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The Consequences of the European Cartel-Busting Revolution

DR ALAN RILEY*

INTRODUCTION

> "Such agreements [cartels] can lead to a more ordered organisation of production and can check wasteful and excessive competition. … They can lead to a rapid improvement in techniques and a reduction in cost, which in turn, with enlightened administration of industry, can provide a basis of lower prices to consumers. They can spread the benefits of inventions from one country to another by exchanging research results, by the cross-licensing of patents, and by the provision of important 'know-how' in the working of these patents"
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> Lord McGowan, Chairman of Imperial Chemical Industries (ICI), House of Lords Debates 1944.[1]

> "I consider cartels to be a veritable cancer in an open, modern market economy. Unlike other forms of anti-competitive behaviour, they serve one purpose and one purpose alone: that of reducing or eliminating competition. They bring no benefit to the economy and can therefore never be viewed favourably from an economic standpoint. Their impact is entirely negative in that they lead to less choice for consumers, higher costs and reduced competitiveness for

*Dr Alan Riley, Reader in Private Law, City Law School, City University, Associate Research Fellow, Centre for European Policy Studies, Brussels and Chair of the Competition Law Scholars Forum. www.clasf.org. Electronic Mail: alan.riley.1@city.ac.uk. An earlier version of this paper was delivered before the Irish Society of European Law in Dublin in October 2004. The author would like to thank Dermot Cahill, Barry Rodger, David Lawsky, Peter Freeman, James Killick, Julian Joshua and Karen Williams for their comments and observations on an earlier version of this paper. All errors and omissions are solely those of the author.

1. Reader, *Imperial Chemical Industries*, Vol.2 (OUP, 1975) 425.

> industry, delays in firms making essential adjustments and less innovation".[2]
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> Professor Monti then
> European Commissioner for Competition, 2001.

The more than 50 years which separate Harry McGowan's paean to cartels and Mario Monti's vigorous attack on them has seen a huge shift in perception across Europe as to the value of such corporate co-operation. Europe has moved in that time from cartels being publicly supported by the state to participation in cartels in some Member States being deemed a serious criminal offence. The key institution in generating this huge shift in perception has been DG Competition. This was the institution which first developed the basic law, prosecuted the initial cases, forcing cartels underground,[3] and later drawing upon developments in the United States adopted a leniency programme that has already resulted in the largest haul of cartel cases in the global history of competition law.

With large numbers of cartel cases coming into DG Competition via the leniency Notice Competition Commissioner Neelie Kroes like the great Thurman Arnold,[4] Roosevelt's head of the Antitrust Division of the US Justice Department (the US competition agency), has the opportunity to transform competition regulation, to reach out to industry, the public, media and politicians to build political support for vigorous action against cartels and obtain the resources and procedures necessary that would assist the Commission to drive significant cartel activity out of the European economy. Furthermore, at a time when the value of the European Union is being questioned Ms Kroes and DG Competition can, through the vigorous prosecution of cartels, demonstrate to the public the direct value of the EU institutions to their daily lives.

This article examines how DG Competition came to be a cartel-buster and the consequences of its cartel-busting for the development of European competition law. This article is divided into six parts. Part one outlines the American influence on the European approach to dealing with cartels; part two examines the damage that cartels can do the national, European and global economy. Part three considers the traditional approach of the

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2. *2001 European Community Annual Competition Report* (European Commission, 2002), 34.
3. Harding and Joshua, *Regulating Cartels in Europe* (OUP, 2003).
4. Weber Waller, *The Antitrust Legacy of Thurman Arnold* (2004) St John's L. Rev. 569.

Commission to the application of Community competition law. Part four describes the US leniency programme and considers the impact it had on changing the thrust and direction of US competition policy. Part five considers the European response to the impact of the US leniency programme. Finally part six considers the consequences of the success of the European Commission's 2002 Leniency Notice for the development of European competition policy.

AN OUTLINE OF THE AMERICAN CARTEL-BUSTING REVOLUTION AND ITS IMPACT ON EUROPEAN COMPETITION LAW

Immediately after the Second World War the Antitrust Division launched a raft of successful legal challenges against undertakings running international cartels.[5] On the eve of that war it had been estimated that 42% of global trade was cartelised.[6] The Antitrust Division's legal challenges aimed to destroy the legal cover for international cartels obtained through for instance the abuse of intellectual property rights[7] or export cartel rules contained in the Webb Pomerene Act.[8] These successful legal challenges combined

5. Wells, *Antitrust and the Formation of the Post-War World* (Columbia University Press, 2002).
6. Wells, *ibid.*, p.25.
7. In 1926 the US Supreme Court in *United States v. General Electric Company et al.*, 272 (1926) US. 476, 477, had accepted the legitimacy of price-fixing in the context of a patent licensing agreement. "A patentee, in licensing another person to make, use and vend [the patented article], may lawfully impose the condition that sales by the licensee shall be at prices fixed by the licensor and subject to change at his discretion". This ruling provided an extremely effective means for undertakings to organise price-fixing cartels with virtual immunity from the application of the antitrust laws. As part of the post-war attack on international cartels the Division initiated a number of legal challenges against the patent exemption contained in the *General Electric* case. These challenges succeeded in the Federal District Court's and on appeal. In one of those cases *United States v. Line Material Co.* et al 333 (1948) US 287., the Supreme Court clearly overruled the *General Electric* case law: "Where two or more patentees with competitive, non-infringing patents combine them and fix prices on all devices produced under any patent, competition is impeded…As the Sherman Act prohibits agreements to fix prices, any arrangement between patentees runs afoul of that prohibition and is outside the patent monopoly".
8. Under the Webb-Pomerene Export Trade Act 1918, immunity from the US antitrust laws was granted to exporters to form industry cartels for the purposes of overseas trade. However, from the perspective of antitrust law these Webb-Pomerene cartels

with the economic power of the United States in the immediate aftermath of the war led to international cartels being unwound across the global economy.[9] Thereafter it was believed by many policy-makers, economists and competition regulators that there were very few international or indeed European wide cartels in existence. It was assumed that the establishment of an open liberalised trading system under the General Agreement on Tariffs and Trade (GATT) and the tariff cutting Kennedy, Tokyo and Uruguay rounds, and the subsequent creation of the World Trade Organisation (WTO) would make it difficult to establish and maintain international or continental wide cartels.[10]

This view has been proved to be comprehensively wrong. In August 1993 the Antitrust Division introduced a new leniency programme, which offered immunity from fines and prison sentences to the first member of a

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could be used as cover to participate in international cartels that affected domestic US commerce. See Wells, *op. cit.*, 17. However, in a series of post-war cases the Division challenged the use of Webb-Pomerene associations as a front for international cartel activity that in fact affected US commerce. In a series of cases, most notably in *United States v. United States Alkali Export Association, Inc., et al.*, 86 (1948–1949) F.Supp 59, the Federal Courts supported the Division in narrowing the scope of the Act.

9. In the immediate post-war period, given the collapse of the European and Asian economies, and US occupation of Germany and Japan, combined with the overwhelming economic power of the United States, the US were able to enforce its antitrust law across most of the non-Communist world. That power was reinforced by the economic reality that given US economic power it was probable that in most markets there would be at least one very strong US undertaking, who faced with the increased enforcement of the US antitrust laws at home and abroad would simply not countenance the return to the cartel practices of the pre-war world. Equally foreign undertakings who sought to sell into the only standing major market, the United States, had to comply with its antitrust laws, circumvention being extremely difficult due to the extra-territorial application of the US rules. Wells, *op. cit.*, 135.
10. For a discussion of the arguments as to the ebb and flow of cartel activity in the United States and Europe in the second half of the 20th Century see the report of the International Competition Policy Advisory Committee, *Final Report* (2001, Washington, D.C.) Chap.4, pp.175–177. The *Final Report* also considers the alternative argument that following prosecution by the US authorities most international cartels simply went underground. Caves however provides a compelling argument that in fact in the post war world many American firms, given the unique opportunities opened to them moved from a commercial policy of co-operation to one of aggression. See Caves, *Multinational Enterprise and Economic Analysis* (2nd ed, CUP, 1996) 92–93.

cartel who provided evidence of its existence.[11] The leniency programme has revolutionised competition law enforcement in the United States. Under the old leniency programme introduced in 1978 only one leniency application was received on average each year.[12] Since the mid-1990s the Antitrust Division has been receiving at least two per month, and in some quarters it has risen to three per month.[13] Dozens of cartels have been busted by the Antitrust Division as a result of evidence obtained from the leniency programme and over 40 executives have received prison sentences for their participation in cartels.[14] The US success did not go unnoticed in Europe. Traditionally, the Commission had given greater weight to tackling anti-competitive threats to the single market via attacking parallel imports and vertical restraints. However, at least partly in response to the American success the Commission's Directorate-General for Competition (DG Competition) set up a cartel directorate,[15] adopted a Fines[16] and Leniency Notice[17] and sought to re-focus its attention on cartels via the modernisation

11. Corporate Leniency Programme (hereafter CLP) notice of August 10, 1993, see www.usdoj.gov/atr/public/guidelines/lencorp.htm.
12. Spratling and Arp, *The Increasing Globalisation of International Cartel Enforcement*, Conference Paper, 2004 Transatlantic Antitrust Dialogue, British Institute of International and Comparative Law, May 2004, 3.
13. Griffin, *The Modern Leniency Program After 10 Years-A Summary Overview of the Antitrust Division's Criminal Enforcement Program*, Conference Paper, ABA Antitrust Section, Annual Meeting, San Francisco, California, August 2003.
14. Griffin, *ibid.*
15. Kroes, *Taking Competition in Europe Seriously*, Conference Paper, IBA/ Commission Conference, Antitrust Reform in Europe—A Year in Practice, Brussels, March 2005. It should be noted however that the Commission practice in recent years has fluctuated. In 1998 the Commission established its first properly resourced Cartel Unit. However, in the wake of the significant reforms put into place by Commissioner Monti in the merger field, which led to the abolition of the Merger Control Task Force in 2003, DG Competition also abolished the dedicated Cartel Unit. Therefore from July 2003 to March 2005 there was no dedicated cartel department in DG Competition. The rapid resurrection of a dedicated cartel unit suggests that a combination of the pressures of an increasing number of cartel cases coming in via leniency applications, together with a realisation that such cases need a dedicated team of specialists who had experience of undertaking investigations and who could evaluate evidence led to a rapid rethink. For a discussion of the abolition of the Cartel Unit see *2003 European Community Annual Competition Report*, (European Commission, 2004), para.34.
16. *Commission Notice on the Guidelines on the Method of Setting Fines Imposed Pursuant to Article 15(2) of Regulation no.17 and Article 65(5) of the ECSC Treaty*, OJ [1998] C1/9.
17. *Commission Notice on the Non-Imposition or Reduction of Fines in Cartel Cases*, [1996] OJ C207/4.

programme, by abolishing time-consuming administrative notifications of commercial agreements.[18] Between 1996 and 2002, largely as a result of information received under the 1996 Leniency Notice, the Commission significantly increased the number of decisions against cartels.[19] It was however, in February 2002, when the Commission adopted a US style leniency notice that the numbers of leniency applications escalated. Between February 2002 and November 2004, the Commission received 92 leniency applications.[20] The Commission's leniency notice is producing more cartel cases than the whole period from the founding of the Community in 1958 to 2002. It has also received more leniency applications than its US equivalent between February 2002 and November 2004.

The consequences for European competition law of this cartel-busting revolution are immense. The size and number of the cartel cases currently pending before DG Competition are overwhelming its limited resources. There are clearly procedural and managerial issues that will have to be tackled to ensure that the caseload can be efficiently dispatched. There are also a range of consequences that flow from this flood of cartel cases.[21]

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18. For the thrust of the Commission's modernisation programme and the proposed change of focus in enforcement policy see the discussion of the modernisation white paper, *White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty*, Commission Programme No.99/027.
19. The Commission granted a form of leniency in 16 cases during the 1996-2002 period, but note that there are a number of older cartel cases still before the Commission where the 1996 Notice is still applicable hence the number of overall cases in which the old notice is applied will rise. See Kerse and Khan, *EC Antitrust Procedure* (5th edition, Sweet & Maxwell, London, 2005): 7-058. However, in a number of cases the leniency applications were derivative from a US leniency application. Most notably, in the *Vitamins* case, where Aventis sought immunity under the EC Notice, following on from a leniency application under the US programme. See Riley (by the author), *Cartel Whistleblowing Toward an American Model* (2002) MJECL 62, 80.
20. *Answer Given by Mr Monti on Behalf of the Commission, to Chris Hunhe MEP*, November 17, 2004, P-2432/04/EN. Question drafted by the author.
21. These include the impact of a large number of cases on the development of the jurisprudence of European competition law; the impact of public hostility to cartels as more and more cartels come into public view; related to that issue is the question of enhancing the sanction mix, as well as enhancing leniency incentives. The Commission will also have to grapple with the communications challenges and opportunities presented by rising public interest in its activities. There are also a number of follow-on issues that have to be tackled including the claims for stronger rights of defence for undertakings faced with an allegation of membership of a cartel, given the increasing public hostility and the level and type of sanctions that can be imposed. A further issue is the prospect of enhancing civil competition

The broader consequences for European competition law are equally profound. The substantive nature of the law is likely to undergo significant development, particularly in respect of the scope of price-fixing and the establishment of a distinct class of serious competition offence. Procedurally European competition law is likely to develop quasi-criminal procedures in respect of cartel cases with an independent judicial element to oversee cartel procedures, while retaining the more traditional administrative regulatory model for other competition cases. For industry, the consequences of the cartel busting revolution are particularly startling: Very high fines combined with severe reputational damage, together with the prospect of heavy civil damages and with the likelihood of a severe personal sanctions in the not too distant future make cartel activity a very dangerous game indeed. Law firms equally have to transform their approach to dealing with cartels. It is no longer a regulatory game of hide and seek, with the aim of lopping a couple of million of the Commission fine. Cartel cases are now much more serious where the clients' reputation and share price may be seriously damaged, and complicit executives will require independent legal advice as their interests and those of the undertaking may inevitably conflict.

