual mean is $415 million.

d) Largely for price fixing, but not all.

e) The number pending on Sept. 30, 2007 was 9; the numbers were 30 or higher from 2000 to 2004, peaking at 44 at the end of fiscal year 2004; the average shown for 1995-99 is for 1998-99.

Sources: U.S. DEPARTMENT OF JUSTICE, SHERMAN ACT VIOLATIONS YIELDING A CORPORATE FINE OF $10 MILLION OR MORE (2007), *available at* http://www.usdoj.gov/atr/public/criminal/225540.htm; U.S. DEPARTMENT OF JUSTICE, ANTITRUST DIVISION: WORKLOAD STATISTICS for FY 1990-1996, FY 1997 – 2006, and 1998-2007; U.S. DEPARTMENT OF JUSTICE APPROPRIATION FIGURES FOR THE ANTITRUST DIVISION: FISCAL YEARS 1903-2007 (2007), *available at* http://www.usdoj.gov/atr/public/10804a.htm; Connor 2007d, *supra* note 23.

Table 2. Monetary Penalties Imposed on Corporate Members of International Cartels Discovered January 1990- December 2007							
Antitrust Authority Location	**Geographic Scope of Cartel**						
	North America	EU-Wide	European Nations	Africa, Asia, & Oceania	Latin America	Global	Total
	Million nominal U.S. dollars						
FINES:							
U.S. Govt.	260.1			141.2 [a]		3736	4137 [a]
Canada Govt.	53.2	0.7				155.4	209.3
European Commission		7467				5124	12,585
EEA Members [e]		110	5646			318.6	6075
Other Eur.		0	0				0
Africa				29.1			29.1
Asia				755.3		10.4	765.7
Oceania				61.5		7.0	68.4
Latin America					302.2	0.2	302.4
Total fines	313.3	7572	5646	987.1	302.2	9352 [c]	24,172
OTHER PENALTIES:							
U.S. direct buyers	5767			60.0		12,579[d]	18,406
U.S. indirect buyers	225.6	28.4				1006	1260
Canada private	8.7					164.3	173
Other private			95.7 [b]	1405 [c]			1501
Total private	5999	28.4	95.7	1465		13,749	21,340

Total penalties	6312	7600	5742	2452	302.2	23,100[d]	45,512

a) Includes U.S. fines for a bid-rigging case in Egypt and restitution of $60 million for the U.S. government in the same case.
b) Includes three cases of court-ordered restitution: Norwegian hydro-electric equipment, UK generic drugs, and Danish district heating pipes – the sole such examples Europe.
c) Includes restitution ordered for the Kazakhstan government in a petroleum cartel ($530 million), $0.5 million in the Israeli diamond-transport case, and for the Korean government in a military fuels case ($86.1 million).
d) Includes fines by Korea and Australia ($16.9 million) for four bulk vitamins, Korea ($8.5) for graphite electrodes, and Mexico ($0.2) for lysine; the largest amount ($3413 million and rising) was settlements by U.S. state attorneys general in *Insurance Brokers' Contingent Fees*.
e) National enforcement by the 25 member states of the EU plus the four countries of the European Free Trade Area that enforce the EU's competition laws; these 29 countries comprise the European Economic Space. Some national indictments are made using Article 81 of EU law.

Source: *Prosecutions of International Cartels*, *supra* note 10, at Table 6, adapted from Private International Cartels spreadsheet dated February 8, 2008.

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Survey of Public Attitudes to Price-Fixing and Cartel Enforcement in Britain

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The paper reports on results from a public survey on attitudes to collusion and cartel enforcement in Britain. Respondents demonstrate an understanding that price-fixing is harmful and should be punished. While there is strong support for high corporate fines and naming and shaming, only one in ten Britons think individuals responsible should be imprisoned. Weak perceptions of the severity of price-fixing are confirmed by only six in ten people considering such practices to be dishonest. Sex and age strongly influence attitudes. Education and newspaper readership have less of an effect, indicating poor information dissemination. Only 20 per cent would report their employer's involvement in price-fixing without guarantees of anonymity and/or a reward; 14 per cent would not report at all for fear of potential consequences. Public opinion is divided as to whether leniency programmes are justifiable. Respondents consider public enforcement to be more important than compensating parties injured by cartels.

1. INTRODUCTION

Much of the literature on cartel enforcement is theoretical. The empirical papers that exist in Europe focus mainly on enforcement efforts, and draw their conclusions from the information contained in the formal cartel decisions of the European Commission, D-G Competition.[1] The US literature largely focuses on the characteristics of cartels and their effects.[2] Christine Parker has conducted a study of the Australian Competition and Consumer Commission's (ACCC) enforcement activity and business responses to it, gauging the opinions of enforcement officials, competition lawyers and

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1 Examples include: A Stephan, 'An Empirical Assessment of the 1996 Leniency Notice' (2005) CCP Working Paper 05-10, presented at the 2006 EARIE conference, Amsterdam. Available at: <http://www.ccp.uea.ac.uk/publicfiles/ workingpapers/CCP05-10.pdf> [all websites accessed 28 May 2008]; Brenner, S, 'An Empirical Study of the European Corporate leniency Program', presented at the 2005 EARIE conference, Porto. Available at: <http://www.fep.up.pt/conferences/ earie2005/cd_rom /Session per cent20VII/VII.G/brenner.pdf>; MP Schinkel et al, 'An empirical analysis of Commission Decisions and their Appeals Histories', presented at the 2004 EARIE conference, Berlin. Available at: <http://www.diw.de/english/produkte/veranstaltungen/earie2004/papers/docs/ 2004-462-V01.pdf.>

2 Examples include: M Levenstein & VY Suslow, 'Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy' (2004) 71(3) Antitrust Law Journal 801; JM Connor & RH Lande, 'The size of cartel overcharges: Implications for US and EU fining policies' (2006) 51(4) The Antitrust Bulletin 983; JE Harrington, 'How Do Cartels Operate?' (2006) unpublished paper, John Hopkins University, available at: http://www.econ.jhu.edu/pdf/papers/WP531harrington.pdf.

businessmen.[3] Finally, Barry Rodger[4] is conducting surveys on firms that have been fined for involvement in cartel infringements.

Public attitudes are important to cartel policy in four respects. First, individuals' willingness to desist from price-fixing and other collusive behaviour is strongly influenced by how bad they perceive such behaviour to be. The weight of social stigma imposed upon them if caught can have a strong deterrent effect. In as much as the harm caused by cartels is not obvious to people, greater education about the effects of such infringements, and the importance of enforcement, may be necessary to stiffen deterrence. These perceptions will also determine people's willingness to report such behaviour when they think they may be victims of it, or when they suspect their employer to be participating in it.

Second, because cartels are difficult to detect, competition authorities rely heavily on the use of leniency programmes. These typically grant immunity to the first infringing firm that self-reports an infringement and provides evidence of those involved. If cartel infringements are perceived to be too serious, public attitudes may strongly oppose the use of such detection mechanisms as they allow some guilty parties to go unpunished and allow the sanction on others to be substantially reduced.

