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Leniency

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Confession Consequences in a Crowded Investigative Environment: Complexities in Cooperation with Multiple Authorities in Cartel Investigations

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Confession Consequences in a Crowded Investigative Environment: Complexities in Cooperation with Multiple Authorities in Cartel Investigations

Rein Wesseling[1]

Amnesty and leniency applications have frequently been compared to confessions in the Catholic Church. The parallel is evident for the confession part. But what about the penance? In the Catholic Church there is no fixed catalog of actions a sinner has to take to qualify for absolution. Yet, though there is a degree of discretion for the priest, he will convey what is required in a finite manner. That is different from the leniency process. Leniency policies will define that applicants have to cooperate fully with the authority. But what full cooperation means is determined *en route* and on a case-by-case basis. The discretion for authorities as well as the dependence of the leniency applicants in leniency processes is prominent.

Both the discretion and the dependency would appear to be inherent in the leniency concept. At the same time, such a combination of discretion and dependency is generally unlikely to lead to optimal and balanced outcomes. The risk for disproportionate demands being imposed on those seeking absolution is exacerbated where numerous authorities are exercising their vast discretion in parallel.

These are very general observations. At the same time there are concrete indications that elements of the leniency policies of competition authorities in multi-jurisdictional investigations are not optimally balanced. As set out in more detail elsewhere, a combination of developments in the antitrust law enforcement area have rendered the benefits of leniency applications less obvious in some situations.[2]

The Deputy Assistant Attorney General of the U.S. Antitrust Division recently put it nicely where he said that authorities are operating "in an increasingly complicated and crowded investigative environment".[3] In the (very "crowded") investigative environment in which multi-jurisdictional cartel investigations take place the question arises whether there is room for more transparency, restraint, and coordination on the side of the competition authorities. The same Deputy Assistant Attorney General concluded that there is such room and that enhanced cooperation between authorities and increased focus on key evidence can make investigations more efficient and effective.

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[2] Christof Swaak & Rein Wesseling, *Reconsidering the leniency option: if not first in, good reasons to stay out*, (36) EUR. COMPETITION L. REV. 346-354 (2015).

[3] *Leniency in Multi-Jurisdictional Investigations: Too Much of a Good Thing?*, Brent Snyder, Deputy Assistant Attorney General, Antitrust Division, US Department of Justice, Remarks as Prepared for Delivery at the Sixth Annual Chicago Forum on International Antitrust, Chicago, Illinois, (June 8, 2015).

Increasingly leniency policies are applied in combination with settlement procedures. Settlement procedures themselves imply a significant degree of discretion for authorities, too. The accumulation of multiple authorities' discretion in leniency-based settlement procedures itself raises further questions about due process, transparency, and accountability.[4]

Against this background a continued debate about the room for improvements leading to a more effective and efficient investigative process is welcome. Even if the ambition is not to define the Sacrament of Penance for leniency applicants, this issue of CPI aims to contribute to that debate by taking stock of the leniency regimes in numerous jurisdictions.

[4] Laura Guttuso, *From `Mono` to `Stereo`: Fine-Tuning Leniency and Settlement Policies*, (38) WORLD COMPETITION 395-422 (2015).

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Criminalization of Cartels and Leniency:
An Exercise in Complexity

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Criminalization of Cartels and Leniency: An Exercise in Complexity

Marcelo Calliari[1]

I. INTRODUCTION

What change a decade brings. Ten years ago the calls for a spread of leniency policies[2] were undisputed. Their success in detecting cartels in a few jurisdictions, notably the United States and the European Union, seemed to justify the expectation that their adoption by more and more countries would only improve enforcement and desincentivize cartels worldwide. A little less undisputed, but with similar claims of increased deterrence, the call for criminalization was also spreading and the discussion on pros and cons of including this weapon in the anticartel arsenal grew and spread.

The success of those evangelizing movements is reflected in the increased number of jurisdictions that have adopted criminal provisions, and the much larger number of those that have introduced leniency programs. It should therefore be somewhat surprising to see that *pari passu* with the trend, when defenders of these developments should be celebrating, the debate has shifted somewhat to ponder whether we have gone too far, and whether the risk today is that leniency itself may be disincentivized by the growing complexity, uncertainty, and cost associated with its dissemination.

There are many reasons for this shift in the leniency debate and this publication will explore several of them. This paper will focus on only one, that of criminalization of cartel enforcement and its impacts on the incentives for leniency. As most countries that have contemplated criminalizing cartels will attest, this is a challenging enterprise that increases the level of complexity in the system—and could therefore increase the risk and reduce predictability for potential cooperators. The counter-bet is obviously that the added deterrence effect will more than outweigh those negative impacts.

In this debate, Brazil may offer a very interesting practical example of the effects to leniency caused by criminal enforcement, and it serves as a real life experiment of how positive and negative incentives interplay. It also serves as a sobering reminder both of the imperative of carefully planning and designing a proper institutional and legal framework for criminalization,

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[2] Leniency terminology is not uniform throughout the antitrust world. In Brazil, leniency is the term reserved for the first applicant to reveal the conduct and cooperate, and generally offers full immunity, while an agreement with a reduction in fines available for the following cooperators who come after the first one in is called a settlement (even though it is more akin to a second-in leniency in Europe than to the settlement program of the European Commission). Unless indicated—as when referring to Brazilian specific programs that will follow the Brazilian nomenclature—the term leniency will be used more broadly to encompass all cooperation programs, be it the immunity for the first cooperator or the reduced sentences for the following ones. The author hopes that these references will be self-explanatory in the context of the paper.

and of the likelihood that unexpected developments will happen anyway, challenging the authorities to adjust in a way that will protect leniency.

II. THE CHALLENGE OF CREATING AN INSTITUTIONAL DESIGN MODEL

In general, in most countries criminal enforcement tends to be traditionally (and understandably) subjected to very stringent procedural and formalistic requirements, often much more so than civil or administrative antitrust law. Further, in most countries enforcement of criminal law is entrusted to specific entities—such as public prosecutors—that have been around for much longer than competition authorities, are part of much larger and more established organizations, and have their own agendas, priorities, discourse, practices and concepts—and are much less permeable to the international debates that are one of the hallmarks of antitrust today.

Most countries in fact do not have the luxury of having the criminal and the antitrust enforcers rolled into one, such as the Department of Justice in the United States. Constitutional or other restrictions in many jurisdictions may actually prevent administrative competition authorities themselves from becoming a criminal enforcer, which means that criminalizing cartels necessarily brings new players into the antitrust enforcement scenario, with multiple and often unforeseeable consequences.

The criminalization of cartels requires an institutional design that will obey the legal framework of the specific jurisdiction while at the same time stimulating efficiency and rationality, as well as coordination between criminal and antitrust agencies. In this sense, the definition of the model itself becomes crucial, and several variations are possible, ranging from complete separation between criminal prosecutors and the competition authority to interdependence (as when criminal prosecutors can only pursue a case upon referral by the competition agency, similar to Japan and South Korea); and from separate and independent to overlapping jurisdictions.

Evidently there is no right or wrong model, and any model will have to adapt to the legal culture, framework, and idiosyncrasies of each country. But they can be more or less efficient, bring more or less complexity and uncertainty, and ultimately offer more or less incentives for leniency applications. And, as a rule, all are subject to improvements with experience.

III. THE BRAZILIAN EXPERIENCE

A. Administrative vs. Criminal Charges

In Brazil cartels are not only an administrative violation according to the Competition Law[3] but also a crime, subject to criminal Law n. 8.137/1990[4]. If the competition authority CADE[5] is in charge of enforcing the Competition Law, the police and the public prosecutors (both at the Federal and State levels) are responsible for investigating cartel crimes and bringing cases before criminal courts.

[3] Law n. 12.529/11

[4] Other criminal statutes, such as public bids Law n. 8.666/1993 and others, may also provide criminal penalties for cartel-like behavior.

[5] Conselho Administrativo de Defesa Econômica (Administrative Council for Economic Defense).

Administratively, both companies and individuals can be convicted and punished with fines, cease-and-desist orders, and a host of other potential penalties provided in the Competition Law. Criminally, only individuals can be prosecuted, and companies face no criminal liability in Brazil. Thus, an individual can simultaneously face both an administrative and a criminal prosecution and, as a consequence, be penalized under the Competition Law and also face imprisonment and a criminal fine under Law n. 8.137/90. The investigations can run completely in parallel or can communicate with each other.

Though in the books for over 20 years, the crime of cartels was very seldom prosecuted until the last ten years, having really taken off in the last five years, before reaching the point today where over 300 individuals are currently facing criminal prosecution in Brazil.

B. The Leniency Program

This duality had been taken into account already in the creation of the leniency program in Brazil in 2000, providing both administrative immunity for companies and administrative and criminal immunity for individuals. This proved to be a crucial element in the development of the program. As leniency requires the confession of a violation, an individual would be exposing himself/herself criminally if the protection of leniency was restricted to the administrative sphere.

Ensuring that leniency will have this dual effect—criminal as well as administrative immunity—has proven instrumental to secure the cooperation of individuals. In fact, practical experience in negotiating leniency unavoidably involves addressing the understandable doubts and concerns from individuals contemplating cooperation, regarding their risks and exposure on the criminal front. The fact that criminal immunity is granted is unsurprisingly an enormous incentive for cooperation. This stands in stark contrast to the lack of criminal effects of the Brazilian settlement system, which will be discussed below. But even in the context of leniency the criminal dimension remains an uncertainty factor.

The negotiation and execution of a leniency agreement in Brazil was entrusted by the law to the competition authority, even if the effects would include both administrative and criminal immunity. Allocating the power to grant leniency is not a trivial matter in a system that has criminal enforcement, and has been an issue in other countries as well, given that it requires either giving an administrative agency the power to grant criminal immunity, or providing that both authorities (jointly or independently) will have to negotiate and decide to grant immunity.

In Brazil, in order to preemptively avoid any questioning, the competition authority chose not to rely on the power granted by the law and has traditionally called the criminal prosecutors to also sign leniency agreements, while trying to maintain the bulk of the actual negotiation centralized with the competition authority. It is a delicate balance that has worked so far, but depends on the goodwill of the prosecutors to continue.

The Brazilian experience so far indicates that the criminal prosecution of individuals can be a very effective tool in cartel enforcement, and acts as powerful incentive for individuals to cooperate with an investigation. The contribution by individuals helps the company strengthen its case in seeking leniency while, for the authority, it strengthens a conviction decision and certainly improves the odds when facing an appeal in court. In this sense, by increasing the chance of a successful conviction, cooperation by individuals also provides an added incentive

for other defendants who were not the first ones in to also cooperate and seek a settlement with the authority, thereby further reducing the chances of an appeal in the courts and snow-balling yet other defendants into cooperation.

With a view to further increasing the deterrence effect of criminal sanctions (and by-passing any discussion on reasonability or fairness), the Brazilian criminal statute was amended in 2011 with a small but extremely significant change. The previous penalty for cartels of two to five years of imprisonment "or" a fine was altered to two to five years of imprisonment "and" a fine. As a consequence, convicted individuals are no longer eligible for some alternative penalties and judges have less discretion to impose lighter sentences. Also, the maximum jail time of 5 years can be, and has been, exceeded in several cases if there are aggravating circumstances. This happened for instance in the criminal investigation of the air cargo cartel, in which the judge sentenced one of the defendants to a prison term of 10 years.[6]

C. Criminal Charges Against Foreigners

An important recent development—particularly from an international perspective—is that Brazilian criminal prosecutors have, in what appears to be for the first time, brought criminal cartel charges against a foreigner residing abroad. This was in the context of the high-profile investigation on alleged bid-rigging in the sale and maintenance of subway trains (the "Subway case").[7]

CADE has often prosecuted foreigners administratively, but criminal prosecutors had shown little appetite to face the significant procedural obstacles of cross-border prosecution—possibly also because of the more uncertain application of the extraterritorial effects doctrine in the criminal sphere. It is uncertain whether the Subway case heralds a more permanent change in the practice of the criminal prosecutors or if it just reflects the exceptional media attention this investigation received. In any case, given the treaties Brazil has signed regarding extradition and mutual legal assistance with many countries, including the United States, this development should further stimulate foreign individuals to cooperate with their companies in leniency applications in Brazil.

D. The Petrobras "Lava Jato" Case

At the same time, the upsurge in domestic criminal investigations more recently is providing an incentive for Brazilian individuals (who have in many cases been somewhat reluctant to cooperate with the government) to also apply for leniency. The on-going case involving state-owned oil giant Petrobras[8] (Operation "Lava Jato" or "Car Wash," as it was code-named by the police and prosecutors) has in this sense undoubtedly had an major impact in the perception of leniency and cooperation in Brazil. The largest investigation ever to take place in the country, unfolding in the media in real time and spreading to several different areas, from antitrust to corruption and money laundering, it has captured the eyes and minds of the country.

[6] This decision is currently under appeal.

[7] CADE Administrative Proceeding n. 08700.004617/2013-4 and multiple other criminal, civil, and administrative investigations before different courts and agencies around the country.

[8] CADE Administrative Inquiry n. 08700.002086/2015-14 and, like the Subway case referred above, multiple other criminal, civil, and administrative investigations before different courts and agencies around the country.

Just to give an idea of the dimension of the investigation so far, according to the Federal Prosecutor's Office,[9] as of August 2015 (in figures that will quickly grow outdated): at least 715 investigation proceedings had been initiated involving allegations of corruption, money laundering, cartels, and other criminal offenses; more than 140 individuals were under investigation; 28 plea agreements had been signed; 356 search warrants had been carried out; 105 individuals had been arrested; 53 requests for international cooperation were issued; R $870 million (approximately U.S. $248.5 million) had been recovered; and the sum of convictions by then was 225 years, 3 months, and 25 days.

Also in the context of the Petrobras investigation, leniency agreements have already been signed with CADE and other agencies, and the leniency program adopted by the new anticorruption statute[10] (largely inspired by the antitrust one) is about to be tested for the first time. Not to mention the civil actions popping up, some of them with claims of hundreds of millions of U.S. dollars.

Even if the largest part of this scandal refers to corruption and bribery (though sometimes linked to competition matters), the concepts of leniency and cooperation are gaining great recognition and momentum both within the government and the public in general, given the obvious positive impact to the effectiveness of the investigation. Also, the large number and the political and economic prominence of many of the individuals arrested are starting to convince defendants that the threat of jail is much more real than the long history of impunity in Brazil would suggest.

E. Scope of Criminal Protection

But the Petrobras case is also highlighting another issue that requires careful attention from any jurisdiction planning to introduce criminal sanctions for cartels—some that only became clear with practical experience in Brazil—and may have important effects to the leniency program.

The question refers to the exact scope of the criminal protection awarded by leniency. Is it limited to the crime of cartel, or does it cover other related crimes? Can cartel charges be combined with conspiracy, and does leniency provide protection against that? What if other crimes are also involved, such bid-rigging or corruption? Will the leniency applicants expose themselves to criminal prosecution for a conduct for which they are not covered by the leniency agreement? What if the evidence for the antitrust violation also proves other crimes, such as corruption and bribery? These matters are less simple to deal with in practice then it may seem, taking into account that sometimes different violations are subject to different criminal statutes and possibly even to different specific enforcing agents.

The new Brazilian law of 2011 increased the scope of protection for leniency from only cartels to include also conspiracy and bid-rigging and "other crimes directly related to the practice of cartel." The record of the congressional debates shows that the possibility of charges

[9] http://lavajato.mpf.mp.br/atuacao-na-1a-instancia/resultados/a-lava-jato-em-numeros. Information as of 14 August 2015, accessed on 24 August 2015.

[10] Law n. 12.846/2013 and regulating Decree n. 8.420/2015.

of conspiracy being brought against leniency applicants only protected for cartels is a real concern. But even with the changes, the exact reach of this expanded protection is still uncertain.

Is a corruption scheme that provides for bribery payments linked to bid-rigging "directly related" to the cartel? This will ultimately be decided in the courts, but it has an impact in terms of incentivizing leniency applications. As with all things related to leniency, the more transparency and predictability that can be offered, the better, and countries considering criminalizing cartels should take the chance of preventively addressing this issue as carefully and holistically as possible before it arises in a concrete case. If, as is almost inevitable, unforeseen difficulties arise, the Brazilian experience throughout some of these trials has shown how important it is for the competition authority to firmly stand on the side of protecting the leniency program.

F. Settlement Programs

Even with all of these concerns regarding leniency and the first one in, maybe the biggest challenge to antitrust cooperation programs in Brazil in the face of growing criminal enforcement comes in the context of the settlement program—that is, the benefits offered to those cooperators who come in second or later to the authority.

The settlement program in Brazil underwent a major change in March 2013, when CADE issued Resolution No. 5[11] containing new provisions designed to make negotiations and benefits more transparent, predictable, and attractive. The new Resolution created a scale of discounts based on the timing of an applicant's presentation of a settlement proposal and the degree of cooperation, with a reduction of 30 percent to 50 percent of the fine that would be imposed for the first proponent; reduction of 25 percent to 40 percent of the fine that would be imposed to the second proponent; and reductions of up to 25 percent to any following proponents. A settlement proposal made after the investigation phase has ended can provide a maximum of reduction of 15 percent.

The law however does not provide any criminal effect to a settlement. When the CADE settlement resolution mentioned above was being drafted, there was considerable debate as to whether a settlement should necessarily require parties to confess, given the obvious potential criminal repercussions. Many contended that this requirement would reduce the number of settlements. CADE ultimately decided to maintain the requirement of a guilty plea, considering that since leniency mandated a confession, a settlement for someone coming in later in the investigation could not be more beneficial. The impact of a confession for civil claims is considerable, and there was a concern that exposing a leniency applicant more than a settlement signatory on the civil front could also be a disincentive for leniency.

The fact is that this new regulation has launched a new era of settlements in Brazil. According to CADE, more than 50 such settlements were signed since March 2014 when the new Resolution came into force. This is in stark contrast to the old system, in which settlements were few and far between and most defendants fought the charges before CADE and later in the

[11] Resolution n. 5, dated 6 March 2013, *available at* http://www.cade.gov.br/upload/Resolução%205_2013.pdf, accessed on 24 August 2015.

courts. The authority has in this result an easy rebuke to the claims that this confession requirement would scare away potential settlement proposals.

