Leniency in Antitrust Enforcement: Theory and Practice

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This paper discusses the theory and practice of leniency in antitrust enforcement, i.e. the granting of immunity from penalties or the reduction of penalties for antitrust violations in exchange for cooperation with the antitrust enforcement authorities. After a description of the practice of leniency in the US and in the EU, and of its history, the paper analyses the positive effects and the possible negative effects of leniency on optimal antitrust enforcement, and the extent to which these effects can be measured. Objections of principle and institutional problems that may constitute obstacles to the introduction of leniency policies are discussed, as well as some further issues, namely the impact on the effectiveness of leniency of criminal penalties on individuals, of follow-on private damages actions, and of penalties in other jurisdictions, 'Amnesty Plus', and positive financial rewards or bounties.

I. INTRODUCTION

A. Definition

This paper deals with leniency in antitrust enforcement, defined here as the granting of immunity from penalties or the reduction of penalties for antitrust violations in exchange for cooperation with the antitrust enforcement authorities.

The cooperation could consist in the provision of intelligence and/or evidence of the antitrust violations, and/or in the recognition of the violation and acceptance of the reduced penalty.[1] It could possibly in addition involve acceptance of remedial or compensatory measures.[2]

The penalties that are waived or reduced could be any penalties that can be imposed or sought by the antitrust enforcement authorities in the jurisdiction concerned: fines on companies, fines on individuals, director disqualification and/or imprisonment.[3]

B. Examples

1. US Department of Justice

The US Department of Justice has a Corporate Leniency Policy (also known as corporate amnesty or corporate immunity policy), under which it accords immunity to

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1 Typically the cooperation and the penalties that are waved or reduced relate to the same antitrust violation; see however below, section 'Amnesty Plus', as to penalty reductions for one violation in exchange for cooperation concerning another violation.

2 See below, section 'Restitution to injured parties'; this paper does not deal with settlements of antitrust investigations in cases where no penalties are envisaged but only remedial or compensatory measures; on such settlements, see my article 'Settlements of EU Antitrust Investigations: Commitment Decisions under Article 9 of Regulation No. 1/2003' (2006) 29 *World Competition* 345-366.

3 On the choice of penalties for antitrust offences, see my article 'Is Criminalization of EU Competition Law the Answer?' (2005) 28 *World Competition* 117-159; see also below, section 'Leniency and criminal penalties on individuals'.

corporations reporting their illegal antitrust activity at an early stage.[4] Immunity means in this case not charging such a firm criminally for the activity being reported.[5]

Immunity will always be granted if, at the time the corporation comes forward to report the illegal activity, the US Department of Justice has not received information about the illegal activity from any other source. A number of other conditions must also be met, in particular that the corporation, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity; that the corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation with the US Department of Justice throughout the investigation; that, where possible, the corporation makes restitution to injured parties; and that the corporation did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity.[6]

If a corporation thus qualifies for immunity, all directors, officers and employees of the corporation who admit their involvement as part of the corporate confession will receive immunity, in the form of not being charged criminally for the illegal activity, if they admit their wrongdoing with candor and completeness and continue to assist the US Department of Justice throughout the investigation.[7]

If the US Department of Justice has already received information about the illegal activity, and possibly already started an investigation, immunity may still be granted to a corporation that is the first to come forward and qualify for immunity, provided that, at the time the corporation comes in, the US Department of Justice does not yet have evidence against the company that is likely to result in a sustainable conviction. The same conditions as to prompt termination, full cooperation and restitution have to be met. Moreover, immunity will only be granted if the US Department of Justice determines that granting immunity would not be unfair to others. In applying this last condition, the primary considerations are 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.[8]

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4 US Department of Justice, Corporate Leniency Policy (10 August 1993), available at http://www.usdoj.gov/atr/public/guidelines/0091.pdf.

5 Idem, at 1.

6 Idem, at 1-2.

7 Idem, at 4. Where a corporation is granted immunity after the US Department of Justice has already received information about the illegal activity, under the conditions described below (text accompanying note 8), the directors, officers and employees who come forward with the corporation will be considered for immunity from criminal prosecution on the same basis as if they had approached the US Department of Justice individually, under the conditions of the Leniency Policy for Individuals (see below, text accompanying notes 11 to 13).

8 Idem, at 2-3.

As a result of a relatively recent statutory modification,[9] companies that have been accepted by the US Department of Justice in its immunity programme and that are found by the court in follow-on suits for damages to have provided satisfactory cooperation with the private claimants are only liable for single instead of treble damages, and the normal rule of joint and several liability for co-conspirators does not apply to the immunity applicant.[10]

The US Department of Justice also has a Leniency Policy for Individuals, which applies to individuals who approach the Division on their own behalf, not as part of a corporate confession.[11] Leniency again means here immunity from criminal prosecution.[12] Immunity will be granted to an individual reporting illegal antitrust activity before an investigation has begun if, at the time the individual comes forward, the US Department of Justice has not received information about the illegal activity from any other source; the individual reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the US Department of Justice throughout the investigation; and the individual did not coerce another party to participate in the illegal activity and clearly was not the leader in, or instigator of, the activity.[13]

The Corporate Leniency Policy and the Leniency Policy for Individuals only apply to (hard-core) cartels. Indeed, although the text of the criminal provisions in the US Sherman Act covers all types of restrictive agreements as well as unilateral monopolistic behaviour, by long tradition the US Department of Justice limits criminal prosecution to hard-core violations of Section 1 of the Sherman Act such as price fixing, bid rigging, market division, or customer allocation schemes among horizontal competitors.[14]

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9 Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. 108-237, §§ 201-214, 118 Stat. 661 (June 22, 2004), 15 U.S.C. § 1 note (2004 Act).

10 Idem, § 213.

11 US Department of Justice, Leniency Policy for Individuals (10 August 1994), available at http://www.usdoj.gov/atr/public/guidelines/0092.pdf; see also note 7 above.

12 Idem, at 1.

13 Idem, at 1-2.

14 S.W. Waller, 'The Incoherence of Punishment in Antitrust' (2003) 78 *Chicago-Kent Law Review* 207, at 216, referring in footnote 48 to *US* v *Dunham Concrete Prods.*, Crim. No. 1842 (E.D. La. 1969) as the last criminal monopolization indictment discovered by that author; and J.M. Connor, 'Price-Fixing Overcharges: Legal and Economic Evidence', American Antitrust Institute (AAI) Working Paper No. 04-05, available at http://www.antitrustinstitute.org/recent2/355.pdf, at 7. As the US Department of Justice has no powers to impose or to seek the imposition of civil or administrative fines, it only seeks prospective, injunctive relief against other violations of Section 1 and all violations of Section 2 of the Sherman Act. The Federal Trade Commission has relatively recently applied in competition cases its power, which it had traditionally used in consumer protection cases, to seek disgorgement of unlawful profits. Otherwise deterrence and punishment are left to private treble-damage suits; see again S.W. Waller, at 210, 218 and 230-232; S. Calkins, 'Corporate Compliance and the Antitrust Angencies' Bi-Modal Penalties' (1997) 60 *Law and Contemporary Problems* 127, at 136-139 and 150; and US Antitrust Modernization Commission, Civil Remedies-Government Discussion Memorandum (4 May 2006), available at http://www.amc.gov/pdf/meetings/CivRem-Govt_DiscMemo060504-final.pdf.

As already mentioned, beneficiaries of the Corporate Leniency Policy and the Leniency Policy for Individuals are not charged criminally. As to the other corporations and individuals that are charged, the US Department of Justice may enter into plea agreements or plea/cooperation agreements with them.[15]

The US Department of Justice has discretion as to whether it enters into a plea agreement. One of the minimal requirements is that the defendant is willing to assume responsibility for its conduct, i.e. admits guilt.[16] Under a plea agreement, an agreed joint recommendation is normally made to the court as to the penalty to be imposed (amount of the corporate fine, or length of the prison term and/or amount of the individual fine). The agreement is binding on the defendant and on the US Government, but not on the court. It appears however that courts normally follow such agreements.[17] The defendant also agrees to waive the right to appeal the sentence by the court, if that sentence follows the joint recommendation.

The plea agreement is made in the light of the US Sentencing Guidelines, which advise the courts on sentencing.[18] The Sentencing Guidelines determine guideline ranges for prison terms, individual fines and corporate fines, depending on the volume of commerce affected by the antitrust offence and on the defendant's culpability.[19]

Under Sections 3E1.1 and 8C2.5 of the Sentencing Guidelines, recognition and acceptance of responsibility for the offence, possibly including the voluntary payment of restitution, reduces the defandant's culpability.

Section 1B1.8 of the Sentencing Guidelines provides that where a defendant agrees to cooperate with the government by providing information concerning unlawful activities of others, and as part of that cooperation agreement the government agrees that self-

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15 See US Department of Justice, Antitrust Division, Grand Jury Manual, Chapter 9, Plea Agreements (November 1991), available at http://www.usdoj.gov/atr/public/guidelines/207144.pdf.

16 Idem, at 7. In limited circumstances, where employees have died or are not subject to the corporation's control, a corporate defendant's agreement to accept as true the Government's version of the offence may be enough.

17 J. Ratliff, 'Plea Bargaining in EC Anti-Cartel Enforcement – A System Change', paper presented at the 11th EUI Competition Law and Policy Workshop (Florence, 2-3 June 2006), available at http://www.iue.it/RSCAS/Research/Competition/Index.shtml, forthcoming in C.D. Ehlermann and I. Atanasiu (eds), *European Competition Law Annual 2006: Enforcement of Prohibition of Cartels* (Hart Publishing, 2007), at 13.

18 US Sentencing Commission, Guidelines Manual (November 2005), available at http://www.ussc.gov/2005guid/TABCON05.htm. Since the judgment of the US Supreme Court in *United States* v *Booker*, 125 S. Ct. 738 (2005), the US Sentencing Guidelines are no longer mandatory but only advisory. As to the impact of this change, see S.D. Hammond, 'Antitrust Sentencing in the Post-*Booker* Era: Risks Remain High For Non-Cooperating Defendants', address before the American Bar Association Section of Antitrust Spring Meeting (Washington D.C., 30 March 2005), available at http://www.usdoj.gov/atr/public/speeches/208354.pdf. See also US Antitrust Modernization Commission, Criminal Remedies Discussion Memorandum (4 May 2006), available at http://www.amc.gov/pdf/meetings/CrimRem_DiscMemo_060504-fin.pdf.

19 See in particular Section 2R1.1 of the Sentencing Guidelines.

incriminating information provided pursuant to the agreement will not be used against the defendant, then such information shall not be used in determining the applicable guideline range, unless the information was already known to the government prior to entering into the cooperation agreement, or unless there is a breach of the cooperation agreement by the defendant. This possibility (which amounts to the grant of partial immunity) is used by the US Department of Justice in situations where a company that cannot benefit from (full) immunity under the Corporate Leniency Policy because it is not the first to come in, as part of its cooperation pursuant to a plea agreement reveals that the suspected cartel was broader than had been previously identified – either in terms of its duration or of the products, contracts or commerce affected.[20]

Sections 5K1.1 and 8C4.1 of the Sentencing Guidelines provide that the 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. The appropriate reduction is to be determined considering the significance and usefulness of the assistance, taking into account the government's evaluation of the assistance rendered, the nature and extent of the assistance, and its timeliness. The US Department of Justice's practice is to agree cooperation discounts with an average in the order of 30 to 35 % for companies that are the second to cooperate. In one extreme case, a 59 % discount has been granted.[21] A third cooperating company receives a significantly lower discount, the fourth even less, and so on.[22] Moreover, the US Department of Justice's practice for the second cooperating company is to take as starting point for the discount the bottom of the guideline fine range, unless the company had a significant leadership role in the cartel, whereas a higher starting point is taken for subsequent cooperating companies.[23]

There are however no fixed discounts for cooperation outside the Corporate Leniency Policy and the Leniency Policy for Individuals. The size of the discount is determined in each specific case.[24]

Finally, the US Department of Justice has a practice (called 'Amnesty Plus') of granting an additional discount to a cooperating company that reports an unrelated

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20 S.D. Hammond, 'Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations', address to the 54th Annual American Bar Association Section of Antitrust Law Spring Meeting (Washington D.C., 29 March 2006), available at http://www.usdoj.gov/atr/public/speeches/215514.pdf, at 3-4.

21 Idem, at 5 and 2; the one extreme case was *United States* v *Crompton Corporation*, No. CR 04-0079 MJJ (N.D. Cal. 2004).

22 Idem, at 11-12.

23 Idem, at 5-7. Apart from the case of significant leadership role, a higher starting point is also taken if the company failed to discover and report the offence when it was earlier investigated for a cartel in another market; the latter practice is called 'Penalty Plus'.

24 Idem, at 2. Compare with the percentage brackets in the European Commission's Leniency Notice, below, text accompanying note 34.

antitrust violation (in addition to the immunity which the company may obtain for this other violation under the Corporate Leniency Policy).[25]

2. European Commission

The European Commission has a Leniency Notice, which applies to secret cartels between two or more competitors involving practices such as fixing prices, production or sales quotas, sharing markets including bid-rigging, restricting imports or exports, and/or anti-competitive actions against other competitors.[26]

The Commission will grant immunity from any fine which would otherwise have been imposed to an undertaking disclosing its participation in a cartel if that undertaking is the first to submit information and evidence which in the Commission's view will enable it to carry out a targeted inspection in connection with the cartel, and if, at the time of the application for immunity, the Commission did not yet have sufficient evidence to adopt a decision to carry out an inspection and had not yet carried out such an inspection.[27]

If no undertaking has been granted immunity on the above ground, the Commission will alternatively grant immunity to the undertaking that is the first to submit information and evidence which will enable the Commission to find an infringement of Article 81 EC in connection with the cartel, provided that the Commission did not yet have, at the time of the submission, enough evidence to make such a finding.[28]

A number of additional conditions must be met in any case to qualify for immunity: the undertaking must cooperate genuinely, fully, on a continuous basis and expeditiously from the time it submits its application throughout the Commission's administrative procedure; and the undertaking must have ended its involvement in the cartel immediately following its application, except for what would, in the Commission's view, be reasonably necessary to preserve the integrity of the inspections.[29] Moreover, an

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25 Idem, at 9-10 and 14; see further below, section 'Amnesty Plus'.