THE DAMAGE CARTELS INFLICT ON THE NATIONAL AND GLOBAL ECONOMY

From the dawn of modern market economies it has been recognised that cartel activity-essentially takes the form of direct and indirect price-fixing engaged in by firms at the same level of trade, it is likely to occur, and can significantly damage economic development.[22] As Adam Smith observed, "people of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise price".[23] The damage that can be inflicted by

litigation by relying upon Commission prohibition decisions to bring successful damages claims before the national courts.

22. The OECD has defined such 'hard core cartels' as 'anti-competitive agreements, anti-competitive practices or anti-competitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce': *Recommendation on Hard Core Cartels 1998*, Art.2(a) OECD, Paris, 1998.
23. Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776) Vol.I, Bk I, Chap.3. It should be noted that Professor Smith continues with the comment that " it is impossible indeed to prevent such meetings by any

cartels can be categorised under five headings: price increases and loss of consumer value; umbrella effects; loss of innovation; loss of market access and the danger that the economic power of cartels may be translated into overwhelming political power.

PRICE INCREASES

First, cartels raise the price of goods and services above the price level which would have applied if the market had been open to competition. In essence, the cartelists are able to raise prices for no added value to the consumer (which can include businesses and governments who take the cartelists goods and services). The consumer either has to pay more for the cartelised goods or services, or take less of them.[24] From an economic perspective, cartel-influenced price increases generate resource misallocation across the market undermining national and European competitiveness.[25] From a moral (and in some jurisdictions a legal) perspective, the activities of cartels amount to theft. As Joel Klein, former head of the Antitrust Division commented, the activities of executives involved in cartels are no different from other criminals, they are merely "well-dressed thieves".[26]

There is so far relatively little research undertaken on the size of price rises generated by cartels. One small sample study undertaken by the OECD suggested that the price rises ranged from 3% to 65% of the affected commerce.[27] Two recent and more comprehensive studies of all academic literature in the field combined with all final decisions of the US courts in cartel cases concluded that the median overcharge was 25%. For international cartels the median overcharge was 32%, and for domestic cartels it was 18%.[28] These two studies also suggested that overcharges

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law which either could be executed, or would be consistent with liberty and justice". The Antitrust Division and the Commission's Directorate-General for Competition would beg to differ in respect of this latter comment.

24. DTI, *A World Class Competition Regime*, (DTI, 2001), para.7.5
25. Bishop and Waller, *The Economics of EC Competition Law*, (Sweet & Maxwell, 1999), para.4.08 *et seq.*
26. Klein, *The War Against International Cartels: Lessons from the Battlefront*, Conference Paper, Fordham Corporate Law Institute, 26th Annual Conference on International Law and Policy, New York, October 1999.
27. OECD, *Hard Core Cartels* (OECD, 2002).
28. Connor and Lande, *How High do Cartels Raise Prices? Implications for Reform of Sentencing Guidelines*, American Antitrust Institute, Working Paper 01-04

were significantly higher outside the United States.[29] Interestingly although there are no strong trends over time, after 1990 a trend does set in: as the 1993 US Leniency programme began to uncover cartels and penalties increase, overcharges begin to fall.

The level of overcharges falls to 15–16% for domestic cartels and 20–25% for international cartels.[30]

Umbrella effects

Second, cartel activity can generate 'umbrella effects" "Umbrella effects" is the name given to higher prices charged by firms not part of the cartel that were generated or encouraged by the operations of the cartel.[31] For example, OPEC never produced even three-quarters of the US and EU's oil supply. However, when the OPEC cartel raised prices, prices also increased for the oil sold by non-cartel members.[32] There can also be indirect "umbrella effects". In the OPEC case for instance, potential substitutes for oil, such as coal, uranium and natural gas also rose in price.[33]

Undermining innovation

Third, cartels can undermine innovation in the market place. If profits are high from the cartel, the cartelists have an incentive to spend resources on keeping the cartel operating, through enhanced surveillance measures and co-operation, rather than spending money on research and development. The quiet life is profitable and innovation is seen as disruptive to the smooth operation of the cartel. At best, if any innovation is to be introduced it will be introduced slowly and at high prices to ensure it does not undermine the cartel. If a non-cartel member tries to introduce an innovative product the cartel is likely to seek to acquire the innovative technology to either suppress it or control its introduction, or as in the *Pre-Insulated Pipe Cartel* attack the actual firm holding the innovative technology if the acquisition offer is turned down.[34]

(2004). See also Connor, *Price-Fixing Overcharges: Legal and Economic Evidence*, *American Antitrust Institute*, Working Paper, 04-05 (2004).

29. Connor, *ibid.*, p.3.
30. *Op. cit.*, p.82.
31. Areeda and Hovenkamp, *Antitrust Law*, para 377.3 (Supp, 1992).
32. Ahrari, *OPEC: The Failing Giant* (1986) 203.
33. *Higher Oil Prices and the World Economy: The Adjustment Problem* eds Fried and Schultze (1975), see Perry, *The United States*, 102.
34. OJ [1999] L24/1. The attack was made by the cartel threatening the suppliers of

Undermining market access

Fourth, and very importantly from a Community perspective, cartels can undermine market access. Cartels members can agree to not enter into each other's territory, as one way of restricting market access to competitors. Cartel members can also agree to deny market access to any firm that seeks to enter the reserved market of a particular firm.[35] Market access can be denied in a number of ways, from the cartel denying access to a key platform to new entrants, by forcing prices down temporarily making it impossible for the new entrant to gain a foothold, to threatening to boycott key suppliers if they supply the new entrant.[36]

The over-mighty subject

Fifth, there is the over-mighty subject argument. In the United States this argument generated the initial political support to adopt the US antitrust laws faced with the economic power of the cartel-like trusts. One of the arguments made by supporters of enacting a Federal antitrust law was that the economically powerful trusts would be able to deploy their economic power to gain influence and ultimately undermine the balance of the democratic institutions to which they were supposedly subject.[37]

In essence cartels, whether they are direct price-fixing cartels; market-

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the innovative firm with a collective boycott unless the suppliers refused to supply that firm. As the cartel members were the principal customers of the suppliers that threat had a real commercial edge.

35. There is a very long list of Community case law on the subject of market sharing and restriction of market access. For example in the *Sugar Cartel* case. Cases 40/73 *et seq Suiker Unie v. Commission* [1975] E.C.R.1663; in *Peroxygen Products*, OJ 1985 L35/1; the *Cement Cartel* Cases T–25/95 *et seq Cimenteries CBR v. Commission* [2000] E.C.R. II–491; *Soda Ash*, Case T–30/91 *Solvay v. Commission* [1995] E.C.R. II–1775. For many more cartel cases restricting market access see Bellamy and Child, *European Community Competition Law* (5th ed., (Roth ed.), Sweet & Maxwell, London, 2001), para.4–055 *et seq.*
36. Clearly the effect of such practices is that they are likely to raise prices, but this group of practices are distinct from other price-raising strategies as they divide up markets, and are as a consequence likely to be deemed particularly egregious by the Commission.
37. Wells, *op. cit.*, pp.28 and 30–31. During and immediately after the Second World War there was also an argument the international cartels assisted the rise of the Nazi regime and then kept it in power. Clearly some industrialists did support the Nazis however, it is far from clear that international cartels *per se* had any major positive effect on the rise of Hitler; the maintenance of the Nazi party in power or the prosecution of the war. See Wells, *op. cit.*, pp.137–139.

sharing cartels or bid-rigging cartels, have a wholly negative impact on the economy. They have the effect of clogging the arteries of the local, national and European economy, raising prices, misallocating resources, reducing innovation and undermining the operation of the single market.

ADMINISTRATIVE REGULATION AND THE INTEGRATIVE OBJECTIVE OF COMMUNITY COMPETITION LAW

Although cartels are the most damaging form of anti-competitive activity, the Commission has not focused its resources on dealing with cartels until very recently. There are very good reasons why the Commission was not cartel-focused. At the time the original EEC Treaty came into force there was very little active competition law within or outside the EEC anywhere in Europe. The only prior post war [38] experience of prohibitory competition enforcement was the experience the High Authority had running the competition provisions of the European Coal and Steel Community Treaty from 1951 to 1958.[39] The newly established Competition Directorate-General had a very full agenda on its hands. Its first major task was to ensure that, as the public barriers to trade in the form of customs duties and quantitative restrictions were removed under the EEC Treaty, those barriers were not resurrected by the adoption of new private barriers to trade in the form of export bans and market sharing-agreements between undertakings.[40]

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38. For a discussion of pre-World War Two competition enforcement in Europe see Gerber, *Law and Competition Twentieth Century Europe* (OUP, 1999); Harding and Joshua, *op. cit.*, Chap.3 and Wells, *op. cit.*, Chap. 6.
39. There were a number of competition regimes in Western Europe in the immediate post-war period, however they did not focus on prohibiting anti-competitive conduct ex ante, rather they sought to control specified harmful effects. Harding and Joshua, *op. cit.*, pp.94-96; Gerber, *ibid.*, p.174. See also Goyder's discussion of the early years of competition law under the Coal and Steel Community Treaty. Goyder, *EC Competition Law* (4th ed., OUP, 2003), pp.16–22.
40. This focus required the Commission to focus upon attacking export bans in commercial agreements; prohibitions of parallel imports; the structure of distribution agreements which could freeze traders out of a national territory, and only occasionally market sharing cartels. It could be argued that DG Competition should have focussed on cartels at that early stage. There is however a strong argument of hindsight. If Caves is right Caves, *op. cit.* , then at the coming into force of the EC competition rules US firms were moving from a pre-War co-operative stance, to an aggressive commercial stance, which sought to make the most of a unique opportunity where US firms were far better capitalised, had

The second main area of concern was the operation of the notification system, whereby commercial agreements could be notified to the Commission with a view to obtaining clearance. Unfortunately the Commission took a broad interpretation to the application of Article 81(1) which had the effect of encouraging a large number of initial notifications of commercial agreements for clearance.[41] While those agreements did provide the Commission with information on commercial practices across the continent, the burden of the number of notifications received skewed DG Competition's small enforcement resources away from applying the competition rules to managing the notification burden.[42]

Partly in response to the notification burden, and also in order to protect the integrity of the single market from distribution agreements that could potentially separate markets, DG Competition obtained Council permission to adopt block exemption regulations in respect of distribution and other vertical agreements.[43] Block exemptions helped reduce the notification

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better technologies and superior management than most European firms and as a result they were able to compete vigorously and successfully in European markets. Given the fear that private trade barriers would be resurrected as trade barriers were dismantled; compounded by the understanding from modern economics that cartels could not survive for long and the evidence of enhanced competition from US market entrants it was not surprising that the Commission did not focus upon cartels in the early years of its existence. This argument however does not preclude or should not be confused with the more legitimate criticism that the adoption of a broad interpretation of Art.81(1) combined with the notification procedure undermined the operations of DG Competition for at least a couple of decades (see immediately below).

41. The dangers of the notification procedure to effective antitrust enforcement were pointed out by the Community's Economic and Social Committee even before Regulation 17 came into force. The Committee pointed out that although some might see the authorisation system as a means of obtaining better knowledge of the existence of agreements that were harmful to competition, such a system risked diverting the Commission from its true mission by overloading it with administrative work that would prevent it from carrying out a serious in-depth examination of agreements between undertakings and of their real effects. See *White Paper*, *op. cit.*, para.43.
42. It is also the case that the commercial agreements contained in the notification burden rarely raised any serious anti-competitive issue. In more than 35 years of application of Regulation 17/1962 there were only 9 decisions in which a notified agreement was prohibited without a complaint being lodged against it. *White Paper*, *op. cit.*, para 77.
43. Under Council Regulation 19/65 (OJ [1965] 36/1) on the application of Art.81(3) to certain categories of agreements and concerted practices as subsequently amended by Council Regulation 1215/1999, OJ [1999] L148/1, regulations have been adopted by the Commission in the field of vertical restraints. In particular,

burden,[44] but they also became a major part of the Commission workload as it fashioned the block exemption regulation into a tool of public administration to balance effective protection for the single market and market competition, against overwhelming DG Competition with notifications.