This rebuke obviously has to be taken with a grain of salt. The question that could be asked is whether the success is due to the increased transparency of the rules and benefits, and could be even bigger if it were not for the criminal risks. Also, a more careful analysis still has to be made as to whether companies are settling more but maybe individuals are participating less. Further, given the fast-growing interest of criminal prosecutors in pursuing cartel investigations—no doubt spurred by the very visible Petrobras and Subway cases—it could be risky to make predictions as to the attractiveness of a settlement program that criminally exposes a cooperating individual.

It may be a matter of fairness—and good leniency policy—not to expose the first cooperator more than those who follow later, but the impacts of this choice must be assessed. This understanding could be a basis, for instance, for proposing and facilitating coordinated approaches involving both the competition authorities and the criminal prosecutors, so that individuals interested in resolving an investigation could reach parallel but simultaneous settlements in both spheres.

IV. CONCLUSION

If more enforcement and stiffer penalties from multiple agencies may act as a stimulus for companies and individuals to cooperate, excessive complexity, lack of coordination, and risk of cross-exposure can disincetivize potential applicants. Even if it is still unfolding, and the courts have yet to significantly weigh in on this process, the Brazilian experience with leniency, settlements, and criminalization so far seems to point to very positive results in terms of enforcement.

The issue however is that this experience also suggests that it is crucial to constantly reassess and seek a better equilibrium. Legislation and institutional design, regulation, and coordination between government officials can and must constantly be improved.

Criminalization of cartels is a complicated affair anywhere, and affects leniency and cooperation programs in a dramatic way. Authorities considering that path have to acknowledge the complexities of such an environment and offer predictable alternatives for resolution. As detection and penalty figures increase and are celebrated by authorities, companies, individuals, the authorities themselves are navigating more uncertain waters. In this scenario, it becomes even more important to strive to reduce the uncertainty and to maximize the incentives in order to strengthen the cooperation programs that have been so important for improving cartel enforcement around the world.

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The Rise of ROW Anti-Cartel Enforcement

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The Rise of ROW Anti-Cartel Enforcement

John M. Connor[1]

I. INTRODUCTION

International hard-core cartels are typically the most injurious price-fixing offenses, yet they are also the most difficult to prosecute. Detecting collusion and assembling evidence that lies outside an antitrust authority's jurisdiction, combating large well-lawyered multinational corporations, and imposing effective remedies are challenging when faced for the first time.

Effective anti-cartel enforcement began in the United States about a century ago, beginning with purely domestic cartels. Then, in the mid 1940s, the Antitrust Division of the Department of Justice ("DOJ") extracted *nolo* pleas from about 40 international cartels.[2] Because of a number of prosecutorial hurdles, the first U.S. prosecutions that resulted in criminal fines imposed on international cartels did not begin until the late 1980s.[3] The only other jurisdiction that had fined an international hard-core cartel was the European Union through its Commission ("EC").[4]

By several measures, these two jurisdictions virtually monopolized the business of fining international cartels in the 1990. Partly as a consequence, many geographically widespread international cartels escaped having their collusive profits disgorged by the young competition-law authorities in Africa, Asia, and Latin America. That is, the absence of anti-cartel enforcement in the rest of the world ("ROW") contributed to sup-optimal deterrence.

The ROW antitrust authorities have made extraordinarily rapid progress in punishing international price-fixing. Building in part on legal innovations made by the DOJ and EC, many of these newer authorities are close to matching the effectiveness of the two crucibles of anti-cartel enforcement. Indeed, in early 2015, a law-firm's report—widely cited in the antitrust

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[2] Allen & Ovary, *Global Cartel Enforcement: 2014 Year in Review, available at* [http://www.allenovery.com/publications/en-gb/Pages/Global-Cartel-Enforcement--2014-Year-in-Review-.aspx]. International cartels have participants from more than one country or directed their activities mainly outside their home countries.

[3] A brief survey of U.S. and EU anti-cartel enforcement may be found in pp. 67-78 in JOHN M. CONNOR, GLOBAL PRICE FIXING: 2ND EDITION, (2007). My candidate for the first convicted international cartel is the little-known *Specialty Steel ("Oil Country") Tubes* cartel prosecuted by the DOJ in March 1990; the German company Mannesmann AG paid a U.S. $170,000 fine.

[4] The first cartel fines imposed by the European Commission were against the highly durable *Quinine* (1913-1965) and *Dyestuffs* global cartels in July 1969 (*see* CHRISTOPHER HARDING & JULIAN JOSHUA, REGULATING CARTELS IN EUROPE: SECOND EDITION, 123-126 (2010). However, a consistent fining policy against EU cartels began to bear fruit with decisions in 1984-1986, notably the *Peroxygen* case in 1984 (*id.* at 133).

news—made the startling assertion that the ROW agencies had accounted for half of all the world's announced antitrust fines.[5]

In this article, I will examine the rise of ROW cartel enforcement over the past 25 years in greater detail and with more indicators than previous publications.

II. DATA SOURCE

I primarily employ a subset of the latest edition (January 2015) of the *Private International Cartels* spreadsheet, a comprehensive collection of legal-economic data on cartels discovered since January 1990.[6] This data source encompasses the names and locations of more than 1,100 international cartels that have been investigated or punished for hard-core price fixing.[7] The subset is the 813 cartels that have been sanctioned by one or more of the world's competition law authorities.

III. FROM LOCAL TO INTERNATIONAL ENFORCEMENT

As mentioned above, it took more than 50 years after the passage of the Sherman Act before the DOJ tackled international cartels in a serious fashion; and it was not until *Lysine* fines in 1995 that the DOJ began its current campaign against international price-fixers. Similarly, with two unusual exceptions, the EC waited 27 years to issue a decision after the Treaty of Rome was signed to fine an international cartel. The other most mature antitrust authorities, Germany and Japan, held off fining international cartels for 52 and 42 years, respectively (Table 1).

The next wave of cartel prosecutions was initiated by the EU's national competition authorities ("NCAs"), and this trend started well before the official European Competition Network ("ECN") was formally established in December 2002. Indeed, even before the end of 2001, when their authority to do so was unclear, no less than 11 NCAs had penalized international cartels (Table 1). By 2009, another 12 NCAs had joined the club, which now comprises nearly all of the EU's Member States.

The younger ROW authorities followed the same pattern as their older sister agencies by first applying their new competition laws to purely domestic price-fixing and bid-rigging schemes. The first conviction of an international cartel by one of the ROW jurisdictions appears to have been the *Soda Ash* export cartel by India in 1996; the same cartel would be successfully penalized by South Africa and Botswana in 2008. For about U.S. $1 million, they obtained substantial relief for their farmers through lower fertilizer prices.

A trickle of such convictions in the late 1990s turned into a flood in the 2000s. Table 1 lists 29 first decisions involving fines on international cartels by antitrust authorities located in

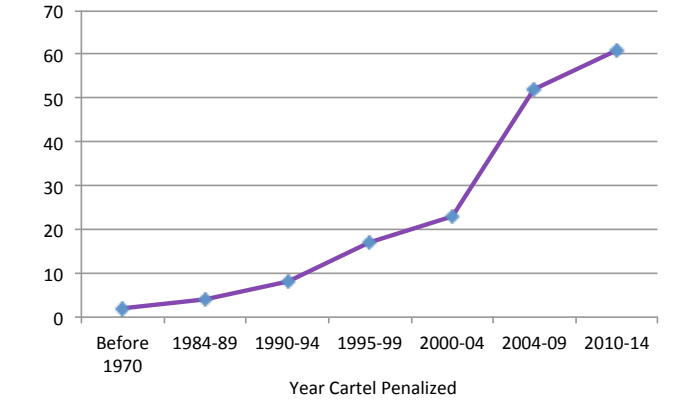
[5] Allen & Overy, Cartel *Enforcement* (January 6, 2015), cited by the *Global Competition Review* (January 7, 2015), the *Financial Times* (January 6, 2015), and many other news sources. The data in this article are confined to international cartel fines, not all antitrust fines.

[6] As legal definitions of those violations vary across jurisdictions, I depend on the local antitrust authorities' definitions and legal standards to decide which cartels to include.

[7] A posted working paper explains the details of this data set. *See* John M. Connor, The Private International Cartels (PIC) Data Set: Guide and Summary Statistics, 1990-2013: SSRN Working Paper. (August 9, 2014), *available at* [http://ssrn.com/abstract=2478271].

Africa, Asia, and Latin America. Most of them were added since 2005. The ROW agencies now comprise about half of the 61 such authorities worldwide (Fig. 1).

1. Cumulative Number of Authorities Worldwide, by Year They First Penalized an Intl. Cartel



The Competition Commission of Singapore ("CCS") provides a good recent example of a new authority emerging from one with purely local concerns to one ready to punish collusion begun and continuing offshore. Established in January 2005, the CCS spent its first nine years focused on combatting local-market collusion, such as pest control, construction, bus, and employment services. In its short life, the CCS was able to institute a full range of cartel-detection systems: amnesty, amnesty-plus, and whistleblower bounties. In late 2014, the CCS had 19 amnesty applications awaiting decisions. On December 2013, it announced its first penalties on an international cartel, imposing fines on several Japanese bearings manufacturers; the CCS fined its second international cartel of freight forwarders in 2014.

Fining international cartels is a big step forward in maturation for ROW jurisdictions. First, introducing leniency programs, whistle-blower bounties, extraterritorial reach, and criminal penalties may be incompatible with existing national laws or the authority's mandate.

Second, the typical international cartelist is a multinational firm with ready access to sophisticated legal advice. The civil servants who populate the ROW antitrust authorities, many of them with few of the specialized legal and economic skills found in leading international law firms and consultancies, often find pushback from defendants and the business community daunting. Defendants spend large resources appealing authorities' decisions to judges with little familiarity with the nation's antitrust laws. Seemingly endless appeals processes in many ROW jurisdictions make collecting fines in the ROWs very difficult compared to the U.S. and EU jurisdictions.[8]

[8] The fine recipients normally appeal the EC's cartel-fine decisions because the European Courts are very good at finding procedural errors in fine computations that favor the defendants. Fines are reduced on average about 10 percent. Appeals of U.S. plea agreements are unknown because the agreements explicitly remove the right to appeal.

Third, given the frequently high degree of government ownership in the ROW economies, competition authorities there tend to have numerous adversarial relationships with government-owned firms involved in collusion. While fining such firms may have odd welfare consequences, winning antitrust cases involving national champions may add to the authorities' luster.

Fourth, the business communities in the ROW are often untutored in the principles of antitrust, as are local prosecutors and judges. Thus, needed advocacy programs in the ROW nations have been produced on a compressed schedule.

I have described progress by ROW antitrust authorities as one of catch-up in adopting the proven prosecutorial practices of the Trans-Atlantic antitrust authorities. There are, however, instances in which ROW antitrust authorities have been first movers. Perhaps the best example is the adoption of bounties for individual whistle-blowers who present antitrust authorities with ample evidence of collusion by their employer.

South Korea has been in the forefront in developing and successfully implementing whistleblower bounties. The KFTC began paying whistleblowers in May 2005, but only after an adverse decision is rendered.[9] Cash payments can assist these executives deal with the inevitable loss of income that follows from ratting on their employer. The United Kingdom adopted a similar policy in 2008.[10] Both programs may be setting their whistleblower rewards too low.[11]

IV. INTERNATIONAL CARTEL PENALTIES RISING

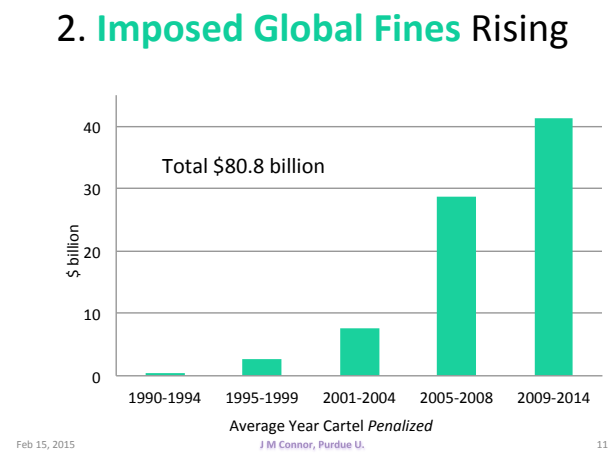
The modern era of antitrust enforcement against international cartels began in the late 1980s in the European Union and the early 1990s in the United States. Over the past quarter century, fines imposed have risen to levels unimaginable in the early 1990s when fines worldwide averaged less than $100 million per year (Figure 2). Then, in October 1996, U.S. Attorney General Janet Reno "sent a message worldwide" by imposing a $100-million criminal fine on one company for its involvement in two global price-fixing conspiracies. Moreover, 31 months later, Attorney General Joel Klein announced a $500-million fine on Hoffmann-La Roche for its leading role in the global *Bulk Vitamins* cartel.[12]

[9] *See, Korea Pays Whistleblowers*, GLOBAL COMPETITION REV. (May 17, 2005). On the high costs of being a whistleblower, *see* C. FRED ALFORD, WHISTLEBLOWERS: BROKEN LIVES AND ORGANIZATIONAL POWER (2002).

[10] *OFT to Pay Whistleblowers*, GLOBAL COMPETITION REV. (February 29, 2008).

[11] *See, Rewarding Whistleblowers*, GLOBAL COMPETITION REV. (March 1, 2008).

[12] *See* CONNOR, *supra* note 3.



These huge fines opened the floodgates for a succeeding stream of big cartel fines. During 1995-1999, international cartel fines more than quintupled on an average annual basis. Subsequent rises in semi-decade fining rates have not been that high, but risen they have. In the past five years 2009-2014, cartel fines have averaged an impressive $8.3 billion annually, and the decisions of the ROW authorities have contributed mightily to the ever-increasing fine levels.

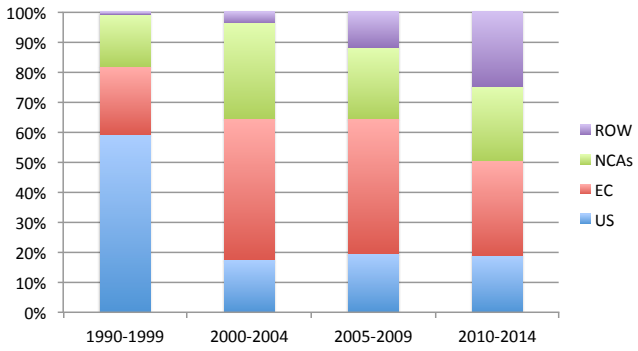
V. THE SHARE OF THE ROW IS RISING

In the 25 years since January 1990, international cartel fines imposed by antitrust authorities have totaled $80.1 billion, of which the United States accounted for 20.5 percent, the EC 37.6 percent, EU NCAs 24.6 percent, and the ROW 17.3 percent.[13] These aggregates obscure large changes in these geographic distributions over time.

In the 1990s, the DOJ and the EC accounted for more than 80 percent of the globe's fines imposed on international cartels, and the EU's NCAs imposed nearly all the rest. ROW authorities' fines barely registered. However, in the past ten to 15 years, the ROW share has impressively ballooned. ROW authorities have issued about 1200 decisions that have mandated monetary fines for cartel participants. The ROW share of all fines in 2010-2014 (24.9 percent) was seven times higher than in 2000-2004 (3.7 percent).

[13] The penalties reported here exclude cases brought by the state attorneys general and reported private damages paid of at least U.S. $50 billion, almost all of them approved by U.S. and Canadian courts. Adding fines and settlements together gives the United States and Canada a 53 percent share of monetary penalties over the past quarter century.

3. Shares of Cartel Fines, 1990-2014



Most of the growth in ROW fine levels has occurred in a dozen large, middle-income nations. India, Korea, China, Brazil, and some smaller jurisdictions have led the way upward in imposing cartel fines.

Cartel fines by ROW competition authorities go from strength to strength. In 2001, ROW fines reached a milestone, surpassing $100 million for the first time. In 2005, ROW fines surpassed $500 million, and since 2009 aggregate fines have exceeded $1 billion in all but one year. In the past ten years, ROW fines exceeded those of U.S. Government agencies in five of those years. However, ROW fines have never surpassed the EC's cartel fines.

The growth in ROW cartel fines is due almost entirely to an increasing number of decisions and the attendant increase in the number of cartelists being fined. Somewhat surprisingly, the ROW authorities have been unafraid to impose fines equal in size per company to their American and European cousins. Cartel fines 1990-2014 averaged about $13 million per corporation in North America and $10 million in other regions.[14]

Although the recent growth of cartel fines in the ROW is impressive, there are at least three important differences between these authorities and the more established antitrust agencies. First, the ROW fines are less severe than those from North America and Europe. By "severity" I mean the ratio of cartel fines relative to the cartel's affected sales in the jurisdiction. It is clear from the data shown in Table 2 that fine-severity ratios are highly skewed. Thus, it is better to focus on the median as the better measure of central tendency. The median fine in the ROW (146 observations) is 1.2 percent of sales. This median is roughly 70 to 80 percent lower than the medians for U.S. and EC fines, but it is only about 25 percent lower than the severity of EU NCA fines. The ROW fine severity is about half the median severity of the 598 "total" observations. (Note that sales of the global cartels usually encompass several continents.)

[14] Recall that our fines data are not corrected for inflation. Because ROW fines are from a more recent period on average than the U.S. and EU fines, in real terms ROW fines may be slightly smaller than those from the European Union.

Second, in the ROW there is a vast gulf between fines imposed (or announced) and fines collected. DOJ annual statistics report the amounts collected. While granting installment payment plans to defendants is now commonplace, over time collected fines statistics tend to equate with the announced fines in press releases or plea agreements. So too with the EC and its NCAs, which rarely have to take a company to court for non-payment of a fine decreed.