26 Commission Notice on immunity from fines and reduction of fines in cartel cases, [2006] OJ C298/17; this notice replaces the earlier Commission Notice on immunity from fines and reduction of fines in cartel cases, [2002] OJ C45/3.

27 Idem, points 8(a) and 10. The inspections referred to are those provided for in Article 14(3) of Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ L1/1. As to the evidence required to conduct an inspection, see the judgment of the EC Court of Justice of 22 October 2002 in Case C-94/00 *Roquette Frères* [2002] ECR I-9011; see further C.S. Kerse and N. Khan, *EC Antitrust Procedure*, 5th edition (Sweet & Maxwell, 2005); L. Ortiz Blanco (ed.), *EC Competition Procedure*, 2nd edition (Oxford UP, 2006); and my article 'Powers of Investigation and Procedural Rights and Guarantees in EU Antitrust Enforcement' (2006) 29 *World Competition* 3-24.

28 Idem, points 8(b) and 11.

29 Idem, points 12 and 22. If the undertaking has not met these conditions, it cannot qualify either for a fine reduction. See also Case T-12/06 *Deltafina* v *European Commission*, currently pending before the EC Court of First Instance.

undertaking which took steps to coerce other undertakings to join the cartel or to remain in it is not eligible for immunity.[30]

Contrary to the US Department of Justice's Corporate Leniency Policy, immunity under the European Commission's Leniency Notice does not mean absence of prosecution. The Commission will normally still adopt a decision finding an infringement of Article 81 EC. The fact that the undertaking cooperated with the Commission during its administrative procedure will be indicated in the decision, so as to explain the non-imposition of a fine.[31]

As the European Commission has currently no powers to impose penalties on individuals other than undertakings,[32] the grant of immunity to an undertaking does not concern its directors or employees, and there exists no other immunity policy for individuals.

Undertakings disclosing their participation in a cartel that do not meet the conditions for immunity may still under the Leniency Notice be eligible for a reduction from any fine that would otherwise have been imposed, if they provide the European Commission with evidence which represents significant added value compared to the evidence already in the European Commission's possession, and provided that they fulfill the same conditions as to genuine, full cooperation and as to termination of the infringement as required for the immunity applicants.[33]

The first undertaking to provide such significant added value will receive a reduction of 30 to 50 % of the fine which would otherwise have been imposed; the second undertaking a reduction of 20 to 30 %, and subsequent undertakings a reduction of up to 20 %.[34]

The degree of added value depends on the extent to which the evidence provided strengthens, by its very nature and/or its level of detail, the European Commission's ability to prove the infringement. The degree of corroboration from other sources required for the evidence submitted to be relied upon against other undertakings involved in the cartel will have an impact on the value of that evidence, so that compelling evidence will be attributed a greater value than uncorroborated or simply corroborating statements.[35]

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30 Idem, point 13. It may however still qualify for a fine reduction if it fulfills the relevant requirements and meets all the conditions therefor.

31 Idem, point 38.

32 It would however be possible under the current EC Treaty to modify Regulation No. 1/2003 so as to provide for the imposition of penalties on individuals other than undertakings; see 'Is Criminalization of EU Competition Law the Answer?', as note 3 above, and Judgment of the EC Court of Justice of 13 September 2005 in Case C-176/03 *European Commission* v *EU Council*, [2005] ECR I-7879.

33 Leniency Notice, as note 26 above, points 23 and 24; and above, text accompanying note 29.

34 Idem, point 26.

35 Idem, point 25.

Guidance as to the normal amount of the fine, and thus on the size of the reduction in absolute terms, can be found in the European Commission's Fining Guidelines.[36] The basic amount of the fine normally corresponds to a proportion of the value of the undertaking's sales of goods or services to which the infringement directly or indirectly relates during the last full business year of its participation in the infringement, multiplied by the number of years of the infringement. The proportion depends on the gravity of the infringement. As a general rule, it will be set at a level of up to 30 %. For secret cartels it will generally be set at the higher end of the scale. Irrespective of the duration of the infringement, a sum of between 15 and 25 % of the value of sales will in addition be included in the basic amount.[37] The basic amount may then be increased or reduced to take into account aggravating or mitigating circumstances.[38] One of the aggravating circumstances listed in the Fining Guidelines is the refusal to cooperate with or obstruction of the European Commission in carrying out its investigations.[39] Another aggravating circumstance mentioned is the role of leader in, or instigator of, the infringement; the European 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.[40]

Finally, the European Commission's Leniency Notice also provides for partial immunity similar to the practice under Section 1B1.8 of the US Sentencing Guidelines.[41] If an applicant for a fine reduction is the first to submit compelling evidence which the European Commission uses to establish additional facts increasing the gravity or the duration of the infringement, the European Commission will not take such additional facts into account when setting any fine to be imposed on the undertaking which provided this evidence.[42]

Contrary to the US Department of Justice's Corporate Leniency Policy,[43] the European Commission's Leniency Notice does not contain any condition of restitution being made, where possible, to injured parties. As to the impact of the granting of

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36 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, [2006] OJ C210/2; these guidelines replace the earlier Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty, [1998] OJ C9/3. For a detailed analysis, see my paper 'The European Commission's 2006 Guidelines on Antitrust Fines: A Legal and Economic Analysis', forthcoming in *World Competition*, Volume 30, No. 2 (June 2007), and available at http://papers.ssrn.com/.

37 Idem, points 13 to 26.

38 Idem, points 27 to 29.

39 Idem, point 28, second indent.

40 Idem, point 28, third indent.

41 See above, text accompanying notes 19 and 20.

42 Leniency Notice, as note 26 above, point 26, last sentence.

43 See above, text accompanying notes 6 and 7.

leniency on follow-on actions for damages, the Leniency Notice states that the fact that immunity or reduction in respect of fines is granted cannot protect an undertaking from the civil law consequences of its participation in an infringement of Article 81 EC.[44]

Whereas the Leniency Notice only applies to secret cartels between competitors, the European Commission also regularly uses its powers to impose fines on undertakings for other types of infringements of Article 81 EC, such as vertical agreements restricting imports or exports between EU Member States,[45] or for abuses of a dominant position prohibited by Article 82 EC.[46]

For these other types of infringements, cooperation can be rewarded with a fine reduction under the Fining Guidelines,[47] which provide that the basic amount of the fine may be reduced where the European Commission finds that mitigating circumstances exist, such as: where the undertaking concerned has effectively cooperated with the European Commission outside the scope of the Leniency Notice and beyond its obligation to do so; and where the undertaking has terminated a non-secret infringement as soon as the European Commission intervened.[48]

The Leniency Notice and the Fining Guidelines currently only provide for the grant of immunity from fines or the reduction of fines in exchange for the provision of intelligence and evidence of the antitrust violations, not in exchange for the recognition of the infringement and acceptance of the reduced fine.[49]

Under an earlier version of its Leniency Notice,[50] the European Commission also granted a reduction of the fine (typically of 10 %) where, after receiving a statement of objections, the undertaking informed the Commission that it did not substantially contest the facts on which the European Commission based its allegations. The European Commission is currently considering introducing a new settlement policy further along

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44 Leniency Notice, as note 26 above, point 38; see further note 114 below.

45 See for instance Commission Decision of 5 October 2005 relating to a proceeding pursuant to Article 81 of the EC Treaty against Automobiles Peugeot SA and Peugeot Nederland NV (Cases COMP/E2/36623, 36820 and 37275), [2006] OJ L 173/20.

46 See for instance Commission Decision of 24 March 2004 in Case COMP/C-3/37.792 Microsoft, available at http://ec.europa.eu/comm/competition/antitrust/cases/decisions/37792/en.pdf.

47 See (text accompanying) notes 36 to 38 above.

48 Fining Guidelines, as note 36 above, point 29, fourth and first indents.

49 Compare with the plea agreements by the US Department of Justice, text accompanying notes 15 to 17 above.

50 Commission Notice on the non-imposition or reduction of fines in cartel cases, [1996] OJ C207/4. This notice was replaced in 2002; see note 26 above.

this line, offering a fine reduction in exchange of not merely a non-contestation of facts, but rather a recognition of the infringement and a commitment to pay the fine.[51]

3. Competition authorities of the EU Member States

The competition authorities of most EU Member States operate a leniency programme for undertakings.[52] These programmes are in many respects similar to the European Commission's leniency programme.

A number of differences however exist. For instance, in the United Kingdom, the Office of Fair Trading's leniency programme for undertakings[53] applies not only to horizontal cartels but also to vertical retail price maintenance agreements.[54] Contrary to the European Commission's Leniency Notice and to the leniency programmes in all other EU Member States, it also contains a provision similar to the 'Amnesty Plus' practice of the US Department of Justice.[55] In Germany, the leniency programme of the Bundeskartellamt excludes from immunity not only cartel participants that coerced others to participate in the cartel, but also the cartel participant that was the only ringleader of the cartel.[56]

In a number of EU Member States, the cartel prohibitions are enforced not only with fines on undertakings, but also with criminal or other penalties on individuals.[57] Some of these Member States also have corresponding leniency provisions for individuals. In the United Kingdom, for instance, directors of companies that have committed competition law breaches can be subjected to director disqualification orders, and individuals involved in cartel conspiracies can be punished with imprisonment and/or fines under the

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51 See speech by Commissioner N. Kroes, 'Reinforcing the fight against cartels and developing private antitrust damage actions: two tools for a more competitive Europe' (Commission/IBA Joint Conference on EC Competitiona Policy, 8th March 2007), available at http://ec.europa.eu/commission_barroso/kroes/speeches_en.html ; see also 'Settlements of EU Antitrust Investigations', as note 2 above, at 365-366.

52 A list of all the competition authorities of the EU Member States that operate a leniency programme can be found on the European Commission's website at http://ec.europa.eu/comm/competition/antitrust/legislation/authorities_with_leniency_programme.pdf.

53 Part 3, 'Lenient treatment for undertakings coming forward with information in cartel activity cases', of *OFT's guidance as to the appropriate amount of a penalty* (December 2004), supplemented by *Leniency and no-action – OFT's draft final guidance on the handling of applications* (November 2006), available at http://www.oft.gov.uk.

54 Idem, footnotes 23 and 8.

55 Idem, paragraph 3.16; see above, text accompanying note 25, and below, section 'Amnesty Plus'.

56 Notice no. 9/2006 of the Bundeskartellamt on the immunity from and reduction of fines in cartel cases – Leniency Programme – of 7 March 2006, available at http://www.bundeskartellamt.de/wEnglisch/download/pdf/06_Bonusregelung_e.pdf.

57 See 'Is Criminalization of EU Competition Law the Answer?', as note 3 above.

criminal cartel offence. The Office of Fair Trading has a policy of no-action letters for individuals, which grant immunity from prosecution under the cartel offence to cooperating individuals, comparable with the US Department of Justice's Leniency Policy for Individuals.[58] An undertaking can apply for no-action letters on behalf of named employees, directors, ex-employees or ex-directors when seeking leniency under the Office of Fair Trading's leniency programme for undertakings, or in conjunction with an application for leniency from the European Commission in accordance with the latter's Leniency Notice.[59] The Office of Fair Trading will also not seek director disqualification orders against individuals who benefit from no-action letters or who are directors of companies that benefit from leniency under the Office of Fair Trading's leniency programme or under the European Commission's Leniency Notice.[60] On the other hand, in Germany, for instance, a specific criminal offence, punishable with imprisonment, exists for bid-rigging, but there exists no leniency programme for this offence.

C. History

The contemporary practice of leniency in antitrust enforcement is generally considered to have been started by the US Department of Justice in 1978, when it adopted its first Corporate Leniency Policy. The basic idea of granting immunity or a reduced penalty in exchange for cooperation to help convict co-conspirators is however probably as old as criminal prosecution.[61]

The US Department of Justice replaced its initial Corporate Leniency Policy of 1978 by its current Corporate Leniency Policy in 1993. The three main changes were that the grant of immunity before the start of an investigation became automatic instead of being a matter of prosecutorial discretion, that immunity also became available after an investigation had started, and that immunity was automatically extended to cooperating directors and employees coming forward together with the cooperating corporation. The US Department of Justice also added its Leniency Policy for Individuals shortly afterwards in 1994.[62] The most important change since then has been introduced by the

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58 Office of Fair Trading, *The cartel offence – Guidance on the issue of no-action letters for individuals* (April 2003), supplemented by *Leniency and no-action – OFT's interim note on the handling of applications* (July 2005), available at http://www.oft.gov.uk; see above, text accompanying notes 11 to 13.

59 Idem, paragraph 3.5; see above, text accompanying notes 26 to 32.

60 Idem, paragraph 3.15 and OFT, *Competition disqualification orders – Guidance* (May 2003), available at http://www.oft.gov.uk, paragraphs 4.12 and 4.27.

61 See N.K. Katyal, 'Conspiracy Theory', (2003) 112 *Yale Law Journal* 1307, at 1330-1331, referring to practices in English law going back to the early 12th century, as well as in early American law.

62 See above, section 'US Department of Justice', and A.K. Bingaman, 'Antitrust Enforcement: Some Initial Thoughts and Actions', Address before the ABA Antitrust Section (New York, 10 August 1993), available at http://www.usdoj.gov/atr/public/speeches/0867.pdf, at 7-9, and 'Report from the Antitrust Division – Spring 1994', Address before the ABA Antitrust Spring Meeting (Washington , 8

Antitrust Criminal Penalty Enhancement and Reform Act of 2004, which grants participants in the US Department of Justice's leniency program the benefits of single instead of treble damages and of the non-application of joint and several liability with co-conspirators in follow-on private actions for damages.[63]

The European Commission's first Leniency Notice was adopted in 1996, and was clearly inspired by the US Department of Justice's Corporate Leniency Policy of 1993.[64] The European Commission had however already in a number of cases before 1996 reduced fines or even abstained from imposing fines in recognition of cooperation received.[65] The idea of granting immunity from fines in exchange for cooperation with the European Commission also underlied Article 15(5)(a) of Regulation No. 17, in force from 1962 to 2004, under the terms of which no fine could be imposed in respect of acts taking place after notification of an agreement to the European Commission and before its decision as to the exemptability of the agreement under Article 81(3) EC, provided the acts fell within the limits of the activity described in the notification.[66]

The European Commission replaced its initial Leniency Notice by a new one in 2002. The main changes were that immunity became automatic, and that fine reductions became more strictly aligned to the timing of the cooperation.[67] In 2006 the European

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April 1994), available at http://www.usdoj.gov/atr/public/speeches/0110.pdf, at 8-9, and S.D. Hammond, 'Cornerstones of an Effective Leniency Program', Presentation at the ICN Workshop on Leniency Programs (Sydney, 22-23 November 2004), available at http://www.usdoj.gov/atr/public/speeches/206611.pdf, at 3-4.

