Cartel Whistleblowing: Toward an American Model?

§ 1. Introduction

In August 1993 the Antitrust Division of the US Justice Department adopted a new Corporate Leniency Programme (CLP). It differed considerably from the previous leniency programme in providing a high degree of transparency and certainty. The first member of a cartel to provide evidence would be granted amnesty from all US prosecutions, particularly, no criminal fines and no gaol sentences could be imposed. The new CLP has been a staggering success. Currently CLP applications are running at two per month. CLP applications have also provided key evidence in the Vitamins case. A case which First has described as ‘probably the most economically damaging cartel ever prosecuted under US antitrust law’. In that case the Antitrust Division obtained the highest fines against an undertaking in the 111-year history of the Sherman Act, $500 million from F. Hoffman La Roche.

Not surprisingly this US success has attracted considerable interest from antitrust authorities across the globe. Leniency programmes have been adopted or are about to be adopted in Ireland, Canada, the United Kingdom, Germany, Sweden, France and in the European Community. Some of these programmes, particularly the Canadian and UK programmes, closely follow the US model. Others such as the German and the 1996 EC

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4. OECD, Report on Leniency Programmes to Fight Hard Core Cartels, (Paris, 2001). 2. This paper uses the term ‘leniency’ in the way recommended by the authors of the OECD paper to describe programmes that provide any reduction in sanction in exchange for information. The terms amnesty or immunity will be used where there is a complete lifting of all regulatory or criminal sanctions.
Leniency Notices (hereafter the 1996 Notice) are less generous in what they offer and less certain and transparent. It is argued below that the lack of benefit to potential applicants, lack of certainty and transparency in the 1996 Notice, notwithstanding the differences in procedures and penalties between the Community and US antitrust laws, significantly undermines its effectiveness. Recently the European Commission published a new notice which represents a radical break with the 1996 Notice. The Commission Notice on Immunity from fines and reduction of fines in cartel cases (hereafter the Valentines Day Notice, or VDN) in particular provides for immunity even after investigations have commenced; provides a conditional guarantee of immunity upfront and abolishes the decisive evidence test. The Valentines Day Notice does deal with many of the criticisms levelled at the 1996 Notice. However, a number of issues of concern remain, including prosecution and citation of immunity applicants, and focus on documentary evidence, which is likely to undermine the effectiveness of the VDN. It is argued that the European Commission should amend its leniency programme directly along US lines. Furthermore, it is contended that the proposed replacement of Regulation 17/1962 provides an opportunity to include additional provisions which will enhance the operation of the newly adopted VDN.

This paper is divided into seven sections. Part two discusses the US model. It first outlines the US model itself and then assesses its impact. Part three provides a similar outline and impact assessment for the 1996 Notice. Part four provides an overall assessment of the Commission’s approach to leniency to date compared with the American model. Part five examines the Valentines Day Notice and part six, raises concerns as to how the Commission procedures fit with the evidence generated from leniency applications and the impact of decentralization. Part seven offers a conclusion and considers the future development of leniency programmes, principally the development of multi-state applications.

§ 2. The US Model

A. THE CORPORATE LE NIENCY PROGRAMME

Under the CLP, leniency is defined as not charging an undertaking criminally, the most significant effect of which is that the undertaking is not required to pay heavy criminal

7. The Notice will inevitably be dubbed the ‘Valentines Day Notice’ as point 28 of the VDN expressly provides for it to come into effect on 14 February 2002.
9. CLP.
fines to the Antitrust Division of the US Justice Department. Where a leniency application has been made under Part A of the CLP, leniency is also extended to all directors, officers and employees of the undertaking who admit their involvement in the illegal antitrust activity as part of the corporate confession. The most important effects of leniency for corporate officers is that they will not face individual criminal fines, nor gaol sentences. Leniency applications made under Part B are treated slightly different. With such applications the Division takes the view that the directors, officers and employees who come forward with their undertaking will be considered for leniency from criminal prosecution on the same basis as if they had approached the Division individually, in return the applicant undertaking reports illegal antitrust activity. The programme then sets out alternative sets of conditions under which leniency activity is made available.

1. **Leniency Before an Investigation has Begun**

Leniency will be granted to a corporation reporting illegal activity before an investigation has begun, if the following six conditions are met:

1. At the time the corporation comes forward to report the illegal activity, the Division has not received information about the illegal activity being reported from any other source;
2. The corporation, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity;
3. The corporation reports the wrongdoing with candour and completeness and provides full, continuing and complete co-operation to the Division throughout the investigation;
4. The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials;
5. Where possible, the corporation makes restitution to injured parties;
6. 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.

2. **Alternative Requirements for Leniency**

If a corporation comes forward to report illegal antitrust activity and does not meet all six of the conditions set out in Part A, above, the corporation, whether it comes forward before or after an investigation has begun, will be granted leniency if the following conditions are met:

10. See Part C of the CLP. Leniency extended to individuals under the CLP is distinct from individual leniency granted under the 1994 Leniency Policy for Individuals notice. This latter notice only applies to individuals who approach the Division on their own behalf, not as part of the corporate proffer or confession. Notice of August 10 1994, <www.usdoj.gov/atr/public/guidelines/lenind.htm>.
1. The corporation is the first one to come forward and qualify for leniency with respect to the illegal activity being reported;
2. The Division, at the time the corporation comes in, does not yet have evidence against the company that is likely to result in a sustainable conviction;
3. The corporation, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part of the activity;
4. The corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation that advances the Division in its investigation;
5. The confession of wrongdoing is truly a corporate act as opposed to isolated confessions of individual executives or officials.
6. Where possible, the corporation makes restitution to injured parties; and
7. The Division determines that granting leniency would be unfair to others, considering the nature of the illegal activity, the confessing corporation’s role in it, and when the corporation comes forward.

The Antitrust Division takes the view that the primary considerations for applying the seventh condition will be how early the undertaking comes forward, whether the undertaking coerced another party to participate in the illegal activity and whether the undertaking clearly was the leader in, or originator of, the activity. The burden of satisfying the seventh condition will be low if the undertaking comes forward before the Division has begun an investigation into the illegal activity. That burden will increase the closer the Division comes to having evidence that is likely to result in a sustainable conviction.

The procedure for obtaining leniency is also set out in the programme. If a Division official receives a request for leniency and believes that the undertaking qualifies for and should be accorded leniency, a favourable recommendation is forwarded to the Office of Operations, setting forth the reasons why leniency should be granted. The Director of Operations will review the request and forward it to the Assistant Attorney General for final decision. If the official dealing with the request recommends against leniency, counsel for the undertaking may seek an appointment with the Director of

11. The gravest concern for the Division would be to grant amnesty to an instigator. From a law enforcement perspective it would be catastrophic to grant the instigator amnesty while on the instigator’s evidence leads to the imposition of heavy criminal fines on the other members of the cartels and subject individual executives to gaol sentences. Furthermore, the Division would have a difficult if not an impossible time in any criminal trial. On cross-examination before a jury the instigating undertakings’ executives would be admitting that they set up and bullied executives from other firms to join the conspiracy. The jury would be faced with the instigator’s executives in the witness box, with their immunity from prosecution and in the dock, executives from firms who were bullied into taking part in the conspiracy facing heavy fines and gaol sentences. See Klawiter, ‘Corporate Leniency in the Age of International Cartels’, Antitrust (2000), 14.
12. CLP Section B, Final para. L.
Operations to make his or her views known. Such meetings are not available as a matter of right, but the opportunity to be heard is generally afforded to representatives of applicant undertakings.\footnote{CLP Section D.}

The text of the CLP leaves a number of issues in need of further clarification. In particular, how undertakings approach the Antitrust Division, the weight of the evidence required by the Division, which undertakings are barred by the CLP from obtaining leniency, the scope of the confidentiality obligation accepted by the Division, the scope of the obligation on undertakings to terminate their participation in the cartel and the restitution obligation.

Undertakings can approach the Division in a number of different ways. Some applicant undertakings simply gather all the information concerning the cartel in their possession and arrange a meeting with Division officials through their external counsel. This strategy is likely to be adopted when an undertaking is sure that there is no ongoing investigation by the Division and that there is little likelihood of any other undertaking making a leniency application. By contrast, where there may be other potential leniency applicants available and an undertaking has not completed its internal information gathering exercise, external counsel may arrange a meeting with Division officials to put down a ‘marker’ as soon as the cartel has been discovered. The marker indicates that the applicant undertaking intends to provide full disclosure in return for immunity. The undertaking will then be given a time period in which to make full disclosure. This may vary from several weeks, when the Division has no knowledge of the cartel, to a few days in the case of an ongoing investigation.\footnote{Hammond, \textit{When Calculating the Cost and Benefits of Applying for Corporate Amnesty, How Do You Put A Price Tag On An Individual’s Freedom?}, 3, paper presented at the National Institute on White Collar Crime conference, San Francisco, California, March 2001. Available from the Division website.} During this time period, no other member of the cartel can jump the queue and obtain leniency for itself.\footnote{Spratling, \textit{In Competition}, (Sweet and Maxwell, 1999), 2.}

A further problem for any undertaking contemplating making an application under the CLP is that it cannot be sure whether there is an on-going investigation which is already generating sufficient information to prosecute, hence making any leniency application worthless. To deal with this problem the Division has developed the practice of permitting counsel to approach it on a ‘no names’ basis. Division officials ask sufficient questions to build up a profile of the industry. The officials will find out from counsel the broad field in which the undertaking is involved and where the major manufacturers

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are located. When the Division believes it has a sufficiently focused profile, a check will be made to see if any of the current Division investigations fit the profile.16

Under the CLP there is no evidentiary burden requirement, such as providing decisive evidence, to be reached before amnesty is obtained.17 Spratling explains that the Division merely requires that the applicant undertaking comes forward and tells what it knows about the cartel. As long as it discloses all the documents it has in its possession relating to the cartel and all its knowledge of the cartel’s activities, and does not falsely implicate other undertakings it will receive amnesty.18 Often such evidence from amnesty applicants will be sufficient to convict the other members of the cartel. Even in cases where there is a lack of convictable evidence, whatever evidence that is provided may lead to evidence which will ensure conviction. Hammond notes that some of the best results under the CLP were achieved with the help of applicants who were not able to provide direct evidence of the activities of other members of the cartel.19 For example, in one case a peripheral player in a cartel who did not attend many meetings, did not have decisive evidence of the cartel, but was nevertheless able to produce sufficient evidence to support search warrants. The execution of those search warrants did lead to evidence which resulted in the conviction of other members of the cartel.20