While compliance with cartel decisions is also high in Japan, Korea, and a few other ROW jurisdictions, non-payment or greatly delayed payments are known to be common in Brazil, India, and many other jurisdictions where appeals are easy and even routine for defendants. For example, a decision of the Brazilian antitrust authority in 2005 to fine a large number of drug companies was still under appeal in 2015. Another example comes from India, where appeals courts are notoriously slow to act. In a public speech in 2014, the Chairperson of the Competition Commission of India stated that delays by penalized firms had reduced the recovery of fines by the Commission to about 8 percent of the amount of fines announced.[15] This percentage may be an extreme one, or it may be representative of collection difficulties in many new jurisdictions.

Third, almost all of the ROW jurisdictions, even those with criminal antitrust laws, eschew the use of prison sentences for cartel managers. Like EU law, most ROW jurisdictions follow administrative procedures and issue civil fees, surcharges, and the like to corporate cartelists; they have no provisions for individual penalties on cartel managers.

However, Japan has a criminal law, and several Asian nations (notably South Korea and Taiwan) adopted the Japanese legal model in their antitrust regulations. While the Japan FTC has, through its Justice Ministry, obtained quite a few prison sentences for cartel crimes since the 1950s, the courts have commuted all of them to home arrests or community service. Until 2014, this was also the situation in Korea; a Korean court sent a bid-rigger to a long prison sentence in late 2014. Brazil also has a criminal code for antitrust offenses, but it issues only fines to cartel manages. Finally, Australia, New Zealand, South Africa, Israel, and many British Commonwealth nations have elements of the Common Law in their antitrust statutes. Except for Israel, which has imposed incarceration on several price-fixers, the Common-Law nations in the ROW rarely use prison sentences for cartel crimes.

The DOJ is unique in the world for its regular implementation of prison sentences for cartel violations since 1960. It has indicted more than 1,000 cartel managers since 1990, of which more than half received prison sentences. An innovation in 1999 was the incarceration of non-resident foreigners for cartel crimes; scores of such non-U.S. executives have been jailed. Extradition has proven to be more difficult, so scores of other non-resident cartel managers have opted to be fugitives.

Unlike the European Union, which is having an extended debate on criminalization of their competition laws, there is no widespread discussion of criminalization in the ROW nations.

[15] Press Trust of India, *Competition Commission of India Recovers Just Rs. 1,000 Crore of Rs. 12,000 Crore So Far*, (November 19, 2014). [http://articles.economictimes.indiatimes.com/2014-11-19/news/56265816_1_fair-trade-norms-competition-commission-crore-penalties].

Except for a small bit of free riding on DOJ incarceration decisions, deterrence there will have to depend largely on corporate fines for the foreseeable future.

VI. CONCLUDING OBSERVATIONS

Perhaps inspired by the examples of the DOJ and the EC in the 1990s, ROW antitrust authorities have ramped up the number of cartel decisions and the size of their fines. In a sense, the last geographic piece of the cartel-enforcement puzzle is now in place. With cartel detection and penalization very largely globalized now, deterrence of global cartels has marginally improved.

The growing share of global fines imposed on cartels by authorities in Africa, Asia, and Latin America (the "ROW") shows no signs of slowing down. Japan, and most of the Asian Tigers, seem increasingly able and willing to impose record fines on cartels. In Latin America, Brazil, Mexico, and Chile are in the vanguard of the anti-cartel bandwagon. Except for South Africa, Israel, and a handful of other small or new authorities, African and West Asian nations by and large have failed to make the important leap into dealing with international cartels.

Since 2000, the DOJ has muddled along with a nearly constant share of 20 percent of the world's international cartel fines. Its fines have been rising, but no faster than the world's growth. Instead, the DOJ shifted gears around 2000-2002 by placing far greater reliance on the threat of incarceration of cartel managers. True to its word, the DOJ on average has extracted guilty pleas from a larger number of executives per firm indicted, and it has successfully lengthened the periods of imprisonment. Indeed, because of the DOJ's relentless pursuit of non-U.S. executives, a good case can be made that it is the Antitrust Policeman to the World.

Since 2000, the EC's share of global cartel fines has been the largest of the four types and has greatly exceeded the DOJ's share. However, especially in the past five years, despite spectacular cartel fines, in terms of total fines imposed the EC too has been supplanted by the EU's NCAs and the ROW authorities.

Apart from the rules governing highway driving, I can think of no other example of voluntary adoption of international standards by governments than the trends discussed in this paper. Without the benefit of an international treaty or formal world conference, nearly all the leading nations in North America, Europe, and the rest of the world now have antitrust authorities with remarkably similar anti-cartel rules and monetary remedies.

Table 1. Landmark International Cartel Fine Decisions, by Year

Authority	Cartel Market	Date	Notes
US DOJ	Dyestuffs and about 40 others	Nov. 1944	*U.S. v. General Dyestuffs Corp.* (SDNY)
EC	Quinine, Dyestuffs	July 1969	Unusual; spurred by prior U.S. legal actions and information
EC	Peroxygen	Nov. 1984	Self-directed EC
France	Public Works	Nov. 1989	1st EU NCA
Italy	Insurance, non-life	June 1994	
Czech Rep.	Coffee Distribution	Nov. 1994	
Hungary	Coffee Distribution	Dec. 1994	
U.S. NAAG	Pesticides	1994	Very few more NAAG or AG cases
Norway	Cardboard	Dec. 1995	1st non-EU, W. European NCA (EFTA)
India	Soda Ash	1996	1st ROW prosecution
Mexico	Lysine	Aug. 1998	1st in Latin America
Australia	Polyurethane foam	Nov. 1998	1st in Oceania
UK	Copper	1998	
So. Korea	Beer	May 1999	1st in Asia
Japan	Petroleum, military	Nov. 1999	2nd in Asia
Germany	Concrete, eastern	Nov. 1999	
Latvia	Air route	Dec. 1999	1st Eastern European NCA
Sweden	Gasoline	June 2000	
Taiwan	Sutures	2000	
Spain	Gasoline	June 2001	
Netherlands	Gasoline	June 2002	
Israel	Diamond transport	April 2003	
World Bank	School furniture	Jan. 2004	
Finland	Asphalt	Mar. 2004	
New York AG	Insurance Brokerage	Jan. 2005	
Iceland	Petroleum Distrib.	Jan. 2005	
Portugal	Diabetes testing	Jan. 2005	
Romania	Cement	May 2005	
Kazakhstan	Petroleum brokers	July 2005	
Argentina	Cement	July 2005	
Armenia	Air route	Oct. 2005	
Switzerland	Interchange fees	Dec. 2005	
Slovakia	Construction, road	Jan. 2006	
New Zealand	Wood chemicals	April 2006	
Brazil	Vitamins	Mar. 2007	
Columbia	Mobile phone fee	Aug. 2007	
El Salvador	Petroleum	Oct. 2007	
Indonesia	Mobile phone fee	Nov. 2007	
Greece	Milk	Dec. 2007	
Austria	Elevators	Dec. 2007	
Egypt	Cement	Jan. 2008	
Estonia	Rail freight	Mar. 2008	
Florida AG	Cruise Lines	April 2008	

Pakistan	Bank rates	April 2008	
Chile	Medical oxygen	June 2008	
Bulgaria	Insurance, auto	July 2008	
So. Africa	Soda Ash	Sept. 2008	Also represented Botswana
Russia	Fuel	Nov. 2008	
Belgium	Plasticizer	April 2009	
Lithuania	Electronic products	Oct. 2009	
Poland	Cement	Oct. 2009	
Cyprus	Fuel Distribution	Nov. 2009	
Saudi Arabia	Medical gasses	May 2010	
Viet Nam	Insurance, auto	Aug 2010	
Michigan AG	Ice	Mar. 2011	
Nigeria	Air route	Feb. 2012	
Turkey	Cement	April 2012	
Ukraine	Timber auction	June 2012	
Singapore	Bearings	Dec. 2013	
Hong Kong	HIBOR	Mar. 2014	
China	Contact lenses	May 2014	
Mauritius	Beer	June 2014	
Total 61			

Table 2. Average Fine Severity by Region of Antitrust Authority, 1990-2014

Region	**Number of Observations**	**Ratio of Fines to Affected Sales (%)**	
		Mean	Median
USA	93	16.7	4.3
EC	125	11.3	6.4
EU NCAs	213	32.1	1.6
ROW	146	13.2	1.18
Total	598	21.4	2.3

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To Settle or Not To Settle After *Timab*

Marc Abenhaïm, Kristina Nordlander, & Stephen Spinks[1]

I. INTRODUCTION

On May 20, 2015, the General Court of the European Union ("General Court") dismissed the appeal brought by Timab Industries ("Timab") and its parent company Cie Financière et de Participations Roullier ("CFPR")[2] against the European Commission's ("Commission") decision fining them for their participation in the animal feed phosphates cartel. This cartel involved the allocation of sales quotas and customers, as well as the coordination of conditions of sale, among six European producers between 1969 and 2004.[3]

The investigations were initially triggered by several leniency applications, including one filed by Timab and CFPR.[4] Based on these leniency applications, the Commission opened infringement proceedings and invited cartel participants to engage in bilateral settlement discussions. Timab took part in these discussions and, in that context, was notified of the range of likely fines envisaged by the Commission. However, unlike the five other cartel participants,[5] Timab ultimately decided not to take part in the settlement proposed by the Commission.

It is the first time that the General Court had to rule on such a hybrid cartel case, where both the standard enforcement procedure and the settlement procedure run in parallel. Under the standard procedure, the undertakings concerned receive a fully-fledged statement of objections ("SO") and enjoy their full rights of defense.[6] The settlement procedure allows them to enter into settlement discussions, waive their rights of defense, and admit their participation in—and liability for—the cartel, in exchange for "a 10% reduction in the amount of the fine which would have been imposed upon them under the standard procedure."[7]

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[2] Case T-456/10 *Timab Industries and CFPR v Commission*, ECLI:EU:T:2015:296 ("judgment"); on appeal: Case C-411/15 P *Timab Industries and CFPR v Commission* (pending).

[3] Decision C(2010) 5001 final of 20 July 2010 relating to a proceeding under Article 101 of the [TFEU] and Article 53 of the EEA Agreement (Case COMP/38866— *Animal feed phosphates*) ("Contested Decision").

[4] Both Timab and CFPR were fined and both appealed the decision. These two companies nevertheless belong to the same "undertaking" within the meaning of EU competition law. For the sake of simplicity, the remainder of this article will thus only refer to Timab.

[5] Namely the Kemira group (Yara Phosphates Oy, Yara Suomi Oy, and Kemira Oy), Tessenderlo Chemie, the Ercros group (Ercros SA and Ercros Industrial SA), the FMC group (FMC Foret SA, FMC Netherlands BV, and FMC Corporation) and Quimitécnica.com-Comércia e Indústria Química and its parent company José de Mello SGPS. For the sake of clarity, these five undertakings will be collectively referred to below as the "settling parties."

[6] Right access to the Commission's file, right to be heard through the written response to the SO and an oral hearing.

[7] Judgment, *supra* note 2 at ¶¶ 61-62.

Hybrid cases arise when the undertakings concerned do not all agree to settle. In such cases, both the settlement procedure and the standard procedure run in parallel and the Commission ultimately adopts, on the one hand, a settled decision addressed to the settling parties and, on the other hand, a standard decision addressed to the other undertakings. This case was also hybrid in the sense that another form of cooperation—the EU leniency program—was involved.

The case therefore illustrates the interplay among the standard procedure, the settlement procedure, and the leniency program. The case also illustrates how such interplay can backfire on the undertakings involved. The fine ultimately imposed on Timab (EUR 59,850,000)—the only undertaking that exercised its full rights of defense—represented 79 percent of the total fines imposed on all cartel participants (EUR 75,647,000) and an increase of 36 percent compared to the higher end of the range of fines initially notified during the bilateral settlement discussions (EUR 44,000,000).

Such an increase seems all the more "paradoxical"[8] as, in exercising its rights of defense, Timab successfully shortened the duration of its participation in the infringement: The Commission only managed to establish its liability from September 16, 1993 to February 10, 2004, instead of December 31, 1978 to February 10, 2004. However, the Commission also re-assessed the added value of Timab's cooperation and corresponding fine reductions. While the settling parties obtained significant fine reductions in exchange for their recognition of liability,[9] the Commission's re-evaluation of Timab's cooperation led to "the non-application of the 35% reduction due to mitigating circumstances, the lesser reduction granted under the leniency notice (5% instead of 17%) and the non-application of the 10% reduction required by the settlements notice [thus leading to] a higher fine than that proposed during the settlement procedure."[10]

The General Court entirely approved that approach, holding that the Commission "correctly" decided not to apply the 35 percent reduction for mitigating circumstances[11] and did not manifestly exceed the limits of its discretion in re-assessing Timab's cooperation under the leniency program.[12] This judgment sends potential settlers a strong message: Way beyond the 10 percent settlement reduction, deciding to drop out of a settlement may sometimes "spill over" on the standard procedure (II), or the leniency program itself (III). Such spillover effects should be carefully factored in deciding about whether or not to settle (IV).

II. SPILLOVER FROM SETTLEMENTS TO THE STANDARD PROCEDURE

In holding that "the Commission correctly decided not to apply the reduction initially planned for mitigating circumstances, that is to say, the 35% reduction "outside the leniency

[8] *Id.* at ¶ 81.

[9] Decision C(2010) 5004 final of 20 July 2010 relating to a proceeding under Article 101 of the [TFEU] and Article 53 of the EEA Agreement (Case COMP/38.866 — *Animal feed phosphates*) ("Settlement Decision").

[10] Judgment, *supra* note 2 at ¶ 87.

[11] *Id.* at ¶ 95.

[12] *See, id.* at ¶¶ 95, 177, and 195.

programme" on the basis of point 29 of the 2006 Guidelines,"[13] the General Court confirmed that the decision to drop out of a settlement could spill over on the standard procedure itself.

A. Equal Treatment Between Settling and Non-settling Parties?

Interestingly, the General Court chose to open its analysis of the appeal with the principle of equal treatment:[14]

> even in [hybrid cases], at issue are participants in one and the same cartel, so that the principle of equal treatment must be observed. [T]hat principle requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified.[15]

Viewing hybrid cases through the lenses of equal treatment presents certain advantages. First, the legal value of that principle is far clearer than that of the various notices and guidelines which govern fine calculations: the Guidelines on Fines, Leniency Notice, and Settlement Notice all merely lay down rules of conduct from which the Commission should not depart without giving reasons compatible with the principles of legitimate expectations and equal treatment. Unlike these soft law instruments, the equal treatment principle binds all EU institutions, across the board,[16] is enshrined in primary law,[17] and has the status of a fundamental right.[18] In the EU competition law area, the recent case law[19] tends to confirm that principle as a relatively reliable limit on the Commission's discretion with respect to fines.

Second, the element of comparison that that principle introduces makes it particularly fit to handle the intricacies of hybrid cases and the interplay between the standard procedure and the settlement procedure. If, by definition, the settlement procedure is an "alternative" to the standard procedure, the choice about whether or not to settle involves an important element of comparison, which the principle of equal treatment helps make more objective. In other words, the principle of equal treatment makes up for the disparities in terms of legal instruments, legal regimes, and procedures that impact the amount of the fine.

Turning to the parameters of comparison between the two procedures, the General Court held that although the settlement procedure is distinct from the standard procedure and presents certain special features, such as an advance statement of objections and the notification of a likely range of fines,[20] "there cannot be any discrimination between the participants in the same cartel

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[13] *Id.* at ¶ 95

[14] A rather surprising initiative, because none of Timab's pleas in law specifically challenged the increase of the fine in light of that principle.

[15] Judgment, *supra* note 2, at ¶ 72, references omitted.

[16] For an interesting perspective on the structuring role of equal treatment in the EU: *see* e.g. R. Hernu, La non-discrimination: principe d'ordonnancement des politiques de l'Union européenne, in V. Michel (dir.), *Le droit, les institutions et les politiques de l'Union européenne face à l'impératif de cohérence*, Presses Universitaires de Strasbourg (2009) 373-387.

[17] TFEU, Articles 10, 18, 19, 37(1), 40(2), second indent, and 45(2), etc.

[18] Charter of Fundamental Rights, Articles 20 and 21.

[19] *See* Case C-580/12 P *Guardian Industries and Guardian Europe v Commission*, EU:C:2014:2363.

[20] Judgment, *supra* note 2 at ¶ 73.

with respect to the information and calculation methods."[21] Settling and non-settling parties are thus in comparable situations when it comes to the information on fines and their calculation methods.

Unfortunately however, the General Court's application of the equal treatment principle slightly diverges from its statement of that principle. Instead of comparing Timab's treatment with that of the settling parties, the General Court compares the calculation method used to arrive at the range of Timab's likely fines with the one used to reach the amount of Timab's fine.[22] In so doing, the General Court did not really compare Timab's situation with that of the settling parties, but rather Timab's situation before and after it dropped out of the settlement procedure.

B. The Range of "Likely" Fines

The remainder of its analysis is less focused on equal treatment than on whether the Commission "penalized"[23] Timab's withdrawal from the settlement procedure and whether the Commission was bound by the range of fines that it had notified during the settlement procedure.[24] The exact link among these foregoing questions, the principle of equal treatment, and the specific pleas in law raised in the appeal, is not very clear in the judgment.

Such a lack of clarity is all the more problematic given that there seems to be a neat contradiction between the idea that "there cannot be any discrimination between the participants in the same cartel with respect to the information"[25] on the one hand, and the statement that the range of fines notified during the settlement discussions is "irrelevant"[26] on the other hand. If words ever mean anything, how can the notification of the range of likely fines not be viewed as a form of "information"?

Without calling into question the non-binding nature of the range of fines in relation to those undertakings that ultimately drop out of the settlement discussions, the General Court could have applied the equal treatment principle to that "information" on fines.[27] Absent such an analysis, it is difficult to see how the General Court reconciles the irrelevance of the range of likely fines with the bold principle that there cannot be any discrimination with respect to the information on the fine.