63 See above, (text accompanying) notes 9 and 10.

64 See note 50 above, and my article 'The Commission Notice on the Non-Imposition or Reduction of Fines in Cartel Cases: A Legal and Economic Analysis' (1997) 22 *European Law Review* 125-140. The origin was even more visible in the earlier draft notice which was published by the European Commission as part of the consultation procedure preceding the adoption of the 1996 Leniency Notice; [1995] OJ C341/13.

65 Examples of reduced fines include Decision of 19 December 1984, *Wood Pulp*, [1985] OJ L85/1, paragraph 148; Decision of 24 April 1986, *Polypropylene*, [1986] OJ L230/1, paragraph 109; and Decision of 13 July 1994, *Cartonboard*, [1994] OJ L243/52, paragraphs 169-171. In its Decision of 1 April 1992, *Franco-West-African Shipowners Committees*, [1992] OJ L134/1, paragraph 74, sub (e), the European Commission decided that 'there are grounds for exempting from fines the four shipping companies which although members of the committees contributed in drawing the attention of the Commission to the practices dealt with in this decision'; see also Decision of 21 December 1994, *Tretorn*, [1994] OJ L378/45, paragraph 77.

66 Council Regulation No. 17 [1962] OJ 13/204 (Special English Edition 1959-62, p. 87), replaced by Regulation No. 1/2003, as note 27 above, which abolished the entire notification system; see my article 'Notification, Clearance and Exemption in EC Competition Law: An Economic Analysis' (1999) 24 *European Law Review* 139-156 and Chapter 1, 'The Reform of Competition Law Enforcement Brought About by Regulation No 1/2003' in my book *Principles of European Antitrust Enforcement* (Hart Publishing, 2005).

67 See above, section 'European Commission', and F. Arbault and F. Peiró, 'The Commission's new notice on immunity and reduction of fines in cartel cases: building on success', *EC Competition Policy Newsletter*, June 2002, 15-22, available at http://ec.europa.eu/comm/competition/publications/cpn/cpn2002_2.pdf.

Commission again amended its Leniency Notice, mainly to clarify the threshold for immunity in terms of information to be provided and to clarify the duty of cooperation of all leniency applicants.[68] As already mentioned above, the European Commission is also considering introducing a new policy of 'direct settlements', under which fine reductions would be granted in exchange for a recognition of the infringement and a commitment to pay the fine.[69]

The leniency programmes in the EU Member States have generally been adopted following the example of the European Commission, and thus indirectly of the US Department of Justice. The United Kingdom and Germany were the first EU Member States to do so in 2000. Both have already supplemented or amended their leniency programmes since.[70]

These relatively frequent modifications reflect a process of experimentation, and of emulation between jurisdictions.[71] Competition authorities have been learning how to design more effective leniency policies by trying them out. They may also have to adjust leniency programmes in reaction to learning on the side of the cartel participants and of the specialised lawyers defending them. Indeed, leniency is a game played at two stages between the competition authorities on the one hand and the cartel participants and their lawyers on the other hand. At the stage of the application for leniency, the cartel participants' lawyers will try to obtain for their clients immunity from penalties or as high a reduction as possible, while giving as little evidence as possible of the antitrust violations. Even if they obtain full immunity, it is generally against their interest to have the violation fully established, as this can only increase their liability in follow-on private actions for damages.[72] At the stage of the formation and maintenance of cartels, cartel participants will try to adapt their organization to the leniency policies, so as to mimimize the destabilizing effect, or even (if the leniency policies are badly designed) to exploit the leniency policies to their advantage.[73]

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68 See above, section 'European Commission', in particular note 26; O. Guersent, 'The EU model of administrative enforcement against global cartels – Evolving to meet challenges', paper presented at the 11th EUI Competition Law and Policy Workshop (Florence, 2-3 June 2006), available at http://www.iue.it/RSCAS/Research/Competition/Index.shtml, forthcoming in C.D. Ehlermann and I. Atanasiu (eds), *European Competition Law Annual 2006: Enforcement of Prohibition of Cartels* (Hart Publishing, 2007); and press release IP/06/1705 and MEMO/06/469 of 7 December 2006, available at http://europa.eu/rapid/.

69 See above, text accompanying note 51.

70 See above, section 'Competition authorities of the EU Member States'.

71 See W.E. Kovacic, 'Background Note: Using Evaluation to Improve the Performance of Competition Policy Authorities', in *OECD*, Evaluations of the Actions and Resources of Competition Authorities (16 December 2005), DAF/COMP(2005)30, 19, at 22, available at http://www.oecd.org/dataoecd/7/15/35910995.pdf.

72 See below, section 'Leniency and follow-on private actions for damages'.

73 On cartel organization and learning in general, see M.C. Levenstein and V.Y. Suslow, 'What Determines Cartel Success?', (2006) 44 *Journal of Economic Literature* 43-95; on the effects of leniency on cartel stability, see below, sections 'Increased difficulty of creating and maintaining cartels' and 'Facilitation of the creation and maintenance of cartels'.

As already mentioned, competition authorities in different jurisdictions have been emulating each other in designing effective leniency programmes. Systematic exchanges of experience have been taking place in the framework both of the OECD and of the ICN (International Competition Network).[74] In Europe, the ECN (European Competition Network), which groups the European Commission and the competition authorities of the EU Member States, has recently launched an 'ECN Model Leniency Programme'.[75]

II. CONTRIBUTION TO OPTIMAL ANTITRUST ENFORCEMENT

A. Optimal antitrust enforcement and the imposition of penalties

Before examining how the granting of immunity from penalties for antitrust violations or the reduction of such penalties can contribute to optimal antitrust enforcement, it may be useful to recall the role of the imposition of penalties in the optimal enforcement of the antitrust prohibitions.

As I have argued in more detail elsewhere,[76] the imposition of penalties on companies and individuals that are found to have breached the antitrust prohibitions can in several ways contribute to the enforcement of these prohibitions. First, the imposition of penalties may have a deterrent effect, in that it creates a credible threat of prosecution and punishment which weighs sufficiently in the balance of expected costs and benefits to deter calculating companies and individuals from committing antitrust violations. Secondly, in the case of collective violations such as cartels, the differentiation of penalties according to the role played by the different co-conspirators can have the effect

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74 See OECD, *Fighting Hard-Core Cartels – Harm, Effective Sanctions and Leniency Programmes* (2000), available at http://www.oecd.org/dataoecd/41/44/1841891.pdf; S.D. Hammond, 'Cornerstones of an Effective Leniency Program', paper presented before the ICN Workshop on Leniency Programs (Sydney, 22-23 November 2004), available at http://www.usdoj.gov/atr/public/speeches/206611.pdf and ICN, *Anti-Cartel Enforcement Manual, Chapter 2: Drafting and Implementing an Effective Leniency Program* (second version April 2006), available at http://www.internationalcompetitionnetwork.org/capetown2006/FINALFormattedChapter2-modres.pdf.

75 This Model Leniency Programme was posted on the ECN website http://ec.europa.eu/comm/competition/antitrust/ecn/ecn_home.html on 29 September 2006; see further C. Gauer and M. Jaspers, 'Designing a European solution for a "one stop leniency shop"', (2006) *European Competition Law Review* 685, and K. Dekeyser and M. Jaspers, 'A New Era of ECN Cooperation – Achievements and Challenges with Special Focus on Work in the Leniency Field' (2007) 30 *World Competition* 3.

76 See my articles 'Optimal Antitrust Fines: Theory and Practice' (2006) 29 *World Competition* 183-208 and 'Should Private Antitrust Enforcement Be Encouraged in Europe?' (2003) 26 *World Competition* 473-488.

of raising the cost of setting up and running cartels.[77] Thirdly, the public punishment of those who violate the antitrust prohibitions may also have a moral effect, in that it sends a message to the spontaneously law-abiding, reinforcing their moral commitment to the antitrust prohibitions.[78] Indeed, corporate managers are not necessarily just maximizers of profits for themselves and their principals. They may feel a moral responsibility to live within the law whether or not they are likely to be caught, and this normative commitment could trump their interest calculus.[79] Psychological research suggests that normative commitment is generally an important factor explaining compliance with the law.[80] Moreover, the detection and prosecution of antitrust violations with a view to the imposition of penalties may also have the additional direct benefit of bringing violations to an earlier end. Finally, the imposition of penalties may contribute to corrective justice, in the form of disgorgement of unjust enrichment,[81] and possibly also in the form of compensation, either because the imposition of public penalties facilitates follow-on private actions for damages or because the making of restitution to injured parties is somehow taken into account in the imposition of the public penalties.[82]

The imposition of penalties for antitrust violations will however also always have a cost. Two types of costs could be distinguished. First, it could have undesirable side-effects. For instance, errors or the risk of errors in the imposition of penalties could lead to lawful and economically desirable conduct being deterred. Second, the detection, prosecution and punishment of antitrust violations will always have an administrative cost, which includes both the cost borne by the public sector (cost of competition authorities, prosecutors and courts) and the cost borne by the businesses or individuals concerned (cost of lawyers and experts, management time).

The presence of cost has two implications. First, it raises the question how much avoidance of antitrust violations (and how much corrective justice) is worth the cost of attaining it. The answer to this question depends on the one hand on how high the cost is and on the other hand on how much value society attaches to the avoidance of antitrust

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77 See 'Optimal Antitrust Fines: Theory and Practice', as note 76 above, at 201-204.

78 See 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.

79 C.D. Stone, 'Sentencing the corporation' (1991) 71 *Boston University Law Review* 383 at 389.

80 See T.R. Tyler, *Why People Obey the Law* (Yale UP, 1990).

81 See 'Optimal Antitrust Fine: Theory and Practice', as note 76 above, in particular at 190, footnote 38.

82 See below, section 'Restitution to injured parties'.

violations (and to the pursuit of corrective justice).[83] In all likelihood something less than full enforcement is optimal. Second, whatever level of avoidance of antitrust violations (and of corrective justice) is aimed at, one should try to achieve that goal at the least possible cost.

B. Positive effects of leniency

Leniency can in several ways contribute to optimal antitrust enforcement, depending on the type of cooperation concerned (provision of intelligence and evidence of the antitrust violations and/or recognition of the violation and acceptance of the penalty) and on whether the type of violations concerned are committed by single offenders or are collective violations like cartels.

1. Improved collection of intelligence and evidence

In order to be able to impose penalties or to seek the imposition of penalties for antitrust violations, competition authorities need intelligence of the existence of such violations, and evidence sufficient for the penalties to be upheld in court.

Competition authorities can try to obtain the necessary intelligence and evidence from three possible sources. First, they could themselves monitor markets, observing publicly available information and data, and possibly use economic analysis of these data to try to detect and prove violations. In particular for cartels, this first method has not been very important in practice. Economic evidence is generally insufficient in court to establish collusion, and screening for cartels appears difficult, given current methods of economic analysis.[84]

Secondly, the authorities could obtain information from third parties. Customers or competitors harmed by antitrust violations may bring complaints to the authorities,[85] and third parties may otherwise volunteer to provide information. As Donald Baker has pointed out: 'The desire for revenge is more picturesque, but it is still very much present. In my experience, disgruntled current employees, fired employees, former trade

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83 See generally, with regard to deterrence, G.J. Stigler, 'The Optimum Enforcement of Laws' (1970) 78 *Journal of Political Economy* 526 and K.G. Elzinga and W. Breit, *The Antitrust Penalties: A Study in Law and Economics* (Yale UP, 1976) at 9-15.

84 This may of course change with the development of better methods; see J.E. Harrington, 'Behavioral Screening and the Detection of Cartels', paper presented at the 11th EUI Competition Law and Policy Workshop (Florence, 2-3 June 2006), available at http://www.iue.it/RSCAS/Research/Competition/Index.shtml, forthcoming in C.D. Ehlermann and I. Atanasiu (eds), *European Competition Law Annual 2006: Enforcement of Prohibition of Cartels* (Hart Publishing, 2007).

85 See European Commission's Notice on the handling of complaints by the Commission under articles 81 and 82 of the EC Treaty, [2004] OJ C101/5.

association officials, and even ex-spouses and ex-lovers may be anxious to finger the individuals who they think have done them in'.[86]

The third, and usually best, source of information are the companies and individuals that have committed the antitrust violations themselves. For certain types of violations, in particular secret price cartels, the undertakings that have committed the violations and their staff may be the only ones holding the information which the competition authorities need to detect and punish the violations.

As I have analysed in more detail elsewhere,[87] there are essentially three ways in which competition authorities can obtain information from the companies and individuals that have committed the antitrust violations: direct force, compulsion and leniency. First, they could use direct, physical force or covert intrusion to obtain evidence in the hands of the companies and their staff. Indeed, depending on the applicable legal regime, competition authorities may have powers to conduct inspections (so-called 'dawn raids') at business premises, and inspections at private homes, or carry out directed surveillance or use covert human intelligence sources.[88] The use of inspections has at least two drawbacks. Firstly, it can only be used to obtain existing documents or other existing physical or electronic evidence. Secondly, without help from the undertakings or staff concerned, and unless the competition authorities already have precise intelligence as to what documents or records they can find at what exact place, the method is a very expensive one, in that the authorities would have to go through many documents, files or records before finding relevant information.

In order to avoid the limitations and costs of the first method of obtaining information through the direct use of force, competition authorities could try to make companies and individuals cooperate in handing over the information sought by using compulsion in the form of threatened sanctions for refusal to cooperate. The threatened sanctions for refusal to cooperate could be of two kinds. Refusal to cooperate with investigations could be punished as a separate offence, and such refusal could also be punished through an increase in the amount of the penalty imposed for the antitrust violations established following the investigation.