Again well away from the cartel field DG Competition, particularly under Competition Commissioners Sutherland and Brittan set about applying Article 82 and 86 to tackle abuses of market power by state undertakings and market-suffocating state regulation.[45] Given the size of the state in many EU economies this was an understandable development, though it again reinforced the administrative-regulatory approach of the Commission, as opposed to the Commission as direct law enforcer, and also reduced the available resources for investigations into cartels. This burden was reinforced by the need to deal with large number of state aid cases (approximately 350 per year between 1987 and 1990).[46] Stronger application of the state aid rules had the effect of increasing the number of state aid notifications, which in turn generated another major work burden for DG Competition.

A further development initiated by Sutherland and brought to a successful conclusion by Brittan was the adoption of the Merger Control Regulation 4064/89. This again reinforced the administrative focus of DG Competition and its management resources, although on this occasion the Member States did agree to provide additional staff resources to DG Competition.

Even in the early 1960s the Commission investigated some cartel cases. Some of these cases arose out of cartels making the mistaken belief that it

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Regulation 2790/1999, OJ [1999] L336/21, on vertical agreements; Regulation 1400/2002, OJ [2002] L230/30, on vertical agreements in the motor vehicle sector and Regulation 772/2004, OJ [2004] L123/11, on technology transfer agreements.

44. More than 25,000 agreements notified to the Commission were dealt with by the exclusive dealing block exemption Regulation 67/67 alone. Goyder, *op. cit.*, p.56. See also *White Paper*, *op. cit.*, Also see the discussion in the White Paper as to the other administrative means deployed to reduce the notification burden, such as excluding by notice agreements of minor importance.
45. Sutherland and Brittan notably were willing to use their special powers in Article 86(3) to open up traditionally closed national markets to competition. Goyder, *op. cit.*, p.490 *et seq*.
46. Bellamy and Child, *Common Market Law of Competition* (4th edition, Sweet & Maxwell, 1993, Rose ed.), para.18–001. The numbers of state aid cases in recent years have accelerated to approximately 400 cases per year. See Bellamy and Child, *European Community Law of Competition*, *op. cit.*, para.19–001.

might be possible to obtain an exemption under the notification-exemption system created by Regulation 17.[47] Other cases arose out of complaints. These cases were dealt with by a process of negotiation and settlement. It was only with the *Dutch Cement* case that the first contentious procedure was initiated.[48] The first case in which a penal fine was levied occurred three years later in 1969 in the *Quinine* case.[49] After *Quinine* the Commission pursued more cartel cases. However, the numbers were still very small in comparison to the rest of the caseload of DG Competition: On average only 1.5 cartel cases per year between 1970 and 2001.[50] Furthermore, it was still the case that the majority of cartels uncovered through the 1970s and into the 1980s, were settled rather than prosecuted.[51]

The fact that the Commission had successfully managed to prosecute some cartel cases could have provided a basis for re-doubling its efforts in this field from the mid-1970s. However, as explained above, the under-resourced DG Competition had the burden of all its parallel imports, individual exemptions, regulatory block exemption, state aid, liberalisation and dominance work. These burdens pulled DG Competition away from the 'sharp end' of cartel work. Also it found that bringing cases before the ECJ proved difficult. After the initial flurry of cases following *Quinine*, undertakings began to cover their tracks more effectively. Finding sufficient evidence that would convince the ECJ proved difficult as the *Wood Pulp II*[52] and *Italian Flat Glass*[53] cases revealed. Equally, the Commission

47. Harding and Joshua, *op. cit.*, pp.112–113.
48. Case 8–11/66 *Cimenteries et al v. Commission* [1967] E.C.R. 75.
49. Case 41/69 *ACF Chemiefarma v. Commission* [1970] E.C.R. 661
50. European Commission, *XXXIIIth*, *Report on Competition Policy* (2003), para.26. That 1.5 per year figure also includes the larger number of cases busted as a result of information received from the US Leniency Programme at the end of the 1990s, hence the number of cases from a solely European sources is likely to be closer to 1 per year than 1.5.
51. Harding and Joshua, *op.cit*, p.119.
52. In *Wood Pulp II* the Commission had sought to prove the existence of a cartel based on the concertation of announced prices for wood pulp. The ECJ ruled that as a matter of law a system of quarterly price announcements of itself did not infringe Article 81(1). The Court looked for, but did not find in the Commission's evidence 'a firm, precise and consistent body of evidence of prior concertation'. Case C89/85 *et seq Ahlstrom v. Commission* [1993] E.C.R. I–1307, para 71. For a discussion of proving pricing fixing cases absent leniency evidence see the discussion in Harding and Joshua, *op. cit.*, pp.155-156.
53. Cases T–68/69 *et al Societa Italiana Vetro et al v. Commission* [1992] E.C.R. II–1403.

suffered a number of procedural reverses culminating in *PVC*[54] and *Soda Ash*[55] which reinforced the view that prosecuting cartel cases was likely to result in a firestorm of potentially hazardous procedural arguments being made by defendants before a fining decision would be upheld.

In addition, these cases were extremely staff and time intensive, which from an administrative view was likely to call into question whether cartel cases should be run when DG Competition had many other calls on its time and resources and when these cases may well fail.

The third factor was the received notion that there were not really many cartels about, and in any event, cartels were inherently unstable and therefore, although technically serious, there was no need to worry about them too much.[56] DG Competition officials could also rely on modern economics to support them in this belief as it suggested that the optimal strategy amongst cartelists was to cheat on the cartel supported the view that most cartels were unstable and would not survive for long.[57] This market view of cartel behaviour was reinforced by the presumed impact of trade liberalisation. Trade barriers were being abolished at European and international levels, opening markets to competition. While a few firms might seek to market-share in European markets to maintain their own national markets, such activity was likely to be difficult to sustain under the pressures of the existence of the Community's prohibitory rules, the natural instability of cartels and new competitors entering the market post-liberalisation. There was also a fourth factor which was likely to influence Commission priorities. It was far from clear in parts of the Commission that all cartels were unwholesome. In its early years, and indeed into the early 1980s, the Commission would consider applications for exemption for "crisis cartels".[58]

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54. Cases T–79/89 et al., *BASF et al v. Commission* [1992] E.C.R. II–315. The saga of the PVC cartel's non-existent decision, the appeal to the ECJ; the subsequent re-adoption of the decision, return to the CFI, and final ruling of the ECJ in 2002 a period of almost twenty years from initial investigation to final judgment of the ECJ is retold in Harding and Joshua, *op. cit.*, pp.132-134.
55. Cases T–30/91 *et al.*, *Solvay et al v. Commission* [1995] E.C.R. II–1775.
56. For a discussion of these issues see ICPAC, *Final Report*, *op. cit.*
57. Bishop and Waller, *op. cit.*, paras 4.06–4.20. The economist view does not however take account of the trust factors which can undermine the incentive to cheat. Lewis has set out a long list of trust factors which build support for long term operation of cartels across the economy. These include such factors as social standing, regulatory and legal support, punishment mechanisms and market transparency. Lewis, *Trust*, *Distrust*, *Antitrust.* TLR (2004) 515, 563–595.
58. *Sulphuric Acid Association* OJ [1980] L260/24.

Procedurally in such a context there were likely to be few sanction cases and therefore operating an investigative and administrative machine in which the Commission both investigated a case, ran the "prosecution", and delivered a final ruling was understandable. Most of the cases the Commission dealt with did not involve a penal sanction being levied. Regulatory cases would be argued before the Commission's procedures in respect of prospective exemptions; complaints against state operators; state aid and merger cases would also be run under these procedures. Only a small group of the Commission's case load involved sanctions, and cartels were rare.

THE US CARTEL BUSTING REVOLUTION[59]

The corporate leniency programme

In 1978 the Antitrust Division adopted its first Corporate Leniency Programme (CLP). Under the first CLP an undertaking could apply to the Division for leniency. However, leniency was only available before a Division investigation had begun, and whether leniency was secured was a matter entirely left to the discretion of the agency.[60] The 1978 programme achieved very little. In the first ten years of the CLP only four undertakings qualified for leniency.[61] In respect of international cartels the 1978 CLP led to exactly zero successful prosecutions.[62] In August 1993 the Division radically revised the CLP. The 1993 CLP[63] abandoned its prosecutorial discretion: The first member of a cartel to seek leniency would, subject to certain key but transparent conditions be guaranteed leniency. Guaranteeing

59. This part of the article is divided into two parts. The first part examines the CLP and explains how it works in practice. The second part two considers the impact of the leniency programme, additional factors (such as Amnesty Plus) that have increased its effectiveness, as well as external factors which have supported the CLP, such as a re-focus by the Division on international rather than domestic cartels and increased fines. The part also considers what are the key lessons of the CLP.
60. *Prosecutorial Amnesty-Whisteblowing Conspirators* (1994) Trade Reg Rep (CCH) 13–112.
61. In the 14 years the 1978 CLP was in force only 17 leniency applications were made and in only 10 cases was leniency granted. Spratling and Arp, *op. cit.*, p.3.
62. Hammond, *Cornerstones of an Effective Leniency Program*, Workshop Paper, November 2004, International Competition Network (ICN) Workshop, Sydney, Australia.
63. *Corporate Leniency Programme*, *op. cit.*

leniency[64] means that the corporate leniency applicant will not be subject to criminal prosecution, pay any criminal fines and individual executives will not be subject to criminal prosecution, pay personal fines or be imprisoned.

The leniency programme was divided into two parts. The first part applied where no investigation had yet been initiated against the cartel. Under the CLP the undertaking had on discovery of the cartel to take prompt action to terminate its unlawful activity. It is required to report its wrongdoing with candour and completeness. The confession must be a true corporate act. Where possible the undertaking must make restitution and the undertaking must not have coerced another undertaking to participate in the cartel.

The second form of leniency applies where the Division has already initiated an investigation. The undertaking must be the first to come forward. The Division must not yet have evidence against the cartel that is likely to result in sustainable evidence and it complies with the candour, corporate act, restitution and non-coercion criteria. The Division also determines that granting leniency would not be unfair to others considering the nature of illegal activity, the confessing undertaking's role in it and when it came forward.[65]

In addition to corporate leniency, the Division also offers individual leniency to executives participating in the cartel who are liable to criminal prosecution. Where a pre-investigation corporate leniency application has been made, leniency is also extended to all directors, officers and employees

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64. In US antitrust leniency, amnesty and immunity refers to cancellation of fines and immunity from jail sentences and no conviction. In the Community competition regime immunity refers to a 100% fine reduction and leniency to a fine reduction of less than 100%. Also unlike the US system the Commission will still 'prosecute' applicants irrespective of whether they receive immunity or leniency. For the sake of clarity this article adopts the US approach of treating leniency, immunity or amnesty as referring to a 100% cancellation of the fine that would otherwise be paid, and in the US case cancellation of personal fines, jail sentences and the no conviction guarantee of successful US leniency applicants. The article will refer to those undertakings who make late leniency applications as leniency applicants who receive fine reductions.

65. The provisions under the post-investigation part of the CLP are more subjective and subject to greater administrative discretion, the pre-investigation leniency. The primary concern in applying this last condition is how early the undertaking comes forward; whether there was any coercion and whether the undertaking was the leader or originator of the cartel. The burden of satisfying this condition rises the closer the Division comes to having evidence that is likely to result in a sustainable conviction.

of the undertaking who admit their involvement in the cartel as part of the corporate confession and agree to co-operate with the Division. Where a post-investigation corporate leniency application is made, the Division deals with individual leniency applications differently. The Division takes the view that the directors, officers and employees who come forward with their undertaking will be seriously considered for leniency from criminal prosecution on the same basis as if they had approached the Division individually, in return the applicant undertaking reports the cartel activity.[66]

This bare outline of the CLP does not provide by any means a complete picture of how the leniency programme works in practice.[67]

Applicants can approach the Division with all the information regarding the cartel, 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 current ongoing investigation, and there is therefore little likelihood of any other cartel member making a leniency application. If an applicant does not immediately have all the information to hand and fears that another cartel member may file for leniency then external counsel may arrange a meeting with Division officials and put down a "marker". The marker indicates that the applicant intends to provide full disclosure in return for immunity. The undertaking will then be given a fixed time period in which to make full disclosure.[68] During this time period, the marker protects the undertaking's priority. No other member of the cartel during that period can jump the queue and obtain leniency for itself.[69]

One major uncertainty for undertakings in considering whether to make a leniency application is that they cannot be sure of whether there is an ongoing investigation which has already generated enough information to

66. See Pt C of the *CLP*, *op. cit.* Leniency is extended to individuals under the CLP is distinct from individual leniency granted under the 1994 Leniency Policy for Individuals notice. The 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, 2004, www.usdoj.gov/atr/public/guidelines/lenind.htm
67. In particular how leniency applicants can approach the Division; the role of the originator of the cartel; the evidentiary burden that applicants face; restitution and treble damages; the consequences of coming second and the importance of individual leniency in encouraging undertakings to come forward.
68. Hammond, *When Calculating the Cost and Benefits of Applying for Corporate Amnesty, How do you put a Price Tag on an Individual's Freedom?* 3, Conference Paper, presented at the National Institute on White Collar Crime, San Francisco, California, March 2001. If an undertaking subsequently discovers that the cartel is more extensive than first thought it can apply to the Division to extend the scope of it leniency. Sprating and Arp, *op. cit.*, p.4.
69. Spratling, *In Competition* (Sweet and Maxwell, London, 1999), 2.