In sum, the General Court missed an opportunity of actually applying the equal treatment principle. This is all the more regrettable given that both the equal treatment principle and the decision about whether or not to settle involve an element of comparison between the settlement

[21] *Id*. at ¶ 74.
[22] *Id*. at ¶ 82.
[23] *Id*. at ¶ 88.
[24] *Id.*
[25] *Id*. at ¶ 74.
[26] *Id*. at ¶ 105.
[27] And the outcome would not necessarily have differed: in relation to settling parties, the Commission acted in line with the range of fines whereas in relation to Timab, it significantly departed from it (difference in treatment). However, as already arises from ¶¶ 83-87 and 170-196, the Commission had to re-evaluate the case file and the added value of Timab's cooperation (objective justification). In the alternative, the General Court could have taken a narrower approach, ruling that Timab was provided with the same degree of information on the likely range of fines, at the same stage in proceedings, and was thus not treated differently in relation to the information on fines.

procedure and the standard procedure. For any rational economic operator, deciding about whether or not to settle naturally involves comparing the two options and the notification of the range of likely fines constitutes a crucial moment in this respect. In the present case, one cannot exclude that Timab made its decision in view of that notification.

Holding that such communication is "irrelevant" ultimately boils down to presenting undertakings with the choice between the "known" and the "unknown." Not the ideal way of making sure that rational economic operators "decide, in full knowledge of the facts, whether to settle or not."[28] The issue is further complicated by the spillover effects that may arise between settlements and leniency.

III. SPILLOVER FROM SETTLEMENTS TO LENIENCY

As the judgment confirms, Timab's decision not to settle (and instead challenge the legal characterization of the evidence it had brought) also spilled over on the assessment of its cooperation under the leniency program: The initial leniency reduction of 17 percent retrospectively dropped down to 5 percent when the Commission, faced with Timab's legal arguments concerning the scope of its liability, re-assessed the added value of its cooperation. This illustrates that despite their differences, leniency and settlements in fact largely overlap.

A. Differences Between Leniency and Settlements

There are key differences between leniency and settlement in terms of purpose, stage, and type of cooperation:

1. "While the purpose of the leniency policy is to reveal the existence of cartels and to facilitate the Commission's work in that regard, the purpose of the settlement policy is to serve the effectiveness of the procedure in dealing with cartels" by following a simplified procedure.[29]
2. While an application for leniency intervenes at the stage of the investigation, settlement discussions and submissions intervene at the later stage of the infringement proceedings.
3. While an application for leniency involves the provision of factual evidence and statements, the settlement procedure in contrast involves a different type of cooperation, whereby the undertakings concerned "explicitly concede their liability with respect to the infringement,"[30] the scope, gravity, and duration of which they also explicitly recognize.[31]

In other words, while leniency essentially involves the provision of factual input, concluding a settlement requires the undertaking to explicitly recognize the legal characterization of that input.

That is the point where Timab's willingness to cooperate stopped. In its initial leniency application, Timab submitted factual evidence about its participation in anticompetitive practices between 1978 and 2004.[32] Timab was then invited to discuss—and expand on—that factual input

[28] Judgment, *supra* note 2 at ¶ 102.
[29] *Id*. at ¶ 65.
[30] *Id*. at ¶ 68.
[31] *Id*. at ¶ 67.
[32] *Id*. at ¶¶ 74, 77-78; *see also* Contested Decision, Recital 318.

during the bilateral rounds of settlement discussions. Importantly, Timab's leniency application did not take a definitive position on the legal characterization of its conduct as a single and continuous infringement and its cooperation indeed stopped right at this stage of the reasoning. While initially recognizing it had taken part in certain forms of anticompetitive practices, Timab then denied that its conduct could be considered as part of a single and continuous infringement between December 31, 1978 to February 10, 2004, within the meaning of the case law.

Unfortunately for Timab, what followed was that its unwillingness to concede the legal characterization of its factual input (in settlement) meant that the factual input in question lost its "added value" on the basis of which a significant fine reduction would have been awarded (under leniency and the standard procedure). So the above-described differences between leniency and settlement interacted in a somewhat surprising way that may not have been clearly set out in EU legislation. Timab's decision not to settle spilled over on the leniency reduction because the applicable legal frameworks overlap.

B. Overlaps Between Leniency and Settlements

In this case, the range of fines initially notified included an indication of the leniency reduction and related to the whole of the two periods (between 1978 and 2004). Because of Timab's successful legal arguments, the Commission had "abandoned" the first period (1978-1993) and considered that it was no longer possible to reward self-incrimination for that period.[33] The General Court accepted the idea that "the abandonment of the first period also has an impact on the 17% reduction under the leniency notice."[34] It then reviewed the Commission's assessment of that impact under the judicial standard of marginal review, and found that the Commission did not manifestly exceed the limits of its discretion in re-assessing the quality and usefulness of Timab's cooperation under the leniency program.[35]

From a strict leniency point of view, it is difficult to find fault with that approach:

1. In order to qualify for a fine reduction under the leniency program, the applicant must cooperate genuinely, fully, on a continuous basis, and expeditiously from the time it submits its application throughout the Commission's administrative procedure.[36] Independently of the settlement procedure, Timab's revised strategy might have been seen as a break in that cooperation.

2. The applicant's cooperation must represent "significant added value" compared to the evidence already in the Commission's possession,[37] something that can evolve as the administrative procedure goes and as the Commission evaluates the respective contributions, the interplay between them, etc.

[33] *Id*. at ¶ 91.
[34] *Id*. at ¶ 95.
[35] *Id*. at ¶¶ 177, 195.
[36] Leniency Notice, points (12) (a) and (24).
[37] *Id*., points (24)-(25).

3. The Leniency Notice makes it clear that the level of reduction is only determined in the Commission's final decision adopted at the end of the administrative procedure.[38]

4. Finally, the Commission does enjoy a margin of discretion in relation to fines,[39] which tends to confirm the standard of limited review applied by the General Court.

Nevertheless, one cannot but remain with the impression that the mere dropping out from the settlement cost Timab more than the 10 percent settlement reduction itself. That impression is due to the fact that Timab saw the detailed fine calculation, including the leniency reduction, in the specific context of the settlement discussions. Outside the settlement procedure, the Commission has no obligation to communicate on the level of leniency reduction (or any other fine reduction). This is something that the parties do not discover until the decision. By way of contrast, "the range notified during the settlement procedure […] is an instrument specific to that procedure."[40]

This is another key aspect on which leniency and settlements overlap: Through the settlement procedure, the Commission can use the notification of the range of likely fines to communicate on other fine reductions. Showing these other fine reductions to the parties gives the Commission an opportunity to raise the stakes and increase their incentives to settle. The mechanism works for both the leniency reduction and the reduction for cooperation outside leniency. As a result of the judgment, the spillover effects between the procedures work both ways: The Commission's communication on the fine reductions other than the settlement reduction increases the undertakings' incentives to settle; all the more so now that they know their decision not to settle might deprive them of these other fine reductions.

IV. "ALL OR NOTHING," THE "LOCK-IN" EFFECT OF COOPERATION

In conclusion, the first lesson to be learned is that potential settlers should now carefully think through the (adverse) consequences of raising legal arguments, even if these arguments prove successful vis-à-vis the Commission. Way beyond the mere 10 percent settlement reduction, deciding not to settle may backfire on other possible fine reductions, whether under or outside the leniency program. Unfortunately for the potential settlers, rationally comparing the options is not really possible, or it boils down to choosing between a (more or less favorable) predictable outcome and an unpredictable one.

The key to addressing informational issues—and that will be the second lesson—is to make the most profitable use of the bilateral settlement discussions, which aim is to reach a "common understanding."[41] In Timab's case, it seems these discussions failed over a misunderstanding. Until Timab replied to the SO, the Commission believed it could prove Timab's liability for the whole period.[42] And until the Contested Decision, Timab did not expect that its victory on the liability point would cost it 57 percent of various fine reductions, including

[38] *Id*., point (26).
[39] *See supra* page 4 and note 19.
[40] Judgment, *supra* note 2 at ¶ 102.
[41] *Id*. at ¶ 64, 117.
[42] *Id*. at ¶¶ 78, 94, 117.

the leniency reduction. Such a misunderstanding might perhaps not have occurred if Timab had raised its legal argument during the settlement discussions.

Because of the interactions between settlements and leniency, leniency applicants as well should anticipate, long in advance, the possibility that a settlement may be offered and the consequences of not taking it. It is also important that they carefully factor all the legal aspects of the factual input and evidence they submit to the Commission.

All in all, the interdependence between the different forms of cooperation unavoidably raises the stakes for the parties and ultimately locks them in an "all or nothing" logic. It will remain to be seen whether, in the long run, such a logic still tilts the balance in favor of cooperation.

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Is the Continued Success of Leniency in Cartel Cases in Danger? Some Comments from a Private Practitioner's Perspective

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I. INTRODUCTION

For many years leniency has been the most successful tool in uncovering secret hardcore cartels, both at the level of the European Commission and national competition authorities ("NCAs") in the European Union.[2] Hardly any cartels have been prosecuted without input from an immunity applicant and, apart from evidence collected during inspections, the authorities obtain all the evidence from leniency applicants including lower-ranking ones, *e.g.*, written evidence resulting from detailed electronic review and personal statements. Not surprisingly, the competition authorities ("CAs") continue to praise the effectiveness of the leniency tool.[3]

However, some recent developments, combined with disincentives that have always existed, risk gradually undermining the existing leniency system.[4] While it is unlikely that it will collapse any time soon, companies are already weighing more carefully than ever the pros and cons of applying for leniency. This trend will likely continue in the future because, in recent years, the risks and frustrations of cooperation with the authorities have increased. Three main groups of threats or disincentives to leniency can be distinguished:

1. The first group of threats lies in the companies' sphere and relate to the increasing difficulty of uncovering smoking-gun evidence as well as growing challenges to organize internal investigations in such a way as to obtain a reliable set of underlying facts as a basis to make an informed decision on whether to apply for leniency.
2. The second group relate to the application of leniency rules by the enforcers. CAs that apply the existing leniency rules have great discretion in how they handle applications

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[2] In 2014, 80 percent of European cartel investigations were initiated by leniency applicants, *cf European cartel fines in 2014 Casenote,* ECON. OF COMPETITION, REGULATION & LITIGATION (January 2015); in Germany about 50 percent of investigations originate in leniency applications: *see* Wirtschaftwoche*, Interview with Andreas Mundt, 2014*, DAS REKORDJAHR DES BUNDESKARTELLAMTS (01 December 2014), *available at* http://www.wiwo.de/unternehmen/handel/andreas-mundt-2014-das-rekordjahr-des-bundeskartellamts/11056950.html.

[3] Commission, *Commission Staff Working Document accompanying the document 'Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Competition Policy'* 2014, COM(2015) 247 final, 21 f.; Hannoversche Allgemeinen Zeitung (01 Nov 2015), *Interview with Andreas Mundt*, WIR SCHÜTZEN VOR ZU HOHEN PREISEN, *available at* http://www.haz.de/Nachrichten/Wirtschaft/Deutschland-Welt/Wir-schuetzen-vor-zu-hohen-Preisen.

[4] Swaak & Wesseling, *Reconsidering the leniency option: if not first in, good reasons to stay out*, 36 E.C.L.R. 346 (2015); Schwab & Steinle, *Pitfalls of the European Competition Network – Why Better Protection of Leniency Applicants and Legal Regulation of Case Allocation is Needed*, 29 E.C.L.R. 523 (2008).

and can therefore encourage or discourage leniency applicants. In this context, key questions are (i) how much applications by lower-ranking applicants are rewarded, (ii) whether the procedure offers predictability and reliability with regard to leniency status, and (iii) the interpretation of what cooperation with the authority means.

3. The third group of threats result from policy decisions to stimulate private enforcement, which conflicts with public enforcement in the area of leniency.[5] In this context, it matters how the Commission and NCAs handle third-party access to file ("TPA") requests and how the national courts will order disclosure of incriminating documents after the implementation of the Damages Directive[6] into national law. In light of the increasing number of follow-on damages actions launched by private plaintiffs,[7] companies considering leniency may well wonder whether voluntarily incriminating oneself before the CAs becomes too dangerous in times where leniency documents are no longer safe from disclosure to private plaintiffs by CAs or the courts.

II. CHALLENGES TO LENIENCY IN THE COMPANIES' SPHERE

On the basis of an unreliable, incomplete set of facts, the risks of applying for leniency outweigh the benefits, because the CAs could feel betrayed and claim lack of cooperation and withdraw the leniency status, but still use the evidence so far provided by the applicant.[8]

Another risk arising from an incomplete application is the risk of an additional investigation, where the applicant is not protected from fines. The risk of spill-over of pending investigations into other product groups and territories has always existed, but the fact that many companies have had bad experiences in past investigations nowadays makes it a more prominent consideration in the assessment. In this context, it is unhelpful that there still is no central marker system.

A. Effect of Compliance Trainings on Availability of Evidence

One factor that makes leniency applications more difficult now than ten years ago is that internal investigations in which infringements are uncovered have become more difficult and are less likely to lead to the discovery of the necessary key pieces of evidence. One threat to the leniency system is the growing lack of written evidence as a result of increased awareness by employees on what constitutes a competition-law infringement. Due to companies' increased compliance activity, employees have become better at leaving no traces in those cases where

[5] Cf. Art. 1 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, [2014] OJ L 349.

[6] *Supra* note 5.

[7] *See* European Commission, *Commission Staff Working Document – Impact Assessment Report: Damages actions for breach of the EU antitrust rules Accompanying the proposal for a Directive of the European Parliament and the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union,* COM(2013) 404 final, SWD(2013) 204 final, [52], which contains data collected by the Commission.

[8] Commission Notice on immunity from fines and reduction of fines in cartel cases, [2006] OJ C298/17 ("Leniency Notice"), (30).

cartel activity is not sufficiently deterred by compliance efforts.[9] At the Commission and other EU jurisdictions that continue to rely heavily on written evidence, this is an obstacle to applying for leniency.[10] Where no such documents exist, applying for leniency bears the risk of being rejected.[11] To some degree, the CAs have reacted and are now searching mobile devices for communication other than emails. However, it is still true that finding written evidence for an infringement has become more difficult.

The situation is different in Germany, where the lack of written evidence can be overcome by witness testimony. In several recent German cartel cases in consumer goods, companies have been fined without a single smoking-gun document in the file. The Federal Cartel Office ("FCO") has relied on oral testimony from offenders in witness hearings and on accompanying written evidence that the relevant contact took place. Exclusive reliance on oral testimony however has its risks as well, because of the incentive of lower-ranking applicants to exaggerate their account of what was discussed with competitors in order to obtain a discount from fines.

B. Decreasing Willingness to Offer Employees Incentives for Cooperation

Another factor that makes internal investigations less fruitful is the companies' decreasing willingness to indemnify interviewees from fines or to give any job guarantees prior to cartel interviews. In the public debate on compliance, companies feel increasingly under pressure to act as good corporate citizens. In this context, rewarding employees who have been involved in cartel conduct is no longer perceived as acceptable in the business community and attracts criticism from shareholders. This is especially true of companies that have already been involved in cartel investigations in the past and think that they cannot afford internal leniency for a second time—even if the relevant conduct concerns a different business unit. The risk is to be blamed for rewarding unlawful conduct and failure to implement a change in the company's culture.

Both the lack of protection offered by the company and of transparency on how the results of the interview will be used against the employee, however, will normally lead to a lack of cooperation on the part of the employees who are asked to disclose any relevant conduct and provide any evidence. An interviewee who is left in the dark as to whether the information he or she provides will be used against him or her will likely not cooperate and remain silent. The interests of the individual and the company are only aligned if the company offers certain guarantees like indemnity from fines and abstention from sanctions.[12] The fact that the

[9] Marx & Mezzetti, *Effects of antitrust leniency on concealment effort by colluding firms,* 2 J.A.E. 305, 310 (2014).

[10] Cf. ECJ, *Salzgitter Mannesmann GmbH v Commission of the European Communities*, judgment of January 25, 2007, Case C-411/04 P, ECLI:EU:C:2007:54, [42]: "In Community competition law cases, oral evidence plays only a minor role, whereas written documents play a central role."

[11] The lack of written evidence at the applicant does not mean that there is no risk of an investigation because there could still be written evidence at other cartel participants.

[12] On individual leniency programs, *see* Lasserre, *Antitrust: A Good Deal for All in Times of Globalization and Recession*, 7 COMPETITION POL'Y INT'L 245, 268 (2011); sometimes an indemnification from fines is restricted, *e.g.* for directors of a stock corporation in Germany s 93 (4) sentence 3 Aktiengesetz provides that the indemnification cannot be granted by the supervisory board but must be granted by the general assembly, *see* BGH judgment of 8. July .2014, Case File No II ZR 174/13, [2014] D.S.T.R. 2518, 2519.

individual's incentives are not aligned with the company's in the absence of indemnification is aggravated in legal regimes where the wrongdoers are subject to penal liability, *e.g.*, in the event of bid-rigging,[13] and leniency only extends to the cartel proceedings.

If no offers are made by the company in protection of those employees potentially involved in cartel conduct the investigation risks being ineffective and its results untrustworthy. Either no evidence is found at all or there remains a significant risk that such evidence is not complete. A single employee's lack of cooperation risks undermining the company's significant efforts to cooperate with the authorities, which creates a strong disincentive to apply for leniency.

C. Increasing Formalism in Internal Investigations

Increasing experience with cartel investigations, corporate internal investigations, and press coverage of cartel cases have led to higher sophistication in the process but also to additional burdens. Data-protection issues are a cause for delay and are sometimes used as an excuse to withhold information or block an internal investigation. The very wording of the consent declaration by employees asked to make the electronic files available for review can become highly controversial.[14] Questions about who has to be informed about an investigation, *e.g.*, the works council or supervisory board,[15] have gained weight and the fear of doing something wrong presses for internal disclosure.

On the other hand, the confidentiality of the leniency status is at risk if information obligations under laws other than competition law are fully respected and more and more stakeholders are informed.[16] Interviewed employees now often bring their own lawyers because they have read about what happened to employees engaged in cartel activity in the past. Companies are also struggling with the obligation to make former employees available,[17] who generally have no interest in cooperating anymore but want to focus on their career at their new employer.