Compared with the first method of direct force, the second method of making the company or its staff cooperate through the threat of punishment for non-cooperation has two advantages. Firstly, its use is not limited to obtaining information contained in already existing documents or records. Secondly, the method is less costly in that the company and its staff will be able to locate or bring together more easily the required elements of information than the competition authorities' inspectors searching without

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86 D.I. Baker, 'The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging' (2001) 69 *George Washington Law Review* 693 at 708.

87 See my article 'Self-incrimination in EC Antitrust Enforcement: A Legal and Economic Analysis' (2003) 26 *World Competition* 567-588, and Chapter 5, 'The Collection of Intelligence and Evidence from Antitrust Violators', in *Principles of European Antitrust Enforcement*, as note 66 above.

88 For an overview of the investigative powers of the European Commission and the competition authorities of the EU Member States, see 'Powers of Investigation and Procedural Rights and Guarantees in EU Antitrust Enforcement', as note 27 above.

help through a mass of business records with which they are unfamiliar. The method of inducing cooperation through the threat of sanctions also has its problems, however. First, as in the case of the first method of direct force, the competition authorities already need to have some level of intelligence concerning the antitrust violation. Secondly, it still imposes a significant cost on the companies and individuals concerned, including the economic cost in terms of resources spent on complying with the requests for cooperation as well as the psychic cost where individuals are subjected to on the spot oral questions for explanations. Thirdly, the problem of reliability constitutes a specific drawback of the second method of obtaining information under compulsion. Information obtained under compulsion may be unreliable for two sets of reasons. On the one hand, companies or individuals that have indeed committed antitrust violations or their staff may give misleading answers when questioned, in the hope of wrongfooting the investigating authorities and thus escaping detection and punishment. The threat of sanctions for untruthful answers may not be effective to the extent that the authorities are believed not to be able to obtain the necessary information to establish the untruthfulness. On the other hand, where the companies or persons being investigated are in reality innocent, there is a risk that ingenious questioning will lead less sophisticated respondents to make seemingly inculpatory statements, or, in situations of on the spot oral questioning where psychological or physical pressure is created or felt, the individuals questioned may end up making untruthful inculpatory statements so as to escape from the pressure. Because of these costs and risks, the law imposes some limits on the possible use of compulsion, in particular against individuals, under the privilege against self-incrimination.[89]

Leniency is the third method to obtain information from the companies and individuals that committed the antitrust violations. Compared to the first and second method, direct force and compulsion, this third method has clear advantages. Indeed, contrary to the first method, it can be used to obtain all kinds of information, not just existing documents or other existing physical evidence. Like the second method, it saves on search costs in that the collecting of relevant information is done by the undertaking and its staff, who are most familiar with it. But contrary to the second method, it does not suffer from the same reliability problems, as there is no clear incentive at least for immunity applicants to provide unreliable information, given that they risk losing the benefit of immunity if they provide misleading information and given that immunity from punishment is the highest benefit they can obtain.[90]

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89 For a detailed discussion, see 'Self-incrimination in EC Antitrust Enforcement' and 'Powers of Investigation and Procedural Rights and Guarantees in EU Antitrust Enforcement', as notes 87 and 27 above; see also Judgment of the EC Court of Justice of 29 June 2006 and Opinion of Advocate General Geelhoed of 19 January 2006 in Case C-301/04 P *Commission* v *SGL Carbon*, [2006] ECR I-5915.

90 See also Opinion of Advocate-General Mischo of 18 May 2000 in Case C-298/98 P *Finnboard* v *Commission*, [2000] ECR I-10159, paragraphs 24-27; see however below, section 'Positive financial rewards or bounties'. There can however be problems with the reliability of information provided by applicants for reductions in penalties, as they may try to obtain such reductions by wrongly incriminating other parties.

It is however important to note that leniency is not a substitute but a complement to the other methods of collecting intelligence and evidence of antitrust violations.[91] Indeed, leniency can only work if the companies and individuals concerned perceive a risk that the competition authorities will detect and establish the antitrust violation without recourse to leniency. The risk could be a specific one, where the competition authority is already collecting or receiving information of the antitrust violation by other means (or is believed to be doing so, or to be doing so in the near future) or a more general one, where a competition authority, as a result of many other recent cases of successful detection and prosecution, is believed to be good at it. In the case of collective violations such as cartels, and if leniency policies are well designed in that immunity is only granted to the first co-conspirator to come forward, and reductions in penalties are linked to the timing of the cooperation as compared to the other co-conspirators, companies and individuals may decide to cooperate out of fear that a co-conspirator may do so before them. Such a 'race to cooperate' may amplify the positive effects of leniency, but again such a race can only start if there is a risk that the competition authorities will detect and establish the antitrust violation without recourse to leniency, or at least a belief by at least one of the conspirators that at least one of the other co-conspirators may believe that there is such a risk.[92]

Leniency not only allows for cheaper and more reliable collection of intelligence and evidence of antitrust violations than would be possible if only the other investigative methods were available. It also adds an incentive for cartel participants to create and keep more evidence in the first place.[93] This increases the possibilities for competition authorities to find evidence through other methods, for instance through 'dawn raids', and this increased possibility in turn increases the incentives to apply for leniency, thus creating a virtuous circle.

More generally, the larger amount and better quality of evidence which competition authorities may get hold of thanks to leniency (both because of the reduced costs of collecting it and because more evidence is created and kept in the first place) will allow for higher penalties to be upheld in court. This again increases the incentives to apply for leniency, thus creating another virtuous circle.[94]

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91 See 'Self-incrimination in EC Antitrust Enforcement', as note 87 above, at 588, and J.E. Harrington, as note 84 above, at 14-16.

92 See also 'The Commission Notice on Non-Imposition or Reduction of Fines in Cartel Cases: A Legal and Economic Analysis', as note 64 above, at 133.

93 See C. Aubert, P. Rey and W.E. Kovacic, 'The Impact of Leniency and Whistleblowing Programs on Cartels' (2006) 24 *International Journal of Industrial Organization* 1241-1266, at 1260-1264.

94 See also OECD, *Prosecuting Cartels Without Direct Evidence of Agreement* (15 February 2006), DAF/COMP/GF(2006)3, at 4.

2. Increased difficulty of creating and maintaining cartels

Setting up and maintaining a successful cartel requires effort. The cartel members have to select and coordinate their behaviour on mutually consistent, collusive strategies, allowing the cartel participants as a group to increase profits, and providing for a fair distribution of profits between them. They also need to develop mechanisms to discourage cheating, involving monitoring, rewards and punishments. In a dynamic economy, successful cartels may have to develop an organizational structure that allows them to solve these problems continuously.[95]

A well-designed leniency programme can make these tasks more difficult. The possibility for a deviator to apply for leniency increases the payoff of cheating, thus making collusion more difficult to sustain.[96] It increases uncertainty, making it more difficult for cartel participants to reach agreement, diminishing trust among them, and increasing the need for costly monitoring.[97]

This effect of raising the cost of setting up and maintaining cartels[98] is not unique to leniency. The same logic underlies the legal rule that cartel or other restrictive agreements are legally unenforceable,[99] and the practice of imposing higher penalties for cartel members that play active roles in setting up and running the cartel, and lower penalties for cartel members that are exclusively passive.[100]

This effect of leniency may lead to cartels breaking down earlier than they would otherwise or even not being formed in the first place.[101]

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95 M.C. Levenstein and V.Y. Suslow, as note 73 above, at 44-45; see also J.E. Harrington, 'How Do Cartels Operate?' (June 2006), available at http://www.econ.jhu.edu/People/Harrington/CartelOperations-6.28.06.pdf.

96 J.E. Harrington, 'Optimal Corporate Leniency programs' (November 2005), available at http://www.econ.jhu.edu/People/Harrington/amnesty11-05.pdf, at 3, has called this the 'Deviator Amnesty Effect' of leniency.

97 N.K. Katyal, as note 61 above, at 1342-1350, and G. Spagnolo, 'Divide et Impera: Optimal Leniency Programmes', CEPR Discussion Paper No. 4840 (December 2004), available at http://www.cepr.org/pubs/dps/DP4840.asp, at 6.

98 N.K. Katyal, as note 61 above, at 1363, calls this 'cost deterrence'.

99 See Article 81(2) EC.

100 This makes the setting up and functioning of cartels more difficult, because, faced with the prospect of higher fines, there will be less volunteers to play active roles. Those who nevertheless accept to do so are likely to want compensation in the form of a larger part of the gain, which is likely to be difficult to agree on, and to weaken the sense of solidarity and mutual trust within the group; see N.K. Katyal, as note 61 above, at 1341-1346 and 1363-1367; 'Optimal Antitrust Fines: Theory and Practice', as note 76 above, at 203; and 'The European Commission's 2006 Guidelines on Antitrust Fines: A Legal and Economic Analysis', as note 36 above.

101 The two are of course linked, as the earlier breakdown means that the cartel is less profitable and thus less likely to be entered into in the first place; see 'The Commission Notice on the Non-Imposition or

The size of this effect of leniency on cartel formation and stability (as well as the size of the effect of leniency in terms of improved collection of intelligence and evidence[102]) depends essentially on three factors:[103] the expected leniency discount, the probability of detection and punishment in the absence of cooperation, and the profitability of the cartel. The higher the discount from the otherwise applicable penalty that is offered to the cartel member who defects and cooperates with the competition authority, the stronger the incentive to cheat and report will be. This discount is to be compared to the leniency available in case of cooperation at a later point in time, or of a lesser degree. For optimal effect, leniency programmes should thus make the leniency discount dependent on the timing of the cooperation (including in comparison with other cooperating cartel members) and its extent. Higher penalties for antitrust violations allow for more effective leniency, as they allow for larger benefits to be offered to leniency applicants.[104] Clarity and certainty as to the leniency discounts on offer are also important, as they reduce the risk for the potential leniency applicant of opting for cooperation with the competition authority.[105] As already mentioned above, the effectiveness of leniency also crucially depends on the credibility of the competition authority's enforcement activity, more specifically on the risk, as perceived by the potential leniency applicant, that the competition authority will be able to detect, establish and punish the antitrust violation if that potential leniency applicant decides not to apply for leniency. While this risk can be enhanced by good design of the leniency programme, creating a race to cooperate between the different cartel members, it ultimately depends on (the perception of) the competition authority's ability to detect and punish the antitrust violation without the help of leniency.[106] Finally, the effect of leniency will of course also depend on the profitability of the cartel. Cartels that are already less profitable will of course be the first to break down earlier, or not even come into existence, as a result of leniency.

Reduction of Fines in Cartel Cases: A Legal and Economic Analysis', as note 64 above, at 130, 133 and 140, and J.E. Harrington, as note 96 above, at 5-6.

102 See above, section 'Improved collection of intelligence and evidence'.

103 See also S. D. Hammond, as note 62 above; 'Self-Incrimination in EC Antitrust Enforcement: A Legal and Economic Analysis', as note 87 above, at 587; and 'The Commission Notice on Non-Imposition or Reduction of Fines in Cartel Cases: A Legal and Economic Analysis', as note 64 above, at 140.

104 Conversely, higher penalties that cannot be waived or reduced as part of leniency make leniency less effective; see below, sections 'Leniency and criminal penalties on individuals', 'Leniency and follow-on private actions for damages' and 'Leniency in multiple jurisdictions'.

105 See OECD, as note 74 above, at 8, and S.D. Hammond, as note 62 above, at 19-20.

106 See above, text accompanying notes 91 and 92; OECD, as note 74 above, at 4; ICN, as note 74 above, at 2; and J. Rosenstok, 'Analysis of self-reporting in law enforcement against cartels in the Netherlands', Master Thesis, Maastricht University (March 2005), available at http://www.encore.nl/publications/Rosenstok.pdf.

3. *Lower costs of adjudication*

Apart from positive effects of leniency at the investigative stage (improved collection of intelligence and evidence),[107] leniency can also lead to cost savings at the adjudicative stage,[108] if the cooperation rewarded consists in the recognition of the violation and acceptance of the penalty.

In the case of the US Department of Justice, for instance, the practice of plea agreements allows the saving of the costs of full litigation before the federal district court, as well as the costs of further appeal.[109]

As to the European Commission, it currently adopts a reasoned decision in every cartel case (typically of dozens or even a few hundred pages), finding the infringement and imposing the fines. This decision can be appealed by each of the companies concerned before the EC Court of First Instance, with the possibility of a further appeal, limited to points of law, before the EC Court of Justice. On average, 3 to 4 appeals are brought against every cartel decision.[110] Significant cost savings could thus be made if a mechanism could be introduced under which companies would recognise the violation and commit to pay an accepted fine, as the European Commission's decision would then no longer need to contain the same detailed reasoning, and there would no longer be systematic appeals to the EC Courts. As already mentioned above, the European Commission is currently considering the introduction of such a settlement mechanism.[111]

The savings of the costs of full litigation, or of fully reasoned decisions and frequent appeals, allow or would allow the antitrust enforcement authorities to investigate and punish more violations with their available resources, thus increasing the probability of detection and punishment, and hence increasing deterrence.

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107 See above, section 'Improved collection of intelligence and evidence'.

108 On the different systems of adjudication in antitrust enforcement in the EU and the US, see my article 'The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis' (2004) 27 *World Competition* 201-224, and Section 1.2.10 and Chapter 6 of *Principles of European Antitrust Enforcement*, as note 66 above.

109 See above, text accompanying notes 15 to 17. As has been pointed out by G.M. Grossman and M.L. Katz, 'Plea Bargaining and Social Welfare' (1983) 73 *American Economic Review* 749-757, plea bargaining not only saves resources, but can also function as an insurance and as a screening device. These positive effects must however be weighed against possible negative effects, in particular the lowering of the penalty level; see below, section 'Lowering of the penalty level'.

110 N. Kroes, 'The First Hundred Days', speech at the 40th Anniversary of the Studienvereinigung Kartellrecht (Brussels, 7 April 2005), available at http://ec.europa.eu/comm/competition/speeches/index_speeches_by_the_commissioner.html, at 4; see also Case Associates, Casenote 'Penalties for Price-fixers – A survey of fines imposed in 43 cartels by the EC Commission' (May 2006), available at http://casecon.com/data/pdfs/casenote41.pdf, at 2, reporting that 87 % of fines are appealed.