Third, cartel enforcement in the EU has been dramatically stepped up in the last decade and public support is needed to ensure its success and to back any additional resources required. Leniency programmes have been adopted on the Community level, in the UK and will soon be available in every Member State. There has also been a significant escalation in the level of fines imposed on infringing firms. In 2007 alone, more than €3 billion was imposed in cartel fines by the European Commission. Some national jurisdictions have also adopted criminal offences; notably in the UK where individuals can be imprisoned for up to five years for price-fixing under Part 6 of the Enterprise Act 2002. Other enforcement mechanisms are being contemplated, such as the introduction of a system of negotiated settlement. The European Commission also hopes to encourage private enforcement, which is currently perceived as weak in Europe as compared to the US. If the strengthening of cartel enforcement is not in tune with public opinion, many of these enforcement mechanisms may prove ineffective.[5] Competition authorities may also feel a political backlash if public opinion perceives their enforcement efforts to be too draconian.[6]

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[3] C Parker & N Stepanenko, 'Compliance and Enforcement Project: Preliminary Research Report' (2003) Centre for Competition & Consumer Policy, unpublished paper, available at: <http://cccp.anu.edu.au/Preliminary%20Research%20Report.pdf>

[4] Strathclyde Law School.

[5] See for example: C Harding, 'Business Collusion as a Criminological Phenomenon: Exploring the Global Criminalisation of Business Cartels' (2006) 14 Critical Criminology 181 at 197.

[6] C Parker, 'The "Compliance" Trap: The Moral Message in Responsive Regulatory Enforcement' (2006) 40(3) Law & Society Review 591.

Finally, public attitudes give some indication of the willingness to convict individuals at jury trial: in particular, the extent to which price-fixing is considered dishonest for the purposes of the UK criminal offence.

This paper presents an overview of the results of a survey gauging public attitudes in Britain to price-fixing and cartel enforcement mechanisms. This is the first ever survey of consumer attitudes to cartels. A representative sample of 1,219 residents of Great Britain, aged 18 or over, was surveyed.[7] The survey was carried out between the 28th–30th March 2007 by YouGov Plc and was commissioned by the ESRC Centre for Competition Policy.

Section 2 of this paper discusses the methodology used in carrying out the survey. Section 3 presents and discusses some of the main survey results, including: the extent to which price fixing is perceived as wrong; the appropriate punishment for firms and individuals; the extent to which price fixing is perceived as dishonest for the purposes of the UK's cartel offence; perceptions of when price fixing should be punished; whether there should be exceptions; attitudes to leniency programmes; willingness to report price fixing; and attitudes towards private enforcement.

2. METHODOLOGY

2.1 How the survey was carried out[8]

YouGov Plc maintains a panel of over 160,000 adults throughout Great Britain. In order to register with YouGov, each panel member completes a detailed profiling questionnaire and sets up an account name and password. This questionnaire enables YouGov to select a representative sample each time they conduct a survey – representative according to the demographic make-up of the population. Information acquired at registration includes: region; age; gender; education; housing tender; size of household; children in household; cars in household; daily newspaper readership; vote in last general election; employment status; sector; income; religion; and ethnicity.

The YouGov pool is recruited from a wide variety of sources. Most have been actively recruited via non-political websites. These range from invitations and pop-up advertisements on ISP home pages to websites on varied subjects. YouGov have also employed specialist recruitment agencies to contact specific groups in order to ensure a wide demographic spread.

In conducting the survey, YouGov first selected a sub-group from their pool that was representative of the population as a whole. They then emailed the selected panel members and invited them to complete the survey by clicking on an Internet link. In

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[7] As a guide: for a 1,000 sample, margin of error is in the region of +/- 3 per cent points based on a 95 per cent confidence interval (YouGov).

[8] See YouGov 'Questions & Answers' available at: <http://www.yougov.com/corporate/aboutQA.asp?jID=1&sID=1&UID> and 'How YouGov Works' available at: <http://www.yougov.com/corporate/aboutYGWorks.asp?jID=1&sID=1&UID>

order to complete the survey they were required to log in and provide their password. This ensured that the right people completed the survey, and enabled their answers to be matched to the demographics they provided when they registered with YouGov. Respondents receive a small incentive for completing YouGov surveys. The purpose is to ensure that samples are as representative as possible, and that responses are not tilted towards those passionately interested in the subject of the particular survey.

The survey yielded 1,219 responses out of 3,000 members of the public emailed. This is a response rate of about 41 per cent.[9] When fieldwork was complete, the raw data was adjusted, taking account of age, gender, social class, newspaper readership and past vote (in a general election), to ensure that the results were representative.[10] Almost all surveys involve weighting, whether they are conducted online, face-to-face or by telephone. This is to ensure that the published results properly reflect the population they seek to measure.[11]

YouGov surveys are also weighted according to past vote and newspaper readership to ensure that results are attitudinally representative as well as demographically representative of the population.

2.2 Why an online survey?

For the purposes of statistical analysis probability-based sampling is more desirable than quota sampling. Under the former, the entire population is known and a sample can be selected in such a way that every member of the population has an equal chance of being drawn. This reduces selection errors and produces a sample that is likely to yield more accurate results. If one were surveying employees of a company or some other easily identifiable population, probability-based sampling could be easily employed. However the difficulty of public surveys is obtaining correspondence information for the population that is complete and accurate. Population censuses are infrequent and many opt out of the publicly available electoral register. Telephone directories are similarly incomplete and an increasing proportion of people now use mobile phones instead of landlines. For these reasons public surveys tend to rely on a quota sample: a group of people is chosen according to their demographic characteristics. They are representative of the general population and so their responses should accurately reflect public attitudes. The difficulty in such surveys is ensuring that no significant group in the population is excluded or under-represented. YouGov's methods for limiting such effects and compensating for them were described in the previous section.

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[9] Typical response rates in telephone surveys can be as low as 15 per cent. See, op cit, n 8, and P Kellner, 'Can Online Polls Produce Accurate Findings?' (2004) 46(1) International Journal of Market Research 3.

[10] The combination of sample-selection and weighting techniques currently produces accurate figures for region, employment status and housing tenure, so no further weighting is needed; but, as with potential panel-effects, this data is monitored regularly by YouGov.

[11] For example, men comprise 48 per cent of the population and women 52 per cent. The raw figures in the survey were close to this (49 per cent and 51 per cent respectively) but were weighted to reflect the actual population.

Conventional survey methods include postal self-complete questionnaires, telephone interviews and face-to-face interviews. Postal surveys tend to yield poor response rates mainly due to the volume of 'trash mail' received by households, but also because of the effort required in returning the questionnaire. There is also no way of ensuring that the questionnaire is completed properly or by the right person. Telephone and face-to-face surveys also have difficulty obtaining representative samples. Telephone polling companies generally achieve only 15 interviews for every 100 residential numbers they dial.[12] There is a difficulty in finding a time that is convenient for all respondents, particularly those who work long hours. Many will refuse to answer questions to strangers over the phone or face-to-face because they consider these to be an infringement of their privacy. Although interviewers in such methods ensure that respondents understand the questions and complete the survey properly, respondents may be less frank in their answers as they may feel rushed or influenced by the interviewer.

Online surveys have the advantage of being anonymous and convenient. People can fill in the survey in private, at a time of their choosing, at their own pace, and free from interviewer effects. There is no scope for human error in processing questionnaire data, or reading respondents' handwriting. If an answer has not been selected, the respondent cannot move onto the next question page. Online surveys also prevent respondents from returning to earlier questions at the end of a survey and changing their responses, influenced by the content of later questions.