The high cost of an internal investigation, in particular the electronic review of significant amounts of electronic data of a number of different employees—which can cost millions of

[13] Cf. s 298 German Criminal Code (Strafgesetzbuch).

[14] Cf. s 4 German Federal Data Protection Act (Bundesdatenschutzgesetz): "The collection, processing and use of personal data shall be admissible only if permitted or prescribed by this Act or any other legal provision or if the data subject has consented." The data subject is the employee, whose consent has to be informed and must cover the specific information used, *see* s 4a Federal Data Protection Act. However, under exceptional circumstances it is possible to proceed without consent of the individual concerned. According to Section 32(1) sentence 2 BDSG, the processing of employee data is permissible if there are factual circumstances indicating that an employee may have committed a crime, that the data processing is necessary for uncovering such crime, and the legitimate interest of the employee in keeping his personal data secret does not outweigh the employer's interest in the data processing for purposes of investigating the potential crime.

[15] s 80 (2) German Works Constitution Act (Betriebsverfassungsgesetz) requires the work counsel to be informed before conducting internal investigations; Breßler/Kuhnke/Schulz/Stein, 'Inhalte und Grenzen von Amnestien bei Internal Investigations' [2009] N.Z.G. 721, 724f; s. 90 (1) (3) German Stock Corporation Act (Aktiengesetz), cf. Schockenhoff, 'Geheimhaltung von Compliance-Verstößen' [2015] N.Z.G. 409, 415f..

[16] Leniency Notice, (12) (c); *see* also General Court, *Deltafina SpA v European Commission*, judgment of 12 June 2014, Case C‑578/11 P, ECLI:EU:C:2014:1742.

[17] Leniency Notice, (12) (a).

euros—often leads to the launch of half-hearted internal investigations only relying on interviews, which carries the risk of not uncovering the full underlying facts. Employees who might have been involved in cartel conduct, but have not been offered any incentive to cooperate prior to the interview, tend to downplay relevant contacts and usually only become more transparent once they are confronted with written evidence like emails or calendar entries in the interview. An investigation that does not involve review of electronic files is unlikely to form a solid basis for a decision on whether or not to file for leniency.

III. THREATS TO LENIENCY RESULTING FROM THE ENFORCEMENT OF THE LENIENCY RULES BY THE COMMISSION AND NCAS

A. Risk of Not Being Rewarded for Cooperation

To some degree, CAs have contributed to discouraging companies from filing for leniency. The clear ranking based on the timing of the application under the European leniency regime[18] has caused frustration because, in some cases, lower-ranking applicants that provided significant amounts of evidence did not get any fine reduction from the Commission because the Commission already had enough evidence in its possession.[19]

The General Court decided in *Versalis and Eni* that the Commission has a wide margin of discretion in assessing cooperation, and that the assessment of added value relates to the Commission's investigation and not to the maximum evidence a company could provide.[20] However, at the time they make the decision to cooperate, companies do not have the information to assess whether the cooperation is still worthwhile, because they do not know how much evidence the Commission already has. It also leads to frustration if lower-ranking applicants get a lower discount even if the value-add they provide is more significant than that provided by higher-ranking ones.[21]

The number and quality of leniency applications after inspections could be improved if ranking was not the exclusive consideration under the EU Leniency Notice, but if the added value was also taken into account. Hybrid settlements could potentially be avoided if lower-ranking applicants also had a sufficient interest in cooperating with the Commission.

The risk for lower-ranking applicants of getting no bonus at all, despite significant effort, is avoided under the German leniency regime, where both the timing and the value-add of the

[18] Leniency Notice (8).

[19] Cf. Commission Decision of 23 June 2010 relating to a proceeding under Article 101 of the TFEU and Article 53 of the EEA Agreement (Case COMP/39.092—Bathroom fittings and fixtures) where several companies did not receive a reduction for lack of value add; also *see* Swaak & Wesseling, *supra* note 4 at 346, 349 (fn 19) with further reference to a number of cases where reductions were very low.

[20] General Court, *Versali and Others v Commission*, judgment of 13 December 2012, Case T–103/08, ECLI:EU:T:2012:686, [360], confirmed by ECJ, *Commission and Others v Versalis and Others*, judgment of 5 March 2015, Case C-93/13 P, ECLI:EU:C:2015:150.

[21] The Commission's "Bathroom fittings" case is also an example for this phenomenon. In that case the third applicant filed its application only four days after the second one (*see*, *supra* note 19).

application are taken into account.[22] In practice, the FCO even grants significant discounts to lower-ranking applicants in order to encourage them to cooperate; in some cases lower-ranking applicants have obtained higher discounts than the companies ranking before them. The downside of the German system is that lower-ranking applicants have a strong incentive to report additional conduct in order to obtain the discount, which bears the risk of exaggeration—especially in a system where oral testimony has the same value as written evidence.

Excessive demands in requests for information to leniency applicants under tight deadlines without any understanding on the part of officials of both the underlying costs of electronic review as well as the practical difficulties of obtaining evidence are another disincentive to leniency that should be mentioned in this context.

Some authors have mentioned frustrations caused if no investigation follows after an application.[23] Rationally speaking, it is still best for an applicant if no investigation is opened, as long as it is able to protect its rank in case the authority changes its mind, which is normally the case in no-action letters. In contrast, closing the file against other participants in the cartel that do not cooperate might indeed cause frustration among leniency applicants.

B. Uncertainty on the Scope of the Duty to Cooperate

Another disincentive to leniency is a remaining insecurity on what "cooperation" of the leniency applicant with the authorities really means.[24] In many jurisdictions, it is not clear what is considered as lack of cooperation. Is the duty to cooperate limited to providing incriminating facts? Or if the company makes certain legal arguments, *e.g.*, on the CA's jurisdiction, the qualification of the relevant conduct as a single complex continuous infringement, or the hardcore nature of the relevant conduct, is that non-cooperation?

In some cases, CAs have not shied away from threatening a withdrawal of the cooperative status if a company made legal arguments on the relevant conduct. In light of the increasing pursuit of borderline conduct falling short of a hardcore cartel, in particular by certain NCAs, it is of concern that a leniency applicant should have to give up legal defense arguments. This applies to horizontal information exchange cases as well as vertical cases. As long as making legal arguments in defense of the relevant conduct, *e.g.*, that it is not hardcore, is not clearly outside the danger zone when it comes to evaluating the company's cooperation, then leniency risks not being attractive in borderline cases.

Renewed enforcement in the area of vertical infringements calls the policy decision into question that in most jurisdictions (with exceptions, for example, in Belgium and Austria) vertical conduct is not covered by the applicable leniency regime. In hub-and-spoke scenarios, the fact that leniency is not available for purely vertical conduct constitutes a disincentive to leniency, because such cases can in fact comprise a mixture of horizontal and vertical conduct.

[22] FCO, Notice No 9/2006, Notice on the immunity from and reduction of fines in cartel cases - Leniency Programme - of 7 March 2006, [5]: "The amount of the reduction shall be based on the value of the contributions to uncovering the illegal agreement and the sequence of the applications."

[23] Swaak & Wesseling, *supra* note 4 at 346, 350 with further references.

[24] *Id.,* 351.

Since indirect horizontal coordination is difficult to prove, companies risk being rejected under the leniency regime, while the CA could in theory pursue the remaining vertical conduct.

The FCO tried to avoid frustrating a recent applicant by analogous application of the leniency notice in its latest vertical RPM case. However, these were special circumstances where conditional immunity was granted under the leniency notice; only later did it emerge that the horizontal elements in the file were not strong enough and the FCO then decided to pursue the vertical conduct. While the analogous application of the German leniency notice protected the leniency applicant in the case at issue, legal certainty and inclusion of vertical conduct into the leniency programs would be preferable.

IV. PRIVATE ENFORCEMENT THREAT HAS BECOME MORE IMMEDIATE

A further dangerous trend discouraging leniency applications is the fact that CAs in the European Union have become less stringent in protecting information provided by leniency applicants from disclosure to third-party claimants. Further, the courts have not resisted this development, but have rather contributed to it. The transformation of the Damages Directive into national law—which will provide the civil courts with a disclosure mechanism further facilitating plaintiff access to incriminating documents, including documents submitted by leniency applicants—further aggravates the situation.

A. TPA to File at the Level of CAs

To understand this problem, one has to distinguish between access to files and publication of fine decisions at the level of the CAs and disclosure of evidence ordered by courts in civil follow-on damages proceedings.

1. The Commission's Approach

The Commission has recently started to publish more detailed non-confidential versions of fine decisions than previously; these now include information sourced from leniency applications, but still avoid direct quotations from the corporate statement. This approach was cleared by the General Court in its recent "*Akzo Nobel*" judgment.[25] The Court found that information contained in leniency applications could only be excluded from the non-confidential version of the decision if it were confidential.

To be confidential, information must be known to a limited number of persons, its disclosure must be liable to cause serious harm to the person who provided it or to third parties, and the interests at risk from disclosure need to be worthy of protection. The last condition was denied by the General Court. It found that the leniency applicant's interest in non-disclosure not only did not merit any particular protection but that, on the contrary, third-party plaintiffs' interests in asserting their rights are worthy of protection. The Court therefore insisted that leniency applicants cannot rely on their exposure to civil claims as a reason to legitimately oppose the disclosure of leniency applications.

[25] General Court, *Akzo Nobel and others v Commission,* judgment of 28 January 2015, Case T‑345/12, ECLI:EU:T:2015:50; Kafetzopoulous, *European Commission Policy on publication of cartel decisions: the latest victory of damage claimants against leniency applicants* 36 E.C.L.R. 295 (2015).

TPA to the Commission's cartel file[26] has so far been handled conservatively by the Commission, which was temporarily challenged by the General Court in *CDC*,[27] where it annulled a Commission decision that had rejected the application of a third party for disclosure of the table of contents of the Commission's case file. However, the confirmation of a presumption against disclosure of documents in the file by the European Court of Justice ("ECJ") in the *EnBW* case in order to protect the confidentiality of cartel proceedings[28] has helped to keep the threshold for TPA to the Commission's file high.

The presumption against disclosure allows the Commission to lawfully dispense with a specific and individual assessment of each document requested. Interestingly, the ECJ decided that the presumption extends not only to leniency documents, but also to all documents in the cartel proceedings. However, the ECJ also decided that the presumption against disclosure is a rebuttable one.[29] This means that a TPA applicant can still claim that a specific document does not fall under the presumption, or that there is an overriding public interest in disclosure.[30]

In this context, the ECJ decided that fostering private enforcement is generally not a public but a private interest.[31] Only when there is no other way of obtaining the requested information, and the information is needed to establish the claim for damages, may the claimant's interest in the requested document constitute an overriding public interest.[32] This also means that there is no certainty that a leniency application or other evidence voluntarily provided by a leniency applicant is 100 percent protected from TPA to file.

2. The FCO's Approach

In Germany, fine decisions in cartel cases are not published, not even in non-confidential versions. However, third parties seeking access to the FCO's files have so far been provided with a redacted version of the fine decision.[33] Only in exceptional cases will the FCO provide the potentially damaged party with further documents.[34] Despite the FCO's restrictive approach, the number of applications for disclosure is steadily rising, with some 150 applications for disclosure made to the FCO in 2014.[35]

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[26] Claims are based on Regulation (EC) No 1049/2001.

[27] General Court, *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Commission,* judgment of 15 December 2011, Case T-437/08, Reports 2011 II-08251, ECLI:EU:T:2011:752, [79]-[81].

[28] ECJ, *European Commission v EnBW Energie Baden-Württemberg AG*, judgment of 27 February 2014, Case C-365/12 P, ECLI:EU:C:2014:112 ("*EnBW*"), [65] ff; General Court, *Koninklijke Wegenbouw Stevin BV v European Commission,* judgment of 27 September 2012, Case T-357/06, ECLI:EU:T:2012:488.

[29] *EnBW*, [100].

[30] Article 4 (2) Regulation 1049/2001.

[31] *EnBW*, [108].

[32] *EnBW*, [132].

[33] FCO, *Annual Activity Report 2013/2014*, (German version), *available at* http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Taetigkeitsberichte/Bundeskartellamt%20-%20T%C3%A4tigkeitsbericht%202014.pdf?__blob=publicationFile&v=2, p. 27.

[34] FCO, *Annual Activity Report 2013/2014*, (German version), p. 27.

[35] FCO, *Annual Activity Report 2013/2014*, (German version), p. 27.

According to German case law in the wake of the ECJ's *Pfleiderer*[36] and *Donauchemie*[37] preliminary rulings—which required a case-by-case balancing of the plaintiff's interest in disclosure with the public interest in preserving the attractiveness of leniency—leniency statements and accompanying documents have so far been found to be protected by the Bonn Local Court.[38] However, in a recent judgment, the Higher Frankfurt Regional Court cast doubt on this practice, emphasizing that in light of the ECJ's case law, which requires a case-by-case balancing of interests, disclosure of leniency applications cannot be excluded as a matter of principle. In the same vein, the Hamm Higher Regional Court ruled that a public prosecutor must grant access to the files, including leniency applications from a criminal investigation into bid-rigging, to the civil courts.[39]

The above shows that significant legal uncertainty on the protection of leniency information from private plaintiffs has arisen both at EU and national levels. While the Damages Directive increases legal certainty, which was one of its main goals,[40] the protection of the leniency applicant is limited, which reduces the incentive to cooperate with the CAs, as will be explained below.

B. TPA to Evidence in Court Proceedings

Prior to the enactment of the Damages Directive, national courts had already tried to obtain confidential information from the Commission.[41] However, the Damages Directive has further increased the risk that leniency documents in civil damages proceedings are no longer safe from the hands of private plaintiffs. Once it has been implemented in the different Member States,[42] national courts will benefit from a disclosure mechanism.[43]

This means that a court will be able to order the plaintiffs, defendants, or third parties to disclose specified items of evidence or entire categories of evidence that have to be defined as precisely as possible, provided there is a justified request that supports the plausibility of the claim for damages.[44] Disclosure must be proportionate, which requires the court to consider the legitimate interests of all parties involved and third parties.[45] The leniency applicant's interest not

[36] ECJ, *Pfleiderer AG v Bundeskartellamt,* judgment of 14 June 2011. Case C-360/09; ECLI:EU:C:2011:389; 2011 I-05161, especially [31].

[37] ECJ,. *Bundeswettbewerbsbehörde v Donau Chemie AG and Others,* judgment of 6 June 2013, Case C-536/11, ECLI:EU:C:2013:366, especially [34].

[38] Local Court Bonn, order of 29 December 2011, Case File No 51 Gs 2496/10; Higher Regional Court Düsseldorf, order of 22 August 2012, Case File No V – 4 Kart 5 + 6/11 OWi.

[39] Higher Regional Court Hamm, order of 26 November 2013, Case File No 1 VAs 116/13 - 120/13 and 122/13, confirmed by German Federal Constitution Court Case File No 1 BvR 3541/13, 1 BvR 3543/13 and 1 BvR 3600/13; ECLI:DE:BVerfG:2014:rk20140306.1bvr354113; *available at* https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2014/03/rk20140306_1bvr354113.html .

[40] Directive 2014/104/EU, recital 9.

[41] General Court, *Alstom v European Commission*, order of 29 November 2012, Case T-164/12 R, ECLI:EU:T:2012:637.

[42] Art. 21 Directive 2014/104/EU: transposition deadline : 27 December 2016.

[43] Art. 5 Directive 2014/104/EU.

[44] Art. 5 Directive 2014/104/EU.

[45] Art. 5 (3) Directive 2014/104/EU.

to be charged with damage claims is defined as interest that does not warrant protection.[46] Courts must be able to order the disclosure of confidential information where this is considered relevant to the action.[47]

The Damages Directive only grants absolute protection from disclosure to leniency statements and settlement submissions.[48] However, pre-existing information, *i.e.*, evidence that exists irrespective of the Commission proceedings and that is submitted to the Commission by an undertaking in the context of its application for immunity from or reduction of the fine, is not protected.[49] This means that evidence accompanying a corporate statement will not be protected from disclosure. In the *Pfleiderer* case, the companies had urged the ECJ to include documents accompanying a leniency application in the protective scope, but the ECJ followed Advocate-General Mazák's proposal to distinguish between the statement and pre-existing documents, as the Commission had also argued.[50]

Another risk is that only temporary protection (pending closure of proceedings before the NCAs) is awarded to documents specifically prepared for the proceedings of a CA, information the CA has drawn up, and settlement submissions that have been withdrawn.[51] This means that the statement of objections and responses to requests for information are only temporarily excluded from disclosure. This is also potentially dangerous for a leniency applicant because it cannot defend itself like a company that does not cooperate with the CA in responding to an SO and an RFI, as these documents are likely to contain incriminating statements.

The leniency applicant's expectation not to be treated less favorably than other participants in a cartel, and that documents voluntarily provided as part of cooperation with the authorities are protected, is already frustrated by the disclosure mechanism foreseen in the Damages Directive. Whether further damage to public enforcement will be done will depend on how Member States implement it and how national courts make use of it.

This private practitioner's experience that companies are becoming ever more reluctant to apply for leniency should serve as a warning to the legislator and the courts not to expand the scope of disclosure too far when transposing the Damages Directive. It should also serve as a reminder to national courts to adhere to the principle of proportionality when granting disclosure orders.

[46] Art. 5 (5) Directive 2014/104/EU.
[47] Art. 5 (4) Directive 2014/104/EU.
[48] Art. 6 (6) Directive 2014/104/EU.
[49] Art. 4a (3) Regulation (EC) No 773/2004.
[50] Opinion of AG Mazák in *Pfleiderer AG v Bundeskartellamt,* Case C-360/09, ECLI:EU:C:2010:782, [17].
[51] Art. 6 (5) (c) Directive 2014/104/EU.