111 See above, text accompanying note 51.

4. Restitution to injured parties

As already mentioned, one of the conditions to obtain immunity under the US Department of Justice's Corporate Leniency Policy is that, where possible, the corporation makes restitution to injured parties.[112] Furthermore, under the US Sentencing Guidelines, the voluntary payment of restitution can reduce the defendant's culpability and thus the amount of the penalties imposed.[113] In the United Kingdom, the Office of Fair Trading recently brought to an end its investigation in the *Independent Schools* case. As part of the settlement, the schools under investigation agreed to make ex-gratia payments totalling £ 3 million to a charitable fund to benefit pupils who attended the schools, in addition to the payment of a nominal penalty of £10,000 per school.[114]

Requiring restitution to injured parties as a condition for leniency may contribute to the optimal pursuit of the enforcement objective of corrective justice,[115] in that it may otherwise not have been feasible for the injured parties to obtain compensation through a follow-on private action for damages, or by saving the costs of such follow-on litigation.

C. Risks of negative effects

1. Lowering of the penalty level

Waiving or reducing penalties to reward cooperation inevitably has a negative effect on the penalty level, and thus on deterrence.[116] It is thus crucial to design and apply

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[112] Above, text accompanying notes 6 and 7.

[113] Above, text following note 19.

[114] See P. Collins, 'Public and private enforcement challenges and opportunities', Speech to the Law Society's European Group (6 June 2006), available at http://www.oft.gov.uk/News/Speeches+and+articles/2006/0306.htm; see also Decisions of the European Commission of 21 October 1998, *Pre-Insulated Pipe Cartel*, [1999] OJ L24/1, recital and of 30 October 2002, *Nintendo*, [2003] OJ L255/33, recitals 440 and 441, granting reductions of the fines imposed on respectively ABB and Nintendo for violations of Article 81 EC in recognition of the fact that ABB had paid "substantial compensation to Powerpipe and its previous owner" and that Nintendo had "offered substantial financial compensation to third parties identified in the Statement of Objections as having suffered financial harm as a result of [Nintendo]'s violation". The European Commission has refused to grant such reductions in other cases, and the EC Court of First Instance has recently confirmed that addressees of fining decisions have no right to obtain such reductions; see paragraphs 349 to 355 of the judgment of 27 September 2006 in Case T-59/02, *Archer Daniels Midland* v *Commission*, not yet reported.

[115] On the different objectives of antitrust enforcement and their relationship, see references in note 76 above.

[116] 'The Commission Notice on the Non-Imposition or Reduction of Fines in Cartel Cases: A Legal and Economic Analysis', as note 64 above, at 130; M. Motta and M. Polo, 'Leniency programs and cartel prosecution' (2003) 21 *International Journal of Industrial Organization* 347-379; J.E. Harrington, as

leniency policies in such a way that this negative effect is outweighed by the positive effects discussed above,[117] and that no more leniency is granted than strictly necessary to obtain these positive effects.[118]

The need to avoid unneccessary penalty reductions explains the limitation of leniency policies that offer full immunity to secret, horizontal cartels, given that these are the types of antitrust violations that are most difficult to detect.[119] It also explains the limitation of the benefit of full immunity to the single first cartel member to cooperate.[120] In order to establish the antitrust violation in court, the evidence provided by the first leniency applicant may however not be sufficient, and corroborating evidence may be needed from a second source.[121] To the extent that this is the case, substantial leniency towards the second cooperating cartel member may be necessary.[122] Much more questionable is the need to grant substantial leniency to the third, fourth, fifth, sixth or seventh cooperating cartel member.[123]

One way to counteract the penalty-lowering effect of leniency may be first to raise the level of penalties applicable in the absence of cooperation.[124] If, for instance,

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note 96 above, who has called this the 'Cartel Amnesty Effect' of leniency; and Case Associates, as note 110 above, reporting that cartel members have been receiving an average fine reduction of 42 % through the European Commission's leniency programme (and a further 18 % by disputing the fine in court).

117 Section 'Positive effects of leniency'.

118 'The Commission Notice on the Non-Imposition or Reduction of Fines in Cartel Cases: A Legal and Economic Analysis', as note 64 above, at 130 and 134; see also J.M. Connor, *Global Price Fixing – Our Customers are the Enemy* (Kluwer Academic Publishers, 2001), at 387-388 and 561.

119 Idem, at 131.

120 Idem, at 132-133; and OECD, as note 74 above, at 27. As already indicated above (text accompanying notes 92 to 106), the limitation of immunity to the single first leniency applicant also creates a race to be the first to cooperate, and this 'Race to the Courthouse Effect' is a countervailing force to the 'Cartel Amnesty Effect'; see J.E. Harrington, as note 96 above, and note 116 above.

121 See generally B. Vesterdorf, 'Burden of proof in cartel cases', paper presented at the Nordic Lawyers Academy – Challenges in Nordic Cartel Cases (Helsinki, 4-5 May 2006), at 10.

122 See for instance European Commission Decision of 30 October 2002 in Case COMP/E-2/37.784 *Fine art auction houses*, [2005] OJ L200/92, where, out of two cartel participants, the first received immunity and the second a 40 % reduction of the fine. One may observe that in this case the cartel had already been detected by the US Department of Justice prior to the European Commission's investigation; see C. Mason, *The Art of the Steal – Inside the Sotheby's-Christie's Auction House Scandal* (Putnam, 2004).

123 See for instance European Commission Decision of 17 December 2002 in Case COMP/37.667 *Specialty Graphite* [2006] OJ L180/20, where, out of eight cartel members, one received immunity, six a fine reduction of 35 % and the last a fine reduction of 10 %. It should be noted that this decision applied the 1996 version of the European Commission's Leniency Notice, which was replaced in 2002, i.a. to make the fine reductions more strictly dependent on their timing and usefulness; see above, text accompanying notes 33, 34 and 67.

124 Such general raising of the level of penalties in the absence of cooperation, which is transparent and non-discriminatory, should be distinguished from an opportunistic raising, in a specific case where

leniency leads to an average penalty reduction of 33 %, this effect can be neutralised by first raising the penalty level applicable in the absence of cooperation by 50 %. To some extent, this may indeed have happened historically. In the US, leniency was introduced in 1978, and made more generous in 1993 and 2004, whereas Congress raised the maximum jail term for antitrust offences in 1974 and 2004, and the maximum fines for corporations in 1974, 1990 and 2004. The three changes in 2004 were part of the same Act.[125] The European Commission adopted its first Leniency Notice in 1996 and its first Fining Guidelines, which reflected an increase in the level of lines, in early 1998. The European Commission's current reflections on introducing a new settlements policy follow the publication of its new Fining Guidelines in 2006, which again reflect an increase in the level of fines.[126] A similar pattern can be found in the EU Member States. In France, for instance, a leniency programme was introduced in 2001 by the same Act of Parliament which also increased the maximum fine.[127] One could argue that these general penalty increases could have been introduced anyway, irrespective of the introduction of a leniency policy, so that the fact remains that the leniency policy has the effect of lowering the penalty level. On the other hand, the existence of a leniency policy, which allows antitrust offenders to reduce their exposure to penalties by cooperating with the authorities and which results in more and better evidence of the antitrust violations being discovered, may precisely allow the higher penalty levels, because the antitrust offenders' failure to take advantage of the possibility to cooperate increases their culpability, and hence the acceptability of higher penalties, and because the stronger evidence equally makes higher penalties acceptable.

Another measure which could be taken to reduce the penalty-lowering effect of leniency is to raise the requirements as to the quality of evidence that has to be provided by the first cooperating cartel member in order to be granted immunity. It is often argued that the threshold as to the evidence to be provided by the first immunity applicant should be kept low, so as maximize the number of leniency applications.[128] The ultimate objective of a leniency policy is however not a high number of leniency applications, but stronger deterrence.[129] Requiring very little evidence from the first leniency applicant

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cooperation has taken place, of the penalty from which the leniency discount is deducted. The latter practice would undermine the clarity and certainty of the leniency policy, and thus its effectiveness; see M. Bloom, 'Immunity/Leniency/Finalncial Incentives/Plea Bargaining', paper presented at the 11th EUI Competition Law and Policy Workshop (Florence, 2-3 June 2006), available at http://www.iue.it/RSCAS/Research/Competition/Index.shtml, forthcoming in C.D. Ehlermann and I. Atanasiu (eds), *European Competition Law Annual 2006: Enforcement of Prohibition of Cartels* (Hart Publishing, 2007), at 4; and above, text accompanying note 105.

125 See above, sections 'US Department of Justice' and 'History', and 'Is Criminalization of EU Competition Law the Answer?', as note 3, at 123.

126 See above, sections 'European Commission' and 'History', and 'The European Commission's 2006 Guidelines on Antitrust Fines: A Legal and Economic Analysis', as note 36 above.

127 See D. Voillemot, *Gérer la clémence* (Bruylant, 2005), at 59.

128 See for instance M.J. Reynolds and D.G. Anderson, 'Immunity and Leniency in EU Cartel Cases: Current Issues' (2006) *European Competition Law Review* 82, at 85.

129 See also below, section 'Measuring the effects of leniency'.

means that more often it will be necessary to grant substantial leniency also to a second leniency applicant (and possibly a third etc.) in order to obtain enough evidence to be able to establish the antitrust violation in court. This multiplication of leniency tends to reduce deterrence. Moreover, requiring more evidence from the first leniency applicant does not necessarily reduce the number of applications. It may instead increase the incentive for cartel participants to create and keep more and stronger evidence, which in turn increases the effectiveness of leniency (directly, as better evidence is obtained through leniency, as well as indirectly, by increasing the possibility for competition authorities to collect such evidence without resorting to leniency, which again increases the incentive to seek leniency).[130]

2. Exclusive reliance on leniency

As explained above, an essential component of an effective leniency policy is the belief by antitrust violators that their violation risks being detected and punished by the antitrust enforcement authorities if they do not apply for leniency, or at least, in the case of collective violations such as cartels, a belief by at least one of the conspirators that at least one of the other co-conspirators may believe that there is such a risk.[131]

A leniency policy will thus only start working if the antitrust enforcement authority concerned has first built up a sufficient level of credibility as to its capacity to detect and punish antitrust violations on its own. For the authorities that have managed to do so, and subsequently operate a successful leniency programme, there may be a risk in relying too much on this success. If for a prolonged period they do not detect and prosecute any case anymore other than through leniency, they may lose their capacity to do so, or at least antitrust offenders may start doubting their continued capacity to do so. If this were to happen, the success of their leniency programmes would risk coming to an end.

It may thus be useful that antitrust enforcement authorities continue, at least from time to time, detecting and punishing antitrust violations without the help of leniency, and are seen to do so.[132]

3. Facilitation of the creation and maintenance of cartels

As already mentioned above, successful cartels tend to be sophisticated organizations, capable of learning. It is thus safe to assume that cartel participants will try to adapt their organization to leniency policies, not only so as to minimize the destabilising effect, but also, where possible, to exploit leniency policies to facilitate the

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130 See above, text accompanying notes 93, 94 and 121 to 123. It should however be predictably clear what the required threshold of evidence is; see above, text accompanying note 105.

131 See above, text accompanying footnotes 91, 92 and 106.

132 As to the European Commission, see Case Associates, as note 110 above, reporting that in 4 out of 39 cartel cases from the period 1999 to 2004 no leniency reductions were given.

creation and maintenance of cartels.[133] This raises the question whether there could be features of leniency programmes that risk being exploited to perverse effect.[134]

The limitation of immunity to the single first cooperating cartel participant is clearly important in avoiding perverse effects.[135] If this condition did not exist, one could imagine all the members of a cartel collectively denouncing it to the antitrust enforcement authorities and claiming leniency, only after having fully implemented the cartel agreement up to its time of natural death.[136]

In situations where the same companies participate in a number of cartels in different markets, or repeatedly form cartels over time, one could imagine a system in which cartel participants take turns to apply for leniency, every time one of the cartels is (about to be) detected by the competition authority.[137] In jurisdictions where cartels are not only punished by fines on companies, but also by imprisonment of individuals, such a system is most unlikely to be attractive,[138] but in jurisdictions without such individual penalties it might work.[139]

Another potential perverse scenario to be considered is the use of leniency as a mechanism to punish deviations from the cartel agreement. Again the limitation of immunity to the single first cooperating cartel participant very much reduces the risk of such perverse effect, as it makes it impossible for all the other cartel members together to denounce the cartel to the antitrust enforcement authority, obtain immunity themselves, and have the deviator penalised by the authority. One may however wonder wether it would be possible to set up a system in which one cartel member would play a central

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133 See above, text accompanying notes 73 and 95.

134 Other than the general penalty-lowering effect discussed above, section 'Lowering of the penalty level'.

135 See 'The Commission Notice on the Non-Imposition or Reduction of Fines in Cartel Cases: A Legal and Economic Analysis', as note 64 above, at 133.

136 Cartels tend to die natural deaths, be it only after a long life, because of the entry or expansion of non-cartel members; see M.C. Levenstein and V.Y. Suslow, as note 73 above.

137 The cartel participants could then also try to make use of the possibilities offered for partial immunity to later leniency applicants that provide evidence of a longer duration of the infringement; see above, text accompanying notes 20, 41 and 42. A first cartel participant would apply for immunity, providing evidence of the last third of the cartel period, while saying that the cartel may have started earlier, but that it cannot retrieve evidence of that. A second cartel member would then come forward with evidence of the other two thirds of the cartel period.