Online surveys can be criticised for being biased towards the wealthier in society and those more technologically-minded. However, internet access has now become affordable, even for low-income households. Moreover one would expect the less technologically minded to be older members of the population, yet in the raw (unweighted) data those aged 55 and over were over-represented.

With online surveys there is a danger that respondents randomly select answers without reading the questions in order to complete surveys as quickly as possible. YouGov occasionally asks respondents classification questions they have answered before to check for consistency, and have found little evidence of this. In this survey, respondents were asked more than one question on a number of themes with the choice of answers switched between negative first and positive first. We do not observe conflicting answers between these questions and so are confident that this criticism does not hold.[13]

A comparison of UK election polls carried out using different research methods since 2001 have shown online polling to be as accurate or better in predicting final election

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[12] See YouGov 'Questions & Answers', op cit, n 8, above.

[13] There is also the suggestion that online surveys are biased towards people who use the internet at work for leisure purposes. We asked respondents the extent to which they agreed with the following statement: 'Using the internet and telephone at work for leisure purposes is not wrong; most people do it, it is almost a perk of the job'. 35 per cent agreed with this statement, whereas 32 per cent disagreed. This result may suggest that the bias described above does not exist among respondents of this survey.

results.[14] Sanders *et al* considered opinion polls covering the 2005 General Election.[15] They found that there were few statistically significant differences between co-efficients generated through a YouGov internet survey and a conventional face-to-face interview method carried out for General Elections since 1963 by the National Centre for Social Research (Natcen).

2. THE SURVEY RESULTS

3.1 Is price-fixing wrong?

To ensure balanced and unbiased results, respondents were mainly presented with various scenarios and were asked to either agree or strongly agree with one of two balanced alternatives. They also had the option to agree with neither, or select 'don't know'.[16]

To begin with respondents were asked about their shopping preferences:

Table 1: Willingness to Search

SHOPPER A hates shopping around and does not like it when a friend buys the same item as her cheaper in a different shop. She likes prices to be identical in all shops.	
SHOPPER B enjoys shopping around and does not mind her friends sometimes getting a better deal. She likes prices to be different between shops.	
Are you more like Shopper A or Shopper B?	%
Like Shopper A (of which strongly)	**18** (6)
Like Shopper B (of which strongly)	**66** (19)
Neither Shopper A nor Shopper B	14
Don't know	3

Clearly respondents prefer prices to be different between shops and enjoy shopping around, even if they sometimes fail to locate the lowest price.

Respondents were then asked the first price-fixing question to gauge the extent to which they understand the harmful effects of collusion on price. The term 'fixing

[14] See *The Economist* <http://www.economist.com/media/pdf/YGrecord.pdf>; P Kellner, op cit, n 9; DM Reiner, '2006 EPRG Public Opinion Survey on Energy Security: Policy Preferences and Personal Behaviour' (2006) Judge Business School, University of Cambridge, unpublished paper, available at: <http://www.electricitypolicy.org.uk/pubs/wp/eprg0706.pdf>

[15] D Sanders et al, 'Does Mode Matter for Modelling Political Choice? Evidence From the 2005 British Election Study' (2007) Political Analysis 15 (Autumn).

[16] The ordering of the questions was the same for all respondents. The sequence was designed to limit the effect of earlier questions biasing responses to later questions. Except where otherwise stated, questions were asked to all respondents.

prices' was not employed in this first question to test whether it held negative connotations that would bias responses.

Table 2: Price-Fixing I

Imagine the owners of three corner shops in your area meet once a month to agree on what prices to charge for groceries.	
SHOPPER A believes that this is good for their customers because it ensures similar prices and saves them the hassle of searching each shop for the lowest price.	
SHOPPER B believes that this is bad for their customers because it will result in much higher prices.	
Which shopper do you most agree with?	%
Agree with Shopper A (of which strongly)	**17** (4)
Agree with Shopper B (of which strongly)	**69** (25)
Neither Shopper A nor Shopper B	12
Don't know	3

The results indicate a strong understanding among respondents that when competitors collude in setting prices, they will look to inflate those prices in order to increase their collective profits to the detriment of their customers.

However when presented with a situation of market sharing where a wide geographic distribution of competitors yields higher prices, but also convenience, a clear majority of respondents demonstrated a willingness to accept this trade-off. This may indicate that where forms of collusion other than price-fixing bring some benefit to consumers, they are more likely to be acceptable.

Table 3: Market Sharing & Convenience

At the beginning of summer, the ice cream sellers in a seaside resort get together and agree where to park their ice cream vans. This ensures they are well spread out from one another.	
TOURIST A believes that this is bad for their customers because each ice cream van will charge much higher prices when situated away from their competitors.	
TOURIST B believes this is good for their customers because they would rather have less distance to walk in order to buy an ice cream, even if that means paying more.	
Which tourist do you most agree with?	**%**
Agree with Tourist A (of which strongly)	**26** (9)
Agree with Tourist B (of which strongly)	**43** (9)

Neither Tourist A nor Tourist B	27
Don't know	4

Respondents were then introduced to the term 'fixing prices' and asked whether they believed this to be a harmful practice that should be punished, or a harmless practice that should not.

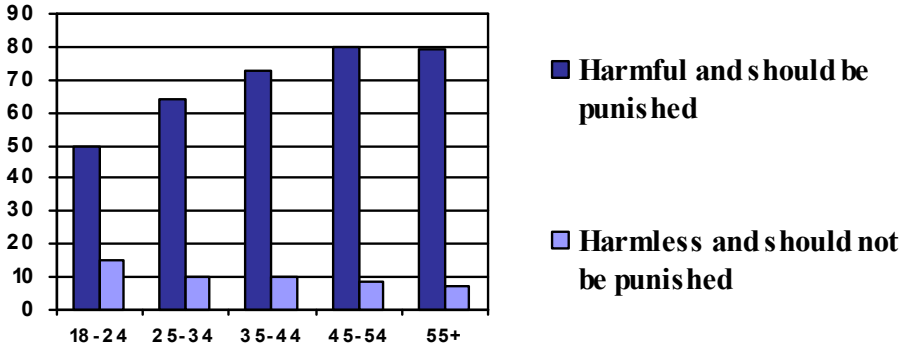
Table 4: Price-Fixing II

The next scenario is about 'fixing prices'. This is when competing businesses agree on what prices they will each charge.	
CITIZEN A believes that 'fixing prices' is a harmless business practice, that businesses should be free to set prices how they want and that such practice should not be punished.	
CITIZEN B believes that 'fixing prices' is harmful to customers, that each business should set its own price independently, and that such practice should be punished.	
Which citizen do you most agree with?	**%**
Agree with Citizen A (of which strongly)	**9** (2)
Agree with Citizen B (of which strongly)	**73** (37)
Neither Citizen A nor Citizen B	14
Don't know	5

A majority of respondents recognise that price-fixing is harmful and feel it should be punished. The proportion of negative responses to this question is 4 per cent higher than in the first price-fixing question. This difference may be due to the general nature of this question, as compared to the specific businesses example presented in the first question (corner shops). It may reflect a better understanding of the subject following the introductory questions. Responses may also be affected slightly by the term 'price-fixing'.