make a leniency application worthless or whether a leniency application has already been made. To erase this disincentive the Division has introduced a no-names procedure. Under this procedure counsel can approach the Division to inquire whether leniency might be available. 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 are located. When the Division believes it has a sufficiently focused profile, it will check that profile against ongoing investigations.[70]

Under the CLP to obtain leniency, it is necessary to demonstrate that the undertaking "did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity". The Division recognised that this language represented an interpretative ambiguity and could be read as excluding a wide range of potential leniency applicants, for instance where there were several ringleaders running a cartel. The Division clarified its approach to ringleaders by indicating that it was only where there was one organiser, or ringleader, would that organiser or ringleader be excluded from the CLP.[71]

Under the CLP there is no evidentiary burden requirement to be reached before amnesty is obtained. Spratling explains that the Division merely requires that the applicant undertaking comes forward and tells what it know about the cartel. As long as it discloses all the documents in its possession relating to the cartel and all knowledge of its activities it will receive amnesty.[72] Even where the leniency applicant does not provide enough evidence to ensure conviction,[73] the evidence that is provided may well lead to other evidence that will secure conviction. For instance,

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70. Spratling, *In Competition*, *op. cit.*, p.2. In order to further reassure nervous executives the Division, 'studiously avoids obtaining information that would allow us to reverse engineer or make an educated guess as to the identity of the no-names enquirer, because that would discourage applications'.
71. Spratling, *Making Companies an Offer They Shouldn't Refuse: The Antitrust Division's Corporate Leniency Policy-An Update*, Conference Paper, 1999, DC Bar Association's 35th Symposium on Associations and Antitrust, February 1999.
72. *Interview with Gary Spratling*, *Antitrust* (2000) 8.
73. The low evidence standard encourages leniency applicants to come forward, they do not have to worry that they do not have enough evidence, they can just bring what they have and they will still get leniency. In addition, a low evidence standard has the beneficial effect of encouraging peripheral players in a cartel to apply for leniency hence widening the potential pool of leniency applicants, while at the same time placing heavy pressures on the major players in the cartel, who have reason to fear not only that one of the heavyweights might file for leniency, but so might one of the minnows.

evidence provided by a leniency applicant may provide sufficient evidence to obtain search warrants that may lead to a haul of evidence, and as a by-product, the filing of additional leniency applications seeking fine reductions, which again will bring in more evidence.[74]

The CLP also requires that restitution be made to victims of the applicant undertaking's cartel activities. Restitution will only be excused where, as a practical matter, it is not possible (for example, where the applicant is in bankruptcy and subject to a court order from taking on additional obligations). Payment of full restitution may not be required where it would jeopardise the undertaking's continued viability. At a point before leniency becomes final, the Division will indicate to the applicant that it is satisfied at its attempts to ensure restitution.[75] In practice there is usually little difficulty in ensuring that victims are compensated. The American tort system will see the launch of dozens of lawsuits against cartel members as soon as the victims get to hear of a cartel investigation.[76] However, the leniency applicant is protected from the full force of the litigation system, as under the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (the Antitrust Reform Act), leniency applicants are only liable to pay single instead of treble damages.[77]

If a leniency applicant applies even 10 minutes after another member of the cartel has applied for leniency, the earlier applicant will secure immunity from fines and personal fines and gaol sentences for its executives.[78] By contrast, the slightly later leniency applicant is exposed to the full range of criminal fines and its participating executives, jail sentences. However, there is an opportunity from relief from the full rigour of the Division's cartel-busting regime. The Division operates a tiered

74. Hammond, *Costs and Benefits of Amnesty*, 3.
75. OECD, *Report on Leniency Programmes* (OECD, 2001), para.23.
76. There have even been a case where reports of an investigation led to a filing of over 80 lawsuits, all of which continued to proceed despite the fact that the Division closed its investigation without bringing any charges. Spratling and Arp, *op. cit.*, p.40.
77. However, leniency applicants are required under the Act to co-operate with the victims of the cartel and provide information on the operation on the cartel. As long as those information obligations are complied with, the applicants pay only single damages and the joint and severality rule under which the other members of the cartel could seek contributions from the leniency applicant to pay damages (and under which victims could seek contributions from the leniency applicant for damages for the entire damage caused by the cartel) do not apply. Under the Act, the leniency applicant will only pay single damages for its share of the losses.
78. A 10 minute time difference between leniency applicants has occurred. Spratling and Arp, *op. cit.*, p.36.

approach to its fining policy, hence the later the leniency applicant, the heavier the fine and the likelihood of jail time rises. The effect of this approach is graphically illustrated by the *Graphite Electrodes Cartel*:[79] the first member of the cartel paid zero fines; the second in paid $32.5 million; the third $110 million and the fourth $135 million.[80] In essence, the tiered approach to sanctioning undertakings encourages a "race to the courthouse" approach, encouraging undertakings to own up to participation in the cartel and get their confession in to the Division in order to maximise their opportunities to minimise the sanctions that could be levied against them.

The impact of the US Corporate Leniency Programme

The 1993 CLP has transformed the Division's cartel busting. As Scott Hammond, Director of Criminal Enforcement at the Antitrust Division observes,

> "… over the last five years, the Amnesty programme 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".[81]

The data demonstrates the impact of the CLP:[82] The 1978 CLP generated very few leniency applications-approximately one per year.[83] By contrast, the 1993 CLP has generated roughly two per month. It has been responsible

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79. For a full discussion of the case see the Commission decision, OJ.
80. Hammond, *Costs and Benefits of Amnesty*, *op. cit.*, p.7.
81. Hammond, *Costs and Benefits of Amnesty*, *op. cit.*, p.2,
82. Spratling and Arp, *op. cit.*, 6–7. If two dates are compared August 10, 1993, when the CLP came into force, and the situation 10 years later on 10, August 2003. On August 10, 1993 there were only three sitting grand jury investigations into suspect international cartel activity; on August 10, 2003 there were 49. In August 1993 the highest fine against a price-fixing cartel was $5 million; in August 2003 it was $500 million. The number of foreign defendants subject to criminal prosecution over a price-fixing case, from the establishment of the Sherman Act in 1890 to August 1993 amounted to eight foreign undertakings and eight individuals. By August 2003 the number had risen to 72 foreign undertakings and 90 foreign individuals.
83. Spratling and Arp, *op. cit.*, p.3.

for securing close to $2 billion in fines[84] and the conviction of over 30 defendants on price-fixing charges.[85] Some of the largest cartels ever uncovered by the Division including *Graphite Electrodes, USAID construction, Rubber Chemicals*, and the *Vitamins* case[86] (the largest cartel case ever uncovered), arrived at the door of the Division via a leniency application. In *Vitamins*, F.Hoffman La Roche paid a fine of $500 million, and a second undertaking BASF paid a fine of $225 million.[87] Evidence from leniency applications has also assisted the rising number and length of jail sentences handed down to executives participating in cartel cases. Since 1999, over 75 years in prison have been imposed in individual defendants in connection with price-fixing and related cases, and more than 30 defendants have received terms of one year or longer.[88]

The Division has sought to enhance the effectiveness of the leniency programme by a series of measures: the Amnesty Plus and Penalty Plus programme, together with the 'omnibus question' asked of corporate witnesses. Spratling and Arp have argued that these developments,

> "perhaps as much, and possibly more, than the core amnesty policy-have significantly increased the Division's effectiveness at uncovering additional anti-competitive activities."[89]

Amnesty plus

Over half of the 50 plus ongoing grand jury investigations were generated from evidence that arose from earlier investigations. The Division observed this pattern of 'spin-off' effects earlier on in the life of the 1993 CLP. It developed a proactive programme, known as Amnesty Plus. In essence Amnesty Plus provides that when an undertaking is negotiating a plea agreement in a current investigation, it can seek more lenient treatment by disclosing the existence of a second cartel, obtain immunity for its involvement in for that cartel and a substantial additional discount on the fine it would otherwise pay on the first cartel.[90]

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84. Hammond, *An Overview of Recent Developments in the Antitrust Division's Criminal Enforcement Program*, Conference Paper, ABA Midwinter Leadership Meeting, Kona, Hawaii, January 2005, 8.
85. Leslie, *op. cit.*, p.643.
86. In the European case Hoffman La Roche paid •462 million. The Commission decision in the *Vitamins* case can be found at OJ [2003] L6/1.
87. Hammond, *An Overview of Recent Developments*, *op. cit.*
88. Spratling and Arp, *op. cit.*, p.10.
89. Spratling and Arp, *op. cit.*, p.7.
90. **Text for footnote here?????????**.

As Leslie observes:

> "The program has created domino effects in cartel exposure as leverage from one investigation can expose other cartels. For example, ADM [Archer Daniels Midland] would not be able to qualify for leniency for its participation in the lysine cartel after all of the other members had confessed and offered to provide evidence, as they all had. The last firm to confess about its cartel activities would seem to have little to offer the government. However, ADM had one bargaining chip: the citric acid cartel to which it belonged. The last to confess in lysine, but the first to confess in citric acid, ADM struck a favourable deal. The government in turn used ADM's confession and the evidence that it provided to prove the existence of price-fixing in citric acid and as leverage to compel confessions from other members of the citric acid cartel. The first confession then provides the leverage that prosecutors can use to induce confessions from the remaining cartel members."[91]

Penalty plus

In addition to Amnesty Plus, the Division has also created a major penalty downside for leniency applicants who do not tell all and gain Amnesty Plus when they have the opportunity: Penalty Plus. The Division takes the view that if an undertaking does not take the opportunity for an Amnesty Plus disclosure when it is available e.g., during the negotiation of the plea agreement, and it subsequently discovers cartel participation by the leniency applicant, it will seek a substantial increase in the penalty against the undertaking. Hence undertakings are put under very heavy pressure in the course of their plea negotiations to tell all. The consequences of a Penalty Plus prosecution can be severe.[92]

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91. Leslie, *op. cit.*, p.643.
92. In one recent case, the Division asked the court to impose a sentence that was almost 30% above the top of the guideline fine range for the undertakings antitrust recidivism. Furthermore, three of the executives were carved out of the plea agreement and subject to criminal prosecution. If the undertaking had admitted cartel participation when it had the chance it would have not been subject to any fine and none of its employees would have faced the prospect of lengthy jail sentences. See Hammond, *An Overview of Recent Developments*, *op. cit.*, p.10.

The omnibus question

The Amnesty Plus programme is reinforced by the standard practice of the Division to ask the so-called "omnibus question' at the end of a witness interview or grand jury interrogation. The question is posed after examining a witness about anti-competitive activities in connection with a specific market sector under investigation. The witness must answer the question truthfully or lose whatever protection available under the amnesty or plea agreement, and also would be subject to separate penalties for perjury and making false statements.[93]

Individual leniency

The 1993 CLP is also reinforced by the individual leniency procedure. Individual leniency is a procedure separate from the CLP for individuals who apply on their own behalf, who can tell all, and receive immunity from fines and prison sentences. Given the threat to individuals and their incentive to self-report if the undertaking does not, the existence of the individual leniency programme puts pressure on the undertaking to report or face individual employee's filing their own leniency applications. As Hammond observes,

> "While we do not receive individual amnesty applications at the same rate as company applications, the individual amnesty program helps prevent companies from covering up their misconduct. *The real value and measure of the Individual Leniency Program is not in the number of individual applications we receive, but in the number of corporate applications it generates.* [Hammond's italics] It works because it acts as a watchdog to ensure that companies report the conduct themselves."[94]

Any assessment of the impact of the CLP has to be put in the context of three other developments, which significantly enhanced its effectiveness. Firstly, a re-orientation of the Division's focus from domestic cartels to international cartels in the mid-1990s (away from its tradition cartel focus

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93. Spratling and Arp, *op. cit.*, p.9. The question is usually phrased:-"Do you have any information whatsoever, direct or indirect, relating to (a description of the conduct, for example, price-fixing, bid-rigging, market allocation) with respect to other products in this industry or in any other industry?".
94. Hammond, *Cornerstones of Leniency*, *op. cit.*

of 'ready-mixed concrete, asphalt, school buses and school milk program' cartel)s.[95] The Division reasoned that international cartels by their very nature were likely to have a greater adverse economic impact on the US economy than local or regional cartels, given that international cartels affect larger volumes of commerce and geographic areas.[96]

Second, utilisation of the Criminal Fines Improvements Act 1987. Until Congress enacted the Antitrust Reform Act in June 2004 and raised the maximum criminal fine for an offence under the Sherman Act to $100, million the maximum fine was $10 million. Under the 1987 Act however, the Division was able to seek fines well in excess of the statutory maximum. The Act provided an alternative fine to the statutory maximum to be imposed of twice the gain, or twice the loss. In practice, the actual gain or loss is rarely calculated. Under the US Sentencing Guidelines,[97] an alternative calculation of 20% of the volume of affected commerce is used to calculate the base fine. This base fine can then be raised or lowered by a series of negative or positive factors.[98] As Denger points out the impact of the

95. McDavid, *International Cartel Enforcement and EC Competition Policy*, in Barry Hawk (ed.) Fordham Corporate Law Series 1999 (Juris Publishing, 2000), 57, 58.