138 See also C. Aubert, P. Rey and W.E. Kovacic, as note 93 above, at 1250.

139 One (at least partial) solution could be to exclude repeat offenders from leniency. In one EU Member State, Greece, recidivists are excluded from immunity. However, excluding repeat offenders from leniency would mean that leniency would no longer work at all if the same group of companies that was found to have formed a cartel a first time subsequently enters a new cartel. If all these companies cannot apply for leniency because they are repeat offenders, this second cartel would thus be more stable than the first one. Paradoxically, excluding recidivists from leniency may thus encourage recidivism.

role in organizing and administering the cartel, and would be the only one to have all the evidence of the cartel, and could use this position to deter the other cartel members from deviating from the cartel agreement under the threat of a leniency application. It would however seem very unlikely that the other cartel members would be willing to enter into such an agreement, as they would have to trust the ringleader to act exclusively in the common interest, and would risk being the co-victim of deviations by one of the other non-ringleaders. This would only be different if the ringleader could coerce the other cartel members into the agreement. In all jurisdictions, however, leniency programmes exclude coercers from immunity.[140]

4. Negative moral effects

As already mentioned above,[141] corporate managers are not necessarily just maximizers of profits for themselves and their principals. They may feel a moral responsibility to live within the law whether or not they are likely to be caught, and this normative commitment could trump their interest calculus. The public punishment of those who violate the antitrust prohibitions has thus not only a deterrent effect, in that it helps creating a credible threat of punishment for those who would be willing to commit violations on the basis of a profit calculation, but also has moral effects, in that it sends a message to the spontaneously law-abiding, reinforcing their moral commitment to the rules.

For people to have such moral commitment to the law, however, it is important that the law and its enforcement is perceived to be fair.[142] Leniency, in particular in its strongest form of immunity, may raise two (closely related) concerns in this respect.[143]

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[140] See above, text accompanying notes 6, 7, 13, 30 and 56. In some jurisdictions, including the US and Germany, leniency programmes go further in that they also exclude non-coercing sole ringleaders. Such an exclusion generally makes sense it that it deters potential ringleaders from volunteering to take on this role, in the same way as higher penalties for ringleaders; see above, text accompanying note 100; K. Mehta, 'Comments on Switgard Feuerstein's "Collusion in Industrial Economics – A Survey"' (2005) 5 *Journal of Industry, Competition and Trade* 217-222, at 220; and N.K. Katyal, as note 61 above, at 1343 and 1365. On the other hand, allowing (non-coercing) ringleaders to apply for immunity may have the effect of making the other cartel members more cautious in following the ringleader's initiative; see also C. Aubert, P. Rey and W.E. Kovacic, as note 93 above, at 1250. Finally, the exclusion of the ringleader as a potential immunity applicant reduces the number of such potential applicants, and thus reduces the potential of a race to be the first to cooperate; see above, text accompanying notes 92 and 106. The first version of the European Commission's Leniency Notice in 1996 excluded all ringleaders (even if there were several of them); see note 50 above, and Judgment of the EC Court of First Instance of 15 March 2006 in Case T-15/02 *BASF*, [2006] ECR II-497, paragraphs 316, 321 and 535-536. This was however changed in 2002, and the current Leniency Notice only excludes coercers; see above, text accompanying note 30.

[141] Text accompanying notes 78 to 80.

[142] See T.R. Tyler, as note 80 above, as well as the literature listed in note 78 above.

[143] See also OECD, as note 74 above, at 26.

First, there may be concerns about the retributive injustice of an antitrust offender escaping punishment. The main response to this concern is to design and apply leniency programmes in such a way as to ensure that no more leniency is granted than strictly necessary to obtain the positive enforcement effects,[144] and to stress the condition for any beneficiary of leniency, and in particular of immunity, to provide genuine and full cooperation to the enforcement authorities. This appears to be reflected, for instance, in the case law of the EC Court of Justice, which has emphasized that for companies to benefit from leniency under the European Commission's Leniency Notice, their conduct must reveal 'a genuine spirit of cooperation'.[145] Requiring restitution to injured parties as a condition for leniency may also help to assuage justice concerns.[146]

A second (closely related) concern focuses on the unequal treatment between the beneficiary of immunity or leniency and the other cartel participants, who receive full punishment for the same antitrust violation.[147] Again the main response is to ensure that leniency is only granted to the extent that the company or individual has genuinely and effectively cooperated with the competition authority, thus objectively distinguishing its situation from the other cartel participants that have not done so, or not to the same extent, or at the same early point in time. Equally important is to ensure that leniency policies are applied in a transparent and consistent way, thus providing an equal chance for all cartel participants to benefit from them.[148] In this respect, the EC Court of First Instance has stressed that, under the general principle of equal treatment, the European Commission must ensure that it does not distort the conditions of competition between undertakings in a (potential) race to be the first to cooperate, by contacting one of them, or giving them unequal access when they contact the European Commission.[149]

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144 As argued above, section 'Lowering of the penalty level', limiting leniency to what is strictly necessary to obtain its enforcement benefits is also indicated to counter the penalty-reducing effect of leniency.

145 Judgments of the EC Court of Justice of 28 June 2005 in Joined Cases C-189/02 P etc. *Dansk Rorindustri a.O.* v *Commission* (*Pre-insulated Pipes*), [2005] ECR I-5425, paragraphs 388-403, and of 29 June 2006 in Case C-301/04 P *Commission* v *SGL Carbon*, idem, paragraph 68. See also, in the UK, the Judgment of the Competition Appeals Tribunal of 19 May 2005 in Cases 1019/1/1/03 etc. *Umbro a.O.* v *Office of Fair Trading*, [2005] CAT 22, paragraphs 210-234.

146 See above, section 'Restitution to injured parties'. One might also consider excluding recidivists from immunity, in particular if the recidivism followed an earlier grant of immunity; see however note 139 above.

147 See also D. Voillemot, as note 127 above, at 99-100.

148 On could try to argue that a company that is willing to cooperate but detains less evidence that it can offer in exchange for leniency is disadvantaged as compared to another willing applicant with more evidence at its hands. This argument should however be rejected (and has indeed been rejected by the EC Court of First Instance in its Judgment of 18 July 2005 in Case T-241/01 *SAS* v *Commission*, [2005] ECR II-2917, paragraphs 211-221), because distinguishing according to the usefulness of the cooperation appears objectively justified. Moreover, as pointed out above, text accompanying note 93, granting leniency in proportion to the evidence provided creates a desirable incentive for all cartel participants to create and keep evidence.

149 Judgments of the EC Court of First Instance of 13 December 2001 in Joined Cases T-45/98 etc. *Krupp Thyssen a.O.* v *Commission* [2001] ECR II-3757, paragraphs 237-248, and of 15 March 2006 in Case

Both concerns, as to the guilty remaining unpunished and as to co-conspirators being treated unequally, would appear to be particularly acute in the case of immunity being granted to the ringleader of a cartel, in particular if that ringleader has coerced other cartel members into committing the infringement. As already discussed above, in all jurisdictions coercers are excluded from immunity, and in several jurisdictions also non-coercing sole ringleaders.[150]

D. Measuring the effects of leniency

The most obvious measurement of the effects of leniency is the number of leniency applications received by the competition authorities, and the amounts of the penalties imposed with the help of these leniency applications. Indeed, both the US Department of Justice and the European Commission have been regularly reporting the success of their leniency policies, in that they receive several applications for leniency per month, and that these applications have helped them in imposing high amounts of penalties.[151]

On its own, the number of leniency applications is not a good indicator of the success of a leniency policy, as it may reflect excessive generosity and thus a weakening rather than a strengthening of deterrence.[152] The imposition of more and higher penalties, without an increase in the competition authority's resources, is however clearly a sign of success. Indeed, more and higher penalties means more deterrence and hence fewer antitrust violations.

The only doubt one could have as to the overall positive effect of leniency policies would be that this positive effect would be outweighed by perverse effects of leniency, either in that cartel participants find ways to exploit leniency programmes so as to facilitate the creation or maintenance of cartels, or in that leniency programmes have negative moral effects leading to less respect for the antitrust prohibitions.[153] However,

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T-15/02 *BASF* v *Commission*, [2006] ECR II-497, paragraph 504. The European Commission would thus not be allowed to adopt the US Department of Justice's practice of 'affirmative amnesty', under which the latter approaches a company – which may at the time not even know that it or its competitors are under investigation – to cooperate and seek leniency; see ICN, as note 74 above, at 5, and S.D. Hammond, as note 20 above, at 11.

150 See above, (text accompanying) note 140. See also notes 139 and 146 above as to the case of recidivists.

151 See for instance S.D. Hammond, as note 62 above, at 2-4; O. Guersent, 'The fight against secret horizontal agreement in the EC competition policy', in B.E. Hawk, *2003 Fordham Corporate Law Institute International Antitrust Law & Policy* (Juris Publishing, 2004), 43, at 45-49; and European Commission, *Report on Competition Policy 2005*, SEC(2006)761, paragraph 175.

152 'The Commission Notice on the Non-Imposition or Reduction of Fines in Cartel Cases: A Legal and Economic Analysis', as note 64 above, at 139.

153 See above, sections 'Facilitation of the creation and maintenance of cartels' and 'Negative moral effects'.

as explained above,[154] leniency programmes in all jurisdictions appear to be designed in ways that would appear to make it very unlikely that they could be exploited in a way that facilitated the creation and maintenance of cartels, certainly in those jurisdictions that impose not only fines on companies but also imprisonment on individuals,[155] and a good design and application of leniency programmes should also be able to limit negative moral effects.

Of course, it would be nice if we were able to measure the overall effect of leniency by observing directly its impact on the cartel population. But, given that cartels hide themselves, we have no way to observe directly the population of cartels. We can observe the population of discovered cartels, but this is a very unreliable indicator of the cartel population, as an increase or decrease in the number of detected cartels can be equally due to improved or worsened detection as to an increase or decrease in the cartel population. In a recent paper, Joseph Harrington has shown that the change in the duration of discovered cartels can be informative as to the change in the rate of cartels.[156] In order to use this proxy to measure the effect of a leniency policy, one would however also have to be able to separate the effect of the leniency policy from the effect of other changes in antitrust enforcement during the same period, such as changes in the competion authority's resources or in the applicable penalties.[157]

III. OBSTACLES TO THE INTRODUCTION OF LENIENCY POLICIES

As described above,[158] many jurisdictions have introduced leniency policies in the last decade, following the initial example of the US Department of Justice. In most jurisdictions, however, the introduction of leniency programmes, in particular programmes offering immunity from penalties, has not been uncontested, and their use has not yet spread everywhere. In Germany, for instance, a leniency programme for companies exists since 2000, but there is no leniency programme for individuals that are punishable with imprisonment for the specific criminal offence of bid-rigging.

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154 Idem.

155 The risk for jurisdictions without such penalties for individuals is that, in situations where the same companies participate in a number of cartels in different markets, or repeatedly form cartels over time, cartel participants might take turns to apply for leniency, every time one of the cartels is (about to be) detected by the competition authority; see above, text accompanying notes 137 to 139.

156 J.E. Harrington, 'Modelling the Birth and Death of Cartels with an Application to Evaluating Antitrust Policy' (June 2006), available at http://www.econ.jhu.edu/People/Harrington/CartelBirthDeath-6.06.pdf.

157 See above, text accompanying notes 124 to 127, as to the phenomenon of penalties being raised in parallel with the introduction of leniency programmes.

158 Section 'History'.

Whereas initially doubts as to their effectiveness may have slowed down the introduction and spread of leniency policies, such doubts would not appear to play a significant role anymore today, as leniency policies are widely credited as having contributed to an important extent to the increase in the number and the size of antitrust penalties obtained or imposed by the US Department of Justice and by the European Commission.[159] Objections of principle and institutional problems may however still constitute obstacles to the introduction of leniency policies.

A. Objections of principle

The two strongest objections of principle that could be raised against leniency, in particular in its strongest form of immunity, namely the retributive injustice of antitrust offenders escaping punishment, and the unequal treatment between the beneficiaries of leniency and the other offenders, have already been discussed above.[160] Provided that no more leniency is granted than strictly necessary to obtain the positive enforcement results, that beneficiaries of leniency are required to provide genuine and full cooperation, that leniency policies are applied in a transparent and consistent way, and that coercers are excluded from immunity, the granting of leniency would not appear unfair.

Leniency has also raised objections as akin to the use of informants or spies.[161] While one may readily applaud, in the light of historical experience with totalitarian regimes, vigilance against the use by the state of neighbours, friends and family to spy and inform on each other's private life, especially for political offences, in the antitrust context this objection would rather seem to reflect an 'honour among thieves'-culture.[162] In the end, the issue appears to be whether or not, or to what extent, one considers antitrust offences, in particular secret price-fixing cartels, to be reprehensible. Strong antitrust enforcement requires a societal consensus that antitrust offences are bad.[163]

Objections have also been raised as to the compatibility of leniency with respect for the rights of the defence, but none of these objections appear convincing. As the EC Court of Justice has held in relation to the European Commission's Leniency Notice: 'admission of an alleged infringement is a matter entirely within the will of the undertaking concerned. The latter is not in any way coerced to admit the existence of the agreement. It must therefore be considered that the fact that the Commission took

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159 See above, section 'Measuring the effects of leniency', and references in note 74.

160 Section 'Negative moral effects'.

161 In French, the emotionally charged term '*délation*' is used in this context; see D. Voillemot, as note 127, at 13 and 93-95.

162 Compare with D. Brault, 'Jusqu'où augmenter la prime aux repentis?' (2005) *Revue Lamy de la Concurrence* 113, at 115, referring to the 'mutual confidence between contracting parties' ('*la confiance mutuelle entre co-contractants*').

163 See also 'Is Criminalization of EU Competition Law the Answer?', as note 3 above, at 150-151.

account of the degree of cooperation with it shown by the undertaking concerned, including admission of the infringement, for the purpose of imposing a lower fine does not constitute any breach of its rights of defence'.[164]

B. Institutional problems

In some jurisdictions the question has arisen whether the competition authority has the power to introduce a leniency policy, or whether the legislator has to introduce such a policy or has to create a new empowerment for the competition authority to do so. In the case of the European Commission, which itself adopted its Leniency Notice, the EC Court of Justice has confirmed that it had the power to do so.[165]

In some jurisdictions, there exists a principle of mandatory prosecution, under which the public prosecution office is obliged to take action in relation to all criminal offences which may be prosecuted, provided there are sufficient factual indications.[166] This could be considered to create a problem for the introduction of leniency, at least in its stronger form of immunity, with regard to criminal penalties. The problem would not appear to arise if the immunity granted is not immunity from prosecution but only immunity from the imposition of penalties. In any event, the principle of mandatory prosecution usually only applies 'unless otherwise provided by law',[167] which means that a leniency policy can be introduced, provided that it is done through a legislative act. It may also be noted that the Council of Europe has recommended since 1987 to its Member States to introduce or extend the application of the principle of discretionary prosecution, wherever possible, or otherwise to devise measures having the same purpose.[168] In any

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164 Judgment of 14 July 2005 in Joined Cases C-65/02 P etc. *ThyssenKrupp Stainless a.O.* v *Commission*, [2005] ECR I-6773, paragraphs 52-53; see also the Opinion of Advocat-General Léger of 28 October 2004 in the same case, [2005] ECR I-6773, paragraphs 134-146; 'The Commission Notice on the Non-Imposition or Reduction of Fines in Cartel Cases: A Legal and Economic Analysis', as note 64 above, at 137-138; 'Self-incrimination in EC Antitrust Enforcement: A Legal and Economic Analysis', as note 87 above, at 580; and Judgment of the EC Court of First Instance of 15 March 2006 in Case T-15/02 *BASF* v *Commission*, [2006] ECR II-497, paragraph 58.