Education and newspaper readership appears to have little impact on attitudes towards price-fixing; suggesting that these two mediums are poor at disseminating information about its effects, current cartel laws, and prosecutions in the UK. On the other hand, age seems to have a big impact with only 50 per cent of 18-24s feeling price-fixing is harmful and should be punished, compared to at least 79 per cent of 45s and over (Fig. 5). This suggests that an important source of knowledge about price-fixing may be experience as a consumer.

Fig. 5: Age



Figures 6-8 illustrate attitudes according to certain demographic characteristics. It is observed throughout the survey that men have more hardened attitudes to price-fixing than women. 80 per cent of men think it is harmful and should be punished, compared to only 65 per cent of women (Fig. 6). There is a positive relationship between hardened attitudes and wealth, possibly because of greater spending power (Fig. 7). There is a negative relationship with managerial responsibility (Fig. 8). This is perhaps puzzling given that top-level management should have better knowledge about competition law than anyone else within a firm. However it may be that some managers are influenced by the possibility of crisis cartels, which are discussed later in this paper.

Fig. 6: Gender

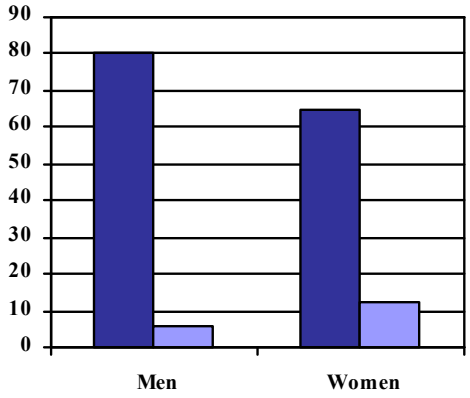


Fig. 7: Social Grade / Wealth

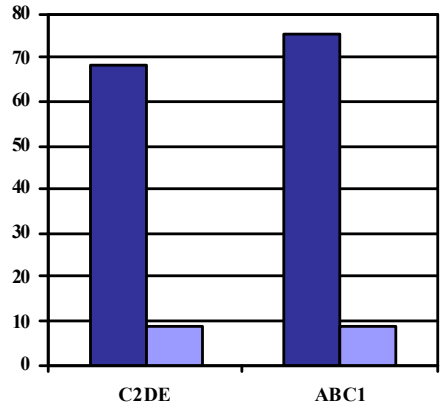
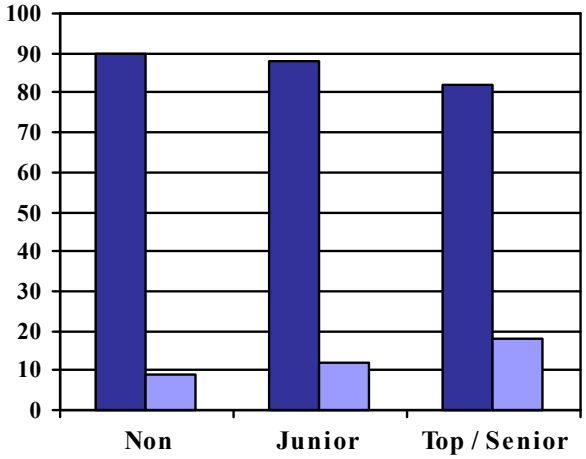


Fig. 8: Managerial Responsibility



3.2 Appropriate punishment for firms

The results in Table 4 confirm strong public support for punishing price-fixing behaviour, but do not tell us how severe the act of price-fixing is perceived to be. At no point in this survey was it revealed to respondents whether price-fixing is illegal in the UK or how it is punishable. All respondents except those who felt price-fixing is harmless (1,110 respondents) were asked a series of questions designed to gauge what they felt is the appropriate punishment for price-fixing. Respondents were presented with a range of punishments which businesses could face for such behaviour and were asked to select which (if any) they felt should apply.

Table 9: Punishment for Firms*

Five large businesses agree to fix prices so that their customers are charged more than would be the case if they acted independently, and so that each will earn extra profit…	
If each of these BUSINESSES were to be punished, which, if any, of the following do you think each of these businesses should face?	%
Public naming and shaming	**68**
Compensation to over-charged customers	**56**
Fine equal to the extra profits made	**17**[17]
Fine greater than the extra profits made	**48**
Other	4
Don't know	6
None of these/No punishment	2

* Those who agreed with Citizen B (who believed that 'fixing prices' is harmful to customers) or were undecided/did not know

The main sanction imposed by competition authorities in the UK and EC is administrative fines. There appears to be substantial public support for imposing fines on price-fixing firms. Interestingly the support is far stronger for fines that exceed the extra profits earned through the cartel, rather than fines proportionate to those profits. A weak majority believe that these firms should be made to compensate affected customers. The sanction with the strongest support is public naming and shaming. Consumers made aware of a firm's anti-competitive behaviour may make efforts to take their business elsewhere. However sanctions aimed at affecting a firm's reputation faces two problems. First, most cartels prosecuted by the European Commission in the last decade concern upstream markets where the immediate victims of price-fixing are other firms purchasing goods. These firms may simply pass on the higher prices to final consumers. Second, the very characteristics that make price-fixing possible (few firms

[17] The results have been adjusted so that those respondents who selected both 'fine equal to' and 'fine greater than' the extra profits made, are classed as having selected only the latter.

in the industry, barriers to entry, low substitutability of the good produced) also mean that buyers have little choice but to continue purchasing from these firms post-collusion, regardless of how low their opinion of them becomes.

3.3 Appropriate punishment for individuals

Table 10: Punishment for Individuals*

The decision to fix prices is usually made by a number of INDIVIDUALS within a business…	
In addition to the punishment (if any) you stated businesses should receive, if each of the INDIVIDUALS in a business were to be punished, which, if any, of the following do you think each of these individuals should face?	%
Public naming and shaming	**55**
A ban from holding senior managerial positions in businesses	**48**
A personal fine	**42**
Imprisonment	**11**
Other	2
Don't know	9
None of these/No punishment	5

* Those who agreed with Citizen B (who believed that 'fixing prices' is harmful to customers) or were undecided/did not know

The vast majority of respondents who felt firms should be punished for price-fixing behaviour also felt that the individuals responsible within those businesses should be punished. Bans from holding senior managerial positions and personal fines both have significant public support. The most popular sanction again proved to be public naming and shaming. Table 11 indicates that it is generally the same people who believe that firms and individuals should face public naming and shaming, rather than just one or the other.

Table 11: Public Naming & Shaming Comparison

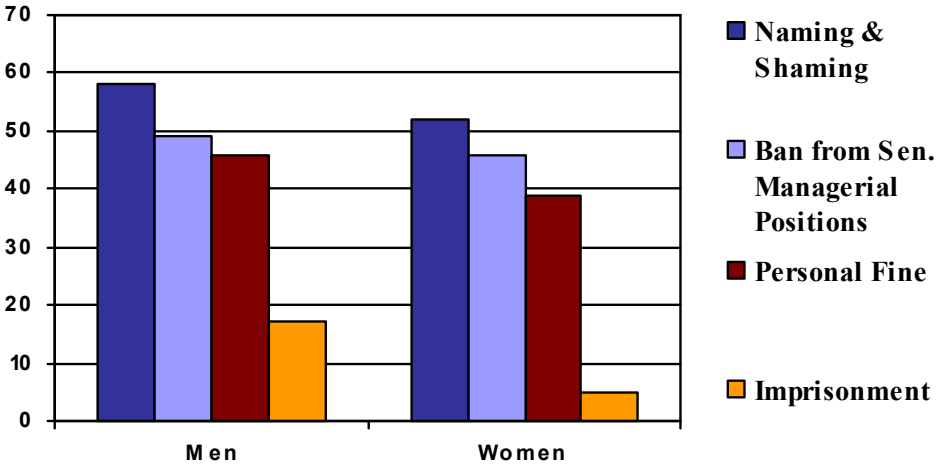
Public Naming & Shaming	Individuals		
Firms	%	YES	NO
	YES	**50**	**18**
	NO	**5**	**27**

It is unclear what effect, if any, the public naming and shaming of individuals has. Many of these individuals may otherwise be considered 'decent' members of their

community.[18] If their actions are known within their industries, and firms worry about reputation, then these individuals may find it difficult to seek employment.