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Japanese Leniency Program: Issues to be Considered

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Japanese Leniency Program: Issues to be Considered

Madoka Shimada & Sumito Nakano[1]

I. INTRODUCTION

The leniency program has played an important role in cartel investigations carried out by the Japan Fair Trade Commission ("JFTC"),[2] the sole competition authority in Japan, since the inception of the program in 2006. The program has frequently been used by applicants to obtain an exemption from, or reduction of, potential sanctions. It also informs the JFTC of cartel conduct and helps it obtain necessary information concerning such matters. This is similar to the goals and effects of leniency programs in other jurisdictions.

However, the Japanese leniency program has several unique characteristics when compared to leniency procedures in other jurisdictions such as the United States and European Union. Some of these unique characteristics pose potential problems to leniency applicants. This article gives an overview of: (i) cartel regulations in Japan, (ii) the Japanese leniency program, (iii) cooperation between the JFTC and foreign competition authorities, (iv) issues concerning Japanese cartel regulations and the Japanese leniency program, and (v) points to be considered when a foreign company plans to file for the leniency program with the JFTC.

II. OVERVIEW OF CARTEL REGULATIONS IN JAPAN

The main law governing cartels in Japan is the Antimonopoly Act of Japan (the "AMA").[3] Similar to many other jurisdictions, violation of cartel regulations under the AMA is subject to severe sanctions. Moreover, companies that conspire in a cartel are subject to sanctions under the AMA even if the companies are located outside of Japan, so long as customers in Japan are affected by the cartel's conduct.

The JFTC may render cease and desist orders and/or surcharge payment orders against companies that violate the prohibition of cartels under the AMA. The amount of a surcharge payment order is determined based on the target company's sales of goods and services that were affected by the conduct of the cartel, and is calculated by using multipliers that vary depending on the target's type of business and size. The administrative surcharge amount is determined only by employing this simple calculation and the JFTC has no discretion in determining the amount.

In addition to the administrative orders described above, companies and individuals who violate the AMA's cartel prohibitions can be criminally penalized if the violation is regarded as being vicious and serious, or if the cartel violation occurs repetitively at a specific company or in

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[2] *See* JFTC's website in English (http://www.jftc.go.jp/en/) for further information.

[3] *Available at* http://www.jftc.go.jp/en/legislation_gls/amended_ama09/.

a specific industry.[4] In addition, it should be noted that anyone who suffered from any loss incurred by a cartel's conduct can file a civil suit against the participants of the cartel seeking damages against them. However, filing such a civil suit in cartel cases is currently uncommon in Japan except for cases filed by public agencies regarding bid-rigging in public procurements.

III. OVERVIEW OF THE JAPANESE LENIENCY PROGRAM

In filing with the JFTC under the Japanese leniency program, an applicant is required to make an initial filing by fax. The Japanese leniency program has a marker system in which each applicant obtains a marker upon submitting its initial filing to the JFTC. The first leniency applicant who files before the JFTC initiates a formal investigative procedure, such as a dawn raid, will be fully exempt from paying any administrative surcharge.[5] Also, the JFTC has announced a policy whereby the first leniency applicant who files before the initiation of a formal investigative procedure, as well as its directors, officers and employees, will be exempt from criminal prosecution.[6] Furthermore, the administrative surcharge amount of the second leniency applicant who files before the JFTC initiates a formal investigative procedure will be reduced by 50 percent,[7] and that for the third to fifth applicants will be reduced by 30 percent.[8]

For leniency applicants who file after the JFTC initiates formal investigative procedures, the surcharge amount for leniency applicants (up to three applicants after the formal investigative procedures begin, and up to five applicants in total including those who filed beforehand) will be reduced by 30 percent.[9] As the JFTC has no discretion in determining the amount of the administrative surcharge, the degree to which a leniency applicant cooperates with the JFTC's investigation does not affect the administrative surcharge amount imposed on the applicant; although, in practice, the scope of the affected sales and the target period could be adjusted by the JFTC.

The Japanese leniency program has been used frequently by companies since the procedures became effective in 2006. During the five years from April 2010 to March 2015, the JFTC received a total of 487 leniency filings, and issued administrative orders for 71 cartel cases in total.[10]

IV. COOPERATION WITH THE JFTC AND FOREIGN COMPETITION AUTHORITIES

The JFTC cooperates with foreign competition authorities as a signatory to cooperation agreements with authorities in the United States,[11] the European Union,[12] and Canada,[13] and also

[4] The Fair Trade Commission's policy on Criminal Accusations and Compulsory Investigations of Criminal Cases Regarding Antimonopoly Violations. An English translation based on the policy before the latest amendment is *available at* http://www.jftc.go.jp/en/policy_enforcement/cartels_bidriggings/anti_cartel.files/policy_on_criminalaccusation.pdf.

[5] Article 7-2(10) of the AMA.

[6] *See supra* note 4.

[7] Article 7-2(11) of the AMA.

[8] *Id.*

[9] Article 7-2(12) of the AMA.

[10] *Available at* http://www.jftc.go.jp/houdou/pressrelease/h27/may/150527_1.files/honnbun_3.pdf (Japanese).

[11] *Available at* http://www.jftc.go.jp/en/int_relations/agreements.files/usagree.pdf.

[12] *Available at* http://www.jftc.go.jp/en/int_relations/agreements.files/J-ECagreement.pdf.

via other means such as cooperation arrangements, economic partnership agreements, and memorandums on cooperation with foreign competition authorities.[14]

The most recent agreement between the JFTC and a foreign competition authority, which came into effect in August 2015, is the cooperation arrangement between the JFTC and the Australian Competition and Consumer Commission.[15] This competition arrangement provides that both competition agencies will give due consideration to sharing information obtained during the course of an investigation.[16] Such activities may lead to a broader and deeper cooperation between the JFTC and a foreign competition authority than would take place under any of the other agreements or arrangements that were previously concluded.

In addition, treaties and domestic laws regarding international assistance in investigations enable the JFTC and foreign competition authorities to cooperate in investigations.

V. ISSUES REGARDING JAPANESE CARTEL REGULATIONS AND THE JAPANESE LENIENCY PROGRAM

Cartel regulations and the leniency program in Japan have some unique characteristics when compared to those in other jurisdictions.

First, in Japan, privileges such as the attorney-client privilege are generally not recognized. Therefore, the JFTC can retain evidence that would have otherwise been protected due to privileges in the United States, European Union, and other jurisdictions.

Second, during voluntary interview sessions conducted by the JFTC with individuals who are allegedly involved in cartels, representatives—such as legal counsel or the relevant company's legal department personnel—are not allowed to attend the sessions. Further, the interviewee is not allowed to record the audio of conversations that take place during the sessions.

Third, the JFTC places emphasis on information obtained from the interviews of individuals involved in the cartel, rather than the proffers made by the target company through its legal counsel. Because of this emphasis, investigators at the JFTC often request to hold sessions with a large number of the target company's employees. Each interview is held for several hours, from the morning to the evening, and each interviewee is interviewed several times. This process creates physical and mental stress on the interviewees.

VI. POINTS TO CONSIDER WHEN PLANNING TO UTILIZE THE JAPANESE LENIENCY PROGRAM

The points to be considered by a foreign company considering whether to file for the leniency program with the JFTC are stated below.

First and foremost, when a foreign company becomes aware of a cartel involving its company, the company should consider whether the conduct is regulated by the AMA. Even

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[13] *Available at* http://www.jftc.go.jp/en/int_relations/agreements.files/J-CANADAagreement.pdf.
[14] *Available at* For more information, *see* http://www.jftc.go.jp/en/int_relations/agreements.html.
[15] *Available at* http://www.jftc.go.jp/houdou/pressrelease/h27/apr/150430.files/150430MOU2.pdf.
[16] *Available at* Clause 4.3 of the arrangement.

though the JFTC has not clarified how it construes the range of the AMA's extraterritorial application, past cases indicate the JFTC assumes jurisdiction in cases where consumers in Japan could be affected by the cartel's conduct.[17]

Second, if the AMA applies to the cartel's conduct, the company should take a few key factors into consideration when determining whether to file for the leniency program with the JFTC. When considering this course of action, the company should consider: (i) whether the JFTC could obtain information on the matter at hand from other sources (i.e., leniency applications of other cartel participants or through communicating with foreign competition authorities which have obtained information on the matter); (ii) the applicant's possible exposure to JFTC sanctions (for this purpose, the impact of the sanctions on the company's Japanese business must be considered); and (iii) the positive and negative effects of applying for the leniency program with the JFTC.

With regard to point (iii), it is important to note that the JFTC now tends to request more cooperation from leniency applicants than before. In many cases, the JFTC will repeatedly ask questions and request the submission of relevant documents concerning business details and the conduct of the applicants' cartel. The applicants, in order to secure an exemption or a reduction of sanctions, are required to continue to cooperate with the JFTC's requests for an extended period of time. This is not unique to the Japanese leniency program (for example, the same requirements may apply throughout the leniency programs in South Korea and China).

In addition, the JFTC sets tight timelines for leniency applicants to submit documentation. Even in investigations concerning a large-scale cartel or an international cartel, the JFTC allows only three weeks for a leniency applicant to file a document called a Form 2 document after submitting the Form 1 document. Also, even after a leniency applicant submits the Form 2 document, the JFTC requests that the applicant continuously report additional information and submit additional evidence to the JFTC. To deal with these JFTC requests, foreign companies should retain local counsel who have a great deal of experience dealing with leniency applications with the JFTC, in order to make the filing process as smooth as possible.

Third, it is important for foreign companies to keep in mind that, in an international cartel case in which competition authorities in many jurisdictions are involved, the JFTC tends to issue orders earlier than foreign competition authorities investigating the same case. Moreover, in cease-and-desist orders issued against a company that participated in a cartel, the JFTC often orders the company to confirm the company has ceased being involved in the cartel and to notify the employees and business partners of the company that it has ceased being involved in the cartel.

[17] Cease and Desist Order and Surcharge Payment Order against Marine Hose Manufacturers, http://www.jftc.go.jp/en/pressreleases/yearly-2008/feb/individual_000147.html. In the Cease and Desist Order/Surcharge Payment Orders against Cathode Ray Tube ("CRT") case, the targeted products were manufactured by factories in Southeast Asia, thus whether the consumers in Japan could be affected by the conduct was disputed at the JFTC tribunal. In May 2015, the JFTC rendered a decision that the conduct would mainly affect consumers located in Japan.

Even though the cartel's conduct must already have been stopped, the JFTC may issue such a cease-and-desist order for confirmation purposes. Sometimes this creates a tension between the company's stance it took before foreign competition authorities and its stance in any civil suits (in particular in the United States).

Last, part of the evidence collected by the JFTC, including records of written statements prepared through the JFTC interview sessions, can be disclosed during the litigation process thereafter. Evidence collected by the JFTC can be disclosed to an appellate court if the JFTC orders are appealed,[18] and also in criminal procedures, if applicable.

The evidence collected by the JFTC can also be used by a plaintiff in a civil litigation. In a recent civil suit[19] concerning a company that participated in a cartel, the company's shareholders sought damages against directors and statutory auditors by way of a shareholders derivative lawsuit. In that case, the court issued an order to produce some of the evidence the JFTC obtained during the investigation. Furthermore, such evidence could be subject to discovery in any related civil suits in other countries.

VII. CONCLUSION

The Japanese leniency program, which was designed based on leniency programs of other countries, has been the central method for the JFTC to open an investigation into a cartel and to collect necessary information about the matter. On the other hand, as stated above, there are some aspects in which the applicant's interests may not be sufficiently protected, given the unique aspects of cartel investigations and leniency procedures in Japan. If you need to consider filing for the JFCT's leniency program in an international cartel case, it is important to consider such points for the best interest of the applicant.

[18] Since April 2015, when the amendment to the AMA took effect, JFTC orders are directly appealed to a court, instead of firstly being examined at the JFTC tribunal, as was done before the amendment to the AMA took effect.

[19] Osaka District Court Order dated July 15, 2012 (Sumitomo Electric).

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Leniency—What Exactly are the Implications for the Applying Undertaking in the European Union?

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Leniency—What Exactly are the Implications for the Applying Undertaking in the European Union?

Marcin Trepka[1]

I. INTRODUCTION

Leniency programs are one of the most revolutionary solutions introduced into cartel detection and prosecution systems in the last few decades. Leniency has increasingly become a powerful tool at the disposal of the antitrust authorities who frequently rely on it in fighting cartels. Due to the fact that many of the large global cartels have been identified and investigated as a result of immunity applications, leniency is very often considered as the most effective tool for detecting cartel activity.

The antitrust authorities benefit significantly from leniency programs. Thanks to cooperation with former cartelists they are afforded an opportunity to obtain insider evidence on cartel infringement, which otherwise may be difficult to detect because of the secret nature of cartels. Conversely, a cartel participant reporting itself, and providing evidence of a cartel, can obtain total immunity from a fine or a reduction of such penalty.

Examples of recent high profile European Commission ("EC") antitrust investigations in which leniency played a significant role are recent cartels in euro and yen interest rate derivatives. Barclays' revealing of the existence of the euro cartel meant it obtained full immunity and thereby helped it to avoid a fine of around EUR 690 million for its participation in the infringement. At the same time, UBS received full immunity for revealing the existence of the yen cartels and thereby avoided a fine of around EUR 2.5 billion for its participation in five of the seven infringements. Citigroup received full immunity for one of the infringements in which it participated, thereby avoiding a fine of around EUR 55 million. Jointly, between 1998 and 2013, leniency applications contributed to the opening of 93 investigations by the EC in which 71 existing cartels were detected and fined with the participation of over 610 businesses.

Leniency also had its share in major cartel investigations conducted in other Member States, e.g. the one closest to the author, the Polish antitrust authority. In the biggest cartel case to date involving almost all the cement producers in Poland (the cement cartel case), two entities applied for lenient treatment, namely Lafarge and the Heidelberg Group. The former was granted full immunity, the latter a 50 percent reduction of its fine. The remaining cartel members ended up with approximately EUR 100 million in fines. In another high profile case, a leading DIY chain store, Castorama, received full immunity for revealing the existence of anticompetitive practices in the domestic paint wholesale market and thereby avoided a fine of approximately EUR 55 million.

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Model leniency programs provide immunity to businesses from any antitrust fines that would otherwise have been imposed. In most cases in the European Union the following conditions have to be met:

1. The applicant is the first to submit evidence that, in the authority's view, at the time it evaluates the application will enable such authority to carry out inspections or enables the finding of an infringement of competition law in connection with an alleged cartel.
2. The authority did not, at the time of the application, already have sufficient evidence to adopt an inspection decision, or had not already carried out an inspection, or did not have sufficient evidence to find an infringement of competition law in connection with the alleged cartel arrangement.
3. The conditions attached to leniency are met.

Companies that do not qualify for immunity may still benefit from a reduction of a fine. However, depending on the leniency program, there might also be some exclusions from immunity from fines. The most common reason of exclusion is coercion of another undertaking into participating in the cartel.

Leniency is a tempting offer when infringing conduct is likely to be detected and punished—in particular when detected internally in terms of routine risk monitoring or a whistleblower notification without prior knowledge of the existence of cartel behavior in the first place. A company threatened with an antitrust investigation might want to consider a leniency application, at least as part of its risk management. Professional management of the company's reputation and financial risks will certainly include reasonable assessment of all the circumstances of this solution including taking into account all advantages and disadvantages of an application for leniency.

Self-reporting can have also a downside for a company's business activity. It could represent an opportunity for a company but, on the other hand, it involves some risks that each future leniency applicant should take into account.

Obviously, opting for leniency should never merely involve a simple cost-benefit analysis. This article is not intended to encourage or discourage a business from filing a leniency application—that should be always a deliberate choice of the companies concerned. It is to indicate the most significant, standard implications of a leniency application presented in an objective comparative manner based on the SWOT[2] analysis method and aims to present a full picture.

II. LENIENCY (SWOT) ANALYSIS

A. Strengths

The attractiveness of leniency results from the fact that there is no other legal way in which a company can obtain 100 percent immunity from an antitrust fine. Therefore, from a purely financial point of view, leniency seems to be a promising solution for a business.

[2] Analysis of a project of business situation evaluating its strengths, weaknesses, opportunities, and threats.

Moreover, if a company wants to reorganize its operations so as to comply with antitrust rules in the future, a potential leniency application can facilitate such change.

The leniency procedure, in many cases, requires the carrying out of an audit in a company in order to assess the scale and scope of the infringement. It can be helpful for future risk management and for introducing or improving the compliance program so as to mitigate the risk of violations and fines in the future. Also, most competition authorities require businesses to submit such applications in the first place in case of detection of any competition law infringement as a requirement of an effective compliance program.

B. Weaknesses

Despite the clear benefits of leniency, a company applying for immunity has to bear in mind that it will imply both admission of cartel involvement and cooperation with the antitrust authority during the proceedings. There is no "one-stop shop" solution in terms of leniency applications, which means filing for lenient treatment with one antitrust authority does not grant a marker in any other authority potentially concerned. Therefore, in cases where companies take part in cross-border cartels, they expose themselves to penalties in several jurisdictions and would only be fully protected if they apply for leniency with all authorities that could pursue a case against them (i.e. multi-leniency application). In such cases more than one authority may investigate the case and each authority would need the information for its respective investigations under its own rules. Respectively, obligation to cooperate applies to each antitrust authority concerned.

The threat of a penalty is not the only risk involved in cartel activity. In addition, a company's image may be affected and the company may damage its reputation in the eyes of its customers, counterparties, and suppliers, and the company may now have a less favorable defense position in potential lawsuits. Filing an application is an admission of guilt. Reporting cartel activity can also have a detrimental effect on a company's business relations with its competitors and contractors. Exposing co-operators in exchange for leniency may lead to a loss of trust in business circles. These issues are not without significance from a business perspective.

An application for leniency starts time-consuming proceedings that require much effort from the reporting company throughout the entire process. Not to mention that considerably more effort is required for a multi-leniency application. The reporting entity is required to present the incriminating facts and evidence and to fully cooperate with the authority. Besides providing all relevant information and evidence relating to the alleged cartel, it may involve (i) answering requests for additional information that may contribute to the establishment of the facts; (ii) making employees and directors available for interviews; and (iii) not destroying, falsifying, or concealing relevant information or evidence relating to the alleged cartel. Also, in most cases, the leniency applicant should put an end to its involvement in the cartel immediately following its application, except for what would, in the authority's view, be reasonably necessary to preserve the integrity of the authority's inspection.

