

# Why would cartel participants still refuse to blow the whistle under the current EC leniency policy?

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## 1. INTRODUCTION

This article examines the level of transparency and predictability of the 2006 leniency policy, which is the latest policy implemented by the European Commission (the Commission) to relax the sanctions imposed on participants of cartels who come forward to disclose information about the cartels to the Commission. This policy increased leniency for whistle blower(s) in a cartel and happened parallel with the tendency to increase fines for those in a cartel who remained 'silent'.<sup>3</sup>

The Commission's first leniency programme dates back to 1996 with the reduction of fines (up to 75%) to cartel participants who disclosed the existence and details of their cartel activity.<sup>4</sup> Without a guarantee of full immunity there was, in reality, little incentive to report the cartel to the Commission.

Therefore, the policy was modified. The initial modification took the form of the 2002 leniency notice<sup>5</sup> in which full immunity became available to an applicant if certain conditions were met.<sup>6</sup> The changes in the 2002 leniency notice resulted in 167 leniency applications between 2002 and the end of 2005.<sup>7</sup> The 1996 leniency notice, which was effective for twice that time, resulted in only 80 applications. However, the modifications introduced by the 2002 leniency notice were still only partly effective.

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<sup>3</sup>Competition Commissioner Neelie Kroes stated: *'My message to companies is clear; the European Commission will not tolerate cartels. If you take part in cartels you will face very substantial fines...if you are already in a cartel, then blow the whistle to the Commission to gain immunity before someone else blows the whistle on you'*. (EU Focus 2007, 209, 4-5.) This strengthens the vision of previous Commissioner Mario Monti: M. Monti, *Fighting Cartels Why and How? Why should we be concerned with cartels and collusive behaviour?* Third Nordic Competition Policy Conference, September 11 and 12, 2000. There he stated that 'cartels are cancers on the open market economy'; J. S. Sandhu, 'The European Commission's leniency policy: a success?' (2007) 28(3) E.C.L.R. 148-157.

<sup>4</sup>European Commission, Commission Notice on the non-imposition or reduction of fines in cartel cases, (1996) O.J. C207/4 (1996 Leniency Notice).

<sup>5</sup>European Commission, Commission Notice on Immunity from fines and reduction of fines in cartel cases, (2002) O.J. C45/3 (2002 Leniency Notice). To place this in a context see also: R. Lane and J. McMahon, 'Current Developments, European Union Law' (2004) 53(2) I.C.L.Q. 465; J. Carle, 'The new leniency notice', (2002) 23(6) E.C.L.R. 265-272; X, 'New leniency policy adopted for cartel whistleblowers' (2002) EU Focus 95, 6-7; M. Jephcott, 'The European Commission's new leniency notice- whistling the right tune' (2002) 23(8) E.C.L.R. 378-385; C. R. A. Swaak and D. J. Arp, 'A tempting offer: immunity from fines for cartel conduct under the European Commission's new leniency notice' (2003) 24(1) E.C.L.R. 9-18.

<sup>6</sup>2002 Leniency Notice paragraphs 8-13.

<sup>7</sup>See Commission Memorandum, Competition: Commission proposes changes to the Leniency Notice- frequently asked questions, paragraph 1.

<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/357&format=HTML&aged=0&language=EN&guiLanguage=fr> (Accessed March 27, 2008).

The current leniency policy came into force in 2006 and was intended to improve efficacy, transparency, and predictability of leniency application, as well as to address concerns that leniency applicants were unfairly disadvantaged in subsequent civil damages actions.<sup>8</sup> This leniency policy was also the result of a pressing need to introduce more incentives for cartel members to come forward.<sup>9</sup>

Under the current system, an applicant making a leniency application will apply to seek full immunity from sanctions. If full immunity is not available, the applicant can apply for a reduction of any fine levelled against it.<sup>10</sup> The 2006 EC leniency policy is in line with the European Competition Network's (ECN<sup>11</sup>) Model Leniency Programme.<sup>12</sup>

This article aims to investigate how effective the current EC leniency policy really is by investigating some of the problems that have been attributed to the current leniency policy. The article will also endeavour to determine whether the underlying aims of certainty and predictability have been reached in relation to the current leniency policy and identify any areas, which should be improved to make the leniency policy more effective.

## 2. PROBLEMS UNDER THE CURRENT LENIENCY POLICY

### (A) THE MARKER SYSTEM, ITS PITFALLS AND ALTERNATIVE SOLUTIONS

The marker system is one of the main innovations of the 2006 leniency policy. The system, originated in the US, and was followed soon after in Ireland, South Korea, Canada, Germany, the UK and Australia.<sup>13</sup> It gives a leniency applicant the opportunity to save a place in the queue for all the applicants.<sup>14</sup> Within a reasonable period of time the applicant has to perfect the marker by proffering the necessary information to the Commission.<sup>15</sup> The purpose of the marker system is to encourage a race between cartel members to report cartels to the Commission and to provide the best information and most useful evidence on the cartel available to them.<sup>16</sup> This system should add transparency, certainty and predictability to the leniency process as the leniency applicant is aware of where he stands

<sup>8</sup>European Commission, Commission Notice on immunity from fines and reduction of fines in cartel cases, (2006) O.J. C298/17.