The results in Tables 10 and 11 may reflect how the perceived personality behind the wrongdoing will always be first and foremost the firm, rather than the individual. A significant divergence of opinion between men and women is again observed:

Fig. 12: Appropriate Punishment – Gender



3.4 Significance for the UK criminal cartel offence

The survey reveals very weak public support for the imprisonment of individuals who have committed price-fixing offences; with only one in ten people (11 per cent) feeling it is appropriate (Table 10). This has strong implications for the criminal offence set out in Part 6 of the Enterprise Act 2002. By virtue of s.188-190, an individual is guilty of a criminal offence if he or she 'dishonestly agrees with one or more other persons to make or implement, or to cause to be made or implemented' any of the arrangements defined in s.188(2) relating to at least two undertakings. The penalty is up to five years imprisonment and/or an unlimited fine, and the required standard of dishonesty is that set out in *R v Ghosh*.[19] In order for an individual to be convicted, a jury must determine that:

1. according to the ordinary standards of reasonable and honest people what was done was dishonest. [If it was not dishonest, the test is not satisfied]
2. [and] … the defendant himself must have realised that what he was doing was by those standards dishonest. (recital 696)

The survey results are also interesting in light of the House of Lords ruling in *Norris* v *USA*.[20] The US unsuccessfully attempted to extradite the former chairman of Morgan

[18] See for example character references presented in mitigation for JP Lambe following his guilty plea in the *Irish Heating Oil* Case: '€4.4m fuel price-fixer gets a €15,000 fine', The Irish Independent, 7 Mar 2006, available at: http://www.independent.ie/national-news/44m-fuel-pricefixer-gets-a-15000-fine-106337.html

[19] [1982] 2 ALL ER 689.

[20] *Norris v Government of the United States of America and others* [2008] UKHL 16.

Crucible, who is alleged to have played a central role in the price-fixing of carbon products during the 1990s. The alleged conduct occurred before the 2002 Act came into force, and so the US could not rely on the cartel offence to satisfy the dual-criminality requirement of the Extradition Act 2003. Instead, they argued that price fixing constituted the common law crime of conspiracy to defraud at the material time. Conspiracy to defraud hinges on the same standard of dishonesty as the statutory offence. With reference to the historical tolerance with which English law and successive British governments treated cartels in the past, the Lords ruled that price fixing was not dishonest at that time '…unless there were aggravating features such as fraud, misrepresentation, violence, intimidation or inducement of a breach of contract, [cartel] agreements were not actionable or indictable'.[21]

The first convictions under the cartel offence have come almost five years after the cartel offence came into force, and have been induced by a US plea bargain. Under this arrangement, the individuals involved in the marine hose cartel – who had already admitted guilt and negotiated prison sentences in the US – agreed to plead guilty to the UK offence in lieu of serving the US jail sentences.[22] When the first 'original' prosecution comes about, there is no doubt that the Office of Fair Trading (OFT) or the Serious Fraud Office (SFO) will produce evidence that the individual tried to hide cartel meetings, or that they knew such behaviour was illegal, in order to prove dishonesty. However dishonesty is first and foremost an objective judgement, and will be influenced by jurists' preconceptions about the act of price-fixing and its severity. According to *Norris* v *USA*, secret price fixing was not dishonest prior to the introduction of the cartel offence – indeed one of the motivations behind criminalisation, was hardening of attitudes towards practices such as price fixing.[23] All respondents in the survey were asked whether they felt price-fixing is dishonest:

Table 13: Dishonesty

	%
Dishonest (of which strongly)	**63** (25)
Not Dishonest (of which strongly)	**21** (2)
Neither	11
Don't know	5

Approximately six in every ten Britons (63 per cent) believe price-fixing is dishonest, but only one in four strongly hold that belief. Two in every ten (21 per cent) believe it

[21] Ibid, at 17.

[22] OFT Press Release, 'Three imprisoned in first OFT criminal prosecution for bid-rigging' (11 June 2008); OFT Press Release, 'OFT brings criminal charges in international bid rigging, price fixing and market allocation cartel' (19 December 2007); S D Hammond, 'Recent developments, trends, and milestones in the Antitrust Division's criminal enforcement program', unpublished paper, presented at 56th Annual Spring Meeting, ABA Section of Antitrust Law, Washington DC, 26 March 2008 at 18-19.

[23] A Hammond & R Penrose, 'The Proposed Criminalisation of Cartels in the UK', a report prepared for the Office of Fair Trading (November 2001), [2002] UKCLR 97 at 2.5-2.6.

is not dishonest. This figure is lower than one would expect given that the overwhelming majority of respondents do recognise that price-fixing is wrong (Table 4). Figures 14 and 15 confirm effects of age and sex identified earlier in this paper.

Fig. 14: Dishonesty – Age

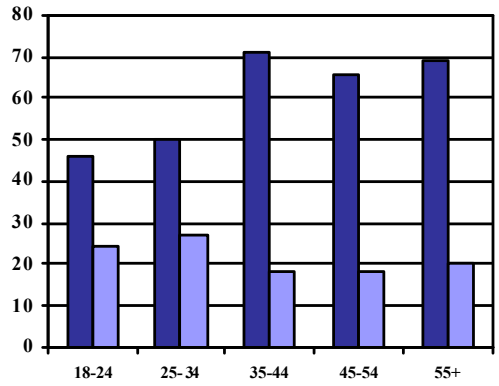
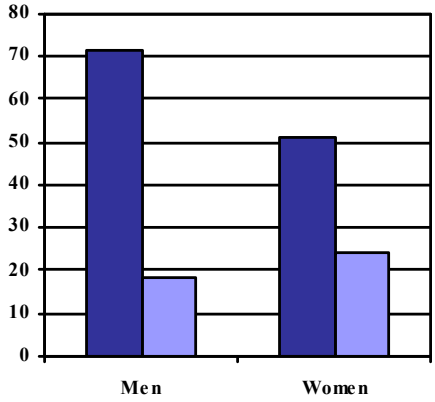


Fig. 15: Dishonesty – Gender



Dishonest **Not Dishonest**

The results may reflect insufficient knowledge about the nature of price-fixing, its harmful effects and the laws which ban such behaviour. This lack of knowledge should be remedied in the course of a trial. However, it may also be that the dishonesty test is not well suited to the cartel offence. Its origins are in cases concerning theft, the effects and nature of which may be a lot clearer to people. By contrast, individuals may pay a cartel inflated price for a product but still objectively feel that price was fair. There can also be cases (although unusual) where price fixing and the restriction of output will have positive effects and can be justified by efficiency arguments under Article 81(3) EC.[24]

We asked respondents the following open question, which menat that they could enter any answer they wished.