Inconveniences for a company can arise also in connection with possible personnel changes in the company's structure. For strictly PR reasons, or due to disciplinary actions, the company may terminate the contracts with senior managers involved in cartel activity. But what can be more severe for a company is that other managers not involved in anticompetitive

conduct might be prepared to change their jobs in order not to be associated with a company being a cartel participant.

By admitting cartel participation, the company also exposes itself to lawsuits of the entities injured by the cartel activity. In most leniency regimes, the leniency applicant is not protected from the civil law consequences of its cartel participation. Damages in private enforcement litigations may, however, exceed the amount of the fine that would be imposed by the authority. Therefore, as a result of the leniency application, a civil lawsuit may be brought by cartel victims seeking compensation. A crucial issue in the event of a follow-on action for damages is access to the evidence collected by the competition authority.

So far, some general rules established by the Court of Justice of the European Union ("CJEU") have been applied in this area. Under settled case law any individual has the right to claim damages for a loss caused to him by anticompetitive conduct (see the *Courage and Crehan* or *Manfredi and Others* cases). In the Pfleiderer case, it was assumed that the person adversely affected by an infringement of competition law and seeking damages shall not be precluded from being granted access to documents relating to the leniency procedure, but it is for the national courts to determine the conditions under which such access must be permitted (*Pfleiderer AG v Bundeskartellamt*).

Finally, in most recent case law, the CJEU stated that cartel victims may bring an action before the courts of one single Member State against several defendants domiciled in various Member States (see *Hydrogen Peroxide SA v Akzo Nobel NV and Others*). This means that companies that have participated in an unlawful cartel must expect to be sued in the courts of a Member State in which one of them is domiciled.

New rules concerning actions for damages for infringements of competition law have been introduced by the Damages Directive.[3] The new EU Directive intends to facilitate private damage claims—something of significance also for leniency applicants. Although the Damages Directive sets some rules protecting leniency applicants as it denies access to leniency statements for the purpose of actions for damages, and removes joint and several liability from the leniency applicant, its aim is mainly to introduce principles facilitating actions for damages.

The Damages Directive stipulates, among other things, that a final infringement decision of a national competition authority shall constitute full proof before the civil courts in the same Member State and that the victims shall be entitled to full compensation (i.e. compensation for actual loss and for loss of profit, as well as payment of interest). It establishes also a rebuttable presumption that cartels cause harm. The Damages Directive needs to be implemented by Member States by December 27, 2016. The European Commission has already updated its antitrust procedures to ensure effectiveness of the Damages Directive.

Last, but not least, a company applying for leniency must bear in mind that cartel activity may have consequences in terms of criminal liability of individuals. In many jurisdictions, cartel

[3] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

activity of individuals, mainly members of senior management who decide to break the law, is sanctioned by fines or imprisonment. It is worth ensuring whether a leniency regime offers a release of criminal liability for individuals.

A separate issue to consider is whether in particular within a leniency regime an individual can apply for leniency. If so—which will be characteristic for jurisdictions where individuals can be fined by the given antitrust authority—it is worth examining the consequences of an individual's leniency application for the company and vice versa. This issue is very topical recently in Poland as, starting this year, individuals may be fined up to approximately EUR 500,000 and at the same time may apply for immunity separately from the company.

C. Opportunities

The main benefit of self-reporting is gaining market advantages over a competitor who, if the infringement is proved, will be punished with a huge fine (amounting e.g. in the case of fines imposed by the European Commission to a maximum of 10 percent of the overall annual turnover in last financial year). This is also one of the key cornerstones of effective leniency regime, i.e. severe sanctions for the members of the cartel who do not report to the authority as well as high degree of likelihood that those cartel members will be discovered and punished. Applying for immunity also enables a company to have some influence on the ongoing investigation.

Moreover, many antitrust regimes foresee a solution called amnesty/leniency plus, which allows a cartelist who did not obtain full or part immunity in one case to obtain an additional reduction of a fine in exchange for cooperation with respect to another cartel activity.

Also, obtaining immunity means a significant reduction of costs of legal fees at the appeal proceedings stage as such business will, obviously, not appeal the authority's decision.

D. Threats

There are several risks in applying for leniency. First, the company's application does not have to be accepted by the competition authority. A leniency applicant, in order to get an award of immunity or fine reduction, has to earn it by providing the competition authority with the relevant information. A company has to submit the information and evidence that meet the relevant threshold. In cross-border cartel cases this applies to all antitrust authorities concerned. For instance, in the case of proceedings before the EC, the submitted information has to enable the organization to carry out an inspection or find an infringement in connection with the alleged cartel.

There is always a considerable uncertainty with a leniency application as to whether another cartel member has not already blown the whistle. A subsequent applicant in most leniency regimes would be granted only a fine reduction, usually a reduction amounting up to 20-50 percent. In order to qualify for a reduced fine, a company must provide the antitrust authority with new evidence with respect to the information already possessed by the authority.

Most leniency regimes enable companies to protect their place in a leniency queue (i.e. "marker") for the given period of time needed to submit the necessary evidence and information. If a company does not provide the required information, its application will be rejected and the company will forego its place in the queue.

III. CONCLUSION

Leniency has one significant advantage—immunity from an antitrust fine, which, if the application is successful, will probably outweigh all the weaknesses and difficulties of the mechanism. On the other side, from the antitrust authority point of view an attractive leniency program is a powerful preventive tool in a fight against cartels, notably because it implants a permanent fear among cartel members that one of them will report the cartel to the antitrust authorities (so-called prisoner dilemma). This makes the cartel instable and discourages companies from engaging in cartel behavior in the first place.

As presented above, obtaining immunity is not as easy as it may seem. In order to be granted immunity from a fine, the undertaking has to meet many conditions, including full cooperation with the authority throughout the whole proceedings. One should also not ignore the consequences of an application for leniency for the company's image and business relations. There is also a risk of not being the first in the queue and then qualifying only for a fine reduction, after which of course providing information and evidence representing "significant added value" with respect to materials already possessed by the authority may turn out to be even more difficult.

Depending on certain circumstances, including among others the scope and scale of the infringement, type of business, branch, business relations, strength of the company's brand, and financial stability of the company, different emphasis would be put on the above-mentioned advantages and disadvantages. A business decision concerning an application for leniency should include at least consideration of the above-mentioned aspects.

On the basis of the above-mentioned general SWOT analysis of leniency policy it seems that the weaknesses and threats still score high. Business entities, when considering an application for leniency, are specifically interested in (i) clear information on the consequences of such application, (ii) what exactly may be demanded from them before and after the granting of full immunity, and (ii) what are the procedural frameworks for leniency mechanisms. The problem of transparency is particularly crucial in leniency applications for cross-border activities and behaviors, since there is no clear rule on how to assess the scope of jurisdictions competent to investigate and decide on the existence of a given cartel. The problem is additionally compounded by the non-existence of a one-marker system or an alternative system of foreign markers' endorsement.

An improvement in these issues might cause quite a change on the SWOT analysis chart. Work is already in progress towards convergence of the EU's and Member States' leniency programs. One such initiative is the Model Leniency Programme prepared by the European Competition Network ("ECN"), which offers fair perspectives to facilitate multiple filings as well as safeguards and protection standards pertinent for the functioning of leniency programs throughout the whole of the ECN. The other entity is the International Competition Network.

Irrespective of the conclusions of the analysis provided in this article there is fairly widespread agreement that leniency programs should be transparent and predictable so that firms can clearly understand the workings of the application process of the competition authority. Creation and introduction of a one-marker system to facilitate international cooperation among competent authorities and increasing the legal safety of applicants for

leniency perfectly embodies this idea. One of the key priorities of the ICC Competition Commission Cartels & Leniency Task Force is to play a key role in making this happen.

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The Evolution of U.S. Antitrust Agencies' Approach to Standards and Standard Essential Patents: From Enforcement to Advocacy

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The Evolution of U.S. Antitrust Agencies' Approach to Standards and Standard Essential Patents: From Enforcement to Advocacy

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I. INTRODUCTION

The focus of this article is on what has become a powerful, if somewhat controversial, exercise of advocacy by the U.S. antitrust enforcement agencies: the employment of pressure and advocacy to encourage a result that some claim is redolent of non-antitrust goals in the interface between standard development organization ("SDO") policies and standard essential patents ("essential patents"). In short, where have we come from, where are we, and how did we get here?

II. THE EARLY RECOGNITION OF THE VALUE OF INTELLECTUAL PROPERTY AND THE IMPORTANCE OF DYNAMIC COMPETITION

In the early part of the last decade, the antitrust agencies acknowledged the competitive and consumer welfare benefits of intellectual property ("IP") protection and standards development, but also focused on the possibility of abuse in limited circumstances—particularly in cases of deception. Thus, then-AAG Tom Barnett, in remarks delivered at a George Mason University Law School Symposium in 2006, cautioned against overvaluing short-term price effects at the expense of long-term dynamic competition in research and development. He observed:

> [i]n particular, regulatory second-guessing of private firms' solutions to technological problems, which I perceive to be on the increase, threatens to harm the very consumers it claims to help,[2]

and also noted:

> [i]f a firm knows it will have to share its intellectual property or be managed by a committee of government regulators, it will not innovate in the first instance.[3]

Concerned with abuse of the standards process, the Federal Trade Commission ("FTC") took action against single-firm manipulation and deception in the standards setting context, e.g.

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[2] Thomas O. Barnett, Asst. Att'y. Gen., Antitrust Div., U.S. Dep't. of Justice, Interoperability between Antitrust and Intellectual Property, Presentation to the George Mason School of Law Symposium Managing Antitrust Issues in a Global Marketplace, 1 (Sept. 13, 2006), *available at* http://www.justice.gov/atr/public/speeches/218316.htm.

[3] *Id.* at 12- 13.

Unocal, *Rambus*.[4] In those matters, the FTC focused on allegations of deception by the respondents' failure to disclose standard essential IP in violation of SSO policies and the post-adoption assertion of those patent rights against downstream rivals.

The 2007 U.S. Department of Justice ("DOJ") business review letter to the Institute for Electrical and Electronic Engineers ("IEEE") tried to strike a balance between deceptive exploitation and reward to innovation, indicating no action on a policy encouraging owners of standard essential patents to disclose them *ex ante* and state the maximum royalty rate. At the same time, joint negotiation by prospective licensees was neither proposed nor cleared; however, DOJ indicated that the rule of reason would govern any such conduct.[5] Plainly, the rule of reason was not considered a template for *per se* legality where the objective of any such joint action was to counter bargaining power by essential patent owners.

Focusing on this threat of buyer collusion, Hill Wellford, then a senior official at the Antitrust Division, stated that while an SSO could use techniques such as FRAND to address possible standards-related market power, it "may not be reasonable to use a collaborative standard setting process to attempt to destroy market power that a patent holder achieved independently through procompetitive means."[6]

Similarly then-DOJ Deputy AAG Gerald F. Masoudi stated:

> [h]arm to short term efficiency does not necessarily equate to harm to competition. If a patentee and an SDO cannot agree about disclosure policies or royalty rates, and end up with competing standards backed by each camp, this may be costly to efficiency in the short run; however, if the credible threat to set up competing standards causes parties to bargain, innovate, or otherwise compete harder, long-term efficiency may benefit. *There is always a temptation to focus on short-term, party-specific harm, since that is the easiest to measure, but the proper focus is on the competitive process and the long-term efficiency of standard setting.* Measuring long-term efficiency is difficult but we need to remind ourselves constantly that this is the goal.[7]

Around the beginning of the current decade, the agencies' balanced approach started to shift. It began with expressions of a theoretical (but not empirically grounded) concern with hold-up and royalty stacking, divorced from any reliance on *ex ante* deception by the patent owner.

For example, a 2011 FTC report commented that:

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[4] Union Oil Co. of Cal., 138 FTC 1 (2004) (consent decree); Rambus Inc., 2004 FTC LEXIS 17 (2004) (initial decision); Rambus Inc., 2006 FTC LEXIS 60 (2006) (order), *rev'd*, 522 F.3d 456 (D.C. Cir. 2008).

[5] Letter from Thomas O. Barnett, Ass't Att'y Gen., U.S. Dep't of Justice, to Michael A. Lindsay 11 (April 30, 2007), *available at* http://www.usdoj.gov/atr/public/busreview/222978.pdf.

[6] Hill B. Wellford, Counsel to the Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Antitrust Issues in Standard Setting, 2d Annual Seminar on IT Standardization and Intellectual Property, China Electronics Standardization Institute Beijing, China 15 (Mar. 29, 2007), *available at* http://www.justice.gov/atr/public/speeches/222236.pdf.

[7] Gerald F. Masoudi, Deputy Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Antitrust Enforcement and Standard Setting: The VITA and IEEE Letter and the 'IP2' Report, Spring Meeting of the American Intellectual Property Law Ass'n, Boston, Mass. 10 (May 10, 2007) (emphasis added), *available at* http://www.justice.gov/atr/public/speeches/223363.pdf.

> Over-compensation (*sic*) and injunctions that cause patent "hold up" . . . can lead to higher prices and encourage speculation in patent rights, which deters innovation. The report recommends that courts adopt an economically grounded approach to calculating patent damages that recognizes competition from non-infringing alternatives, and that courts take into account the ability of injunctions to cause patent hold up based on an infringer's sunk costs.[8]

In a statement to the International Trade Commission ("ITC") in 2012, the FTC wrote:

> ITC issuance of an exclusion or cease and desist order in matters involving RAND-encumbered SEPs, where infringement is based on implementation of standardized technology, has the potential to cause substantial harm to U.S. competition, consumers and innovation. Simply put, we are concerned that a patentee can make a RAND commitment as part of the standard setting process, and then seek an exclusion order for infringement of the RAND-encumbered SEP as a way of securing royalties that may be inconsistent with that RAND commitment.[9]

In the same vein, then-Commissioner Ramirez in 2012 Congressional testimony referred with approval to Judge Richard Posner's opinion in *Apple v. Motorola*[10] to the effect that a patentee who has given a FRAND commitment implicitly accepts damages as sufficient relief for infringement.[11] In a later address to the 2014 Global Antitrust Enforcement Symposium, however, Chairwoman Ramirez noted that issues involving the level of royalty rates do not ordinarily raise antitrust concerns.[12]

More emphasis on the spectre of hold-up came from Antitrust Division chief economist Fiona Scott-Morton, who stated in a late 2012 speech:

> We believe declared SEPs can be a powerful weapon, perhaps enhanced by over declaration, and can be used to harm competition through holdup. . . . the holdup power of the non-SEP owner does not stem from a collective decision by competitors. Rather, it springs only from a single innovation deployed unilaterally

[8] Fed. Trade Comm'n 2011 Annual Report at 11 (discussing its report entitled "The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition" (Mar. 2011)), *available at* https://www.ftc.gov/policy/reports/policy-reports/ftc-annual-reports.

[9] Fed. Trade Comm'n, Third Party U.S. Fed. Trade Commn's Statement on the Public Interest, In re Certain Wireless Comm'ns Devices, Portable Music and Data Processing Devices, Computers and Components Thereof, Inv. No. 337-TA-745 (Int'l Trade Comm'n June 6, 2012), *available at* http://www.ftc.gov/os/2012/06/1206ftcwirelesscom.pdf.

[10] Apple, Inc. v. Motorola, Inc., 2012 WL 2376664 (N.D. Ill. June 22, 2012).

[11] Edith Ramirez, Commissioner, Fed. Trade Comm'n, Oversight of the Impact on Competition of Exclusion Orders to Enforce Standard-Essential Patents, Testimony Before the United States Senate Committee on the Judiciary (July 11, 2012) at 12-13, *available at* https://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-concerning-oversight-impact-competition-exclusion-orders/120711standardpatents.pdf.

[12] Edith Ramirez, Chairwoman, Fed. Trade Comm'n, Standard-Essential Patents and Licensing: An Antitrust Enforcement Perspective, Address at 8th Annual Global Antitrust Enforcement Symposium 11 (Sept. 10, 2014), *available at* http://www.ftc.gov/system/files/documents/public_statements/582451/140915georgetownlaw.pdf.

> by its owner. This is the difference that causes F/RAND encumbered SEPs to be of concern to competition authorities including the Department of Justice."[13]

DAAG Morton did, however, acknowledge in a footnote to her prepared remarks that exclusionary relief might be justified in the case of an unwilling licensee.[14]

In a frequently quoted October 2012 address, Deputy Assistant Attorney General Renata Hesse offered "Six Small Proposals for SSOs before Lunch."[15]

One proposal urges:

> It would seem appropriate [for SSO's] to limit a patent holder's right to seek an injunction to situations where the standards implementer is unwilling to have a neutral third-party determine the appropriate F/RAND terms or is unwilling to accept the F/RAND terms approved by such a third-party.[16]

Another of her proposals offers: "Standards bodies may want to explore setting guidelines for what constitutes a FRAND rate . . . ."[17] In a speech three months later, DAAG Hesse expressed some agnosticism over application of Section 2 of the Sherman Act to allegations of patent "hold-up," and urged further work by bar and academia.[18]

III. THE AGENCIES' PRIMARY FOCUS

The agencies' evolving position focuses on two substantive areas: injunctive relief and the calculation of a reasonable royalty. Regarding injunctive relief, in 2013 the FTC issued two consent orders limiting the use of injunctions with respect to patents subject to a RAND licensing commitment.

In *Robert Bosch*, the FTC used the leverage of merger approval to extract concession from a respondent, which had acquired patent assets subject to a RAND commitment, that it would not seek an injunction except where a licensee refuses to accept a FRAND rate as determined by a third party.[19] According to the FTC majority, the conduct of a patentee in seeking an injunction for infringement of an essential patent subject to a FRAND commitment against a willing licensee constituted an unfair method of competition.