At first sight the CLP bars a significant number of potential applicants from the programme. In particular, the CLP appears to not permit the leaders or originators of a cartel to benefit from its provisions. However, the Division has pointed out that the text of the programme refers to the leader or the originator of the cartel. It has indicated that providing a cartel member was not the leader or the originator, it can apply for leniency. Hence, in a cartel originated by two undertakings, which other undertakings joined later, either one of the two originator undertakings could apply for leniency. It appears therefore that as long as an undertaking did not coerce other members to join the cartel, and was not the sole leader or originator it can apply for leniency.21

A further issue for the consideration of potential amnesty applicants is the Division’s approach to what counts as termination of participation in the cartel. Termination does not require a public announcement as this may impair further investigation of the cartel by the antitrust authorities. Nor does it require notice of termination to the other members of the cartel. It is sufficient to terminate participation by reporting the illegal

16. Ibid., 2. In order to further reassure nervous undertakings, the Division, ‘studiously avoids obtaining information that would allow us reverse engineer or make an educated guess as to the identity of the no names enquirer, because this would discourage applications’.
activity to the Division and refraining from further participation, subject to continued participation with the Division’s agreement.22

A further issue for undertakings, especially small, closely-held undertakings is when can the undertaking be said to have ‘discovered’ the cartel. In larger undertakings it is possible that senior managers and board members may have no knowledge of the cartel. However, in a smaller undertaking, the board members may have directly participated in the cartel. They can be said to have discovered the cartel when their undertaking became a member of the cartel. Hence it would be difficult to comply with the CLP requirement to promptly terminate the undertaking’s part in the activity on discovery of the cartel. However, the Division takes the view that an undertaking will be deemed to have ‘discovered’ the cartel when either the board of directors or the undertakings in-house counsel is first informed of the cartel. Consequently, the fact that senior executives took part in the cartel will not necessarily bar the undertaking from obtaining amnesty. Therefore, for the purposes of a leniency application, a smaller firm’s board can be formally informed of the cartel, even when all the members of the board participated in the cartel. The firm can then take action to cease its cartel activities and inform the Division.23

The CLP requires that restitution be made to victims of the applicant undertaking’s cartel activities where possible. Restitution will only be excused where as a practical matter it is not possible. For example, it might be excused if the applicant is in bankruptcy and prohibited by a court order from undertaking additional obligations. Payment of full restitution may also not be required if it would jeopardize the undertaking’s continued viability. The Division requires that all reasonable efforts be made to its satisfaction. At a point before amnesty becomes final, the Division will indicate to the applicant that it is satisfied with its attempts at restitution.24 In most cases there is little difficulty in satisfying the restitution requirement. In the US, an immunity applicant faces the prospect, if not certainty, of a treble damages suit. Civil suits are the usual means of satisfying the CLP’s restitution requirement.25

Finally, it is the Division’s policy under the CLP to treat the identity of the amnesty applicants as confidential. It will not disclose the identity of an applicant undertaking unless the applicant has previously disclosed its application or permission has been obtained from the applicant for disclosure, or if a court order requires the Division to disclose.26 Confidentiality is an important inducement for applicants, as it limits both

25. OECD, Report on Leniency Programmes, para 29. Although the CLP’s restitution obligation only requires the payment of single not treble damages.
the potential for retaliation in other jurisdictions and the likelihood that antitrust authorities in other jurisdictions will obtain evidence of the undertaking’s involvement in the cartel.27

B. THE IMPACT OF THE CLP

The Antitrust Division is enjoying the greatest enforcement success in the history of the Sherman Act, both in terms of the numbers of convicted defendants, the size of the cases, and the size of the fines. By March 2001 the Division had obtained fines of over $10 million in each of 33 cases since 1995. Less than a decade ago the largest corporate fine ever imposed for a single Sherman Act count was $2 million. Almost all the cases involved international cartels having a significant impact on US commerce.28 Most notable were the Vitamins cartel, in which F. Hoffman La Roche paid the largest fine ever imposed in a criminal prosecution, $500 million, co-conspirator BASF AG paid $225 million; SGL Carbon in the Graphics Electrodes cartel paid $135 million fine and co-conspirator UCAR International paid $110 million; and in the Lysine cartel Archer Daniels Midland paid $100 million. Since the beginning of the 1997 fiscal year the Division has obtained over $1.7 billion in criminal fines.29

The impact of the leniency programme on the success of recent Division convictions has been critical. As Hammond points out,

over the last five years, the Amnesty Program has been responsible for detecting and prosecuting more antitrust violations than all our search warrants, consensual-monitored audio or video tapes and co-operating informants combined. It is unquestionably, the single greatest investigative tool available to anti-cartel enforcers.30

OECD report underscores the importance of confidentiality. It points out that leniency applicants run the serious risk of commercial or even personal retaliation. OECD, Report on Leniency Programmes, para 40.

27. However, once knowledge of the prosecution enters the public domain, foreign antitrust authorities are likely to commence at least preliminary investigations to see whether there is an effect on their commerce. Furthermore, they may have been tipped off by another authority. While leniency information must remain confidential, information obtained as a result of information from the leniency applicant may subject to national confidentiality rules, be able to be transferred to other authorities. See OECD, Report on Leniency Programmes, para 49.


Since the new CLP was introduced in 1993 the Division has received more than 20 leniency applications per year. In the last two years it has led to the conviction of over 30 defendants and the payment of well over $1 billion in fines. Because of the Division’s policy of refusing to disclose the identity of an applicant unless required to do so by a court order in connection with litigation, it is difficult to identify all the cases in which the CLP has played a part. A number of important cases can however be identified. In Marine Construction and Graphite Electrodes, convictions were obtained and fines paid in both cases as a result of evidence obtained under the leniency programme. In Graphite Electrodes the Antitrust Division secured the largest fine ever levied on an individual, $10 million, from the chief executive of SGL Carbon.

Most dramatically of all, in the 1999 fiscal year, evidence obtained under the CLP assisted in securing the largest fines ever obtained in a cartel investigation. F. Hoffman La Roche and BASF alone paid respectively $500 and $225 million in criminal fines in the Vitamins case, for their part in what the then Assistant US Attorney General Joel Klein referred to as ‘the most pervasive and harmful criminal antitrust conspiracy ever uncovered’. The importance of the CLP to the Vitamins case is underscored by the observation that the Division had been investigating the cartel for more than two years before Rhone-Poulenc came forward with information that ‘cracked’ the case. As the authors of the recent OECD leniency programmes report observe, if it were not for Rhone-Poulenc’s information the outcome of the Division’s investigation would have been uncertain.

The impact of the CLP is reinforced by the ‘rollover effect’. This is where the investigation into one cartel provides leads in the investigation of another cartel. Currently there are over 30 sitting grand jury investigations into international cartels. Over half of these investigations were initiated as a result of information obtained in earlier cartel investigations. In response to the rollover effect, the Division introduced Amnesty Plus to provide undertakings with further incentives to disclose information on cartels. Under this extension of the CLP, undertakings under investigation are

encouraged to consider whether they qualify for leniency in other markets in which they operate. Amnesty Plus interacts well with the ‘first through the door’ rule. For example, a cartel may be operating in the US sprockets market. A member of the sprockets cartel applies for leniency and is granted total amnesty from all criminal fines. The other members of the cartel cannot obtain such an amnesty. However, if one of the other members of the sprockets cartel is involved in a cartel in the US widgets sector, it can obtain total amnesty for the widgets cartel and, under the Amnesty Plus programme, it can also obtain a significant discount on the fines it would have otherwise paid as a result of its membership of the sprockets cartel.40 Furthermore, there is a major downside for undertakings and individual executives if they do not report the existence of other cartels in which they participate. If these cartels are later discovered by the Division, it will ask the sentencing court to consider the non-reporting of the cartel as an aggravating factor both in respect of the size of the criminal fines and the length of gaol sentences that may be imposed.41

In effect the CLP acts as a corrosive agent on cartels. Cartel members are painfully aware that only the first one to break ranks obtains total amnesty. For example, in the Graphite Electrodes cartel the second undertaking through the Division’s front door paid a $32.5 million fine; the third undertaking paid $110 million and the fourth $135 million.42 Particularly where the Division has initiated an investigation, all the members of the cartel are aware that any one of them may go to the Division and obtain amnesty leaving all the others to face criminal fines and their executives, gaol sentences. The danger of whistleblowing is likely to be reinforced if the cartel members are not profiting equally, particularly if one party feels cheated. Undertakings may have other reasons for destabilizing a cartel. For example, a takeover may have occurred and the new management may disapprove of cartel activity.43 Alternatively, the undertaking may have competitive advantages that cannot be properly exploited while the cartel remains in existence.44

As a result of the advantages of the CLP to any cartel member who wants to split, the other cartel members have to keep a sharp and constant lookout for signs that a fellow cartel member is considering the whistleblowing option. If one member begins to behave distantly toward the cartel, perhaps by sending only junior executives along to meetings; not sharing confidential business information with other members of the

40. Spratling, Making Companies an Offer, 7.
42. Hammond, Cost and Benefits of Amnesty, 7.
43. A classic example of this practice is the whistleblowing by Christie’s new management of the price-fixing arrangements between it and Sotheby’s in respect of the international fine art market. See ‘A Very French Coup as Christie’s serves up Sotheby’s Head’, Sunday Business Post, 27 February 2000.
44. Which will be reinforced if the executives of the other undertakings are busy trying to deal with Antitrust Division investigations and civil suits, and shareholder and press inquiries, rather than focusing on the business.
cartel or simply not turning up at cartel meetings, the question will arise in the minds of the other cartel members whether this behaviour is a result of the increasingly reluctant member of the cartel entering the CLP. The fear that one member of the cartel has either entered the programme or is about to generate a ‘race to the courthouse’ where an ‘every undertaking for itself’ attitude develops among the cartel members.\textsuperscript{45} There have been cases where only a few hours have separated leniency applications from members of the same cartel.\textsuperscript{46}

The greatest disincentive to making a leniency application is the threat, almost certainty, of a treble damages suit. Even though the leniency applicants identity will remain confidential, it will soon be clear which undertaking has amnesty.\textsuperscript{47} Often the costs of settling the triple damages actions permitted under the Sherman Act outweigh the size of the criminal fines. For example in the \textit{Vitamins} case, six members of the cartel paid a $1.05 billion settlement to direct and $335 million settlement to indirect purchasers. These figures do not represent the final settlements, negotiations with some parties are ongoing.\textsuperscript{48} While the threat of civil suits remains a strong disincentive, it is overridden for most potential applicants by the dynamic of the CLP. Undertakings cannot make a simple cost-benefit analysis. They do not control the situation. If they do not apply for amnesty and another party does, the reluctant undertaking will face a triple damages suit in any event, plus the criminal fines and in all likelihood gaol sentences for its executives. In addition, a party who has amnesty is not subject to an investigation, so there is no criminal case, no state documents or decision against it.\textsuperscript{49} Hence it is more difficult for victims to sue the amnesty applicant. Consequently the amnesty applicant may be able to obtain better settlement terms than the other members of the cartel.