Table 16: Equivalence

What other practice and/or behaviour do you think 'fixing prices' is comparable to – in terms of how GOOD or BAD you consider it to be? [25]	%
Don't Know	**65**[26]
Fraud	**8**
Theft	**7**
Other[27]	**20**

[24] 'Guidelines on the application of Article 81(3) of the Treaty', OJ 2004, C101/46; *REIMS II* 1999/687, OJ 1999, L275/17.

[25] The responses to this question have been classified manually by Stephan (not YouGov) and so there may be some human error.

[26] This does not include blank answers. Respondents chose to enter DK.

Only seven per cent of respondents felt that price-fixing is comparable to theft. Eight per cent felt it was comparable to fraud. A strong majority clearly had trouble relating it to any other illegal act with which they were familiar.

3.5 When price-fixing should be punished

Table 17: When Punishment Should Occur*

WHEN do you think businesses and individuals should be punished for agreeing to fix prices?	%
Whenever price-fixing has occurred, even if prices have not gone up	**56**
Only if prices have gone up	**24**
Only if prices have gone up by at least a fifth	**6**
Other	2
Don't know	11
None of these	2

* Those who agreed with Citizen B (who believed that 'fixing prices' is harmful to customers) or were undecided/did not know

A majority of those who support punishment believe it should be imposed whenever price-fixing has occurred, even if prices have not gone up. Many cartels occur as a result of crisis in an industry and only succeed in reducing the speed with which prices are falling, rather than achieving a price increase.[28] For the purposes of deterrence it is also important that all such agreements are punished regardless of whether they are implemented or effective.[29]

However some economists, most notably Richard Posner,[30] contend that cartels should only be punished if they succeed in raising prices. Rather than imposing punishments only on cartel infringements that have an effect, competition law generally focuses on the intention to fix prices, regardless of whether this actually has an impact on prices. It is for this reason that tacit collusion cannot be punished.[31] Posner argues that while

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[27] All other responses including a small number of incoherent inputs.

[28] See Stephan, op cit, n 1.

[29] See M Motta, *Competition Policy*, Cambridge, CUP, 2004 at 185-190.

[30] RA Posner, *Antitrust Law*, 2nd ed, Chicago, UCP, 2001 at Chapter 3.

[31] Where prices increase as a result of collusion between competitors, without an explicit agreement existing between them. This is usually observed in oligopolistic markets where there are few competitors. 'Tacit collusion' can also be described as 'coordinated effects' and 'conscious parallelism'; The European Commission famously had a decision in such a case annulled by the European Court of Justice. In *Wood Pulp* (*A Ahlström Oy v Commission* [1993] 4 CMLR 407), the Commission argued that price announcements (purportedly used as a signalling tool) constituted an infringement of Article 81 EC. The case showed that alleged collusive behaviour, short of an explicit agreement, can easily be doubted using different economic arguments. These can usually explain the observed behaviour as something other than tacit collusion. The Commission is unlikely to attempt such a case again as it would need to anticipate and rebut all such possible arguments at appeal.

competition authorities' limited resources are being employed to punish failed cartels, more serious successful price-fixing goes unpunished and undetected because overt communication must be proved. He suggests that an effects-based economic approach should be employed instead.[32]

3.6 Exceptions to price-fixing laws

Many cartels are formed as a reaction to crises in an industry, such as long-term decline, or new competition from another part of the world.[33] It can be argued that such collusive agreements have the protection of employment as one of their aims. There is a question of whether cartels conceived with such motivations should be treated any differently to cartels formed purely out of greed. A firm's ability to pay is taken into consideration as a mitigating circumstance when the European Commission calculates fines.[34] If such firms are undergoing financial difficulties there are strong implications for loss of employment within the Community. Arguments of virtuous intentions by cartelists could also jeopardise a conviction under the criminal offence, as this would suggest the individual could not have realised that what they were doing was dishonest according to the standards of 'reasonable and honest people'.[35]

We asked respondents who felt price-fixing should be punished whether there should be any exceptional circumstances. This was an open question; respondents were free to enter any answer they wished.

Table 18: Situations Where there Should be No Punishment*

Can you think of a situation where you feel fixing prices should NOT be punished?[36]	%
None	**49**
Don't Know	**34**
Where it benefits consumers / lowers prices	**8**
Where it protects employment or small businesses	**2**
Other[37]	7

* Those who agreed with Citizen B (who believed that 'fixing prices' is harmful to customers) or were undecided/did not know

[32] See Posner, op cit, n 30, at 69-93.

[33] See Stephan, op cit, n 1.

[34] A Stephan, 'The Bankruptcy Wildcard in Cartel Cases' [2006] Journal of Business Law 511-534.

[35] A MacCulloch, 'Honesty, Morality and the Cartel Offence' [2007] ECLR 355-363.

[36] The responses to this question have been classified manually by Stephan (not YouGov) and so there may be some human error. Respondents were instructed: 'If there is no situation, please type in 'NONE' or if you don't know, please type in 'DK".

[37] All other responses including a small number of incoherent inputs.

The results show limited support for justifications on the basis of benefits to consumers in the style of Article 81(3) EC exemptions. One third of respondents were uncertain.

Later in the survey, we asked all respondents whether factories that formed a cartel to avoid closing down in an area with high unemployment should be exempt from price fixing laws.

Table 19: Crisis Cartels & Protecting Employment

In a country where price-fixing is illegal, three factories are the main employers in a poor region where unemployment is high. In order to avoid closing down, the factory owners agree to fix prices at a higher level than would otherwise be the case.	
POLITICIAN A believes that these factories should be exempt from price-fixing laws in order to protect jobs in this poor region.	
POLITICIAN B believes these factories should face the same consequences as any other business that breaks the law.	
Which politician do you most agree with?	%
Agree with Politician A (of which strongly)	**23** (4)
Agree with Politician B (of which strongly)	**49** (8)
Neither Politician A nor Politician B	17
Don't know	11