165 Judgment of 16 November 2000 in Case C-298/98 P *Metsä-Serla (Finnboard)* v *Commission* [2000] ECR I-10171, paragraphs 56 and 57; see also 'The Commission Notice on the Non-Imposition or Reduction of Fines in Cartel Cases: A Legal and Economic Analysis', as note 64 above, at 135-136.

166 See Council of Europe, Proceedings of the 5th session of the Conference of Prosecutors general of Europe, 'Discretionary powers of public prosecution: opportunity or legality principle – advantages and disadvantages' (Celle, 23-25 May 2004), available at http://www.coe.int/t/e/legal_affairs/legal_co-operation/conferences_and_high-level_meetings/european_public_prosecutors/2004(Celle).asp#TopOfPage.

167 This is the case, for instance, in Germany: see Section 152(1) of the Code of Criminal Procedure.

168 Recommendation No. R (87) 18 concerning the Simplification of criminal justice, adopted by the Committee of Ministers of the Council of Europe on 17 September 1987, again referred to in Recommendation Rec (2000) 19 on the Role of public prosecution in the criminal justice system, both available at http://www.coe.int/t/e/legal_affairs/legal_co-operation/conferences_and_high-level_meetings/european_public_prosecutors/00_0E_Reference%20Texts.asp#TopOfPage. As has also been pointed out by the OECD, as note 74 above, at 26, specifically with regard to antitrust

event, the concerns to avoid arbitrariness and unequal treatment which appear to be underlying the idea of mandatory prosecution, should not apply to leniency policies that are set out and applied in a transparent and consistent way, and that provide no more leniency than strictly necessary to obtain the positive enforcement results.[169]

Finally, in some jurisdictions, the investigation of antitrust violations and their prosecution are carried out by separate authorities. A problem may then arise in that the prosecuting authority resists giving up its prosecutorial discretion and becoming bound by the investigating authority's decisions on leniency applications. This problem can be overcome by involving the prosecuting authority in the introduction and application of the leniency programme,[170] or by imposing it through a higher legislative act, making it binding on the prosecuting authority.

IV. SOME FURTHER ISSUES

A. Leniency and criminal penalties on individuals

As set out above,[171] whereas in the US the cartel prohibition is enforced not only with fines on companies but also with imprisonment of individuals, the European Commission and the competition authorities of most EU Member States can currently only impose fines on undertakings. In the last decade, prison sanctions for individuals have been introduced in Ireland and the United Kingdom,[172] and they may be introduced in the Netherlands in the near future.[173] Prison sanctions also exist in some other EU Member States, for instance in Germany for bid-rigging. This trend towards criminalization raises the question how the addition of criminal penalties on individuals impacts upon the effectiveness of leniency.

If, as is the case in the US, Ireland and the UK, leniency (including immunity) is also available for individuals, and the leniency policies for companies and for individuals are well integrated, in that, when a company is the first to apply for immunity, it can also

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enforcement, few if any enforcement agencies could function effectively without discretion. Some prioritizing and balancing of costs and benefits in the enforcement process is inevitable.

169 See also above, sections 'Negative moral effects' and 'Objections of principle'.

170 See ICN, as note 74 above, section 2.6.7, 'Making leniency work in a bifurcated enforcement model'.

171 See section 'Examples'; see also note 32 above.

172 See 'Is Criminalization of EU Competition Law the Answer?', as note 3 above, at 135-136.

173 The issue was debated in the Second Chamber of the Dutch Parliament on 15 June 2006, and broad support for the introduction of prison sanctions for cartels emerged. See also 'Is Criminalization of EU Competition Law the Answer?', as note 3 above, at 133-135.

obtain immunity for its cooperating staff, but that immunity is normally no longer available for a company if an individual has applied for it earlier (and is similarly normally unavailable for an individual if a company has been first and the individual is not part of the company's application), leniency will be more effective, for three reasons.[174]

First, at least to the extent that the companies care for their staff, the higher overall penalty discount available will make it more attractive for companies to apply for leniency.

Second, additional races to be the first to cooperate are created between the companies and their staff, as well as between individuals. As Scott Hammond has explained with regard to US Department of Justice's practice of combining corporate and individual leniency programmes: 'the individual amnesty program helps prevent companies from covering up their misconduct. The real value and measure of the Individual Leniency Program is not in the number of individual applications we receive, but in the number of corporate applications it generates. It works because it acts as a watchdog to ensure that companies report the conduct themselves. […] So long as one of its employees has individual exposure, the company remains at great risk. If the company self-reports the conduct under the Corporate Leniency Policy, then the company and all of its cooperating executives will avoid criminal prosecution. However, if the company delays or decides not to report, then the company puts itself in a race for leniency with its own employees. In this example, if the company does not report the conduct first, then the executive may come forward on his own and report the conduct for his own protection, thereby potentially leaving the company out in the cold. […] If the secretary gets nervous, say, after talking to a relative who convinces her that she has real criminal exposure for her own conduct, she may decide to report the conduct'.[175] As Donald Baker has further explained, also describing US practice: 'The same process works between individuals at different companies involved in the suspected conspiracy. There certainly have been cases where an individual was indicted for a one-on-one conversation with someone who worked for a competitor and who then turned the defendant in. Of course, as we saw with the *Lysine* cartel, an individual who turns herself in to the government may become a government informant and continue to participate in conspiracy meetings, armed with recording devices in order to entrap the other conspiracy members'.[176]

Third, the presence of criminal penalties for individuals strongly reduces the risk of perverse effects of leniency policies.[177] It would in particular appear to eliminate the risk that, in situations where the same companies participate in a number of cartels in different markets, or repeatedly form cartels over time, cartel participants might take

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174 See also M. Bloom, as note 124 above.

175 S.D. Hammond, as note 62 above, at 12-14.

176 D. I. Baker, as note 86 above, at 708.

177 See above, section 'Facilitation of the creation and maintenance of cartels'.

turns to apply for leniency, every time one of the cartels is (about to be) detected by the competition authority.[178]

To the contrary, if leniency (including immunity) is not available for individuals, the addition of criminal penalties for individuals will decrease the effectiveness of leniency. At least to the extent that they care about their staff, companies will be less inclined to apply for leniency, as this will expose their staff to punishment. Even if they do not care about their staff, companies may not be able to make useful leniency applications, as their staff will not be willing to cooperate for fear of incriminating themselves.

It thus appears essential, when adding criminal penalties for individuals to corporate fines, to provide also for leniency (including immunity) for individuals.[179] This conclusion is confirmed, on the one hand, by the experience of the successful combined application by the US Department of Justice of its Corporate Leniency Policy and its Leniency Policy for Individuals,[180] and, on the other hand, by the example of Germany, where criminal penalties for individuals exist for bid-rigging, without a corresponding possibility for leniency, with the result that the German competition authority, which has an otherwise functioning leniency programme for companies, has never received a leniency application in a bid-rigging case.

The introduction of leniency, in particular immunity, for criminal penalties might be considered more problematic than in the case of fines on companies.[181] However, as argued above,[182] it would appear that all the concerns related to retributive justice, equal treatment and legality which could be raised can be adequately addressed, provided that no more leniency is granted than strictly necessary to obtain the positive enforcement results, that beneficiaries of leniency are required to provide genuine and full cooperation, that coercers are excluded from immunity, that leniency policies are applied

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178 See above, text accompanying notes 137, 138, 139 and 155

179 See further ‘Is Criminalization of EU Competition Law the Answer?’, as note 3 above, at 149-150.

180 As has been pointed out by Margaret Bloom, as note 124 above, at 9, when comparing the statistics of the success of the leniency policies of the US Department of Justice and for instance the European Commission, one should observe that roughly half of the immunity applications received by the European Commission follow leniency applications to the US Department of Justice, and may thus never have taken place if it was not for the strong attraction of the US Department of Justice’s leniency policy, linked to the threat of imprisonment; see also A. Stephan, 'An Empirical Assessment of the 1996 Leniency Notice', CCP Working Paper 05-01 (September 2005), available at http://www.ccp.uea.ac.uk/public_files/workingpapers/CCP05-10.pdf#search=%22Empirical%20Assessment%20Leniency%20Andreas%20Stephan%22.

181 In Sweden, where currently only corporate fines exist, with a leniency programme, a Governmental Committee of Inquiry produced in 2004 a proposal to introduce criminal penalties for individuals, but without a possibility for leniency, referring to the general rule of mandatory prosecution in the Swedish Code of Judicial Procedure; see *Konkurrensbrott – En lagstiftningsmodell*, SOU 2004:131, available at http://www.regeringen.se/sb/d/264/a/36225. See above, text accompanying notes 166 to 169, for arguments as to why the principle of mandatory prosecution should not constitute an insurmountable obstacle to introducing leniency.

182 Sections ‘Negative moral effects’, ‘Objections of principle’ and ‘Institutional problems’.

in a transparent and consistent way, and, in those jurisdictions where this would be necessary, are laid down in a legislative act.

B. Leniency and follow-on private actions for damages

The European Commission published in 2005 a Green Paper on Damages actions for breach of the EC antitrust rules, opening a wide debate in the EU Member States on options to facilitate private damages actions, including follow-on actions in cases where penalties have already been imposed by the European Commission or the competition authority of an EU Member State.[183] Such actions are currently less common in the EU Member States than in the US. This debate raises the question how follow-on private actions for damages impact upon the effectiveness of leniency.

To some extent the impact of follow-on private damages actions appears similar to the impact of the addition of criminal penalties on individuals.[184] If a leniency applicant, and in particular an immunity applicant, could also be offered leniency or immunity from damages, the effect of follow-on private damages actions would be to strengthen the effectiveness of leniency, because potential leniency applicants would be attracted by the larger benefit available to them. To the contrary, if immunity applicants or other leniency applicants cannot be offered corresponding immunity or leniency as to damages, follow-on private damages actions weaken the effectiveness of leniency, as the prospect of having to pay damages, or at least of having to defend oneself in follow-on private actions, adds a negative element to be weighed in the potential leniency applicant's decision wether or not to apply for leniency.[185]

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183 The Green Paper COM(2005)672 and the Commission Staff Working Paper SEC(2005)1732 annexed to it, both of 19 December 2005, as well as many subsequent contributions to the debate, are available at http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/index_en.html; see also D. Waelbroeck and D. Slater, 'The Commission's Green Paper on private enforcement: "Americanisation" of EC competition law enforcement?', and J. Lawrence, 'Seeking the perfect balance – some reflections on the Commission Green Paper: Damages actions for breach of the EC antitrust rules (19 December 2005)', papers presented at the 11th EUI Competition Law and Policy Workshop (Florence, 2-3 June 2006), available at http://www.iue.it/RSCAS/Research/Competition/Index.shtml, forthcoming in C.D. Ehlermann and I. Atanasiu (eds), *European Competition Law Annual 2006: Enforcement of Prohibition of Cartels* (Hart Publishing, 2007), and 'Should Private Antitrust Enforcement Be Encouraged in Europe?', as note 76 above.

184 See above, section 'Leniency and criminal penalties on individuals'.

185 One might counterargue that leniency applicants will still come forward for fear that another co-conspirator would otherwise apply for leniency first. This argument is only partially convincing, however, because the negative effect of the prospect of follow-on damages actions also applies to all the other co-conspirators, and any potential leniency applicant will understand this. It should also be noted that the negative effect exists even if the fact of cooperating with the authority does not place the leniency applicant in a worse position in respect of follow-on damages actions than other cartel members that do not cooperate. Competition authorities generally try to avoid putting the leniency applicant in a worse position than the other cartel members, in particular by providing for an oral procedure for leniency applications, so to avoid corporate statements being discoverable; see M. Bloom, as note 124 above, at 17-21; M.J. Reynolds and D.G. Anderson, as note 128 above, at 82-84;

As already mentioned above, in the US, following a statutory modification in 2004, companies that have been granted immunity by the US Department of Justice under its leniency programme and that are found by the court in follow-on suits for damages to have provided satisfactory cooperation with the private claimants are only liable for single damages based on their own share of the commerce affected by the violation, whereas the other cartel members remain jointly and severally liable for treble damages based on the harm caused by the entire conspiracy.[186]

In the EU, successful leniency applicants do not currently benefit from any immunity or reduction of liability with regard to follow-on private damages actions.[187] Following the US example, the European Commission's Green Paper on Damages actions for breach of the EC antitrust rules puts forward for discussion the options of giving successful leniency applicants a rebate on damages and of removing joint and several liability.[188] As the Green Paper also floats the idea of double damages for cartels,[189] the proposed rebate could take the form of single instead of double damages.[190]

C. Leniency in multiple jurisdictions

International cartels may be subject to the imposition of penalties in multiple jurisdictions.[191] This raises the question how the fact that penalties may also be imposed in other jurisdictions impacts upon the effectiveness of leniency.

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and K. Nordlander, 'Discovering Discovery – US Discovery of EC Leniency Statements' (2004) *European Competition Law Review* 646-659.

186 See above, text accompanying notes 9, 10 and 63.

187 See above, text accompanying note 44.

188 Commission Staff Working Paper, as note 183 above, paragraphs 235 and 236 (Options 29 and 30).

189 Idem, paragraph 150 (Option 16).

190 Idem, paragraph 235. The initial reactions to the Green Paper, however, do not appear to indicate much support for the idea of double damages; see contributions referred to in note 183 above, and U. Böge and K. Ost, 'Up and Running, or is it? Private enforcement – the Situation in Germany and Policy Perspectives' (2006) *European Competition Law Review* 197-205, at 201-202, referring to constitutional concerns in Germany. On punitive damages, see also the Judgment of the EC Court of Justice of 13 July 2006 in Joined Cases C-295/04 etc. *Manfredi a.O.*, [2006] ECR I-6619, paragraphs 92 to 96, and the Judgment of the EC Court of First instance of 27 September 2006 in Case T-59/02 *Archer Daniels Midland* v *Commission*, not yet reported, paragraphs 349 to 355.