96. Spratling, Antitrust *op. cit.*, p.6. This view is also reinforced by the work of Connor, *op. cit.*, who provides evidence that the overcharges made by international cartels are significantly higher than those of domestic cartels.

97. United States Sentencing Commission, *Guidelines Manual* (hereinafter *USSG*). The *USSG* is available at http://www.ussc.gov/GUIDELIN.HTM For the volume of affected commerce see: USSG §§2R1.1(b)(2), 2R1.1(c)(1), 2R1.1(d)(1), 8C2.4(a), 8C2.4(b). It should be noted that a recent trio of Supreme Court cases in *United States v. Apprendi*, 530 U.S. 466 (2000); *United States v. Blakely* 124 S. Ct. 2531 (2004) and *United States v. Booker*125 S. Ct. 738 (2005). The concern of the Supreme Court was that sentencing factors were being taken account by judges that were not addressed to the jury in the criminal trial. In *Booker* the Court determined that when a sentencing judge determines facts not found by the jury or admitted by the defendant in imposing an enhanced sentence under the U.S. Sentencing Guidelines, the defendant's constitutional Sixth Amendment right to a jury trial is violated, but the Court also held that there is no Sixth Amendment violation if the Guidelines are used in an advisory rather than mandatory manner. The Division has responded positively to *Booker*. In the first place given the increase in the statutory maximum to $100 million, most of the middle ranking cartel cases will not be affected by *Booker*. For the most damaging international cartel cases where the Division wishes to impose a fine above $100 million, the Division believes it can rely on the Sentencing Guidelines by fully alleging the amount of gain or loss in the indictments, if necessary to obtain an appropriate fine it will attribute the gain or loss caused by the entire cartel to a defendant. Hammond, *Antitrust Sentencing*, *op. cit.*

98. The major factors tending to increase the fine are size of organisation; recidivist

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.[99]

Third, jail sentences, which were once almost unheard of for price-fixing, have become a major part of the penal strategy of the Division.[100] This strategy was enhanced in June 2004 when the US Congress increased the maximum gaol term from 3 year to 10 years under the Antitrust Reform Act. From a handful of gaol sentences with very low prison terms before 1990, the number and length of jail sentences have increased significantly. The average jail sentence in the 1990s was 8 months, but has nearly doubled in the last 5 years. In the last five years over 100 years of imprisonment have been imposed on price-fixers, with more than 40 defendants receiving jail sentences of one year or longer, including 9 defendants alone in 2004.[101]

The 1993 CLP, together with the developments of Amnesty and Penalty Plus, and supported by the far heavier corporate and personal sanctions than hitherto, act as a corrosive agent on cartels. Cartel members are painfully aware that only the first one to break ranks obtains total amnesty. 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, jail sentences.

As a result of the CLP cartel members find themselves in a variant of the "prisoners' dilemma."[102] The Division has created a reward structure

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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.*

99. Denger, *Total Criminal and Civil Costs of a Cartel: Does our Multi-faceted Enforcement System Promote Sound Competition Policy?* Conference Paper, given at the ABA Section of Antitrust Law, 49th Annual Spring Meeting, Washington DC, March 2001, 1.
100. Lewis, *op. cit.*, p.652.
101. Hammond, *An Overview of Recent Developments*, *op. cit.*, p.3.
102. The classic prisoners dilemma entails two prisoners both charged with a minor crime, facing immunity for that crime for the first one of them who tells the authorities all the facts about a second crime for which the jail sentence is much longer. It is in both their interests to say nothing and accept the penalty for the minor crime. However, they cannot be sure that the other will not "spill the beans" leaving the other to face a long jail sentence. Cartel members are different to prisoners because they can communicate, and there is no initial minor charge with which the authorities can gain leverage. However, the leverage the authorities have in the classic prisoners dilemma is re-created in the cartel context by the leniency programme. The incentive-threat becomes very great when one,

with tiered pay-offs. The incentive-threat of the leniency programme generates fear and heightens suspicion so that even potentially innocent acts can trigger the question of whether a leniency application has in fact been made. Cartel members have to keep a sharp and constant lookout for signs that a fellow cartel member is considering blowing the whistle.[103]

The leniency programme also generates an additional commercial incentive amongst cartel members who are more profitable and efficient than the other members of the cartel and who if the other members are hamstrung by fines, criminal investigations and civil settlements could increase their own market share and profitability. This incentive to file for leniency also exists after a takeover. The new management can file for leniency as a means of discrediting the old management, as well as damaging competitors.[104]

The re-orientation toward international cartel cases, together with the carrot of a transparent and predictable leniency, combined with the stick of extremely heavy financial penalties and jail sentences for participating executives has provided the basis for this devastating American success in detecting international cartels.

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and only one, cartel member will escape with immunity, and a tiered approach to penalties for other applicants with rewards greatest for the second applicant in. That incentive-threat generates leverage for the authorities and is underpinned by the natural suspicion between cartel members, fears of cheating and their commercial asymmetry. See Lewis, *op. cit.*, p.638 *et seq.*

103. For example, if one member behaves apparently distantly to the cartel-sending only junior executives alone-or does not turn up to meetings. The question will then arise in the minds of the other cartel members whether this behaviour of the increasingly reluctant cartel member is because it has entered, or is about to enter, the Leniency Programme. Fear that a member may be about to go to the Division for amnesty with knowledge that only the first will get leniency and knowledge of the tiered approach to fines and jail sentences for other cartel members will sow dissension and encourage a "race to the courthouse' to obtain the best deal possible. This 'race to the courthouse' can be very fine. There has been at least one incident of a leniency application having been separated by no more than 10 minutes, Spratling and Arp, *op. cit.*

104. For example in the *Fine Art Auction Houses Cartel* COM (2002) 4283, October 31, 2002 where the new Christies management applied for leniency in the US, leaving Sotheby's subject to the full force of the antitrust laws and their former chairman a fugitive from American justice. For an account of the operation of the cartel see Mason, *The Art of the Steal: Inside the Sotheby's-Christie's Auction House Scandal.* (Putnam, 2004).

THE IMPACT ON EUROPEAN COMPETITION LAW

The success of the 1993 CLP has not gone unnoticed across the rest of the planet. The fight against cartels has been taken up by the OECD secretariat with the adoption of its 1998 Recommendation on Hard Core Cartels and more recently in publications advocating the establishment of leniency programmes.[105] Competition agencies from Brazil to Korea have followed the US lead and the OECD's advocacy and established their own leniency programmes. Perhaps the most profound impact of the CLP took place in the European Union.

As explained above Community competition policy was not focussed on dealing with cartels. Partly because the European Commission was focussed in its early years on dealing with threats to the integrity of the single market; partly because of the notification overload from filings of commercial agreements seeking clearance and partly because as a result of the overload DG Competition focussed upon generating regulatory regimes to reduce the demand for individual clearance, cartel were not perceived as a priority. The Commission also took on board the received opinion from the economic literature in a modern globalised economy there were likely to be very few cartels about.[106]

The success of the 1993 CLP reinforced the reformers in DG Competition in favour of modernisation of the competition rules, which would sweep away the notification procedure and see a re-focussing of the Commission's activities on the most egregious competition infringements such as price-fixing cartels. Under the influence of the 1993 CLP the Commission adopted a Fines Notice which provided the basis for increasing fines against cartel members. The influence of the CLP was again evident in the establishment of the cartel unit in 1998 and the more recent establishment of the cartel directorate. The influence of the US success in busting international cartels can also be seen in both Regulation 1[107] and the Network Notice[108] where it is made clear that the Commission will focus on dealing with the only the most egregious international or European wide competition cases, such as international or European wide cartels.

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105. OECD, *Hard Core Cartels* (OECD, 2002).
106. Bishop and Waller, *op cit.* and ICPAC, *Final Report*, *op. cit.*
107. Council Regulation 1/2003 *on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty* OJ [2003] L1/1, Recital 3.
108. *Commission Notice on Co-operation within the Network OJ 2004 C101/43*, para.14.

The 1996 leniency notice

In respect of a leniency programme, the Commission adopted its own leniency notice in 1996.[109] At first sight it looked similar to the CLP. However, on closer inspection it departed from the CLP model in three crucial ways that undermined its effectiveness.[110]

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109. *Op. cit.*

110. First, the EC Notice imposed a high evidence standard of "decisive evidence." This high evidence standard weakened the operation of EC Notice. In the first place only those undertakings who were at the centre of the cartel were the only ones likely to have evidence that could be deemed "decisive.". In effect the Commission had narrowed the pool of potential whistleblowers by the application of a high evidence standard (in practice evidence from peripheral players that could not meet the Commission's decisive evidence test has proved crucial in many US cases. Spratling estimates that with a decisive evidence test in the US the number of leniency applications would have fallen by 70-80%. See Spratling, *Antitrust*, *op. cit.*, p.8) In addition, the difficulty with the high evidence standard found in the Notice was that the 'decisive evidence' test was unclear. What in fact constituted "decisive evidence"? The lack of clarity as to whether the evidence provided by undertakings would be sufficiently decisive was likely to act as a deterrent to potential applicants. It should be noted however that the Commission recognised this problem toward the end of the period the Notice was in force by taking an increasingly taken a generous interpretation of the evidence standard. Secondly, the 1996 Notice only provided immunity from fines if the applicant came to the Commission before it launched an investigation. This severely limited the number of potential leniency applicants. In the US 50% of the immunities granted were granted to applicants after the Division had initiated an investigation (see again, Spratling, *Antitrust*, *op. cit.*, p.8). Indeed, the largest cartel ever busted, *Vitamins*, had started with a two year investigation by the Division. It was only when Aventis (formerly Rhone-Poulenc) applied for leniency was the cartel busted (OECD, *Report on Leniency Programmes*, para.14).

    Thirdly, the Commission refused to indicate that immunity or a high fine reduction would be offered right at the beginning of the leniency procedure. Instead it put leniency applicants through the whole contentious procedure only with the expectation that some sort of reduction up to immunity would be offered at the end. Needless to say, it was difficult for counsel to sell to many corporate boards a trade-off between the quantifiable public relations damage that would be done to the undertakings by revealing the cartel, along with the impact of civil damages and hostility of one's competitors against an unquantifiable benefit four or so years hence from the Commission. It is perhaps not surprising that because of these three feature in the six years of its existence the 1996 EC Leniency Notice was only applied 16 times and only on three of these occasions was actually immunity granted (Riley, *op. cit.*, p.85). But note that these figures only take account of the application of the 1996 Notice during the period in which it was in force. There is a tail of cartel cases in which the 1996 Notice

While the 1996 Notice did not have the success of the CLP, it did bring benefits to European cartel investigations. It introduced a much more transparent system to the way the Commission rewarded undertakings for providing information in respect of cartels. It also ended the traditional united front that dominated cartel investigations before the Commission. In cartel cases firms would hang together, refuse to provide any assistance to the Commission, and all tell the Commission the same story.[111] The 1996 Notice terminated that practice: each firm instead sought the best fine-cutting deal it could. Crucially it also gave the Commission experience of and confidence in leniency procedures which provided the basis for future revisions of the Notice. And despite the cases being largely derivative from US discoveries, the Commission did take the discovered cartels to task, imposing over €1 billion in fines in 2001 alone.[112]

In February 2002 the Commission adopted a new leniency notice. It marked a radical departure from the 1996 Notice. The Commission deal directly with three most damaging restrictions on the operation of the leniency notice. The decisive evidence test was abolished; post-investigation full leniency could be granted and offers of upfront conditional full leniency could be offered.

The Commission still prosecutes leniency applicants: it still puts them through the mill of its contentious procedure. It also cites them in the formal prohibition decision-which may act as a deterrence to those facing civil

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will be applied which are still going through the Commission's lengthy investigation and contentious procedures which commenced when the 1996 Notice was still in force).The figures by comparison with the US are in fact worse, not just in absolute numbers but in quality of result. The majority of the cases in which the leniency notice was applied did not involve undiscovered cartels. Instead they involved undertakings already under investigation by the Commission receiving reductions in fines in return for which they did not contest the Commission's decision. This non-contestation approach to applying the 'Leniency Notice' is far removed from the US model. Even worse, apart from Sappi, in the *Carbonless Paper Cartel*, OJ [2004] L115/1 all the cases in which a cancellation or near cancellation was granted resulted from the US. For example, *Vitamins* was detected by the Justice Department's Leniency Programme. Aventis having filed in Washington for leniency, decided to file in Brussels as well for any leniency that was going in the corridors of DG Competition.

111. Reynolds, *Caught Red-Handed: Anti-Cartel Enforcement*, *Conference Paper*, *The Advanced International Cartel Workshop*, ABA Antitrust Section, February 2001, 11.