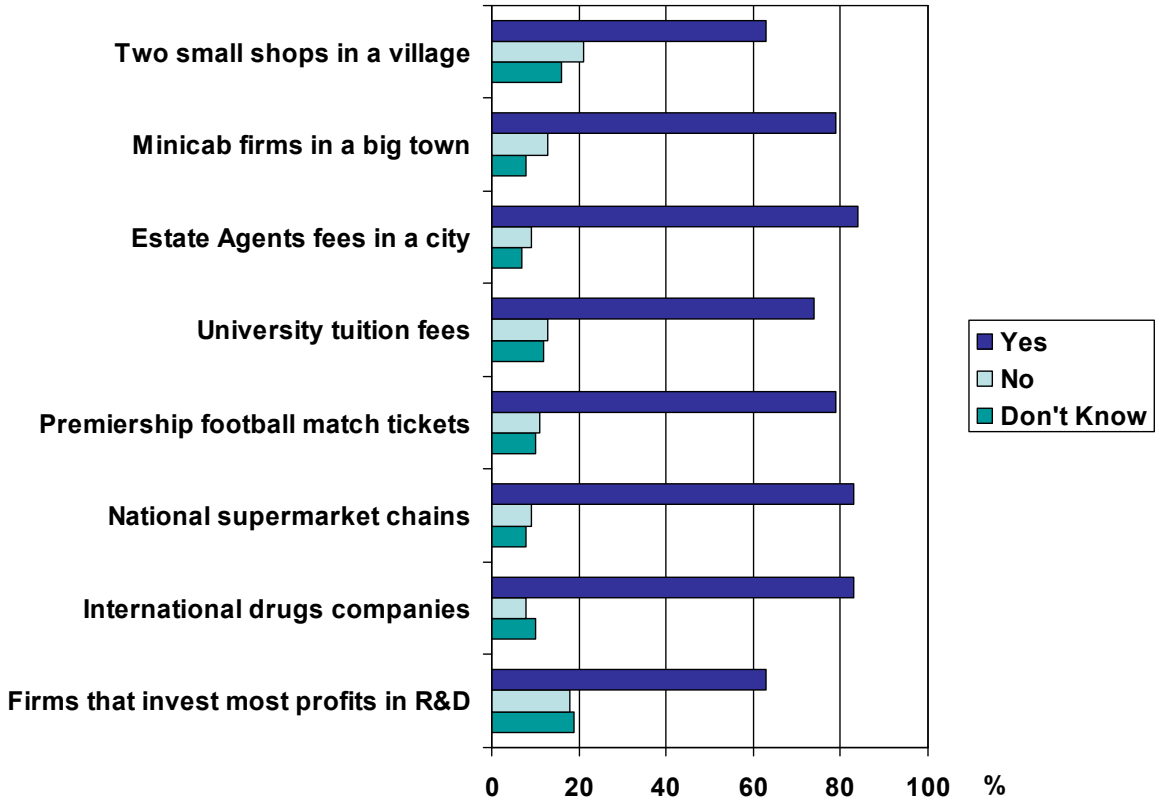
The proportion of respondents against an exemption remained the same. Presented with a specific scenario, around 20 per cent of those unsure in the open question above supported an exemption. Support for protecting employment in this situation is significant; but perhaps a lot lower than one would expect. These results may signal respondents' greater acceptance of job mobility and declining sympathy towards failing companies.[38] It is reasonable to speculate that public opinion in other EU countries such as France may be far more sympathetic to concerns over loss of employment. The effects of age and sex are consistent with earlier results presented in this paper. Education, managerial responsibility and newspaper readership are less significant.

One might think that public support for price-fixing laws only extends to large scale infringements, or those committed by industries enjoying substantial profit. To test this, all respondents were asked whether price-fixing should be banned for various businesses.

[38] For example, this was reflected in the surprisingly subdued public reaction to the downfall of MG-Rover in 2005; See generally: BBC News 'MG Rover Collapse' available at: <http://news.bbc.co.uk/1/hi/in_depth/business/2005/mg_rover/default.stm>

Fig. 20: Different Size/Types of Businesses

'Fixing prices' can be used by firms as a way of increasing their profits. Do you think a law banning such practice should apply to any of the following…?



Support for an exemption to punishing price fixing is weak even for two small shops in a village, or firms that invest most of their profits in research and development. Respondents were particularly unforgiving when it came to pharmaceutical companies, estate agents and supermarkets.

The results presented in this section should give competition authorities greater courage in imposing fines on firms that accurately reflect the infringement they have committed, and should not be side-tracked by concerns over employment or the nature of the infringing business. In Britain at least, the public largely feel that firms should face the same consequences, regardless of the motivation behind price-fixing or their circumstances.

3.7 Attitudes towards leniency programmes

Cartel agreements are secretive in nature and pursuing them through investigations alone is a very costly and ineffective method. Competition authorities have come to strongly rely on leniency programmes. These typically provide immunity from fines to the first firm to self-report an infringement to the authority and disclose information about the other participants. The European Commission first adopted its leniency

programme in 1996. It was reformed in 2002 and again in 2006.[39] The UK adopted a leniency programme under the Competition Act 1998.[40]

All respondents were asked whether granting immunity in order to prosecute a cartel that would not otherwise have been detected is justifiable:

Table 21: Immunity under a Leniency Programme

Five large businesses agree to fix prices in a country where this is illegal. The manager of one of these businesses reports the agreement to the authorities in return for a guarantee that they and their business will not be punished. The four other businesses are fined heavily. All five were equally guilty, but none would have been punished had the manager not come forward.	
To what extent do you agree or disagree that it was RIGHT for the authorities to give a guarantee against punishment to one guilty business in order to catch the other four?	**%**
Agree (of which strongly)	**37** (6)
Disagree (of which strongly)	**38** (12)
Neither agree nor disagree	17
Don't know	8

The survey reveals weak but significant support for leniency programmes. For many there is something unsavoury about allowing a guilty party to walk away free. The greater the punishment faced by those firms beaten to the immunity 'prize', the more unsavoury it becomes. However, it is this stark difference that also makes leniency programmes effective in uncovering infringements.

In this respect, competition authorities may be faced with a challenge. They are trying to strengthen people's perception of how bad price-fixing is by using highly emotive and moral language.[41] However, as people's perception of cartels hardens, public support for leniency programmes is likely to weaken further. The worse they are perceived to be, the more objectionable letting one go unpunished becomes. Yet such programmes lie at the heart of effective cartel enforcement mechanisms. It may even be that their presence will act as an obstruction to strengthening negative perceptions of cartels. The message sent out may be: if some price-fixers are given immunity then it surely cannot be as bad as theft or fraud? This danger was highlighted in August 2007, following the OFT's announcement of a £121.5 million on British Airways for the fixing of fuel surcharges. Virgin (the other party to the infringement) received

[39] 'Commission Notice on Immunity from fines and reduction of fines in cartel cases' OJ 2006, C298/17.

[40] See 'OFT's Guidance as to the appropriate amount of a penalty' 2004 available at <http://www.oft.gov.uk/shared_oft/business_leaflets/ca98_guidelines/oft423.pdf>; and 'Leniency in cartel cases' available at <http://www.oft.gov.uk/shared_oft/business_leaflets/ca98_mini_guides/ oft436.pdf >

[41] See discussion in Harding, op cit, n 5, at 183.

immunity, but was criticised for failing to offer the kind of public apologies repeatedly made by the chief executive of British Airways. The following day, the OFT found itself having to defend its leniency programme to the press.[42]

3.8 Willingness to report price-fixing behaviour

Apart from leniency programmes, competition authorities also rely on complaints to better direct their investigations into cartel agreements. The most obvious source of complaints is the customers of colluding firms, be they final consumers or other businesses. However many cartels are aware of this danger and conduct their collusive behaviour with caution. Prices may rise over long periods of time, justified by purported increases in cost or demand. Cartels may also choose to raise prices, not through price-fixing, but instead through market sharing and output restriction.

