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Editorial – Antitrust Leniency Programmes

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Leniency programs represent the newest tool that antitrust enforcers can employ against price-fixing cartels. These programs offer cartel participants the opportunity to expose the cartel in exchange for immunity from criminal prosecution. Because price fixing is generally a self-concealing crime, leniency programs have proven critical to discovering and punishing cartels. Most developed countries have adopted some form of antitrust leniency.

All leniency policies, however, are not created equal. They can be structured in different ways, which can affect their efficacy. For example, while the United States adopted its first formal antitrust leniency policy in 1978, few firms took advantage of the program and it had a minimal effect on the discovery and deterrence of price-fixing activity. The second incarnation of the program, however, created a sea change in anti-cartel enforcement. In 1993, the Antitrust Division of the U.S. Department of Justice significantly revised its Corporate Leniency Policy and made it easier for confessing firms to qualify for amnesty. For example, the Division limited the discretion that it had possessed under its former policy as to whether to grant amnesty to a confessing firm. Under the revised program, firms that met certain criteria – for example, being the first to confess, not being a ringleader of the cartel, and confessing before government investigators had already developed their case against the cartel[1] – could automatically receive amnesty. Further, even those firms that did not qualify for amnesty (because another cartel member had confessed first) would have their criminal fines discounted by a factor based on the order in which they confessed. This more lenient leniency policy increased the number of cartel confessions from one per year under the old program to three per month under the revised policy.[2]

Today, there is no denying the success of leniency programs around the world. In the United States, the Corporate Leniency Policy has been the 'most effective generator of cartel cases and is believed to be the most successful program in U.S. history for

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1 Under the 1978 policy, amnesty was essentially precluded if the Antitrust Division had already begun an investigation into the suspected cartel. Under the new policy, the existence of an investigation did not automatically preclude leniency. CHRISTOPHER MASON, THE ART OF THE STEAL 251 (2003).

2 James M. Griffin, Deputy Assistant Attorney Gen., Antitrust Div., Dep't of Justice, The Modern Leniency Program After Ten Years: A Summary Overview of the Antitrust Division's Criminal Enforcement Program (Aug. 12, 2003), available at http://www.usdoj.gov/atr/public/speeches/201477.htm.

detecting large commercial crimes'.[3] The European experience with leniency has been similarly triumphant.

These past successes, however, should not leave us complacent about the possibilities for improving leniency programs further. As the American experience illustrates, the form and structure of a leniency program matter a great deal. Changing the qualifications and processes for obtaining leniency can generate more leniency applications, expose more cartels, and maximize deterrence of illegal price fixing.

The issues surrounding the structure and efficacy of leniency programs were explored at the Competition Law Scholars Forum held in September 2010 at City Law School, London. The conferees included enforcement officials, attorneys, academics, and students who have implemented, utilized, and/or studied various leniency policies. The wide-ranging discussion addressed many of the legal, economic, and moral issues that surround government leniency programs. The participants also pondered the morality of government actors granting immunity to one participant in a conspiracy while punishing other members in a conspiracy.

During the course of the day-long discussion, several themes emerged. First, despite the growing importance of leniency programs, the actual operation of these programs is somewhat opaque. For example, leniency programs succeed in generating confessions by rewarding cartel defectors with immunity from criminal prosecution and, in some jurisdictions, limits on private liability. In theory, this causes cartel partners to distrust each other and to race to the prosecutors' office in order to expose the cartel in exchange for leniency. Outside of the enforcement agencies themselves, however, not much is known about the dynamics and timing of the race. At the conference, Peter Willis, a partner at Dundas and Wilson, presented his research on EU leniency applications for which data was available regarding the timing of leniency applications. His data showed a surprising gap in time between the first leniency application by a participant in a given cartel and the second applicant from that same cartel. The sample suggested that the conventional story told by antitrust enforcers that there is a race to the prosecutor's office – sometimes won by a matter of minutes, hours or days – may not explain the confession dynamics in many cartels. The data is fascinating, but unfortunately cannot tell the whole story because the EU does not publish this information for all leniency applicants. Thus, it is unclear whether the sample is representative. If it is, this has broader implications for leniency theory and suggests that antitrust enforcers should consider whether leniency programs could be modified in order to increase the race dynamic.