112. *Annual Community Competition Report 2001* (European Commission, 2002), 4.

litigation especially in the US. It also did not include an Amnesty Plus and Penalty Plus procedure to encourage more leniency applicants to come forward. The Commission says it will offer greater discounts to those who tell all about other cartels,[113] but the possibility of discretionary discounts is not the same as an explicit programme set down in Commission procedures. The latter will give potential applicants, comfort as well as transparency and certainty to come forward to seek such benefits. While the 2002 Notice does introduce a tiered approach to fine reductions, the upper level of fine reduction for a second placed leniency applicant is limited to 50%. The Antitrust Section of the American Bar Association have pointed out that the US experience was that the second undertaking through the door often proved extremely valuable evidence which deserved a greater reduction than 50%.[114] Lewis, also takes the view that a high reduction for the second member of the cartel in to the regulators is valuable as it is likely to significantly destabilise the cartel.[115]

The question was whether the new leniency notice would work anymore effectively than the old notice. The introduction of a low evidence test, post investigation immunity and upfront notice of immunity were likely to encourage applicants to come forward. But was it enough? It turned out to be sufficient. In fact the new EC leniency notice has been more successful than its US equivalent.

In response to a tabled question in the European Parliament in November 2004, the then Competition Commissioner Professor Monti, revealed that between February 2002 and November 2004 the European Commission had received 92 leniency applications, and had already made 38 conditional offers of immunity.[116] The current number of cartel cases, after some double counting, where the Commission receives more than one leniency application is approximately 50. The Commission therefore is now dealing with more cartel cases today than it has dealt with in the whole of its previous history from the foundation of the European Union in 1957 to 2002.

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113. OECD, *Report on Leniency Programmes*, *op. cit.*, para.31.
114. ABA, *The Observations and Comments of the American Bar Association*, *Section of Antitrust Law and Section of International Law on the Draft Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases* (September 2001) 6. The text is available from the ABA website www.abanet.org.
115. Lewis, *op. cit.*, p.638.
116. PQ, *op. cit.*

MAJOR CONSEQUENCES OF THE SUCCESS OF THE 2002 NOTICE

Apart from the adoption of the Merger Control Regulation in 1989, the 2002 Leniency Notice represents the most significant development in the history of European competition law since the adoption of the foundation competition regulation, Regulation 17/1962.

The core impact of the cartel-busting revolution

The large number of cartel cases that will roll off DG Competition's production line over the next few years as leniency applications are converted into public prohibition decisions are likely to have a major impact on Community competition law. The consequence of the Commission detecting very large numbers of cartel cases for the first time is likely to result in a substantial development of the law.[117] Large number of cartel cases where heavy fines are imposed are also likely to encourage the Commission and the courts to distinguish price-fixing, market-sharing and bid-rigging as serious competition offences, distinct from the rest of competition law. The cartel revolution is also likely to create a reaction in other fields of competition law. The Commission is likely to find industry seeking greater clarity as to what sort of horizontal agreements are they permitted to undertake with their competitors for fear of falling foul of the prohibition on price-fixing. Equally, given the number of cases and damage cartel cause, and the increasing resources devoted to such cases, there is likely to be a further re-assessment as to priorities in respect of other regulatory competition activity, e.g. vertical restraints and all but the most egregious infringements of Article 82. There is also likely to be a discussion concerning the level of fines that should be imposed for other infringements of competition law given the very heavy fines imposed for price-fixing. Procedurally, there is likely, given the increasingly heavy penalties and the rhetoric deployed by DG Competition, pressure for a distinct set of procedures for hearing cartel cases (which is discussed further below).

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117. For example, large numbers of price-fixing cases are likely to result in debate before the courts as to the true scope of price-fixing; develop the law as to what in fact counts as infringement, for instance, whether it is possible to lay more than one infringement out of the facts of one cartel.

Public reaction

However, the immediate to medium term impact is not likely to be in the legal development of Community competition law but in the likely public reaction to large numbers of cartel cases, one after the other rolling into the public arena. In the past, in cases like *Pre-Insulated Pipe* and *Vitamins*, a cartel may cause a initial media splash with perhaps more detailed reporting in the *Wall Street Journal* or the *Financial Times*. Once the initial cartel case had been reported the public and media interest dissipated. However, given that the Commission is currently dealing with 50 cartel cases, with many more to come, the public, media and political reaction to and interest in the publication of the details of cartel case, after cartel case, is unlikely to disappear. As more and more cases enter the public domain, there is a strong likelihood of rising public interest in cartels, rising public hostility to undertakings and individuals engaged in cartels, and increasing political calls for greater corporate and personal sanctions for those involved in such practices.

On both sides of the Atlantic there has been until very recently very little public reaction to cartel cases. In modern times, the first cartel case which resulted in a major public reaction was the *GE Electrical Equipment* case in the US in 1959. That case generated significant public and media comment and interest.[118] It was not until the leniency-inspired cartel busts of the mid to late 1990s in cases such as *Lysine*[119] and *Fine Art*[120] that similar public and media interest was generated again. The British Office of Fair Trading (OFT) has all received significant media coverage and approving public interest in cases where there has been a direct consumer interest such as *Football Kits*[121] and *Toys.*[122] Clearly, it is easier for the media to be interested in cases such as these given their direct consumer connection. However, that is not necessarily the case as the *GE* and *Lysine* cases indicate. The very covert nature of cartels, can attract public interest, as well as the prospect of seeing high status wealthy individuals and corporations "in the dock."

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118. Connor, *op. cit.*, p.22.
119. The Commission decision in the *Lysine Cartel* can be found at OJ [2001] L152/24. A second account of the operations of the *Lysine Cartel* can be found in Eichenwald, *The Informant* (Broadway Books, 2000).
120. *Fine Art Auction Houses*, *op. cit.*, and Mason, *op. cit.*
121. For an outline of the *Football Kits* case see, *JJB Sports v. Office of Fair Trading* [2004] C.A.T. 17
122. For an outline of the *Toys* case see: *Argos Limited and Littlewoods Limited v. Office of Fair Trading* [2004] C.A.T. 24.

Furthermore, what is likely to arouse up media interest in the European context is the case after case impact of the European cartel story. The very fact that these cases keep arriving into the public gaze will act to heighten public and media interest and then keep that interest at a much higher level than hitherto. It could be argued that leniency filings will take the course of a bell-jar curve. Hence, this is a temporary phenomena that will flatten out and then decline. However, in the twelve years of operation of the 1993 CLP no bell-jar curve has been observed. The numbers of filings have been constant at approximately two per month with the occasional upward spike and as explained above, the Commission has in fact had a heavier filing record than the Division since it introduced the 2002 Notice.[123]

This likely public and political interest in, and hostility to, cartels is both a challenge and opportunity for DG Competition. At a practical level, DG Competition will have to overhaul its communications operations to deal with increased public and media interest in cartel cases. Clearly this provides an opportunity for DG Competition to get a message across about why cartels are so damaging, and the good work it is doing in tackling such cartels. Potentially, DG Competition should be also able to harness considerable public and political support to press for further reforms that will give it the means to drive cartels out of the European economy.

The changing role of the antitrust lawyer

Equally industry and their legal advisers will have to get to grips with the reality of the increasing costs of involvement in price-fixing cartels. Increased enforcement, penalties and reputational damage will put a premium on effective corporate compliance programmes and training for executives and employees to ensure that undertakings do not engage in cartels.

The approach taken by the competition bar in the Commission's contentious procedures is also likely to change. Historically the competition bar treated cartel cases as a game of regulatory hide and seek with the Commission. Lengthy procedures would be encouraged and knotty procedural points taken with the principal objective being to reduce the fine in the European Court of First Instance. The traditional hide and seek cartel defence is being dropped.

The defence of an undertaking alleged to have committed price-fixing is increasingly being treated as a much more serious matter. Legal advisers

123. *Fine Art Auction Houses*, *op. cit.*

and executives are taking on board the fact that an undertaking found to have been a price-fixer can suffer significant damage to its finances and reputation, and to the reputation and livelihood of complicit executives. Increasingly lawyers are developing a much broader defence strategy than just seeking to reduce the fine. This involves a range of tactics, from boosting evidential and procedural arguments, where appropriate; to undertaking a leniency audit to see whether advantage can be taken of a second place leniency discount or informal amnesty plus arrangements; to being prepared to terminate complicit executives as part of a throughgoing gold standard compliance programme. Lawyers are also increasingly deploying communications consultants to minimise the reputational damage and repairing links between employees and shareholders and senior management.

The clamour for stronger sanctions

Heavier fines

Public and political attention is likely to be driven initially to the size of the fines. Politically the Commission may well find itself in a situation where public and media comment heads in the direction of asking why the fines are not heavier. Any such media charge against the fining policy of the Commission does have some evidential support: There is evidence to suggest that the level of fines are too low. Connor and Landes, for instance suggest that the overcharges in cartel cases are as high as 18% for US domestic cartels and 32% for international cartels.[124]

The OECD in its report on hard-core cartels found overcharges as high as 65%.[125] Especially if a cartel has only been operating for a few years, or the firms involved are single product companies, the Commission's weapon of a maximum 10% worldwide turnover fine will not even take back the ill-gotten gain, never mind deter. Ideally the level of fine should be based on the level of gain or loss, multiplied by the likelihood of detection. However, as Wils has pointed out there are practical difficulties in imposing fines on this basis. If a low detection basis is assumed, then the level of fine becomes catastrophic for the undertaking concerned.[126]

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124. *Op.cit.*
125. OECD *Hard Core Cartels*, *op. cit.*
126. Landes convincingly argued that to achieve optimal deterrence the damages from an antitrust violation should be equal to the infringement's net harm to others divided by the probability of detection and proof of the infringement.

A catastrophic fine level could have the effect of bankrupting the offending undertaking as a result of which a significant number of innocent stakeholders suffer whether, employees, shareholders, suppliers or the local communities in which the undertaking was established. In addition, bankruptcy could have the perverse effect of resulting in increased market concentration, making cartel and negative oligopoly behaviour more likely.

Given the inadequacy of the existing fine mechanisms to remove ill-gotten gain and deter, as well as likely public demands for stronger sanctions DG Competition should give consideration to a higher fine mechanism, which will deprive undertakings of their gains and impose a degree of deterrence, but not so high to impose catastrophic losses. One approach, for instance would be to impose a fine of 10% of worldwide turnover, but for each year of the duration of the cartel, up to a say a maximum multiple of three years.

In effect DG Competition would then be able to impose a corporate fine of up to 30% of worldwide turnover, which would better reflect the gains that cartels can make from price-fixing. This approach is also supported by the argument that the fear of the need for very high 'catastrophic' fine levels relies upon the calculation that the gain or loss from the cartel has to be multiplied by a relatively high ratio, given the low detection level of cartels in order to effectively deter. However, given the impact of the CLP and the 2002 EC Leniency Notice, that ratio has fallen significantly. Hence the need for 'catastrophic' fine levels is not as clear-cut and a fine based on taking back all the gain or loss, with an additional element for punishment may well be enough to deter. If this argument is correct then a fine significantly higher than 10% of worldwide turnover should be available in some egregious cases, but not a catastrophic level of over 100% of turnover.[127]

Personal sanctions

An additional approach to sanction would be to consider the adoption of personal sanctions. Currently, the Commission is not able to impose any personal sanctions under Regulation 1/2003. The lack of personal sanctions is likely to become an issue of public and political criticism, as the cartel-busting revolution unfolds before the public eye. Again, this issue is not as

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See Landes, *Optimal Sanctions for Antitrust Sanctions* (1983) U Chi L.Rev. 652, 656. For a European perspective see: Wils, *EC Competition Fines: To Deter or Not to Deter*, YBEL 1994 (1995, OUP), 16.

127. Wils, *op. cit.*

easy or clear-cut as it first appears. The Community has no criminal law powers. Hence the Member States, without Treaty amendment, cannot create a criminal competition law, (where the Commission would lay specific criminal charges against individual executives). Even in the field of civil law powers, the adoption of personal fines for executives would pose some difficulties.

There are two major concerns here. First, DG Competition's procedures may not comply with Article 6 of the European Convention on Human Rights, by virtue of the fact that the Commission solely investigates, prosecutes and adjudicate competition cases.[128] While there is a live debate as to whether the Commission is currently in breach of Article 6 in respect of investigation and prosecution of undertakings,[129] prosecution of individuals would make the Article 6 argument much stronger. Hence any shift to individual fines would require significant amendments to the Commission's procedures. The second major concern would be the likely effectiveness of any personal sanctions. If undertakings agreed to pay any personal fine the sanction would be worthless. Even if Community legislation forbade payment of the fine, unless the legislation was drafted very carefully circumvention would be possible. For instance, by increasing valuable share options, pension payments or making other increased payments to executives so that they could easily pay the fine.

Another approach to personal sanctions, which still would require amendments to the Commission's procedures to comply with Article 6 would be to seek a power of director disqualification, banning individuals who have participated in cartels from being company directors or having a management role in a company anywhere in the European Union for a set number of years. This approach to personal sanctions has the advantage that an undertaking cannot fund an individual's way out of the sanction.[130]

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128. For a discussion of the human rights issues that arise in EC competition procedures, see Kerse and Khan, *op. cit.*, para.3-003 *et seq.*
129. For a discussion of the issues in this debate see Riley, *Saunders and the Power to Obtain Information in Community and United Kingdom Competition Law* (2000) EL.Rev. 264 and Riley, *The ECHR Implications of the Investigation Provisions of the Draft Competition Regulation* (2002) I.C.L.Q. 55. For a contrary view see Wils, *Self-Incrimination in EC Antitrust Enforcement: A Legal and Economic Analysis* (2003) World Comp 567.
130. It has however two downsides. First, not all individuals who run cartels will be company directors. The counter-argument is that one object of any personal sanctions regime is to deter senior management from participating in cartels who will then police their own firms. A director disqualification power, while it will not apply to all participants involved in a cartel will have a powerful

The disqualification approach can be further developed to create additional personal and corporate sanctions. As an additional personal sanction, foreign nationals who participate in cartels that affect the Community's economy could be banned from entering the European Union. Under US antitrust law, conviction for participation in a cartel by an individual executive who is a foreign national, automatically results in exclusion from the US by virtue of the fact that participation in a cartel is a Federal felony.