An assessment of the impact of the CLP must be put in the context of other developments which significantly enhanced its effectiveness, in particular, the re-orientation of the Division’s focus from domestic cartels to international cartels in the mid-1990s and the realization of the potential of the Criminal Fines Improvement Act 1987. Until the mid-1990s, the focus of the Division was domestic. McDavid referred to

\textsuperscript{45} Or in the choice words of \textit{Forbes Magazine}, ‘If someone in your company has been conspiring with competitors to fix prices, here’s some sound advice. Get to the Justice Department before your co-conspirators do. Confess and the US Department of Justice will let you off the hook. But hurry! Only one conspirator per cartel’, Janet Novack, ‘Fix and Tell’, \textit{Forbes Magazine} (1998), 46. Quoted by Spratling, \textit{Making Companies an Offer}, 1.

\textsuperscript{46} Hammond, \textit{Cost and Benefits of Amnesty}, 2.

\textsuperscript{47} There are a number of ways in which the identity of the amnesty applicant may enter the public domain. The applicant may decide to reassure shareholders that it is not going to be the subject of antitrust charges, it may wish to announce settlement with victims of the cartel to also reassure the markets and it may be required under securities law to disclose an amnesty application. Aside from voluntary or regulatory disclosure, the lack of evident prosecution and the attempts by the applicant to settle on better terms than the other members of the cartel may well result in the applicants identity leaking into the public domain.

\textsuperscript{48} First, 68 \textit{Antitrust Law Journal} 3 (2001), 718.

\textsuperscript{49} Klawiter, \textit{Antitrust} (2000), 15.
it as all ‘ready-mixed concrete, asphalt, school buses and school milk programs’. Under the then Assistant Attorney General, Anne Bingman, and Gary Spratling, Deputy Assistant Attorney General, the focus shifted. They took the view that international cartels were likely to have the greatest adverse impact on American business, given that such cartels affect larger volumes of commerce and geographic areas and were thereby likely to cause greater injury than domestic cartels.

The Sherman Act currently provides for only a maximum fine of $10 million. However, the Criminal Fines Improvement Act 1987 provides for an alternative fine for all federal pecuniary offences which is equal to twice the pecuniary gain derived from the crime or twice the pecuniary loss to the victims. Only in 1997 did the full impact of the alternative sentencing provisions make itself felt in the antitrust field when Archer Daniels Midland was fined $100 million. In practice, the actual gain or loss is rarely calculated. Under the US Sentencing Guidelines, an alternative calculation of 20% of the volume of the affected commerce exists. This is a base value which can be raised or lowered by a series of factors. As Denger has pointed out, the impact of the alternative sentencing regime is to significantly increase the level of potential corporate exposure to hundreds of millions, if not billions, of dollars in criminal fines. In addition, the Division is now more willing to seek gaol sentences for individual executives. Approximately 50 executives were gaolled for antitrust and related offences in the 1999 and 2000 fiscal years. This represents more than the total number of individuals gaolled in the previous five years combined.

The new international focus of the Division, together with the carrot of a clear and certain leniency regime, and the stick of extremely heavy financial and gaol sentences provide the basis for US success in prosecuting international cartels.


52. US Sentencing Guidelines, USSG: 8C2.4(c).

53. The major factors tending to increase the fine are size of organization; recidivist behaviour; violation of a judicial order and obstruction of justice. Factors tending to decrease the fine are effective compliance programmes and co-operation. USSG ibid.


§ 3. The 1996 EC Leniency Notice

A. THE EC NOTICE ON THE NON-IMPOSITION OR REDUCTION OF FINES IN CARTEL CASES (THE EC NOTICE)

The success of the US programme inspired the Competition Directorate General of the European Commission to follow the Antitrust Division’s example. Therefore, in July 1996, the Competition Directorate General adopted its own leniency programme in the Commission Notice on the Non-Imposition or Reduction of Fines in Cartel Cases. The 1996 Notice provides for three categories of leniency. Firstly, the non-imposition of a fine or a very substantial reduction in the fine. Very substantial is deemed to be at least 75%. Secondly, a substantial reduction in fine, deemed to be between 50 and 75%. Thirdly, a significant reduction in the fine that can be imposed, between 10 and 50%.

1. Non-Imposition of a Fine or a Very Substantial Reduction in its Amount

An enterprise which:
   (a) informs the Commission about a secret cartel before the Commission has undertaken an investigation, ordered by decision, of the enterprises involved, provided that it does not already have sufficient information to establish the existence of the alleged cartel;
   (b) is the first to adduce decisive evidence of the cartel’s existence;
   (c) puts an end to its involvement in the illegal activity no later than the time at which it discloses the cartel;
   (d) provides the Commission with all the relevant information and all the documents and evidence available to it regarding the cartel, and maintains continuous and complete co-operation throughout the investigation;
   (e) has not compelled another enterprise to take part in the cartel and has not acted as an instigator or played a determining role in the illegal activity, will benefit from a reduction of at least 75% of the fine, or even from total exemption from the fine that would have been imposed if it had not co-operated.

2. Substantial Reduction in a Fine

Enterprises which both satisfy the conditions set out in Section B, points (b) to (e) and disclose the secret cartel after the Commission has undertaken an investigation ordered by decision on the premises of the parties to a cartel which has failed to provide sufficient grounds for initiating the procedure leading to a decision, will benefit from a reduction of 50 to 75% of the fine.

56. 1996 Notice.
3. **Significant Reduction in a Fine**

1. Where an enterprise co-operates without having met all the conditions set out in Sections B or C, it can benefit from a reduction of 10 to 50% of the fine that would have been imposed if it had not co-operated.

2. Such cases may include the following:
   - before a statement of objections is sent, an enterprise provides the Commission with information, documents or other evidence which materially contribute to establishing the existence of the infringement;
   - after receiving a statement of objections, an enterprise informs the Commission that it does not substantially contest the facts on which the Commission bases its allegations.

Unlike the detailed procedures set out in the CLP, the 1996 Notice provides no procedures as such for potential leniency applicants. Potential applicants or their designated representatives are simply requested to contact the Directorate General Competition.

There are several points that are not immediately apparent from the text of the 1996 Notice.

Firstly, both the 1996 Notice\(^{57}\) and Kerse\(^{58}\) make the point that the Commission is bound by the general principles of law in applying the 1996 Notice,\(^{59}\) and in particular by the principle of legitimate expectations. It is true that technically the 1996 Notice generates legitimate expectations, which an undertaking can rely on. If an undertaking complies with all the provisions of the 1996 Notice in respect of section B, C or D and has provided evidence which leads to the conviction of a cartel, the Commission would be obliged to provide at least a significant discount on any fine it would otherwise have imposed on the applicant undertaking.\(^{60}\) However, given the broad nature of each of the three fine bands in the 1996 Notice, the Commission is still left with considerable discretion. Secondly, the applicant cannot negotiate with the Commission. The final

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57. 1996 Notice, para E3.
59. The CFI in *Cartonboard* considered the issue of whether the rule against self-incrimination was infringed by the 1996 Notice. It rejected this argument. It held the offer of a discount in return for co-operation with the Commission does not infringe the rights of the defence or Article 6 of the European Convention on Human Rights (hereafter ECHR). Case T-311/94 *BPB de Eendracht v. Commission* [1998] ECR II-1129.
60. Clearly, given the range of discounts on offer, a considerable measure of discretion is left in the hands of the Commission. Query, therefore the impact of the doctrine of legitimate expectations. It is submitted that only in a very clear cut case for example, where an undertaking had provided information concerning a cartel in a sector where the Commission had no knowledge that a cartel was operating could an undertaking obtain the highest level of discount or non-imposition of a fine. For a discussion of the doctrine, see Hartley, *The Foundations of European Community Law*, (Oxford, 1998), 245.
decision is taken by the college of Commissioners. The applicant must await the final decision to find out whether a fine has to be paid, and if so, how much.

Thirdly, even if an applicant undertaking provides evidence of a cartel that the Commission is entirely unaware of and provides full co-operation in every particular, even though no fine is imposed it could still face the full force of the Commission’s contentious procedure. Hence, an applicant who is a prime candidate for a fine cancellation under section B faces the issuance of a statement of objections, the application of the administrative procedure and ultimately the publication of details of its involvement in the cartel in the final prohibitory decision.

Fourthly, the EC Notice is narrower in scope than the CLP. Under the CLP only undertakings which coerce other undertakings into entering a cartel or the sole leader or instigator of the cartel, are prohibited from obtaining leniency. The EC Notice, by contrast, is restricted to those cartel members who can show that they were not a leader or an instigator.\textsuperscript{61}

Fifthly, as Joshua\textsuperscript{62} and the authors of the OECD Leniency Programmes report\textsuperscript{63} have pointed out, the Commission requirement of decisive evidence focuses on documentary evidence. The Commission does not have the power to take or compel statements. It relies, particularly for section B, on the production of contemporaneous cartel documentation. In addition, applicants are usually required to produce a detailed corporate statement of their involvement in the cartel.\textsuperscript{64} Sixthly, section D provides for a very wide band of between 10 and 50% fine reduction. This is because paragraph two is itself divided into two very different sub-paragraphs. The first sub-paragraph provides for active co-operation with the Commission, assisting it with the provision of evidence to prove its case. The second sub-paragraph deals with the case where an undertaking merely agrees not to contest the initial findings of the Commission in the statement of objections.

Seventhly, undertakings have to be aware that even if the Commission grants a reduction, that is not necessarily the end of the matter. The EC Notice reserves the right of the Commission to ask the European Court of First Instance to impose a higher fine when an undertaking which obtained a reduction under section D2(b), by agreeing not to contest the final decision subsequently challenges the decision before the CFI. It should also be noted that by virtue of article 229 of the EC Treaty and article 17 of

\textsuperscript{61} It is possible that this restriction is extremely important in reducing the impact of the 1996 Notice. Effectively, the narrow scope of the Notice means that in a cartel set up by two or more undertakings, everyone in the cartel will know that at least those undertakings will not be applying for EC leniency. The result is to weaken the corrosive effect of the Notice.


\textsuperscript{63} OECD, \textit{Report on Leniency Programmes}, para 16.