The individuals best placed to report cartel behaviour may be the employees of the colluding firms. In the US, the Department of Justice (Antitrust Division) will sometimes enter into plea bargains with individuals involved in collusion, pitting them against their employer in obtaining cooperation. There may also be great potential for the reporting of infringements by individuals not directly involved in price-fixing, but who are aware that it is occurring within their firm. One would expect internal compliance programmes to have mechanisms in place which can be utilised by such individuals. However many firms do not have competition law compliance programmes in place, and there may be reluctance to come forward for fear of adverse consequences internally. We tested respondents' willingness to report their employer's anticompetitive behaviour:

Table 22: Willingness to Report Employer

Six people work for a large business they know to be involved in fixing prices in a country where this is illegal. Each considers whether to report their employer's illegal practice to the authorities. Which employee is most likely to reflect your own actions in this situation?	%
EMPLOYEE A will not report it because they believe price-fixing should not be illegal.	**2**
EMPLOYEE B immediately reports this practice because it is illegal.	**20**
EMPLOYEE C will report it only if they can remain anonymous.	**49**
EMPLOYEE D will report it only if they can remain anonymous and are given a reward equivalent to a month's wages.	**2**
EMPLOYEE E will report it only if they can remain anonymous and are given a reward equivalent to a year's wages.	**4**

[42] For example, R Sunderland, 'OFT defends 'snitch' policy', The Observer, 5 August 2007.

EMPLOYEE F will not report it because they fear there is too much at stake; they worry they may lose their job.	**14**
None of them	2
Don't know	7

These results reveal that the majority of respondents would only consider reporting price-fixing if they (at the very least) could be guaranteed anonymity. A significant proportion would not report an infringement, fearing the consequences even where an offer of anonymity and a reward of a year's wages is available. The proportion of people unwilling to report even in return for a reward may very well be under-represented in this survey. When asked if they would hypothetically report a breach of the law, it is easier for respondents to answer yes. A survey question cannot capture the emotional pressures and potential consequences that would exist in such a situation, many of which are unforeseeable. The responses above suggest that competition authorities should have clear mechanisms in place guaranteeing anonymity to potential whistle blowers within a colluding firm.

3.9 Attitudes towards private enforcement

The European Commission and OFT are making efforts to encourage private actions for damages in cartel cases. These can take the form of original actions in cases where an infringement has not been prosecuted by a competition authority. More commonly they take the form of follow-on suits subsequent to the finding of an infringement through public enforcement.[43] Respondents were asked whether they felt compensating customers who have been over-charged by price-fixing is more important than imposing deterrent sanctions on infringing firms:

Table 23: Compensation*

Which of these do you consider to be MORE important?	%
Making sure businesses compensate the customers who have paid higher prices as a result of their price-fixing	**14**
Imposing a punishment on those businesses that is high enough to make others think twice before fixing prices in the future	**38**
Both are equally important	**42**

[43] See the European Commission's, 'White Paper on damages actions for breach of EC antitrust rules' (Apr 2008) available at: <http://ec.europa.eu/comm/competition/antitrust/actionsdamages/files_white_paper/whitepaper_en.pdf> and Green Paper 'Actions for damages' (Dec 2005) available at: <http://europa.eu.int/comm/competition/antitrust/others/actions_for_damages/index_en.html>; see also OFT Discussion Paper 'Private actions in competition law: effective redress for consumers and business' (April 2007), available at: <http://www.oft.gov.uk/shared_oft/reports/comp_policy/ oft916.pdf>.

Don't know	4
None of these	2

* Those who agreed with Citizen B (who believed that 'fixing prices' is harmful to customers) or were undecided/did not know

Respondents placed greater importance on the imposition of punishment by a competition authority than on ensuring those 'injured' by price-fixing are compensated. The results in this question are consistent with those in Table 10 where 56 per cent of those supporting punishment believed that firms should be made to compensate over-charged customers. Some may simply not consider price-fixing to be serious enough to warrant payments of compensation. Others may recognise how the effects of price-fixing can be diffuse, with the extra cost only representing a small proportion of a final consumer's income. The results may also suggest that people expect the competition authority to compel firms into compensating their customers, rather than expecting buyers to embark on the risky and potentially expensive option of suing for damages.

3. CONCLUDING REMARKS

The survey indicates that the majority of Britons (73 per cent) recognise the harmful effects of price-fixing. They understand that colluding competitors will set prices so as to maximise their collective profits to the detriment of their customers. They also recognise the need for such behaviour to be punished, and do not feel that crisis cartels for the protection of employment or small businesses should be exempt. There is a stark divergence throughout the survey between the attitudes of men and women, the former being far less sympathetic towards price-fixing.

However, while there is strong support for significant fines to be imposed on infringing firms, only 11 per cent feel the imprisonment of individuals is appropriate. The dishonesty test in the UK criminal offence was adopted from criminal law, yet only seven per cent of respondents would compare price-fixing to theft, and only eight per cent to fraud. Most fail to draw obvious parallels between price-fixing and more established crimes. Moreover only two in every four people strongly feel price-fixing is dishonest; suggesting that, while a social stigma against such behaviour exists, it is not strong enough to support imprisonment. This may make it hard to secure a conviction under the UK criminal offence. The sanction most favoured by respondents is the naming and shaming of both price-fixing firms and individuals.

These results may reflect a lack of information and public knowledge about the nature of price-fixing, the extent of the harm that it can cause, and the laws and sanctions which are currently in place to tackle it. The fact that education and newspaper readership have little effect on how hardened people's attitudes are to price-fixing suggests that little information is available through these two mediums. By contrast, the fact that attitudes towards price-fixing harden with age suggests that people's understanding of its harmful effects is derived largely through their experience as consumers. More should be done to increase public awareness about the effects of price-fixing, current cartel laws, and prosecutions. The American Antitrust Institute has

produced an educational video called 'Fair Fight in the Market Place',[44] which is about price-fixing, and is specifically targeted to a high school audience. Schools and local television stations throughout the US are being encouraged to show the film. Given the lengthy nature of cartel cases, increasing public awareness can be a difficult task for competition authorities; as demonstrated by the OFT's £100,000 payment to Morrisons supermarket in settlement of a defamation case.[45]

Public opinion is divided as to whether the use of immunity in leniency programmes is justifiable. With better education and information about the nature of price-fixing, the public may warm to the use of the criminal offence. However there may be an inherent tension when it comes to leniency: the more severe people perceive the crime of price-fixing to be, the more unsavoury the prospect of granting immunity to an infringing firm may become.

Should they become aware that their employer is involved in price-fixing most respondents show great reluctance to report the infringement *per se*. 14 per cent of respondents would not report the infringement even in return for a reward equivalent to a year's wages. Competition authorities need to provide clear mechanisms guaranteeing anonymity to whistle-blowing employees as nearly half of respondents would only report if they could rely on such a guarantee.

In relation to private enforcement, respondents generally consider public enforcement to be more important than ensuring compensation is paid to 'injured' customers. Indeed, the responses can be read to indicate that people expect the competition authority to impose compensation as a sanction on infringing firms, rather than seeking damages through the courts. This may go some way towards explaining why private enforcement in the UK appears to be weak in comparison to certain other jurisdictions. It also raises questions as to how much time and public money competition authorities should be investing to encourage private actions for damages.

This paper has given an overview of the survey results pending more detailed analysis. This is likely to concentrate on the demographic characteristics of those more hardened to price-fixing and more accepting of enforcement mechanisms; further implications for the UK criminal cartel offence; and a more detailed look at the significance for private enforcement in cartel cases. Plans for future research include the prospect of carrying out a similar survey in a different EU Member State to observe what difference culture, among other factors, has on attitudes to price-fixing and cartel policy.

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[44] See 'AAI Film FAIR FIGHT IN THE MARKET PLACE is Going National': <http://www.antitrustinstitute.org/Archives/fff.ashx>

[45] 'OFT pays damages to Morrisons over dairy price-fixing claim', The Times, 23 April 2008.