The US authorities are able to use the threat of exclusion as a powerful bargaining chip in order to ensure that executives surrender to its jurisdiction and spend time in jail. It is also deployed to significantly reinforce the incentives of the leniency programme.[131] Clearly, the jail advantage does not exist in a Community context. However, such a threat would increase the incentive to apply for leniency, while increasing the cost of cartel participation. A corporate form of disqualification would be to prohibit those undertakings who had participated in cartels from tendering for any public procurement contracts from any of the 25 Member States or from the Community institutions. Prohibition would be for a set number of years depending on the gravity of the case. This sanction would again significantly increase the attractiveness of leniency, while increasing the cost of cartel behaviour for the other members of the cartel.

Dealing with the problems of success

The Commission does not only have to deal with the prospect of increasing

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effect on those who participate at senior levels. It is also the case that senior management will fear the reputational effects of being banned from director level positions throughout all 25 Member States. The second objection is that those executives closer to retirement will not suffer the same damage from disqualification as younger executives. In a technical sense this objection is correct. However, this objection underplays the reputational damage to senior executives in their late 50's who planned to retire with honour and spend an interesting and profitable partial retirement holding non-executive directorships and consultancy appointments.

131. Spratling, *Criminal Antitrust Enforcement Against International Cartels*, Conference Paper, Arizona, 1997. "In March 1996 the Division entered into a Memorandum of Understanding (MOU) with the Immigration and Nationality Service (INS) which heightens the value and certainty of the immigration relief which the Division can offer to co-operating aliens in plea agreements. The MOU establishes a protocol whereby the Division may petition the INS to pre-adjudicate the immigration statues of a co-operating alien witness before the witness enters into a plea agreement or pleads to the crime."

public and political demand for tougher corporate sanctions and the introduction of sanctions for individual executives. It also has to handle the problems of success.

The major success problem is that DG Competition finds itself overwhelmed by the number of leniency applications. The 92 leniency applications received between February 2002 and November 2004 involve some double or triple counting, as members of the same cartel applied for leniency (notwithstanding that the principle of the leniency programme is that only the first to provide evidence of the cartel obtains leniency). The fact that 38 conditional offers of immunity were made in that period gives a better idea as to the numbers of cartel cases that the Commission is currently dealing with. Contacts with DG Competition suggest that the current number of cartels under investigation is around 50.

The Commission's current cartel caseload is very heavy.[132] One of the most eminent cartel defence specialists referred to cartel cases as 'metaphorical aircraft carriers' as to the weight of paper, organisation and investigator-hours required to get a case afloat and see it to a conclusion.[133]

As Neelie Kroes, the Competition Commissioner recently pointed out it is open to question whether the weight of these metaphorical aircraft carriers can be shouldered under the Commission's existing procedures. Even before the Commission's procedures are considered, the investigation and examination of evidence stages of a cartel case are considerable. The burden is then made almost intolerable by the sheer number of cases

132. The current cartel case-load is now larger than in the entire previous history of DG Competition. Each cartel case can impose a major work burden on an investigation unit, from assessing the initial leniency application; agreeing leniency; organising the inspection raids on the premises of cartel members across the Member States which by necessity will require participation of significant number of additional officials from the directorate as well as officials of the NCAs and potentially co-ordinating such raids with competition officials outside the Community, principally in the United States; sending out requests for further information under Article 18 to the other members of the cartel; liasing with the leniency applicant; preparing the detailed statement of objections; receiving the defence to the statement of objections; organising an oral hearing and following the oral hearing, drafting a draft decision for consideration by the Advisory Committee and then drafting the final decision.

133. The European prophet of cartel-busting, Julian Joshua, note of conversation with the author was formerly deputy head of DG Competition's cartel unit. Joshua laid the intellectual basis for much of the modern European case-law on cartels. He is now a Brussels based partner in the competition specialist firm Howreys where he specialises in cartel defence work.

compounded by the Commission's contentious procedures.[134] In cartel cases where a leniency applicant has provided most of the evidence and other cartel members have provided more evidence, with further additional evidence having been obtained from unannounced inspections by the Commission and the NCAs is that the cartel members have little or no defence to the Commission's allegations. In such circumstances, the Commission should be able to offer a plea bargain, whereby DG Competition could negotiate the level of the corporate fine with the accused undertakings, and the undertakings could pledge not to challenge the agreed fine decision before the Court of First Instance (CFI). Instead of a full cartel prohibition decision, the Commission could simply adopt a short form decision setting out the agreement and imposing the fine.

The effect of such suggested reforms would be to significantly short-cut the existing contentious procedures, save investigator-hours and permit a greater throughput of cases. However, it is open to question how far such a reform could be adopted without some form of external, preferably judicial oversight. In the US system, from where the plea-bargain system derives, any plea bargain in a Federal antitrust case requires the agreement of a Federal District Court. DG Competition would be negotiating sanctions without those sanctions ever having the prospect of being judicially scrutinised. In addition, as pressure increases for personal sanctions to be imposed on individual executives, any introduction of such sanctions will require the corporate plea bargain to incorporate personal plea bargains for individual executives.[135] It would be difficult to ensure compliance with the European Convention on Human Rights (ECHR) unless individual plea bargains were obtained, or unless individual prosecutions took place

134. Kroes, *The First Hundred Days*. 40th Anniversary of the International Forum on European Competition Law, Brussels, April 7, 2005. The contentious procedure is laborious and time-consuming, requiring huge effort to generate statements of objections; defence documents; consultation with the advisory committee of NCAs and finally drafting an extensive prohibition decision in all official languages. As Kroes herself has pointed out it is open to question whether this panoply of procedure is really required.

135. While the undertaking and individual executives would require separate legal representation it is unlikely that a corporate plea bargain could be negotiated in most cases unless the individual executives who participated in the cartel were also subject to a parallel personal plea bargain. It is unlikely the Commission would be able to obtain a corporate plea bargain while seeking to prosecute individual executives who were still running the undertaking with whom they were negotiating.

before an independent tribunal.[136] One approach[137] would be to amend the Commission's procedure to create an independent competition tribunal in Brussels to whom DG Competition could go to obtain approval of any corporate or personal plea bargains, and where no plea bargain was available before whom the Commission would bring its case.[138]

Leniency and decentralisation

While plea bargains and a short form decision could cut the workload of DG Competition and the cartel defence lawyers, the considerable pre-contentious work burden would remain.[139] One approach would be to transfer cases to the NCAs to reduce the work burden. However there are major difficulties with transferring cases to the NCAs. In the first place, there is no uniform leniency notice which applies to the NCAs and the Commission. The NCAs and the Commission have different leniency notices and some NCAs have no leniency application.[140] Hence it is difficult

136. Following *Stenuit v.France* [1992] E.H.R.R. 34 in which the Commission of Human Rights took the view that Community type prohibitory competition rules with significant sanctions are criminal for the purposes of the Convention case law it is difficult to see how any personal sanction on an individual in this context cannot but require a first instance hearing before a judicial authority. On this point, see also the case of *Findlay v. United Kingdom* [1997] E.H.R.R. 221.
137. An alternative approach would be for cartel cases to be heard directly before the CFI, together with hearings for plea agreements and other decrees and orders required by the Commission or undertakings. However, such a development would require Treaty amendment, as well as generating work for the already heavily burdened CFI. Consent orders to plea agreements made by an independent tribunal that was not the CFI by contrast could be created by Regulation and would have the advantage that its consent orders would not add to the workload of the CFI.
138. Given the lack of heavy penal sanctions in other regulatory cases the Commission could conceivably run two sets of procedures. The quasi-criminal procedure for cartels before an independent judicial authority and the existing administrative procedure for other competition cases.
139. Dealing with the leniency applicant; dealing with the problem of multiple leniency applications and liasing with the other NCAs; liasing with the US authorities in international cartel cases; organising dozens of inspections; dispatching Article 18 letters and assessing the evidence generates a major burden for DG Competition's small staff.
140. By no means do all Member States operate leniency programmes. According to the Commission's annex to its Network Notice, *op. cit.*, *Authorities in EU Member States which operate a Leniency Programme*, only 17 of the 25 Member

to ensure that the rights of a leniency applicant are protected if the applicant's cartel case is transferred to a NCA.

That difficulty is illustrative of a wider problem that although Regulation 1 made it possible to transfer cases and virtually harmonised restrictive practices law along the lines of Article 81, there has been little procedural harmonisation under the Community competition modernisation programme so far. Hence, not only does a leniency applicant face an uncertain prospect if a case is transferred from the Commission to a NCA in respect of the applicant's leniency rights, but the applicant and the other cartel members will find themselves dealing with a different procedure, in a different language where the penalties may be considerably different from those imposed by the Commission.[141] This reverence for the autonomy of national procedures under Regulation 1 is due in part to decentralisation being envisaged as the transferring of national or regional cases down to the NCAs, and sending European or international cases up to the Commission. However, the Commission's difficulty in cartel cases is that it is receiving too many European or international cartel cases for it to handle easily.

One solution is for DG Competition to ask for more staff resources as part of a cartel-busting reform package. However, that will not easily solve the immediate or short term problem, as there are very few competition law specialists who are not already either working in private practice, for undertakings, or for other regulators. Consequently it will take time to recruit and train any significant numbers of additional staff.

A second solution which would have immediate impact would be to ask the Council for a second decentralisation regulation which would permit the Commission to ask specific NCAs to act in the name of the Commission and operate wholly according to Commission procedures. The adoption of such a regulation could also be taken as an opportunity to strengthen the rights of defence and streamline procedures permitting faster adoption of decisions via introducing an independent judicial element and permitting

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States Belgium, Cyprus, the Czech Republic, Estonia, Finland, France, Germany, Hungary, Ireland, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Slovakia, Sweden and the United Kingdom operate leniency programmes.

141. There is an extensive discussion of the operation of the network in the literature. A good starting point are the papers from the 2002 Annual EU Competition Law and Policy Workshop, *Constructing the EU Network of Competition Authorities*, at the European University Institute. They can be obtained from www.iue.it/RSCAS/Research/Competition/Menu.shtml .A more recent discussion of the issues involved can be found in Geradin, (ed.) *Modernisation and Enlargement: Two major challenges for EC Competition Law* (Intersentia, 2005).

plea bargain agreements. Such a decentralisation regulation, unlike Regulation 1, would expressly focus on cases that would usually be dealt with by the Commission (such as European wide and international cartel cases).

The NCAs would be able to run such cases on behalf of the Commission. Hence the designated lead NCA would apply the Commission's leniency notice, and apply the Commission's investigative procedures in co-operation with other NCAs and the Commission. The lead NCA would undertake the plea bargain negotiations. The Commission itself would only directly take over the case when the Commission's legal service would seek to have the plea bargain confirmed in a short form decision before the competition tribunal.

The advantages of bringing in the NCAs to assist the Commission in dealing with its cartel caseload are significant. The Commission is able to immediately tap into an existing pool of competition law expertise to help shoulder the investigative and evidence assessment of its caseload. Common procedures for dealing with international and European cartel cases would increase legal certainty and procedural rights for undertakings. Because the new procedural regulation would only apply to international or European cases that clearly fall within the Commission's jurisdiction, national procedural autonomy is preserved for national and regional cases that could be transferred under Regulation 1. There are however, a number of difficulties.[142]

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142. The first is that the NCAs are very asymmetric. Some NCAs such as the British, German, Dutch and Italian authorities have the staff, know-how and linguistic resources to deal with European or international cartels, but many of the smaller NCAs do not have such resources. Invariably it would be one of the NCAs from one of the larger Member States, who would act as the lead NCA. Some Member States in Council may have difficulty accepting that in practice not all NCAs could conceivably act as a lead authority. There are a number ways round this political problem. For instance, while it is true that a lead NCA is likely to come from one of the larger Member States, there may well be the need for the lead NCA to have very strong co-operation with a number of smaller NCAs for linguistic, local knowledge and inspection purposes. Hence, while it is unlikely that some of the smaller NCAs would lead directly, they would be able to participate in international or European cases that would otherwise remain the preserve of the Commission. The other major concern is that the NCAs would be taking extra-territorial Community wide decisions. The point here is that the NCAs are acting in the name of the Commission, so they are not taking decisions on their own account and outside jurisdictional limits set by national law. The NCAs will be taking Community decisions subject to Community law and the control of the competition tribunal or the CFI. In any event, aside from inspection

The due process questions that arise from the cartel busting revolution

Over the last decade DG Competition has faced a relentless attack by undertakings who have been subject to fines in cartel cases, alleging that the Commission in initiating procedures against them has infringed the European Convention on Human Rights.[143]

Defence lawyers have argued that the Commission's power to obtain information; power to carry out unannounced inspections; and the central contentious procedures operated solely by the Commission, amongst a multitude of other issues infringe Articles 6 and 8 of the Convention.[144] In the past, the Commission was able to deflect pressure to change fundamental elements of its procedures for two reasons. First, these arguments were made in very few cases, as sanction cases, and cartel cases in particular were rare. Second, it was unclear whether, if at all, the case law of the Convention applied to undertakings.