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[13] Fiona Scott-Morton, Deputy Ass't Attn'y Gen., Antitrust Div., U.S. Dep't of Justice, The Role of Standards in the Current Patent Wars, at the Charles River Associates Annual Brussels Conference 5-6 (Brussels, Dec. 5, 2012), *available at* http://www.justice.gov/atr/public/speeches/289708.pdf.

[14] *Id.* at FN 7. ("(I)f a putative licensee refuses to pay what has been determined to be a F/RAND royalty (either by a court, a mediator or through some other process agreed upon by the participants in the standardization process) or refuses to engage in a negotiation over what is F/RAND, an exclusion order or injunction could be appropriate. An exclusion order also could be appropriate if a putative licensee is not subject to the jurisdiction of a court that could award damages and impose an on-going F/RAND royalty as relief.").

[15] Renata Hesse, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Six "Small" Proposals for SSOs before Lunch: Remarks as Prepared for the ITU-T Patent Roundtable (Oct. 10, 2012), *available at* http://www.justice.gov/atr/public/speeches/287855.pdf.

[16] *Id.* at 9.

[17] *Id.* at 10.

[18] Hesse, IP, Antitrust and Looking Back on the Last Four Years, Presented at Global Competition Review 2nd Annual Antitrust Law Leaders Forum, Miami, FL 21 (Feb. 8, 2013), *available at* http://www.justice.gov/atr/public/speeches/292573.pdf.

[19] Robert Bosch GmbH, Docket No. C-4377 (F.T.C. Apr. 23, 2013).

Commissioner Ohlhausen dissented, in part on the basis that the impairment of injunctive relief may exceed the Commission's authority under Section 5 of the FTC Act, urging that the Commission should first articulate a Section 5 policy regarding conduct not previously covered by the antitrust laws before invoking it as authority. Another of the Commissioner's concerns was that the enforcement policy on the seeking of injunctive relief on essential patents subject to a RAND licensing requirement effectively ousted other institutions from regulating the area including the federal courts and the ITC. Allied to this concern was that Commissioner Ohlhausen considered the policy to lack "regulatory humility" as it implied that the FTC's judgment on injunctive relief on FRAND-encumbered essential patents was superior. Commissioner Ohlhausen also raised the question whether seeking injunctive relief was in fact protected petitioning following *Noerr-Pennington*.[20]

The agency's subsequent *Google-Motorola* action was to the same effect as the *Bosch* consent. The Commission asserted it could reach opportunistic conduct under Section 5 by a RAND-encumbered patentee that breaches its commitment so as to harm consumers.[21] The majority Commission order establishes elaborate procedures for the essential patent holder's right to seek injunctive relief. Again, Commissioner Ohlhausen dissented.[22]

One might question the use of merger approval to leverage a respondent into accepting an unrelated conduct order and then holding out the consent as an expression of established legal principle. Complaints in the consent order context should not affect established legal precedents.

Still some balance was shown in the DOJ/PTO filing with the ITC (January 8, 2013),[23] acknowledging justification for exclusionary relief in the case of an unwilling licensee. The filing appears to accept the concept of a constructive refusal to deal.

The current state-of-play centers on a revised patent policy statement issued by the IEEE, which expands on the conditions that a holder of essential patents must meet in providing a Letter of Agreement or LOA.

The DOJ provided a no-action business review letter to the IEEE on February 2, 2015.[24]

The shift in agency approach to the review policy is apparent in the following three areas:

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[20] Dissenting Statement of Commissioner Maureen K. Ohlhausen, In the Matter of Robert Bosch GMBH, FTC File No. 121-0081 (Nov. 26, 2012), *available at* https://www.ftc.gov/public-statements/2012/11/dissenting-statement-commissioner-maureen-ohlhausen-matter-robert-bosch; *See* Eastern R.R. Presidents Conference v. Noerr Motor Freight, 365 U.S. 127 (1961); United Mine Workers of Am. v. Pennington, 381 U.S. 657 (1965).

[21] In the Matter of Motorola Mobility LLC, and Google Inc., Docket No. C-4410 (F.T.C. July 24, 2013), *available at* https://www.ftc.gov/enforcement/cases-proceedings/1210120/motorola-mobility-llc-google-inc-matter.

[22] Dissenting Statement of Commissioner Maureen Ohlhausen - In the Matter of Motorola Mobility LLC and Google Inc., FTC File No. 121-0120 (Jan. 3. 2013), *available at* https://www.ftc.gov/sites/default/files/documents/public_statements/statement-commissioner-maureen-ohlhausen/130103googlemotorolaohlhausenstmt.pdf

[23] U.S. Dep't of Justice and U.S. Patent & Trademark Office, Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments (2013), *available at* http://www.justice.gov/atr/public/guidelines/290994.pdf ("DOJ/PTO").

[24] Letter from Renata B. Hesse, Acting Assistant Att'y Gen., U.S. Dep't of Justice, to Michael A. Lindsay (Feb. 2, 2015) ("2015 IEEE BRL").

1. A virtual ban on injunctive relief.
2. Prescription of the appropriate base for calculation of a reasonable RAND royalty.
3. Lack of concern with collective action to prescribe the royalty base.

A. On Injunctive Relief

The IEEE "updated" patent policy (anything but an update) forecloses injunctive relief in the absence of an unwilling purchaser being so adjudicated by an independent authority at the first appellate level. The DOJ business review letter thus addresses a policy limiting—virtually excluding—injunctive relief for a patentee holding essential patents subject to a RAND commitment:

> Limiting this [injunction] threat reduces the possibility that the patent holder will take advantage of the inclusion of its patent in a standard to engage in patent hold up and provides comfort to implementers in developing their products."[25]

The DOJ business review letter acknowledges that provision but goes further than the DOJ/PTO filing with ITC. The DOJ sees no antitrust concern with an SSO imposing a collective ban on injunctive relief.

In what seems a sharp departure from earlier concerns for long-run dynamic competition to bring forward the best technology, discussed above, the DOJ seems to have endorsed an IEEE policy that will work to drive down royalty rates below market value by forcing, patent-by-patent, prolonged litigation with the best result for a patentee being recovery of what would have been determined to be fair and reasonable rate *ex ante*. It prevents an essential patent holder from using an injunction as a defensive matter, eliminates any downside risk to engaging in a constructive refusal to deal, and discourages portfolio licensing. Even some supporters of antitrust action against claimed RAND "violations" are concerned that limitation on injunctive relief would raise *Noerr* issues.[26]

B. Turning to the Issue of a Reasonable Rate

Some implementers have addressed the theory that breach of a FRAND undertaking by an essential patent holder charging excessive rates could constitute an antitrust violation and that reasonable rates could be established *ex ante* by joint bargaining.[27] The FTC's *N-Data* (2008) 3-2 consent order tacitly endorses the theory over dissents by Chairman Majoras and Commissioner Kovacic.[28] According to the FTC's complaint, the transferee of an essential patent subject to a RAND commitment reneged on its royalty-ceiling *ex ante* undertaking. The Commission majority observed that it could be an unfair method of competition for a holder of Essential

[25] *Id.* at 9.

[26] Joseph Kattan & Chris Wood, *Standard-Essential Patents and the Problem of Hold-Up*, *available at* http://www.gibsondunn.com/publications/Documents/Kattan-Standard-Essential-Patents-and-the-Problem-of-Hold-Up-12.19.2013.pdf; George S. Cary, et al, *The Case for Antitrust Law to Police the Patent Holdup Problem in Standard Setting*, 77 ALJ 3, 913 (2011).

[27] Joseph Kattan, *Disclosures and Commitments to Standard-Setting Organizations*, Antitrust 22, (Summer 2002); Kattan, *Frand Wars and Section 2*, Antitrust 30 (Summer 2013); Kattan, *The Next FRAND Battle: Why the Royalty Base Matters*, CPI Antitrust Chronicle (Mar. 2015); Michael A. Lindsay & Robert A. Skitol, *New Dimensions to the Patent Holdup Saga*, 27 Antitrust 2, 34 (Spring 2013).

[28] In re Negotiated Data Solutions, LLC, Docket No. C-4234 (FTC Sept. 22, 2008).

Patents to breach a FRAND agreement where there is coercion and an adverse impact on competition. The FTC's statement takes a pass on the applicability of the Sherman Act. Chairman Majoras's dissent, however, challenges the legal basis and policy of making law by consent order.

Interesting in this context is the later observation by Chairwoman Ramirez explaining that it was her belief that "royalty rates should not be negotiated under the threat of antitrust liability," and "it is important to recognize that a contractual dispute over royalty terms, whether the rate or the base used, does not in itself raise antitrust concerns."[29]

The recent policy change by IEEE requires that a reasonable royalty calculation "should" use smallest saleable component ("SSC") as the base for royalty calculations—other royalty bases might also be considered but parties should use the SSC as a base. The policy statement also provides that a reasonable royalty can only rely on an existing license agreement as evidence of a reasonable rate, but only when there was no "implicit" threat of injunction at the time of that license. Finally, the policy holds that the rate must take into account the value of all Essential Patents covering standard.

The DOJ business review letter bases its "no action" conclusion on the grounds that the policy:

- Promotes desirable clarity.
- Is purely voluntary, with the focus on "should," rather than "must."
- SSC royalty base reflects existing law.
- Does not inhibit portfolio licensing.

The business review letter endorsed the "reasonable rate" required by the updated IEEE policy establishing SSC and rejected the relevance of existing license agreements entered into under "implicit threat of injunction." It wrongly concludes that the policy reflects existing law.[30]

The District Court's decision in *Ericsson v. D-Link* notes that "a patent holder does not violate its RAND obligations by seeking a royalty greater than its potential licensee believes is reasonable. . . both sides' initial offers should be viewed as the starting point in negotiations."[31] The court also explained that there was "nothing inherently wrong or unfair with Ericsson's

[29] Ramirez, *supra* note 11, at 9-11.

[30] This approach, while not contradictory, appears at odds with what AAG Bill Baer explained in a speech to foreign enforcers. AAG Baer said that "Using antitrust enforcement to reduce the price firms pay to license technology owned and developed by others is short-sighted. Any short-term gains derived from imposing what are effectively price controls will diminish incentives of existing and potential licensors to compete and innovate over the long term, depriving jurisdictions of the benefits of an innovation-based economy." *See* Bill Baer, Asst. Att'y. Gen., Antitrust Div. U.S. Dep't. of Justice, International Antitrust Enforcement: Progress Made; Work to be Done, Remarks as Prepared for Delivery at the 41st Annual Conference on International Antitrust Law and Policy (Sept. 12, 2014), *available at* http://www.justice.gov/atr/public/speeches/308592.pdf.

[31] Ericsson Inc. v. D-Link Corp. ("JMOL Order"), No. 6:10-cv-473, 2013 WL 4046225 at *25 (E.D. Tex. Aug. 6, 2013).

practice of licensing 'fully compliant' products."[32] This aspect of the court's holding was not appealed.

Also relevant is the same court's *CSIRO* decision that explained that requiring component licensing is like valuing a book based on the cost of printing and binding.[33]

Innovatio is not persuasive contrary authority.[34] *Innovatio* did not assert the entire market value rule in that case. Accordingly, the court was not briefed on the possible use of the price of the end-product as a royalty base. The *Innovatio* court also never dismissed the entire market value rule. In fact, it noted that it could be appropriate, but not on the facts of the case before it. Even in China[35] and India,[36] use of an end-product base in calculating a reasonable royalty is not categorically barred. I am unaware of any litigated authority that holds that an offer of a rate ultimately determined to be higher than RAND constitutes an antitrust violation.

IV. WHEN ADVOCACY HAS THE FORCE OF LAW

This clear example of the exercise of advocacy by the DOJ and involvement in of private contracting has been criticized cogently by former Commissioner Wright.[37] With the business review letter, DOJ has minimized the threat of licensee "hold-out" as well as implementer royalty-pricing coordination and their resulting long-run effects on innovation.

There was, to be sure, early skepticism with the threat of hold-out expressed by then-Chairman Majoras's speech in September 2005.

> While theoretically possible, this risk is unlikely to be a frequent practical concern. If the SSO members jointly lack buying power, they would not be able to impose a lower-than competitive rate.[38]

My above-reference to remarks of then-Division officials Wellford and Masoudi, however, clearly recognize the reality of the threat and its relevance to antitrust concerns.

The IEEE updated policy constitutes joint action undertaken by dominant implementers who may possess market power to set the base for calculation of royalty rates as the smallest saleable component. Pursuant to the policy, the defined reasonable rate "should" include a

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[32] *Id.* at 24.

[33] Commonwealth Scientific and Industrial Research Org. v. Buffalo Tech. Inc., 492 F.Supp.2d 600 (E.D. Tex. 2007).

[34] In re Innovatio IP Ventures, 2013 WL 5593609 (N.D. Ill. Oct. 3, 2013).

[35] Patrick Moorhead, *Qualcomm Settlement With China's NDRC Removes Major Speedbump*, FORBES (Feb. 10, 2015), *available at* http://www.forbes.com/sites/patrickmoorhead/2015/02/10/qualcomm-settlement-with-chinas-ndrc-removes-major-speedbump/.

[36] Delhi High Court's Decision in *Ericsson v. Intex*, ¶¶ 156-59 (Mar. 13, 2015), *available at* http://op.bna.com/der.nsf/id/tbay-9uwngw/$File/Ericsson%20vs%20Intext.pdf.

[37] Daniel P. Weick, *FTC Commissioner Wright Criticizes DOJ IEEE Letter,* ABA Intellectual Property Committee tidBITS (Mar. 9-15, 2015), *available at* https://www.americanbar.org/content/dam/aba/publications/antitrust_law/at315000_tidbits_20150315.authcheckdam.pdf.

[38] Deborah Platt Majoras, Chairman, Fed. Trade Comm'n, Recognizing the Procompetitive Potential of Royalty Discussions in Standard Setting, Prepared for Standardization and the Law: Developing the Golden Mean for Global Trade, Stanford, Calif. 9 (Sept. 23, 2005).

calculation of the technology's contribution to the smallest saleable component, take into account the value of all essential patents' contribution to the SSC, and rely on existing licenses only where there is no "implied" threat of injunction.

The DOJ letter excuses these requirements as voluntary action that provides for possible other options. One could question how this observation squares with established antitrust law.[39] Moreover, a full rule of reason analysis would consider specific facts and justifications, not available in a generalized request for business review, based on a theoretical justification not supported by empirical evidence. This DOJ endorsement reflects another change in policy by not acknowledging concerns of former officials and by the advocacy of "clarity" with the effect of interfering with bilateral contracting and promoting a policy favoring clarity to the benefit of implementers and specific business models.

There is the concern with proliferation of questionable patents. But is this concern an antitrust problem?

The 2011 FTC Report *The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition* notes that:

> Invalid or overbroad patents disrupt that balance by discouraging follow-on innovation, preventing competition, and raising prices through unnecessary licensing and litigation. For that reason, many of the recommendations in the 2003 FTC IP Report focused on improving patent quality as a means of balancing exclusivity and competition. . . . Good notice of patent rights encourages investment in new technologies. But poor quality patents can discourage innovation by creating uncertainty and raising costs. [40]

There is also the often-expressed concern with hold up.[41] But despite the decades-long assertion of this potential, there remains a lack of empirical evidence and the existence of RAND commitments in SSO policies is not itself proof of hold-up prevalence.

V. CLARITY THROUGH ADMONITION AND ADVOCACY

Finally, there is an expressed desire for clarity. But does extolling the virtues of clarity (i) through admonition, as in DAAG Hesse's 2015 interview with the *ABA Antitrust Source* asking that "people . . . bring us fact patterns [of FRAND violations in the absence of deception] that they think merit enforcement under Section 2,"[42] and (ii) through advocating the use of antitrust to advance an economic policy that may be economically unwise for which antitrust is ill-suited, come at too high a price?

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[39] *See e.g.,* Montgomery Cty. Assn. of Realtors v. Realty Photo, 783 F. Supp. 952, 954 (D. Md. 1992).

[40] Fed. Trade Comm'n, *The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition* (2011) at 1, *available at* http://www.ftc.gov/sites/default/files/documents/reports/evolving-ip-marketplace-aligning-patent-notice-and-remedies-competition-report-federal-trade/110307patentreport.pdf.

[41] 2015 IEEE BRL at 9-11.

[42] Interview with Renata Hesse, Deputy Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Antitrust Source 2 (Spring 2015), *available at* http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/apr15_hesse_intrvw_4_22f.authcheckdam.pdf

There are, moreover, international ramifications in what the U.S. antitrust agencies advise. According to then-Commissioner Wright:

> [r]ecent FTC enforcement actions, testimony, and speeches appear to suggest the beginning of what could be a wholesale departure from the symmetry principle. This development is troublesome, in my view, because it invites a drift toward ad hoc antitrust analysis of IPRs and promotes hostility toward the exercise of property rights and their exchange. It also sends a dangerous signal of approval to emerging antitrust regimes that special rules for IP are desirable from a competition perspective and that business arrangements involving IPRs may be safely presumed to be anticompetitive without rigorous economic analysis and proof of competitive harm."[43]

Furthermore he noted regarding international implications:

> As China and other emerging jurisdictions craft their own approach to applying antitrust principles to IPRs it is critically important that the message coming from the actions and words of the global antitrust community, including the FTC and DOJ, is that promoting competition and consumer welfare as understood through the lens of rigorous economic analysis is the best and most intellectually coherent approach."[44]

The antitrust agencies have established an effective and praiseworthy record of competition advocacy over the years. Their role in the work of international organizations such as OECD and ICN reflects a positive contribution to sound global antitrust convergence. By like token, their advocacy before sectoral and state agencies on the domestic front has capably challenged excessive regulation and regulatory capture.

Advocacy, however, must be based on sound factual and economic analysis and correct legal principles. There is a serious question whether agency advocacy concerning SSOs and essential patents satisfies these criteria.

[43] Joshua D. Wright, Commissioner, Fed. Trade Comm'n, Does the FTC Have a New IP Agenda? Remarks at the 2014 Milton Handler Lecture: "Antitrust in the 21st Century," New York, NY 15 (Mar. 11, 2014).

[44] *Id.* at 8.