\textsuperscript{64} Joshua, \textit{Antitrust} (2000), 22-23.
Regulation 17/1962, the CFI can of its own volition, increase any fine that has been reduced or cancelled by the Commission. Finally, the EC Notice provides no protection from civil liability. It places no restrictions on plaintiffs seeking to initiate actions for damages on the basis of an infringement of articles 81(1) or 82 EC Treaty in the national courts against undertakings which have benefited from its provisions. Nor does the Commission believe itself to be bound to ease the legal obligations of applicant undertakings in other jurisdictions.

B. THE IMPACT OF THE 1996 NOTICE

The 1996 Notice appears to have had, until at least recently, only a relatively minor impact in comparison with the CLP. Since it’s coming into force the Notice has only been applied sixteen times, eight of which occurred only in the last six months of 2001. However, its relatively infrequent application may be due in part to the nature of Community competition procedures. The investigation and contentious procedures can take several years to complete, and application of the Notice is only apparent when the final prohibition decision is published. It may therefore be the case that the willingness of undertakings to apply for leniency under the 1996 Notice is greater than is first apparent. The thirteen cases are Alloy Surcharge, British Sugar, Pre-Insulated Pipes, Greek Ferries, Seamless Steel Tubes, FETTCSA, Amino Acids(Lysine), SAS/Maersk Air, Graphite Electrodes, Sodium Gluconate, Vitamins, Citric Acid, Zinc Phosphate, Belgium Brewers, Luxembourg Brewers, and Carbonless Paper.

In respect of the first eight cases covering a period from 1996 to mid-2001 there was no 100% reduction in section B and only one application in respect of section C. That case concerned Showa Denko in Graphite Electrodes who received a 70% reduction, having been the first undertaking to co-operate and tender decisive evidence of the cartel to the

65. It should be noted however, that in the history of EC competition case law to date, neither the ECJ or the CFI have ever increased a fine.
71. Case IV/35.860, Decision of 8 December 2000, not yet published.
75. Commission Press Release, IP/01/1355, 2 October 2001. No decision has been published yet.
77. Commission Press Release, IP/01/1745, 5 December 2001. No decision has been published yet.
78. Commission Press Release, IP/01/1797, 11 December 2001. No decision has been published yet.
80. Commission Press Release, IP/01/1740, 5 December 2001. No decision has been published yet.
81. Commission Press Release, IP/01/1892, 20 December 2001. No decision has been published yet.
The highest reductions in section D were under section D1, for cooperation not covered by sections B and C, and D2(a) for active cooperation. Tate and Lyle received a reduction of 40% under section D1, as did Cheil and Kyowa in Lysine. The highest reduction of 50% (the maximum) under Section D1 was for Ajinomoto in Lysine, who although the ringleader, did provide decisive evidence of the cartel. Another Lysine cartel member, Sewon was also granted a 50% reduction given the early date and extent of the evidence it provided on the cartel. Significant reductions were also granted under section D2(a) for active cooperation before the issuance of the statement of objections. Notably ABB in Pre-Insulated Pipes received a reduction of 40% for its relatively early co-operation and the provision of information relating to the origins of the cartel and the cartel activities. Vallourec in Seamless Steel Tubes, received an identical reduction for a mix of active and passive cooperation in not contesting the statement of objections, as did Usinor and Avesta in Alloy Surcharges, although in the case of those two undertakings, their extensive cooperation came only after the issuance of the statement of objections. The majority of reductions in this category, however, were for mere none-contestation of the facts set out in the statement of objections. Most of the fine reductions for mere none-contestation fell within the range of 10-20%.

At first sight the eight applications of the Notice in the second half of 2001 suggest that some firms at least are being incentivised to approach sufficiently early and with sufficient evidence to obtain immunity or very high reductions. In Sodium Gluconate Fujisawa approached the Commission before it carried out surprise inspections under Article 14(3). As the investigation had already commenced it could not obtain a 100% reduction. However, as Fujisawa did come in early and provided decisive evidence it managed to obtain a reduction under section B and, at that time, the highest reduction so far of 80%. In Vitamins Aventis (formerly Rhone Poulenc) became the first undertaking to obtain a 100% reduction under section B in respect of the cartel for

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82. Commission, Graphite Electrodes Cartel.
83. In the subsequent case before the CFI, the Court reduced Tate & Lyle’s fine by a further €1.4 million. The Court held, contrary to the Commission’s application of the Leniency Notice, that Tate & Lyle had maintained continuous and complete co-operation with DG Competition. For a discussion of the issues involved in the case see Case T-202/98, T-204/98 and T-207/98 Tate & Lyle PLC and Others v. Commission, 12 July 2001, not yet reported, paras 158-167.
85. Lysine.
86. Pre-Insulated Pipes.
87. Alloy Surcharges.
88. It should be noted that it appears to be possible to obtain additional reductions under different headings. In British Sugar, Tate and Lyle obtained a reduction under one heading of the EC Notice: in that case, 40% under section D1, and then add another 10%, for non-contestation of the facts set out in the statement of objections under section D2(b).
89. Castellot, EC Competition Policy Newsletter, 14.
90. Sodium Gluconate.
vitamins A and E. It is also noteworthy in *Vitamins* that but for the application of the 1996 Notice the fines on Hoffman La Roche and BASF would have been extremely high. Both undertakings co-operated at an early stage of the investigation and produced detailed information on the operation of the cartel. They received a 50% reduction in the fine they would have otherwise paid. In particular, without the 50% reduction Hoffman La Roche’s fine of €462 million would have been €924 million. Interbrew in *Luxembourg Brewers* became the second undertaking to receive amnesty under section B. Also noteworthy was the fine cancellation obtained by the South African firm Sappi in *Carbonless Paper*. It applied to the Commission in the autumn of 1996 before any investigation into the cartel had commenced and was able to provide decisive evidence of its operation. *Citric Acid* saw another application of section B, with a reduction of 90% for Cerestar, who provided decisive evidence of the cartel but only after the Commission had opened investigations. As with the earlier cases the Commission also provided section D reductions to other undertakings of between 10% and 20% for co-operation and non-contestation of the Statement of Objections.

The recent run of applications of the 1996 Notice, the high reductions and three fine cancellations under section B, together with some very high fines and very high reductions suggest that the Notice was finally coming into its own. Furthermore, as suggested above the initial slow start in comparison with the CLP is explicable by the nature and length of Commission investigative and contentious procedures. However, on closer examination the picture does not look so rosy. In the first place, even taking into account the latest cases, the 1996 Notice has achieved only resulted in sixteen cases in six years. It is true that the Commission investigations can take a considerable length of time, but by the end of 2001, if the 1996 Notice was performing anywhere near the US level a significantly larger number of applications and subsequent prohibition decisions of cartels would be expected.

In addition, there is the derivative issue. A number of the thirteen cases, notably *Lysine*, *Graphite Electrodes*, *Vitamins*, *Citric Acid* and *Sodium Gluconate* were originally cases that were exposed as a result of the application of the CLP. Clearly once these cartels had been exposed in the United States, and the details of the scope of their operations found their way into the public domain, the Commission was likely to open investigations in the European Union. In order to reduce any potential fines in Europe,

91. It is interesting to note that the Commission took the view that although Aventis had not disclosed its passive involvement in the cartel in respect of vitamin D3, that non-disclosure did not undermine its immunity application in respect of vitamins A and E. The Commission appear to be willing to separate out the operations of the cartel in different product markets, which to an outside observer appear to be one operation. Aventis was fined €5.04 million in respect of its participation in the ‘vitamin D3 cartel’.

92. *Carbonless Paper*.
93. *Citric Acid*.
94. See in particular, *Citric Acid*, role of Roche; *Carbonless Paper*, in respect of Carrs, MHTP and Zanders and *Zinc Phosphate* Britania, Heubach and SNCZ.
members of these US exposed cartels were bound to seek whatever fine reductions were available in Brussels. It is open to question therefore whether the 1996 Notice created any initial incentive at all for the undertakings in those cartels to come forward and provide evidence to the Commission.

It could be argued in fact that aside from providing a greater degree of transparency in setting out the rewards for co-operation, the 1996 Notice has made little or no impact on the enforcement of Community competition law.95 Such a judgment would be unfair. As Reynolds has pointed out, the Notice has made a noticeable difference to the behaviour of cartel members faced with a Commission investigation. Whereas before the Notice, the undertakings under investigation would present a unified defence against the Commission, the Notice has encouraged greater calculation. Each undertaking can now obtain benefits by revealing all at an early stage in the investigation.96 Furthermore, there may also be undertakings, such as Sappi in *Carbonless Paper*, who are willing to come forward and provide evidence in return for either a 100% reduction or a very high reduction under Section C. However, it is clear that they are likely to be far fewer of them on the ground than applicants under the CLP.


It could be argued that criticism as to the success of the 1996 Notice, compared with the CLP does not take account of the different regulatory context. Participation in cartels in the United States is a criminal offence, this is not the case in Community law,97 nor largely in the competition laws of the Member States.98 The incentive therefore to whistleblow and obtain immunity is therefore far greater in the US. Clearly the prospect of gaol sentences provides a major incentive to potential whistleblowers. However, the approach of focussing on the criminal law nature of cartel infringements in the United States overlooks the advantages that could accrue to potential whistleblowers given the regulatory context in the European Community. In particular, while executives are incentivized to whistleblow by the threat of gaol sentences; from a corporate, rather than a personal perspective there is a major disincentive to make an application under the CLP, the prospect of treble damages litigation, which can be as large or even larger than the fine payable to the Justice Department. By contrast in the European

95. As Kerse indicates mitigation of the fine in return for co-operation from undertakings suspected of infringing the EC competition rules is not a new practice. Kerse, para 7.35.
97. Article 15 (6), Regulation 17/1962.
98. According to the OECD few Member States have criminal sanctions for competition law. France has criminal fines, Germany makes bid-rigging a criminal offence and Ireland applies criminal law to price-fixing, market sharing and bid rigging. Criminal liability pertains also in Austria. See OECD, *Hard Core Cartels*, (Paris, 2000), Annex A.
Community, the prospect of antitrust litigation is negligible. Hence, so long as the fines are sufficiently heavy there is a major incentive to whistleblowing, as the potential whistleblowing undertaking can obtain immunity without facing the prospect of significant damage to shareholders as a result of payment of heavy damages in antitrust litigation.

Effectively the Community regulatory context provides an opportunity for a clean break for a whistleblowing undertaking, given the existence of a well-drafted EC leniency programme. By contrast such a regulatory ‘clean break’ is simply not available in the US, given the likelihood, if not certainty of antitrust plaintiffs seeking treble damages.