Given the number of cartel cases coming on stream, the defence rights questions raised in cartel cases will be raised much more often. Furthermore, the likely increase in corporate sanctions, and particularly the arrival of individual sanctions will make it much more difficult for the Commission not to give ground on fundamental procedural reform. At one level, even without personal sanctions, already DG Competition, can hardly deny that its sanction powers against cartels are now used frequently; involve very high sanctions and that its procedures and the rhetoric against cartels is shifting in a quasi-criminal direction. These factors make it much more difficult to sustain an argument that undertakings' defence rights should not be enhanced.

Combined with the increasing pace of Convention case law in cases such as *Saunders v. United Kingdom*;[145] *Colas Est v. France*[146] and *Findlay*

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and information decisions under Arts 18, 20 and 21 of Regulation 1, the final short form decision would be made by the Commission or, on the advice of the Commission by the external judicial authority.

143. See for example, Case 136/79 *National Panasonic v. Commission* [1980] E.C.R. 2033; Cases 46/87 and 227/88 *Hoechst AG v. Commission* [1989] E.C.R. 2859; *Mannesmannrohren-Werke AG v. Commission* [2001] E.C.R. II–729 and T–224/00 *Archer Daniel Midlands v. Commission*, July 9, 2003.
144. Art.6 protecting rights to a fair trial, in its broadest sense, and Art. **????????????**the right to privacy, including right to home, correspondence and family life.
145. [1996] E.H.R.R. 313.
146. Case No. 37971, April 16, 2002, not yet reported in European Human Rights Reports.

v. United Kingdom,[147] the pressure to enhance defence rights is becoming intense. For instance, the high level of sanctions and rhetoric employed by the Commission makes, it increasingly difficult to argue that that Commission competition procedures are not "criminal" for the purposes of Article 6.

Equally, one of the practical defences deployed by the Commission in respect of its power to require answer questions under Article 18 under threat of penal sanction is that without such a power the Commission had no means to obtain evidence. With 50 cartel cases under investigation, and DG Competition flooded with information from cartel members seeking immunity, that argument looks distinctly weak. It is also difficult to sustain the argument that DG Competition can alone make a definitive adjudication as to whether an undertaking has engaged in a cartel, when the consequences are so severe for undertakings and potentially so for individuals, without such an adjudication amounting to an infringement of the presumption of innocence under Article 6(2) of the Convention.[148]

Developing an effective communication and education programme as part of the overall anti-cartel strategy

A small but very important procedural reform would be to ask the Member States for 1% of the value of all sanctions collected by the Commission to be held by a board of the NCAs and the Commission for the purpose of competition law education, information and research on competition law. Currently 100% of the fines collected by the Commission pass into the Community general budget, essentially defraying the general costs of running the Community and thereby reducing the level of Member State contributions to Community.

Funds for education, information and research could provide the Commission and the NCAs with a second effective means of ensuring compliance with the competition rules aside from the fear left in the trail of numerous cartel-busts, heavy fines and damaged commercial reputations.

147. *Op. cit.*

148. One approach to minimising the impact of any reform to Commission procedures would be to distinguish between cases where a sanction was imposed, in which case a reformed procedure would apply where the Commission would either place a plea bargain before an external judicial authority, who would adopt a short form decision incorporating the plea bargain or the Commission would "prosecute" the defendant undertaking before the external judicial authority, and non-sanction cases where the traditional administrative procedure would apply.

One striking feature of European business practice is the extent to which so many executives still do not understand that price-fixing, market-sharing and bid-rigging are unacceptable commercial practices. If the Commission and the NCAs had a significant budget for education and information, they could develop a major campaign to dissuade executives across the Community from engaging in such damaging competition practices. This educative, preventative approach could save the Commission and the NCAs a lot of future work, and would provide another means of protecting the Community economy, if executives were dissuaded by education from engaging in cartels. The competition agencies would also find it extremely valuable to be able to commission research as to the state of competition in key markets.

Enhancing the 2002 EC leniency notice

One of the other major consequences of the cartel busting revolution is that regulators will be looking for means to protect the leniency notice and enhance its operation. The Community's leniency notice does face two major threats to its effectiveness. One major threat, stems from NCAs either having their own leniency notices, often compounded by being different in their terms to that of the Commission or no leniency notice at all, combined with a decentralised system of enforcement where cases can be transferred between agencies. Given that it is unclear under the decentralisation procedures which NCA will end up with a case, a potential leniency applicant may have to file a leniency application with several authorities.[149] Worse still under some regimes a leniency applicant may be able to obtain leniency while under other regimes this may be difficult, if not impossible.[150] There is a strong argument for the contention that this situation threatens the success of the 2002 Notice and should be dealt with as a matter of priority. The alternative is a decline in the effectiveness of the leniency programme.[151]

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149. Klose, *Opportunities and Risks of Leniency Programmes in Multi-Jurisdictional Cartel Cases*, International Forum on European Competition Law, Conference Paper, April 2005, Brussels, 2.
150. *Ibid.*
151. The Commission should at the very least argue the case for a one stop shop leniency application where application with the one stop shop preserves priority within the Union. It could also seek negotiations to erase the most obvious differences between Member State leniency programmes. In addition, as argued above the Commission could justifiably argue for a common leniency programme to be applied in the cartel cases which are European wide or international in

The second difficulty concerns the disincentive to file for leniency in the Community created by US discovery procedures. The fear here is that documents generated to provide evidence to the Commission will be obtained under the feared US discovery procedures, which may then be utilised in treble damages procedures in the US. DG Competition sought to protect its leniency applicants, first by seeking to restrain US courts from ordering discovery and, second by taking oral statements from the leniency applicant.[152]

The idea behind taking oral statements is that the document created by the Commission is a Commission document and not formally discoverable by the US courts. However, under current Commission procedures that document may still be accessible by other defendant undertakings under the Commission's Access to File Notice[153] and in any event is likely to appear at least in part in the Commission's final prohibition decision, where it can be directly relied upon by plaintiffs.[154] Clearly if a plea-bargain and short form decision procedure is adopted some of this concern will disappear, as the documents are unlikely to be subject to an Access to File request and there will be no full prohibition decision. It is argued in fact that this problem is not so great a difficulty for the leniency applicant, given that the US has now introduced a single damages rule for leniency applicants. The leniency applicant has much less to fear from pleading for leniency in the Community, the answer to its fear of treble damages in the US is to promptly file for both US and Community leniency to maximise its leniency position in both jurisdictions.[155]

In addition to dealing with potential threats to the leniency notice any review of the notice will also have to consider means of encouraging the effectiveness of the notice. There are three key reforms to the notice that the Commission could consider. There is a strong argument for increasing the amount of fine reduction for the second member of the cartel who comes into the Commission with evidence. As Leslie has argued, simple

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scope, as those cases would in principle fall within the Commission's own jurisdiction.

152. Nordlander, *Discovering Discovery-US Discovery of EC Leniency Statements* [2004] E.C.L.R. 646.

153. *Commission Notice on the Internal Rules of Procedure for Processing Requests for Access To File* OJ (1997) C23/3.

154. Klose, *op. cit.*

155. Clearly if the civil actions become common in the Community the same deterrence issue arises domestically as well. However, as is argued below similar means can be deployed to incentivise the potential leniency applicant to file for leniency despite the prospect of civil actions as in the US.

leniency is problematic, undertakings are no better if someone else has confessed, it may in such circumstances be better to keep silent.[156]

A structured pay-off in which full immunity for the first undertaking to come in, is followed by a significant reward of 50–80% reduction for the second one in, and lesser tiered discounts for later arrivals is likely to make confession a dominant strategy. In addition, to which the second undertaking into the Commission may well have better evidence than the first through the door who has obtained immunity.[157] The current notice only permits the second through the door to obtain a maximum 50% discount on the fine that would otherwise be paid. Given Leslie's argument that may be too little.[158]

In addition to the arguments offered above Leslie also makes a compelling case for increasing sanctions as part of an enhancement of the effectiveness of leniency programmes:

> "First, if the penalties are high, amnesty confers a significant benefit and this gives each cartel member a direct incentive to confess in order to avoid even the risk of that high penalty. Second, high penalties increase distrust because each cartel member knows that all of its partners have a significant incentive to confess. The distrust of one's cartel partners, coupled with the likelihood of a significant punishment, makes confession rational. Increasing the probability of detection and prosecution reduces the likelihood of firms' entering cartels. Distrust increases the likelihood of detection because firms are more likely to confess to the government. Thus, the Distrust Model of Antitrust shows how increasing antitrust penalties also increases the probability of getting caught. As a result, increasing antitrust penalties might not just deter future cartels; it could simultaneously lead to the exposure of current cartels"[159]

This "distrust" argument reinforces the policy, and media demands discussed above for higher corporate sanctions and the introduction of a

156. Leslie, *op. cit.*, p.639.
157. Leslie, *op. cit.*, p.640.
158. It could be argued that the 'significant added value' provision of the EC Leniency Notice provides a means to add to the incentive of non-immunity leniency applicants. However, it has been compellingly argued that the significant added value requirement is an uncertain and difficult standard for applicants to meet. See *Opportunities and Risk of Leniency Programmes*, *op. cit.*, p.10.
159. Leslie, *op. cit.*, p.653.

range of individual sanctions including fines, director disqualification and exclusion from the Union.

A final potential reform to the leniency notice would be to introduce an express Amnesty Plus programme. The advantage of an Amnesty Plus is that it is likely to severely disrupt the cartel culture in European business. Traditionally a good business reputation in cartels where a firm had been involved in many cartels assisted cartel formation. However, Amnesty Plus makes undertakings wary of joining a cartel in which experienced multi-cartel players take part. The danger for the other cartel members is that they know that even if the multi-cartel player is not the first through the front door of the Commission it can obtain significant discounts that are likely to be available on any fine by informing the Commission of other cartels it has participated in.[160]

CIVIL DAMAGES IN THE CONTEXT OF EFFECTIVE PUBLIC ENFORCEMENT AGAINST CARTELS

One other major consequence that is likely to flow from the cartel-busting revolution is the greater availability of civil damages in the national courts. In particular, as the Commission generates a greater number of cartel prohibition decisions, plaintiffs will be able to step over the principal procedural barrier to antitrust enforcement, namely evidence.

A considerable body of evidence will be available to the victims (and potential plaintiffs in civil actions in the national courts) of the price-fixing that will be set out in detail in the Commission's decision. Clearly, if the Commission is to streamline its own procedures, introduces plea bargains, and short form decisions, plaintiffs will have not so much evidence to rely on. In such circumstances, two additional procedural rights would protect plaintiffs.

First, the plea bargain and short form decision in which it is incorporated should expressly bind the defendants in respect of the allegations it contains in respect of civil damages actions in the national courts. Second, the Commission should be able to provide as much evidence as possible from its files to plaintiffs commensurate with its obligations of commercial confidentiality and business secrets.

One final consideration in respect of civil damages is the danger that leniency applicants would be deterred in seeking leniency by the prospect of paying out civil damages in the national courts of the Member States.

160. *Op. cit.*, p.644.

One way to protect leniency applicants is to impose interest on damages at several basis points above the ECB's central rate on all cartel overcharges from date of damage, but provide that leniency applicants pay no interest. As interest on damages from date of damage has a similar effect to treble damages,[161] exempting leniency applicants from treble damages maintains the incentive for the potential leniency applicant to apply for leniency, while generating an incentive for plaintiffs to bring civil actions in the national courts.

VIII: RE-SHAPING EUROPEAN COMPETITION LAW

Ms Kroes now has the greatest opportunity ever presented to a European Competition Commissioner to transform competition regulation. The US experience of the 1993 CLP very strongly points in the direction of a continual flow of leniency applications into DG Competition. With the existing caseload and the incoming cases, Ms Kroes has the opportunity to transform and re-shape Community competition regulation. She has the opportunity to use the publicity from the cartel cases to reach out to industry, public, media and the political class to build a consensus across the Union that cartels are extremely damaging to the European economy, and thereby acquire the resources and procedures necessary to drive cartels out of European markets.

It is no understatement to say that Ms Kroes has an opportunity in her grasp of rivalling Thurman Arnold. Arnold transformed US competition law through building public support for the work of the Antitrust Division, vigorous prosecution of cases and persuading Congress to give the Division the resources and procedures necessary to protect the American consumer.[162] Ms Kroes similarly through vigorous prosecution; effective communications with industry and media, and effective lobbying with the Council and the Parliament has the possibility of achieving as much as Arnold.

Following the No Votes on the Constitution in France and the Netherlands, and at a time when many people are questioning the value of the European Union, Ms Kroes and DG Competition have a major opportunity to demonstrate in a very practical fashion the direct value of the Union to people in their pockets and in their daily lives.

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161. Jones, *Private Enforcement of Antitrust Law in the EU, UK and USA* (OUP, 1999), 231.
162. Spencer Weber Waller, *op. cit.*