Some level of clarity was provided by Sari Suurnakki, Deputy Head of Unit for the Cartels Directorate of the Directorate General for Competition of the European Commission. In her presentation, Deputy Suurnakki emphasized the importance of leniency programs in the overall fight against price-fixing cartels. She noted that

[3] Gary R. Spratling, *Detection and Deterrence: Rewarding Informants for Reporting Violations*, 69 GEO. WASH. L. REV. 798, 799 (2001).

leniency programs were responsible for a significant increase in the number of cartels prosecuted by the European Commission. For example, the five-year period from 2005 through 2009 saw three times the number of cartel cases as the equivalent five-year period a decade before. Deputy Suurnakki explained what was expected of leniency applicants, namely that they provide all available evidence and answer enforcers' questions; that they not destroy, falsify, or conceal evidence; that they end all involvement in the cartel; and that they not disclose their application. It is this final requirement of nondisclosure that creates some of the issues we have today of not being able to properly study leniency programs. Deputy Suurnakki also noted the confidentiality of leniency applications and the rules designed to protect that confidentiality, such as the giving of oral statements instead of written documents that could be discovered in subsequent litigation, especially in the United States with its broad discovery rules. In my mind, this creates a tension between the desire to protect the individual leniency applicant and the desire to improve the effectiveness of leniency programs writ large. While cartel investigations need to be kept confidential so as not to alert cartel participants who may destroy evidence, after the cartel has been exposed, excessive secrecy can make it harder to hold the lawbreakers accountable and to study the operations of anti-cartel agencies.

A second theme that emerged at the conference is that leniency programs are but one part of overall anti-cartel policy. Leniency programs should not be created or modified without appreciating the other moving parts of an antitrust enforcement regime. For example, leniency programs work in tandem with government penalties. As the form and amount of antitrust penalties change, so might the configuration of the optimal leniency program.[4] Leniency policies do not exist in isolation. How a jurisdiction structures its leniency program could affect how it should craft other components of its overall antitrust policy, and vice versa.

The two articles in this issue of the Competition Law Review address different aspects of the theme. In her article, Professor Caroline Cauffman of the University of Maastricht studies the relationship between leniency programs and private damages actions. Both enforcement mechanisms serve a deterrent function, but the latter also provide compensation to the victims of cartel overcharges. However, private damages actions could potentially reduce the effectiveness of leniency programs. Professor Cauffman examines ways to reconcile these two components of anti-cartel enforcement efforts.

In our second article, Florence Thépot examines the connection between corporate leniency and individual liability for price fixing. Discussing the economic theory of principal-agent relationships, Ms. Thépot explores how programs that allow for individuals within a cartel to obtain leniency can help destabilize cartels. Moreover, she demonstrates that this destabilizing effect exists even if nobody actually applies for individual leniency.

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[4] Christopher R. Leslie, *Cartels, Agency Costs, and Finding Virtue in Faithless Agents*, 49 WILLIAM & MARY LAW REVIEW 1621 (2008).

These papers are also relevant to the third theme that arose during the conference discussions: how can antitrust enforcement agencies learn lessons from other jurisdictions and how can comparative scholarship inform antitrust leniency policies? While many jurisdictions have adopted antitrust leniency programs, the various programs in operation around the world differ significantly. While the American leniency program has proven successful, is the U.S. experience transferable to other countries? After all, the overall makeup of the American antitrust regime is distinctive. For example, while the United States criminalizes price fixing, other nations do not. While the United States imprisons convicted price fixers, most nations, even those that criminalize price fixing, do not; they rely instead on monetary penalties. And some countries have joint and several liability for price fixing; the United States does not.[5]

Because competition law regimes vary significantly across jurisdictions, the question remains whether these differences mean that the optimal leniency program in one jurisdiction may be suboptimal in another. The answer to this question is important, but requires more comparative work. For example, scholars could compare the effectiveness of leniency programs in those jurisdictions that offer both corporate and individual leniency policies with those that provide only the former. But pursuit of this research agenda requires more transparency, which, as noted above, is sometimes lacking. It is impossible to study which overall antitrust regime creates a more effective race to the prosecutors' office if scholars have insufficient data on the dependent variable, the race itself.

The fourth, and final, theme that I discerned from the day's dialogue is the importance of coordination or harmonization among leniency programs. Depending on the scope of a cartel, a participating firm could seek leniency in one jurisdiction and conceivably open itself up to antitrust liability in dozens of other jurisdictions. This possibility could dissuade a price-fixing firm from confessing in any jurisdiction, which would result in a harmful cartel continuing unabated. Some form of leniency harmonization among jurisdictions could remove this disincentive to cartel defection. Competition authorities already engage in trans-border cooperation regarding enforcement, such as coordination on dawn raids against suspected cartel members. Perhaps there should be greater coordination regarding leniency as well. For example, enforcement agencies could consider the possibility of one-stop leniency, in which the first firm to confess to one centralized body receives leniency in any participating jurisdictions. While conceptually simple, such an approach raises many complicated questions, including issues of preemption, what quantum of evidence and continuing cooperation are necessary, and who would have authority to determine whether a leniency applicant has violated its obligations such that leniency should be revoked. Most states want greater cooperation but none wants to cede its sovereignty.

Antitrust officials from different jurisdictions have made great strides in cooperating in the fight against international cartels. The inclusion of scholars in this transnational

5 *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981).

discussion of antitrust leniency coordination could improve the outcomes of these harmonization efforts. But this, again, requires greater transparency and communication between antitrust enforcement officials, attorneys, and scholars who study leniency programs. The conference demonstrated the need to continue research and discussion of all aspects of antitrust leniency programs, including more transborder cooperation.