However, it is open to question whether the 1996 Notice can be said to have constituted a well-drafted leniency programme. There are several reasons for doubting the Notice’s overall effectiveness. Firstly, the requirement that potential whistleblowers provide decisive evidence placed a very high demand on undertakings. An undertaking could not be sure whether its evidence was sufficient to meet the evidential standard. The contrast with the United States is stark. Under the CLP, all that is required is that the undertaking tells everything it knows about the cartel. This low evidential requirement has significant benefits consequences. It increases the potential pool of whistleblowers, not only the major players in the cartel who have detailed decisive evidence can apply, but also the peripheral players in the cartel who may not have access to such evidence can also apply under the CLP. The realization by the major players that the CLP’s low


100. Penalties need only be significant they need to be applied. If they are applied too infrequently then there will be little incentive for undertakings to come forward. OECD, *Report on Leniency Programmes*, 3. For example, the Irish Competition Authority has recently published a proposal to adopt a leniency programme. However, at about the same time it suffered a major exodus of staff into the private sector undermining its ability to carry out even its basic statutory responsibilities. In those circumstances with minimal resources to carry out its responsibilities any leniency programme is going to be difficult to get off the ground, no matter how well drafted or high the penalties are. See Irish Competition Authority, *Annual Report 2000*, (Stationary Office, Dublin, 2001), 1-5.

101. It is not just the prospect of the payment of treble damages, executives are likely to be tied up in extensive corporate litigation as a result, making it difficult for them to effectively manage the business. OECD, *Report on Leniency Programmes*, para 29.

102. It could be argued that a ‘clean break’ is problematic in the European Community, even if actions in national courts are unlikely, as a result of parallel actions by national competition authorities (NCAs). However, as explained below in Part VI, as a matter of practice and law, the prospect of multiregulator litigation is unlikely.
The evidential requirement could mean that a peripheral player may obtain immunity, leaving the major players out in the cold, creating a significant destabilizing factor in the operation of the cartel. Furthermore, in practice, evidence from peripheral players who could not meet a decisive evidence standard has proved crucial in many US cartel cases.103

Secondly, an undertaking, even one providing cold whistleblowing evidence of a cartel the Commission knew nothing about, would not be told immediately whether it would receive immunity or only a reduction. That undertaking would in fact have to wait until the Commission finally took its decision. Commission officials could not apparently bind the hands of the college of Commissioners.104 The lack of knowledge, for several years, as to what the outcome of a leniency application might be is likely to have proved a major deterrent for many undertakings. Executives of a potential whistleblower were faced with balancing unquantifiable leniency from the Commission against certain hostility, loss of co-operation and commercial aggression from other members of the cartel. Thirdly, even in the case of an undertaking providing cold whistleblowing information, the Commission would still initiate the contentious procedure against the whistleblower and record its involvement in the final prohibition decision. The Commission therefore made it easier for undertakings injured by the cartel to bring civil actions against the whistleblower undertaking, having provided the route map. Again a major deterrent to seek leniency in the Community was created. This was particularly so where the cartel had effects in the US because the decision may be used in the US courts to seek antitrust treble damages. By contrast, the US authorities simply do not prosecute undertakings that are granted full amnesty from fines and criminal prosecution. Fourthly, full amnesty is available to both pre-investigation and post-investigation cases in the US system. The 1996 Notice by contrast restricted amnesty to pre-investigation cases. Spratling estimates that at least half of the US amnesty applications were made after investigations had been initiated.105

The key to an effective leniency programme, as the recent OECD report indicates, is that there should be a high degree of predictability, transparency and certainty, together with a low burden of proof, heavy penalties, and an emphasis on priority.106 That mix is likely to maximize the likelihood of amnesty applicants coming forward. Or as Hammond has argued, the CLP offers a predictable and favourable alternative to the devastating consequences of discovery. If an undertaking is second even by a few hours, that undertaking will be subject to full prosecution. Consequently a dynamic of ‘a winner takes all race is set up which leads to tension and mistrust amongst cartel undertakings.

103. Spratling estimates that if the EC decisive evidence standard were used by the Department of Justice there would be a 70-80% reduction in amnesty applications. Spratling, Antitrust (2001), 8.
105. Spratling, Antitrust (2000), 8. In fact over 50% may actually understate the position.
members. Essentially, an effective leniency programme preys on the asymmetry of most cartels’. That they are not equally favourable to all participants, provides significant additional incentives to disgruntled members of the cartel to leave and seek immunity.

The 1996 Notice failed to meet those standards of predictability, transparency, certainty and a low burden of proof. Even more fundamentally, the extent to which the current Notice really was a leniency programme at all is open to question. Aside from the largely unused section B, the rest of the Notice would not be found in the CLP, but rather under the US Sentencing Guidelines, which provides for reductions of fines for co-operation.

§ 5. The Valentines Day Notice: Toward an American Model?

In July 2001 the Commission published a new draft leniency notice, the Notice of the Commission relating to the revision of the 1996 Notice on the non-imposition or reduction of fines in cartel cases (hereafter the Draft Notice). The Commission noted that experience had shown that the effectiveness of the 1996 Notice would be improved by increased transparency and certainty of the conditions under which reductions of fines were granted. It also argued for a closer alignment between the level of the reduction of fines and the value of an undertaking’s contribution to establishing the infringement.

To that end the Draft Notice proposed reducing the number of fine cancellation or reduction categories to two; the abolition of the decisive evidence test and making it possible for undertakings to find out well in advance of the final decision whether immunity was available or the likely level of fine reduction. Although this constituted a significant development in DG Competition’s policy in respect of leniency it was subject to heavy criticism. In particular, commentators focussed on the fact that the Draft Notice did not provide for the possibility of immunity to undertakings where the Commission had already started its investigation. This was notwithstanding the fact that

108. OECD, Report on Leniency Programmes, para 43.
112. In particular, see the ABA report, The observations and comments of the American Bar Association Section of Antitrust Law and Section of International Law and Practice of the Draft Commission Notice on Immunity from Fines and Reductions of Fines in Cartel Cases, (September 2001), 5, see: <http://www.abanet.org/antitrust/commentsreu.html> (hereafter ABA Report) and In Competition, (August 2001), published by Sweet & Maxwell and available at <http://www.smlawpub.co.uk/online/newslet/incm/200108.cfm>. The author also submitted an earlier version of this paper that examined the implications of the Draft Notice in some detail to the Directorate General for Competition and the competition policy unit of the UK’s Department of Trade and Industry.
the US experience indicated that at least half of US leniency applications came in after the Division’s investigation had commenced. 113 Furthermore, the Draft Notice limited applications for immunity to those cases where the Commission was ‘unaware of the alleged cartel’. This ‘unaware’ standard was in fact a higher standard than that which applied under the 1996 Notice or that found in the CLP. 114

Following extensive consultations the Commission published the new notice in February 2002, which came into effect on February 14. It constitutes a radical break with the 1996 Notice and a significant development even from the Draft Notice. The VDN provides two categories of leniency, section A immunity from fines, and section B, reduction of a fine.

Section A provides:

8. The Commission will grant an undertaking immunity from any fine which would otherwise have been imposed if:

(a) the undertaking is the first to submit evidence which in the Commission’s view may enable it to adopt a decision to carry out an investigation in the sense of Article 14(3) of Regulation 17 in connection with an alleged cartel affecting the Community; or

(b) the undertaking is the first to submit evidence which in the Commission’s view may enable it to find an infringement of Article 81 EC in connection with an alleged cartel affecting the Community.

9. Immunity pursuant to point 8 (a) will only be granted on the condition that the Commission did not have, at the time of submission, sufficient evidence to adopt a decision to carry out an investigation in the sense of Article 14(3) of Regulation No 17 in connection with the alleged cartel.

10. Immunity pursuant to point 8(b) will only be granted on the cumulative conditions that the Commission did not have, at the time of the submission, sufficient evidence to find an infringement of Article 81 EC in connection with the alleged cartel and that no undertaking has been granted conditional immunity from fines under point 8(a) in connection with the alleged cartel.

114. This definition is tighter than both the current requirement in the 1996 Notice to obtain section B fine cancellation. Section B only requires that the Commission does not have sufficient information to establish the existence of the cartel. The Antitrust Division is even more generous, an applicant can make an application for leniency when the Division has not received any information about the illegal activity from any other source.
11. In addition to the conditions set out in points 8(a) and 9 or in points 8(b) and 10, as appropriate, the following cumulative conditions must be met in any case to qualify for immunity from a fine:
   (a) the undertaking co-operates fully on a continuous basis and expeditiously throughout the Commission’s administrative procedure and provides the Commission with all evidence that comes into its possession or is available to it relating to the suspected infringement. In particular, it remains at the Commission’s disposal to answer swiftly any request that may contribute to the establishment of the facts concerned;
   (b) the undertaking ends its involvement in the suspected infringement no later than the time at which it submits evidence under points 8(a) or 8(b) as appropriate;
   (c) the undertaking did not take steps to coerce other undertakings to participate in the infringement.

Section B provides:

20. Undertakings that do not meet the conditions under section A above may be eligible to benefit from a reduction of any fine that would otherwise have been imposed.

21. In order to qualify, an undertaking must provide the Commission with evidence of the suspected infringement which represents significant added value with respect to the evidence already in the Commission’s possession and must terminate its involvement in the suspected infringement no later than the time at which it submits the evidence.

22. The concept of ‘added value’ refers to the extent to which the evidence provided strengthens, by its very nature and/or level of detail, the Commission’s ability to prove the facts in question. In this assessment, the Commission will generally consider written evidence originating from the period of time to which the facts pertain to have a greater value than evidence subsequently established. Similarly, evidence directly relevant to the facts in question will generally be considered to have a greater value than that with only indirect relevance.

23. The Commission will determine in any final decision adopted at the end of the administrative procedure:
   (a) whether the evidence provided by an undertaking represented significant added value with respect to the evidence in the Commission’s possession at the same time;
   (b) the level of reduction an undertaking will benefit from relative to the fine which would otherwise have been imposed, as follows. For the:
      -first undertaking to meet point 21: a reduction of 30-50%,
      -second undertaking to meet point 21: a reduction of 20-30%,
-subsequent undertakings that meet point 21: a reduction of up to 20%.

In order to determine the level of reduction within each of these bands, the Commission will take into account the time at which the evidence fulfilling the condition in point 21 was submitted and the extent to which it represents added value. It may also take into account the extent and continuity of any co-operation provided by the undertaking following the date of its submission.

In addition, if an undertaking provides evidence relating to facts previously unknown to the Commission which have a direct bearing on the gravity or duration of the suspected cartel, the Commission will not take these elements into account when setting any fine to be imposed on the undertaking which provided this evidence.

