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European and American Leniency Programmes: Two Models Towards Convergence?

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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'.

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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.