191 The general rule in international law is that each jurisdiction can impose the penalties provided for in its laws for the violation of its antitrust laws on its territory, without any obligation to take into account the penalties imposed (or not imposed) in the other jurisdictions; see Judgment of the EC Court of Justice of 29 June 2006 in Case C-308/04 P *SGL Carbon* v *Commission*, [2006] ECR I-5977, paragraphs 29 to 39, as well as the Opinion of 19 January 2006 of Advocate-General Geelhoed in the same case. As the EC Court of Justice has pointed out in paragraph 30 of the same judgment, the legal situation is 'completely different' inside the EU. As to the relationship between the European Commission and the competition authorities of the EU Member States, see my article 'The Principle

This impact appears similar to that of follow-on private damages actions, and thus to some extent also to that of the addition of criminal penalties on individuals.[192] If the leniency applicant, and in particular the immunity applicant, can also obtain leniency or immunity in the other jurisdictions, the effectiveness of leniency will be increased, because potential leniency applicants will be attracted by the larger benefit available to them. To the contrary, if immunity applicants or other leniency applicants cannot obtain corresponding immunity or leniency in the other jurisdictions, the effectiveness of leniency will be weakened, as the prospect of penalties in the other jurisdictions adds a negative element to be weighed in the potential leniency applicant's decision whether or not to apply for leniency.

This impact helps to explain the efforts of those antitrust enforcement authorities that were the first to introduce leniency policies, in particular the US Department of Justice, in convincing the authorities in other jurisdictions to adopt similar policies.[193]

D. 'Amnesty Plus'

As already mentioned above, The US Department of Justice and the UK Office of Fair Trading have a policy, called 'Amnesty Plus', under which a cooperating company that does not qualify for immunity as to a first cartel being investigated but that uses the occasion of that first investigation to report a second, distinct cartel will receive, in addition to the immunity it can obtain for the second cartel, a further reduction of the fine for the first cartel.[194]

There would indeed appear to be an increased probability that companies that participate in one cartel, also participate in other cartels. First, these companies, or the responsible individuals within them, must have overcome the normative or moral barrier which would prevent the law-abiding many from engaging in illegal activity.[195] Second, by participating in one cartel, they will have gained valuable experience, making it more

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of *Ne Bis in Idem* in EC Antitrust Enforcement: A Legal and Economic Analysis' (2003) 26 *World Competition* 131-148, and *Principles of European Antitrust Enforcement*, as note 66 above, chapters 1, 2 and 3. See also (text accompanying) note 75 above as to the ECN Model Leniency Programme.

192 See above, sections 'Leniency and follow-on private actions for damages' and 'Leniency and criminal penalties on individuals'.

193 See above, section 'History', including also (text accompanying) note 75 concerning the ECN Model Leniency Programme.

194 See above, text accompanying notes 25 and 55; see also ICN, as note 74 above, at 4, and D. McAlwee, 'Should the European Commission adopt "Amnesty Plus" in its Fight Against Hard-Core Cartels?' (2004) *European Competition Law Review* 558-565.

195 On the importance of normative commitment to the law as a barrier to antitrust violations, see above, sections 'Optimal antitrust enforcement and the imposition of penalties' and 'Negative moral effects'.

likely that their participation in other cartels will be successful.[196] Third, to the extent that ability to pay plays a role in determining the amount of penalties for cartels, companies that participate in several cartels may get punished proportionally less.[197]

It would also seem that, once the participation of a company in one cartel has been detected by an antitrust enforcement authority, there is an increased probability that the antitrust enforcement authority will also detect the participation in the other cartels. Indeed, a rational competition authority will be aware of the increased probability that companies that participate in one cartel also participate in other cartels, and will thus spontaneously focus its investigations in that direction. Moreover, investigations into one cartel may incidentally produce evidence of other cartels, for instance when the authority's investigators conducting a 'dawn raid' at the premises of a company to collect evidence of one suspected cartel come across evidence of another cartel.[198]

Given this increased probability of detection of the second cartel, once the participation of a company in a first cartel has been detected, the justification for an 'Amnesty Plus' policy does not appear obvious. 'Amnesty Plus' comes down to granting more than 100 % leniency for the second cartel. As further discussed below, one could argue as to whether it is a good idea in general to grant more than 100 % leniency, i.e. not only to waive the entire penalty but also to give a positive financial reward to a cooperating company.[199] But whatever one may think about this idea in general, it is difficult to see the justification for applying it only in the specific case of a company whose participation in a first cartel has already been detected. Given that in that specific situation, the probability of detection is higher than normal, there should be less need to go beyond 100% leniency and grant a positive financial reward.

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196 On the complexity of successful cartels, and the importance of learning, see above, text accompanying note 73 and sections 'Increased difficulty of creating and maintaining cartels' and 'Facilitation of the creation and maintenance of cartels'.

197 See for instance the case of SGL Carbon, which received from the European Commission a 33 % discount from its fine for participation in the *Electrical and mechanical carbon and graphite products* cartel (Decision of 3 December 2003 in Case COMP/38.359, available at http://ec.europa.eu/comm/competition/antitrust/cases/decisions/38359/en.pdf, paragraphs 358 to 360) because of its bad financial situation and the fact that it had already been fined for its participation in two other contemporaneous cartels; see further A. Stephan, 'The Bankruptcy Wildcard in Cartel Cases', CCP Working Paper 06-5 (March 2006), available at http://www.ccp.uea.ac.uk/public_files/workingpapers/CCP06-5.pdf; C. Harding, 'Effectiveness of Enforcement and Legal Protection', paper presented at the 11th EUI Competition Law and Policy Workshop (Florence, 2-3 June 2006), available at http://www.iue.it/RSCAS/Research/Competition/Index.shtml, forthcoming in C.D. Ehlermann and I. Atanasiu (eds), *European Competition Law Annual 2006: Enforcement of Prohibition of Cartels* (Hart Publishing, 2007); 'Optimal Antitrust Fines: Theory and Practice', as note 76 above, at 196-197; and 'The European Commission's 2006 Guidelines on Antitrust Fines: A Legal and Economic Analysis', as note 36 above.

198 See the Judgment of the EC Court of Justice of 17 October 1989 in Case 85/87 *Dow Benelux* v *Commission* [1989] ECR 3137, paragraphs 17-19, holding that in a situation where the European Commission's inspectors discover evidence of a violation outside the subject-matter indicated in the decision ordering the inspection, the European Commission can initiate a new investigation and use its investigative powers to obtain that evidence in the framework of this new investigation.

199 See below, section 'Rewards to companies that participated in cartels'.

It has been pointed out that over half of the investigations of suspected international cartels by the US Department of Justice were initiated as a result of leads generated during an investigation of a separate market.[200] It does not follow however that this would not also have happened without 'Amnesty Plus', or that similar phenomena could not be observed at competition authorities that do not have an 'Amnesty Plus' policy.[201]

The obvious disadvantage of 'Amnesty Plus' is that it involves an additional penalty lowering.[202] It could arguably make it more attractive for a company already participating in one cartel to join also other cartels.[203]

E. Positive financial rewards or bounties

Leniency as discussed in this paper above consists in the reduction of penalties or, in its strongest form, the grant of immunity from penalties for antitrust violations in exchange for cooperation with the antitrust enforcement authorities.[204] William Kovacic and others have proposed the grant of positive financial rewards or bounties to incentivize cooperation in the detection and prosecution of cartels.[205]

In April 2005 the Korean Fair Trade Commission introduced an Informant Reward System to facilitate the detection of secret violations of competition law.[206] In June 2005 a first reward of 66.87 million won (about 63,700 USD) was paid to an anonymous informant who had provided decisive evidence in a welding rod cartel case, including the

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200 S.D. Hammond, as note 62 above, at 14.

201 As to the European Commission, see Opening exposé by Commissioner N. Kroes at the 11th EUI Competition Law and Policy Workshop (Florence, 2-3 June 2006), available at http://www.iue.it/RSCAS/Research/Competition/Index.shtml, forthcoming in C.D. Ehlermann and I. Atanasiu (eds), *European Competition Law Annual 2006: Enforcement of Prohibition of Cartels* (Hart Publishing, 2007), at 7, pointing out that the Commission's ex-officio investigations almost always trigger immunity and leniency applications in related geographical or product markets.

202 See above, section 'Lowering of the penalty level'.

203 See J. Rosenstok, as note 106 above, at 64.

204 See above, section 'Definition'.

205 See W.E. Kovacic, 'Private Monotoring and Antitrust Enforcement: Paying Informants to Reveal Cartels' (2001) 56 *George Washington Law Review* 766-797; C. Aubert, P. Rey and W.E. Kovacic, as note 93 above; G. Spagnolo, as note 97 above; A. Riley, 'Beyond Leniency: Enhancing Enforcement in EC Antitrust Law' (2005) 28 *World Competition* 377-400; and W.E. Kovacic, 'Bounties as Inducements to Identify Cartels', paper presented at the 11th EUI Competition Law and Policy Workshop (Florence, 2-3 June 2006), available at http://www.iue.it/RSCAS/Research/Competition/Index.shtml, forthcoming in C.D. Ehlermann and I. Atanasiu (eds), *European Competition Law Annual 2006: Enforcement of Prohibition of Cartels* (Hart Publishing, 2007).

206 See http://www.ftc.go.kr/data/hwp/rewardsystem.doc.

names of executives of the six cartel member companies, meeting places and details of agreement.[207]

It may be useful to distinguish between three different types of positive financial rewards or bounties, depending on whether the beneficiary is (1) a company that participated in the cartel, (2) an individual that could otherwise be penalised for its role in the cartel, or (3) another informant.

1. Rewards to companies that participated in cartels

If the beneficiary of the positive financial reward is a company that participated in the cartel, giving a positive financial reward comes down to granting more than 100 % corporate leniency; instead of merely reducing the penalty which would otherwise have been imposed on the company, or waiving it entirely, the cooperating company is given a positive financial reward. Such a system simply continues the logic of corporate leniency to a further point. Compared with the mere granting of immunity, or only a reduction of the penalty, such a system is likely to create stronger incentives to cooperate, as the benefit offered is bigger.[208] It however also increases the risks of negative effects, in that it further lowers the penalty level,[209] is likely to raise additional concerns in terms of retributive justice and equal treatment and may thus have negative moral effects,[210] and increases the risk of cartel members finding ways to exploit the leniency system in ways that facilitate the creation and maintenance of cartels.[211]

As mentioned above,[212] in situations where the same companies participate in a number of cartels in different markets, or repeatedly form cartels over time, one could imagine a system in which cartel participants take turns to apply for leniency, every time one of the cartels is (about to be) detected by the antitrust enforcement authorities. In jurisdictions where cartels are not only punished by fines on companies, but also by imprisonment of individuals, such a system is most unlikely to be attractive, but in jurisdictions without such individual penalties it might work.[213] Positive financial rewards obviously increase this risk. It would therefore not appear advisable for

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[207] See http://www.ftc.go.kr/data/hwp/informant_reward.doc.

[208] See above, text accompanying notes 103 and 104.

[209] See above, section ‘Lowering of the penalty level’.

[210] See above, section ‘Negative moral effects’.

[211] See above, section ‘Facilitation of the creation and maintenance of cartels’.

[212] Text accompanying notes 137 to 139.

[213] Idem; C. Aubert, P. Rey and W.E. Kovacic, as note 93 above, at 1250.

jurisdictions that do not have criminal penalties for individuals to grant positive financial rewards for companies that participated in cartels.[214]

2. Rewards to individual cartel offenders

If the beneficiary of the positive financial reward is an individual cartel offender, who could otherwise have been penalised for his role in the cartel (assuming thus a jurisdiction in which not only companies but also individuals are prosecuted for cartel offences), giving a positive financial reward comes down to granting more than 100 % individual leniency; instead of merely reducing the penalty which would otherwise have been imposed on the individual, or waiving it entirely, the cooperating individual is given a positive financial reward. Compared with the mere granting of immunity, or only a reduction of the penalty, such a system is again likely to create stronger incentives to cooperate, as the benefit offered is bigger.[215] It also increases the risk of negative effects, but less so than in the case of rewards to companies. Indeed, while it has an additional effect of lowering the penalty level,[216] and is likely to raise additional concerns in terms of retributive justice and equal treatment and may thus have negative moral effects,[217] there would not seem to be an increased risk of cartel members finding ways to exploit the leniency system in ways that facilitate the creation and maintenance of cartels.[218]

3. Rewards to non-offender informants

If the beneficiary of the financial reward is an informant who has not herself committed a punishable offence, the system is unrelated to leniency. It rather builds on one of the other methods than leniency which antitrust enforcement authorities traditionally use to collect intelligence and evidence of antitrust violations, namely to obtain information from volunteering third parties.[219] The reward adds an incentive to the other incentives, such as revenge, or a sense of civic duty, which informants may have to

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214 Compare with P. Buccirossi and G. Spagnolo, 'Optimal Fines in the Era of Whistleblowers', CEPR Discussion Paper No. 5465 (January 2006), available at http://www.cepr.org/pubs/dps/DP5465.asp, who precisely propose such rewards as an, according to those authors, superior alternative to the introduction of criminal penalties on individuals.

215 See above, text accompanying notes 103, 104 and 208.

216 See above, section 'Lowering of the penalty level'.

217 See above, section 'Negative moral effects'.

218 See above, sections 'Facilitation of the creation and maintenance of cartels' and 'Rewards to companies that participated in cartels'.

219 See above, section 'Improved collection of intelligence and evidence', in particular text accompanying notes 85 and 86.

volunteer information to the antitrust enforcement authority. I understand this to be the system which was introduced in Korea in 2005.[220]

[220] See above, text accompanying notes 206 and 207; see further W.E. Kovacic, as note 205 above, as to various possible objections to such a system and answers to these objections.