There are significant differences in procedure between sections A and B. Section A provides undertakings with two options. Undertakings can approach DG Competition immediately with all the evidence relating to the suspected infringement. Alternatively, undertakings can present the evidence in hypothetical terms, providing a descriptive list of the evidence it intends to disclose at a later agreed date. The Commission will provide a written acknowledgement of the undertaking’s application for immunity and the date on which it received the application. The Commission will verify that the evidence provided meets the qualifying conditions of the VDN. Following verification the Commission will grant conditional immunity from fines in writing. At the end of the administrative procedure, so long as the undertaking has continued to comply with its obligations to provide continuous and complete co-operation, has not in fact coerced any other undertaking into the cartel and has made full disclosure the Commission will grant immunity from fines in the final prohibition decision. In respect of section B undertakings are simply requested to approach the Directorate-General for Competition with their evidence. Applicants will receive an acknowledgement of receipt from the Commission recording the date on which the evidence was submitted. However, the evidence will not be considered before the Commission has taken a position on any existing application for immunity. If the Commission comes to the preliminary conclusion that the evidence submitted by the undertaking constitutes

115. Should it become apparent that section A immunity will not be available the Commission will immediately inform the applicant undertaking. VDN, point 12.

116. In respect of a hypothetical application the undertaking is required to present a descriptive list of the evidence it proposes to disclose at a later agreed date. The Commission will verify that the nature and content of the evidence described in the list will meet the conditions for immunity and inform the undertaking accordingly. VDN, points 13(b) and 16.

117. The VDN makes it clear that failure to meet any of the requirements set out in sections A or B, as the case may be, at any stage of the administrative procedure may result in the loss of any favourable treatment set out therein. VDN, point 30.

118. VDN, point 25.
‘added value’ it will inform the undertaking no later than the date on which the statement of objections is issued of its intention to apply a reduction within one of the bands set out in point 23(b).\textsuperscript{119} The final prohibition decision will set out the fines to be paid by the applicants and the extent of and reasons for their fine reductions.\textsuperscript{120}

The VDN constitutes a radical break with the 1996 Notice. The three most noticeable developments are firstly that the decisive evidence test is abolished, secondly that immunity is available in respect of undertakings subject to investigations and thirdly, undertakings can now find out well in advance of the final prohibition decision whether immunity will be granted or a fine reduced. Overall the VDN is far more focused on immunity rather than on fine reductions compared with the 1996 Notice. Even in respect of fine reductions, the emphasis is on the production of evidence that the Commission does not already possess, rather than fine reductions for mere co-operation.

The abolition of the decisive evidence test removes a heavy evidence burden from potential applicants and the uncertainty amongst such applicants as to whether they have enough evidence to obtain immunity. By lightening the evidential load the VDN widens the field of applicants to peripheral players in the cartel who are likely to have less evidence of its operations. This extension of the numbers of potential whistleblowers puts additional pressure on the major players in cartels. Cartels are faced with greater internal threats to their effectiveness as major players will now be faced with the conundrum of whether they should go to the Commission before one of the minor players does so. This extension in the number of potential whistleblowers is reinforced by the abandonment of the restriction contained in the 1996 Notice forbidding the leaders of the cartel from obtaining immunity.\textsuperscript{121} That restriction is replaced by a narrower requirement that the applicant undertaking must not have coerced any other undertaking to participate in the cartel.

The impact of the abolition of the decisive evidence test and the narrowing of the coercion test is reinforced by the extension of the right to seek immunity to undertakings already subject to an investigation by the Commission. If the American experience is any guide the existence of post-investigation immunity combined with a low evidence test should encourage a significant number of additional immunity applicants to come forward.

Another major deterrent to apply for leniency was that undertakings could not find out quickly whether immunity was on offer. Instead they had to wait several years, while the Commission completed its procedures and adopted its decision. This uncertainty as to what was really on offer, graphically demonstrated by Sappi in \textit{Carbonless Paper},

\textsuperscript{119} VDN, point 26.
\textsuperscript{120} VDN, point 27.
\textsuperscript{121} 1996 Notice, Section B 1 (e).
who had to wait almost 6 years before it obtained immunity almost certainly undermined the effectiveness of the 1996 Notice. The provision of upfront conditional immunity in the VDN is likely to encourage undertakings to come forward. They can now more easily account the certain hostility of other cartel participants and victims of the cartel against the advantages of immunity from the Commission.

These improvements are clearly significant and constitute a radical break with the past. However, there are a number of features of the VDN which do provide cause for concern as to how effective it will be in practice. In the first place, the VDN introduces a subjective element into the assessment of whether immunity will be available to applicant undertakings. The VDN makes it clear in both points 8(a) and 8(b) that immunity is only available where the evidence submitted may in the Commission’s view enable it to adopt a decision under Article 14(3) of Regulation 17 or may enable it to find an infringement in connection with an alleged cartel. Clearly the Commission needs to be able to make an assessment as to the nature and quality of the evidence proffered. However, neither the CLP nor the British leniency programme contains such an express subjective element in the criteria for determining whether leniency shall be available. The existence of such a subjective element may well raise a question with potential applicants as to the extent to which they can in fact rely on the provisions of the Notice. This concern is only likely to be allayed by applicants finding in practice that the Commission applies a more objective and transparent standard than that suggested in the VDN.

In addition two issues remain unaddressed by the VDN. The first, is that even where an undertaking has approached the Commission concerning a cartel DG Competition knows nothing about, and DG Competition grants immunity under section A, the Commission will still ‘prosecute’ that applicant. The applicant will be run through the mill of the Commission’s contentious procedure, from statement of objections, via access to file through to oral hearing. The second, is that the full details of it activities in the cartel will be set out in the final public prohibition decision. Potential applicants are likely to be somewhat deterred by the prospect of being put through the mill of the contentious procedure. A far greater deterrent however, is the prospect of the details of

123. The CLP provides a more objective standard, in particular, that ‘at the time the corporation comes forward to report the illegal activity, the Division has not received information about the illegal activity being reported from any other source.’ Equally the British leniency notice provides that in order to benefit from total immunity under this paragraph, the undertaking must be the first to provide the Director with evidence of the existence and activities of a cartel provided that the Director has not already have sufficient information to establish the existence of the alleged cartel’, Office of Fair Trading, Guidance on the Appropriate Amount of Penalty, OFT 423, para 9.32. See <http://www.oft.gov.uk/html/comp-act/leniency/index.html>.
124. It could be argued that the reference to the ‘sufficient evidence’ standard in paragraphs 9 and 10 of the VDN should allay the fears of legal advisers. It is true that the reference to ‘sufficient evidence’ does suggest a more objective standard. However, neither paragraph can easily be interpreted as removing that the initial subjective review that the Commission enjoys in paragraphs 8(a) and (b).
the undertakings activities in the cartel being displayed in the decision for all the world, and particularly victims of the cartel in the United States, to see. Where the cartels activities extended to the US there is a danger that undertakings may well be deterred from applying for immunity under the VDN given the threat of exposure to US treble damages claims. In addition, citation in a Commission decision may well encourage further regulatory investigations in other jurisdictions.

A further cause for concern is that although the VDN marks a radical break with the 1996 Notice in form, in substance, the Commission’s approach to prosecution remains the same. In particular, the Commission still focuses on the importance of undertakings handing over documentary evidence. The importance of documentary evidence is heavily underlined in section B, where the VDN focuses on the importance of 'written evidence originating from the period of time to which the facts pertain.' Documentary evidence is also clearly preferred in section A. In respect of that section, the VDN emphasizes that an initial hypothetical applicant is required to provide lists of documents and expurgated copies of documents. This focus has a twofold impact. Firstly, it is unlikely that all members of the cartel have an adequate documentary record. In practice, it is likely that only the major players in the cartel will have access to most if not all of the documentation. Minor players are likely to have access to far less documentation. Consequently, the effect of focussing on documentary evidence is likely to reduce the pool of potential leniency applicants rather than increase them, as the VDN in other respects seeks to do. Secondly, the emphasis on documentary evidence is likely to alarm undertakings who may later be subject to civil proceedings. In particular, the prospect that the documentation provided to the Commission or generated as a result of Commission requests, may be sought under US discovery rules.

The Commission makes this point crystal clear in the VDN. ‘In line with the Commission’s practice, the fact that an undertaking co-operated with the Commission during its administrative procedure will be indicated in any decision, so as to explain the reason for the immunity or reduction of the fine.’ VDN, point 31.

It is true that the VDN provides that ‘any written statement made vis-à-vis the Commission in relation to this notice, forms part of the Commission’s file. It may not be disclosed or used for any other purpose than the enforcement of Article 81 EC’. VDN, point 33. However, this provision is of little use to an undertaking faced with requests for US discovery. Point 33 creates an obligation for the Commission, it does not bind the undertaking nor provide a basis for resisting discovery of documents generated during a Commission leniency application. A recent development in the ongoing civil litigation in respect of the Vitamins case in the US has seen plaintiffs seeking court orders requiring the disclosure of all documents submitted to foreign antitrust agencies. Maguire, ‘The European Commission’s new Leniency Notice: Roses and Thorns’, Global Competition Review (2002) 36, 37.

Experience in the United States has shown that corporate witness statements are as valuable if not more helpful, than contemporaneous documents that are often of uncertain probative value absent an explanation. Many times contemporaneous documents appear to be innocuous and do not help to support the existence of illegal wrongdoing unless explained and supported by witness statements or other subsequently created documents; other times contemporaneous documents appear to be

125. The Commission makes this point crystal clear in the VDN. ‘In line with the Commission’s practice, the fact that an undertaking co-operated with the Commission during its administrative procedure will be indicated in any decision, so as to explain the reason for the immunity or reduction of the fine.’ VDN, point 31.
126. VDN, point 22.
127. VDN, point 13(b).
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129. ABA Report, 9. The ABA report questions the Commission’s focus on documentary evidence. ‘Experience in the United States has shown that corporate witness statements are as valuable if not more helpful, than contemporaneous documents that are often of uncertain probative value absent an explanation. Many times contemporaneous documents appear to be innocuous and do not help to support the existence of illegal wrongdoing unless explained and supported by witness statements or other subsequently created documents; other times contemporaneous documents appear to be
A further question concerns whether the fine reductions are too low to encourage applicants to come forward. There are no fine reductions over 50%. Only the first undertaking can obtain the maximum 50%, the second undertaking can only obtain a maximum of 30%, and after that the maximum is 20%. The ABA report points out that the experience of US antitrust practitioners has been that later applicants may often provide evidence vital to any prosecution which deserves fine reductions greater than 50%. One surprising omission from the VDN is that no provision is made for an ‘amnesty plus’ procedure. Given the success of ‘amnesty plus’ in the US in creating a ‘rollover effect’ it is surprising that the Commission has not, as the British authorities have, decided to highlight the availability of amnesty plus, by expressly providing for such a procedure. It is true that the Commission will give credit for further disclosures made by an applicant. However, given the value the US authorities attribute to the procedure and that an express procedure would provide greater transparency and certainty and the likelihood that an express procedure would attract more applicants, the omission remains surprising.

Clearly the VDN marks a radical break with the 1996 Notice. However, whether it will bring about an American style uplift in the number of applicants is more questionable. Given the abolition of the decisive evidence test, the extension of leniency to undertakings already under investigation and the availability of upfront conditional immunity, more applicants will certainly come forward. With the VDN there is the possibility of a shift to a much more successful and effective leniency framework, reinforced by the lack of the treble damages disincentive that plagues US leniency procedures, and encouraged by the prospect of a clean break. However, the advantages of the radical features of the VDN, and the weaker European civil liability culture have not indicated a preference for documentary evidence.

130. One possibility for increasing the size of fine reductions is to rely on point 23, last sub point of the VDN which provides ‘where an undertaking provides evidence relating to facts previously unknown to the Commission which have a direct bearing on the gravity or duration of the suspected cartel, the Commission will not take those elements into account the evidence when setting any fine to be imposed on the undertaking’. The likely impact of this provision is that it will provide an additional means to reduce the size of the fine that would be otherwise imposed outwith the rules contained in point 23(b) first sub point, the percentage fine reductions set out therein. Hence, if an undertaking can provide evidence that the cartel had a much longer history than the Commission was aware of, those extra years of cartel activity would result in a significant upward shift in the fine for the other members of the cartel. However, the undertaking that produced that evidence would not have that evidence taken into account in respect of itself even if it was the third undertaking to apply for a fine reduction and only a maximum 20% fine reduction was available.

131. ABA Report, 6.


to be balanced against in particular, the deterrent effects of prosecution of applicants, their appearance in the Commission’s decision and the need for applicants to supply documentary evidence.

§ 6. An American Model, the Draft Regulation and Decentralization

As explained above, the adoption of the Valentines Day Notice constitutes a significant move in the direction of the US leniency model. However, the Commission has difficulty in fully adopting a US style notice because of the structure of its competition procedures.

For example, the investigative and contentious procedures are focused entirely on documentary evidence. Oral evidence is not taken by the Commission prior to the oral hearings, nor is it taken on oath in the oral hearings. Nor is there a procedure for the Commission or defendants to cross-examine witnesses during the oral hearing. Consequently, the Commission has to focus on finding documentary evidence, either in contemporaneous documents, such as minutes of cartel meetings, memoranda or diary notes, or in a detailed corporate statement, supported by extensive documentary evidence. Therefore it can only make limited use of testimony evidence offered by executives. The positive US experience from making greater use of testimony evidence suggests that the limited use of such evidence in Community procedures is likely to have degraded the Commission’s ability to prosecute multi-state cartels. Furthermore, testimony evidence is to be preferred for undertakings because it avoids the problem of creating documents which may later have to be yielded in discovery proceeding in civil courts.

However, an opportunity now presents itself in the Commission’s modernization programme to reform Community procedures to ensure that the Commission can maximize the potential of leniency programmes. The Commission has taken one step in this direction by introducing a new article 19 into the draft regulation that is intended to replace the basic enforcement and procedural EC competition regulation, Regulation 17/1962. It permits officials to interview natural and legal persons, and to record their statements, and use the evidence in proceedings.135

It would also be possible for the Commission to introduce a number of other key reforms along with article 19 in order to maximize the potential of leniency programmes. Firstly, it could reduce the reliance on documentary evidence in the oral hearing itself. This could be achieved by permitting evidence to be taken on oath and

134. ABA Report, 9.
135. Note that Article 19 only indicates that the Commission has the power to interview and record statements, it does not say that it can use the evidence so obtained in proceedings. However, the Explanatory Memorandum, which accompanies the draft regulation, indicates that that indeed is the purpose of Article 19. Draft Regulation, 25, para 1.
for witnesses to be cross-examined. For this to happen the draft regulation would have to strengthen the role of the Hearing Officer, by providing the Hearing Officer the necessary independence and authority to take evidence on oath and run hearings permitting cross-examination.\(^{136}\)

Secondly, the draft regulation could provide a means for the Commission to formally agree not to prosecute an undertaking. The regulation would provide for a short form decision or administrative letter indicating that an undertaking will not be prosecuted or fined. Such a provision would strengthen the incentive for undertakings to come forward by removing them from a publicly recorded decision of their involvement with the cartel and therefore reducing their exposure to antitrust litigation.

Thirdly, it would be possible for the Commission to adopt the American practice of plea agreements. Essentially rather than wasting resources on prosecution, where the Commission has caught undertakings red-handed, as a result of the evidence of a whistleblower, it would be able to enter into plea agreements with the infringing undertakings. These would be published as short form decisions, indicating the nature of the offence and accepting fines paid to the Commission in lieu of prosecution.\(^{137}\)

Fourthly, one of the ingredients of the US success was the availability of heavy fines. It is open to question whether Community fines are sufficiently heavy. Currently, the Commission can impose a maximum fine of up to 10% of the infringing undertakings worldwide turnover of the preceding business year. However, particularly since the adoption of the \textit{Guidelines on the Method of Setting Fines Imposed pursuant to Article 15(2) of Regulation 17}\(^{138}\) (hereafter the Fines Notice), there have been cases where the fine had to be reduced because the calculation under the Fines Notice took the fine above the 10% threshold.\(^{139}\) Furthermore, there is significant academic research on both...
sides of the Atlantic to suggest that a 10% turnover figure may not be sufficient to deter undertakings. One possibility would be for the Commission to retain the turnover figure but apply it for each year of the infringement up to a maximum multiple, for example, three to four years, giving a maximum fine of 30-40% of worldwide turnover.

One major problem raised by Brokx is the potential for conflict between leniency regimes within the Community. He sees a potential for real conflicts and for the undermining of the effectiveness of leniency programmes. At first sight it is not so clear that there is such a problem. Until recently very few Member States had leniency programmes, so there was little likelihood of multi-state conflicts. Furthermore, even if every Member State had a leniency programme it is difficult to see how conflicts would arise. In practice an undertaking would apply for leniency in the Member State where the anti-competitive effects of the cartel were implemented or where it faced the largest fine. If the cartel had an effect in more than one Member State, the potential applicant for leniency would go to the Commission. The case law indicates that it is possible that a National Competition Authority (NCA) could institute proceedings against an undertaking that had obtained leniency from the Commission. However, as the antitrust authorities across the Community co-operate to avoid conflicts, this scenario is extremely unlikely. Furthermore, there are two specific points, one of Community policy and one of law, which are likely to dissuade a NCA from initiating proceedings when the Commission has initiated or is contemplating initiating proceedings, particularly where those proceedings involve the application of a leniency notice. In the first place, the Notice on Cooperation between the National Competition Authorities and the Commission in handling cases falling within the scope of Articles 85 or 86 of the EC Treaty (hereafter the Notice on NCA Cooperation) expressly emphasizes the value of effective co-operation between antitrust regulators and the need for a "one-stop

amount over the 10% turnover threshold. This would appear to be due to the greater emphasis in the Notice on the duration of the infringement in the calculation of the fine. Pre-Insulated Pipes, paras 175-176. The Commission’s fine calculation also exceeded 10% of turnover in the case of Kanageorgis in the Greek Ferries decision. However, in that case the position is complicated by the insolvency and exit of Kanageorgis from the market. Greek Ferries, paras 167-168.

In particular see Wils, ‘EC Competition Fines: To Deter or Not to Deter’, Yearbook of European Law, (Oxford University Press, 1995), 16. Wils draws upon the work of the US law and economics school to make the case that EC fines are too low to deter. Furthermore, the recent UK competition white paper makes the point that the evidence from US cartel busting suggests that cartels often raise prices by around 10%. Even if one takes into account that the effect of the price increases may dampen demand and thus reduce profits, so that not all of the 10% price increase feeds into profitability, the average length of time the cartel continues in operation, around 6 years, can take the level of profitability of the cartel significantly above 10% of turnover. DTI, A World Class Competition Regime, Cm 5223 (UK Government, 2001), 7.3.

Ibid., 43 ff.


shop’ enforcement regime.\(^{145}\) NCA action in respect of a multi-state cartel subject to infringement proceedings by the Commission would undermine the co-operation values set out in the Notice. Secondly, while the ECJ in \textit{Wilhelm v. Bundeskartellamt} made it clear that parallel prohibition proceedings by an NCA are permissible, it did place two significant limits on national proceedings:

… national authorities may take action against an agreement in accordance with their national law, even when an examination of an agreement from the point of view of its compatibility with Community law is pending before the Commission, subject however to the condition that the application of national law may not prejudice the full and uniform application of Community law or the effects of measures taken or to be taken to implement it.\(^{146}\)

The application of more than one antitrust prohibition regime to the same facts involving the same, or some of the same, parties is likely to prejudice the value of leniency programmes throughout the Community. A potential applicant undertaking will have to consider submitting to any regime that might initiate proceedings. Such multiple submissions would not only be burdensome of themselves but may be difficult to make because, in the states that have such programmes, the programmes differ in their details and the extent to which they provide actual immunity. In the context of \textit{Wilhelm}, the application of a national prohibition decision is likely to prejudice the effectiveness of the Commission’s ability to unearth cartels, as undertakings are likely to be less willing to come forward and apply for Community leniency when they are also faced with having to make national leniency applications and/or national prosecution. In \textit{Wilhelm}, the Court indicated that national law may not prejudice the full and uniform application of Community law. It is therefore arguable that national competition law cannot be applied in circumstances where the operation of the Community leniency programme would be prejudiced by a domestic competition regime. However, such an application of \textit{Wilhelm} in respect of national leniency programmes would have the effect of neutering a significant part of domestic competition law. \textit{Wilhelm} presupposes that the application of domestic competition law will only exceptionally result in conflict with Community competition law. It is open to question therefore whether \textit{Wilhelm} remains good law given the development of extensive co-operation between the NCAs and the Commission, in particular by the

145. [1997] O.J. C313/3. The Notice also makes the point that multi-state investigations would be extremely difficult for NCAs to carry out given the lack of powers to investigate infringement of EC or national competition rules beyond their borders, para 24. There are also the beginnings of leniency co-operation between the NCAs as set out in the \textit{Principles for Leniency Programmes}, established at a meeting of the Directors’ General of European Competition Authorities, September 2001, Dublin. Available from the Irish Competition Authority website: <www.tca.ie>.

development of the principle of ‘one-stop shopping’ and the damage multiple enforcement proceedings can have on the operation of leniency programmes.\textsuperscript{147}

It is submitted that at the very least in the assessment of a fine, a NCA would have to take into account the leniency or reduction of fine granted to an undertaking by the Commission. This view is supported by the observation of the ECJ in the \textit{Wilhelm} case. The Court took the view that it would be contrary to natural justice for any previous punitive decision not to be taken into account in determining the sanction which may be imposed by another authority.\textsuperscript{148}

The potential scope for conflict will however be significantly reduced by the draft regulation. Under the draft regulation, article 3 would require the application of Community competition law instead of national competition law, when there is an effect on trade between Member States. The consequence of the application of article 3, read together with article 11, which provides for a co-operation between the NCAs and the Commission, is to make multiple infringement proceedings concerning the same facts and the same, or some of the same, parties impossible. Under article 11(4), it would be necessary to notify the Commission in advance of the adoption of a prohibition decision. Under article 11(6), the Commission would retain the power, currently residing in article 9(3) of Regulation 17, to withdraw a case from an NCA. Hence, in the final analysis, the Commission could remove any potential conflict directly by removing the case from the jurisdiction of the NCA.

More broadly there is the question of double jeopardy. This was an issue even under the rule in \textit{Wilhelm}.\textsuperscript{149} It could be argued that there is double jeopardy under the existing law. Essentially, the same undertaking could be prosecuted twice on the same facts. The defence of the Community and the Member States to the charge of double jeopardy rests largely on the ECJ’s ruling in \textit{Wilhelm}. However, the draft regulation renders the double jeopardy argument virtually unassailable. Under the proposal, the NCAs and the Commission will be applying the same law. It is therefore difficult to see how,

\textsuperscript{147} The one stop shopping principle is also implicit in the \textit{Principles for Leniency Programmes}, established by the Director-Generals of the NCAs.
\textsuperscript{148} \textit{Wilhelm}, para 11.
\textsuperscript{149} It is possible that the right is enshrined in Article 6(1) of the ECHR, which establishes the right to a fair trial before an independent and impartial tribunal, prohibits double jeopardy. Yet, such a right is difficult to reconcile with the existence of Article 4 of Protocol No. 7, which provides a rule against double jeopardy. So far seven Member States, Austria, Denmark, France, Greece, Italy, Luxembourg and Sweden has ratified Protocol 7. It is also notable that most of the applicant states have also ratified Protocol 7. The CFI and ECJ may be more willing to revisit the rule in \textit{Wilhelm} given the increase in the number of NCAs and the level of the sanctions that can now be imposed. For a discussion of the double jeopardy rule in the ECHR case law, see Reid, \textit{A Practitioners Guide to the European Convention of Human Rights}, (Sweet & Maxwell, 1998), 78.
irrespective of article 11, both the Commission and the NCAs can prosecute an undertaking on the same facts.  

The modernization programme should therefore reduce the potential for conflict. The Commission will deal with multi-state cases and the NCAs will deal with domestic cartels. If a domestic cartel has a foreign element, e.g. one member of a cartel is based in another Member State, the two NCAs concerned should be able under the proposed co-operation rules in the Draft Regulation and the proposed notice on case allocation, to determine who is the responsible authority to whom leniency applicants should address themselves. However, if the Commission were to contemplate a more extensive decentralization of the enforcement of EC competition law a number of difficult issues would then have to be tackled. If for example, the NCAs were given the task of dealing with ‘small scale’ multi-state cartels, e.g. cartels covering just two or three states, a number of difficulties arise. Under article 5 of the draft regulation, national procedural rules, including leniency notices are retained. However, in such a genuinely multi-state operation, with different penalties and leniency programmes, there is the potential for the creation of significant disincentives for whistleblowers to come forward, not to mention a degree of enforcement chaos. It is submitted that if the NCAs are to take on such a major role in the enforcement of EC competition law, then article 5 should be amended in order to apply Community penalties and an EC leniency notice. In addition, the Commission and the Member States would need to set out detailed rules on case allocation to assign the prosecution of the case to one court and for that court to be able to impose fines and prohibition orders for all the states concerned.

In addition to the ECHR argument there would also be a strong Community fundamental rights argument. A Community double jeopardy rule may well be derived from the general principles of Community law. The likelihood of such an argument being made is strengthened by the Charter of Fundamental Rights, Article 50 of which provides a double jeopardy rule: ‘No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally convicted or acquitted within the Union according to law.’ Clearly there is an issue as to whether EC competition proceedings are criminal in nature. From the perspective of the Convention on Human Rights they almost certainly are: See Riley, ‘Saunders and the Power to Obtain Information in European Union and United Kingdom Competition Law’, 25 European Law Review 3 (2000), 264.

At the time of writing this article no draft notice on case allocation has been published by the Commission. However, it would appear from the Notice on NCA Co-operation that the Commission’s view would be that if the locus of a cartel was in one state that state’s authority would be responsible. Notice on NCA Co-operation, paras 23-33.


There are a number of other issues that could be raised in respect of NCA co-operation concerning leniency applications, notably the spectre of the roving leniency applicant. Theoretically it is possible to envisage an applicant roving the Community seeking the best place to file its application. However, as a practical matter it is open to question how far this is a real problem. If the cartel has a domestic locus, then one NCA is the proper place for the consideration of the case. If the applicant seeks to file with another NCA or the Commission, the applicant will be required to go to the relevant authority. If the case involves several states the proper authority to approach is the Commission. If it is a case involving cartel activities in two or three states, then there is an issue. The solution suggested above is that EC procedures and penalties should apply and case allocation rules adopted.
In the event that such significant steps to decentralize EC competition law are taken, it is likely that the Commission would come under considerable pressure from those states which have adopted leniency programmes that are more closely tied to the American model to also align the EC leniency notice much more closely to the US model as well.

A further complicating factor is the proposal by the UK authorities to criminalize competition law. According to the recent White Paper *A World Class Competition Regime*, the UK’s criminal competition law will operate parallel to the EC and UK civil rules. The UK criminal law will apply to the most heinous antitrust activities, price-fixing, market sharing, restrictions on output and bid rigging. It is envisaged that there will be a form of leniency available under the criminal antitrust regime.

The UK proposals are significant. This is the first time that a major European economy, the UK is the Community’s second largest economy, has proposed a thoroughgoing criminalization of antitrust law. Some smaller economies, such as Ireland, have criminalized in this fashion. However, none of the larger economies have done so. Germany has only criminalized bid rigging and France only has criminal fines and in both states prosecutions are rare. Such a thoroughgoing criminalization in a major economy will have a significant impact on the leniency debate.

Given the size of the UK economy and the extent of its integration into the single market, it is likely that a significant number of foreign executives may be caught by the UK's criminal jurisdiction. For example, even if a large multi-state cartel does not have British members it is likely to have an effect on British commerce. In such a case,

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154. For the purposes of this article the terms ‘UK criminal law’ or ‘UK criminal competition law’ are used. There are however three legal systems within the United Kingdom; England (including the principality of Wales) and Scotland and Northern Ireland. Under the Enterprises Bill, it is proposed to create criminal cartel offence across the United Kingdom, with the Office of Fair Trading and the Serious Fraud Office prosecuting in England and Northern Ireland and the Lord Advocate in Scotland.

155. UK White Paper, paras 7.24 and 7.44.

156. UK White Paper, paras 7.19-7.22.

157. Under Clause 181(4) of the Enterprises Bill it is proposed to create a criminal leniency procedure.


160. It would appear that the UK authorities intend to take a broad effects based approach to its criminal antitrust jurisdiction. See UK White Paper, para 7.44. Section 60 of the Competition Act 1998 seeks as far as possible to ensure consistency between UK and EC competition law. Presumably therefore the UK authorities would follow the approach taken by the ECJ in *Wood Pulp (Cases 89/85 Ahlstrom v. Commission [1988] ECR S193)* and the CFI in Case T-102/96 Gencor v. Commission [1999] ECR II-753. For a discussion of the scope of the Community effects doctrine see Peter Roth QC (ed.), *Bellamy and Child European Community Law of Competition*, (Sweet & Maxwell, 2001), paras 2-154 to 2-158. Such an approach would mirror that of respectively the US Supreme Court and the Federal First Circuit Court of Appeals in *Hartford Fire and Nippon Paper*.  

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the executives of the undertakings involved in the cartel are likely to be subject to the UK’s criminal jurisdiction. In respect of leniency, the executives of an undertaking involved in a large multi-state cartel are likely to want to obtain leniency from the UK in respect of its criminal jurisdiction and civil leniency from the Commission. It is difficult to estimate the deterrent impact of UK criminalization, as the framework of the British criminal antitrust regime has not yet been finally established, nor the procedures for its operation put into place. UK rules are only known in outline. However, it may be that, faced with a real prospect of criminal prosecution, UK-based executives, who are involved in multi-state cartels, will be more likely to be willing to report cartel activity to British and European antitrust regulators.161

§ 7. Conclusion: Toward a Global American Model

The Valentines Day Notice is a welcome move in the direction of the successful US Leniency Model. The Commission should now build upon the VDN and use the opportunity granted by the draft regulation to re-model EC procedures to maximize the effect of its leniency programme.

The widespread adoption of US leniency principles provides a ‘way out’ of another major problem for the development of international antitrust law. Unlike international mergers, where the parties waive confidentiality on both sides of the Atlantic and across the planet if necessary to get the deal done, there are no waivers in cartel investigations. However, if the Community and most of the Member States, and non-Member States adopt leniency programmes based on the US model, there is a far greater possibility, and indeed incentive, for undertakings to engage in multiple leniency filing. Such a practice would go a long way to overcome confidentiality restrictions and improve cooperation between antitrust authorities.162 Difficulties will remain, notably different levels of penalties, in particular the existence of criminal sanctions. One solution may be a leniency co-operation agreement, providing for a set of common principles for leniency programmes, timing of applications and use of information obtained under a leniency programme.163

161. Given the handful of Member States who have a thoroughgoing criminal antitrust jurisdiction, the UK is unlikely to be able to extradite antitrust offenders from other Member States. In respect of criminal leniency the UK authorities will therefore have to be careful to ensure that they do not grant leniency to a British based executives when all the other individuals who are subject to the UK’s criminal jurisdiction are based overseas.


163. It is possible to see the Principles for Leniency Programmes as a first stage in the development of such procedures between the NCAs within the Community.
A well-drafted leniency programme is a major tool for prising open cartels. The Commission and the Member States should seek to make the most of that tool using the opportunity presented by the reform of Regulation 17/1962 to enhance the effectiveness of the new Valentines Day Notice.