<sup>9</sup>J. Hinloopen, 'An Economic Analysis of Leniency Programs in Antitrust Law' (2003) 4 De Economist 151.

<sup>10</sup>2006 Leniency Notice, paragraph 20.

<sup>11</sup>The ECN consists of the European Commission and the competition authorities of the 25 Member States. It was established during the modernisation reform of the EC antitrust rules as a forum for discussion and cooperation of Member States.

<sup>12</sup>Competition: Commission and other ECN members co-operate in use of leniency to fight cross border cartels <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/1288&format=HTML&aged=0&language=EN&guiLanguage=fr>, (visited May 20, 2008). The ECN launched a Model Leniency Programme with a view to improve the handling of parallel leniency applications in the ECN. The Model Programme is an effort towards a one-stop leniency shop and offers a set of rules on which all ECN programmes can align.

<sup>13</sup>C. Witterick C. and J. Gudofsky, 'Leniency programmes and cross-border co-operation in cartel enforcement: challenges and steps towards convergence' <http://competition.practicallaw.com/8-205-6152>, (visited May 14, 2008).

<sup>14</sup>2006 Leniency Notice, paragraphs 14 and 15.

<sup>15</sup>See 2006 Leniency Notice, paragraphs 8, 9 and 11.

<sup>16</sup>Competition: Commission proposes changes to the Leniency Notice <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/357&format=HTML&aged=0&language=EN&guiLanguage=en>, (visited May 14, 2008).

with respect to the other applicants and the Commission will inform the applicant whether he was the first party to seek leniency.<sup>17</sup>

However, by using the words 'the Commission may grant a marker ... the applicant should...justify its request for a marker'<sup>18</sup>, the Commission has retained significant discretion as to whether or not to grant a marker to the applicant. The Commission has already stated that markers may only be granted if 'a new management, after having taken over a company realises that the acquired company was involved in a cartel and decides to apply for immunity'.<sup>19</sup> It seems that the management seeking leniency and involved in a cartel can only make a formal full immunity application, and cannot apply for a marker. This means that different cartel members<sup>20</sup> would be subject to different leniency practices. Such a policy would appear unfair, considering that the obtaining of a marker is less time consuming than making a full application for immunity.

It is unclear why a leniency applicant should justify its request for a marker.<sup>21</sup> The disclosure of a cartel and detailed information allowing the Commission to find an infringement of Article 81 should, on its own, constitute sufficient reasoning for this.<sup>22</sup> It could, however, be argued that 'justification' is necessary to prevent competing companies from abusing the leniency policy. Indeed, there could be market advantage for a whistleblower when he receives immunity and maintains some advantages of the cartel, while his direct competitors (former cartel partners) find themselves severely punished. A policy that rewards a whistleblower with such considerable market advantage without further justification could incentivise companies to create a cartel, and subsequently notify it to the Commission.

Further, the applicant is required to perfect the marker by providing necessary information within a given time frame. The time frame is set by the Commission on a case by case basis.<sup>23</sup> Some authors agree with this flexible approach as is followed in the US and the UK leniency practice,<sup>24</sup> however, it would have been beneficial if the Commission had stipulated a standard time frame, with the possibility for extensions to this under certain circumstances. This would serve to increase predictability and clarity of the marker. There are many jurisdictions that require a marker to be perfected within a specific time period, for example, Canada (30 days), Australia (28 days), South Korea (seven days) and Germany (eight weeks).<sup>25</sup>

For the reasons elaborated above, it seems the current marker system is unlikely to reach the optimum level of efficiency, due to a lack of a clear and coherent policy. Even though the introduction of the marker system is laudatory, the Commission must further improve its efficiency.

<sup>17</sup>J.S. Sandhu, 'The European Commission's leniency policy: a success', (2007) 28 (3) E.C.L.R., 148-157.

<sup>18</sup>2006 Leniency Notice, paragraph 15.

<sup>19</sup>Commission Memorandum, Competition: Commission proposes changes to the Leniency Notice- frequently asked questions (September 2006) Memo/06/357.

<sup>20</sup>I.e. those with and those without a new management.

<sup>21</sup>*Above* n 15.

<sup>22</sup>*Ibid.*

<sup>23</sup>Paragraph 15 of the 2006 EC Leniency Notice.

<sup>24</sup>Comments of the ABA Section of Antitrust Law and Section of International Law.

<sup>25</sup>[http://ec.europa.eu/comm/competition/cartels/legislation/files\\_leniency\\_consultation/aba.pdf](http://ec.europa.eu/comm/competition/cartels/legislation/files_leniency_consultation/aba.pdf), (visited May 20, 2008).

<sup>25</sup>*Above* n 11.

As the current marker system seems to be far from perfect, it could easily be undermined by (newer) initiatives such as direct settlements. The Commission has recently announced the introduction of a settlement procedure for cartels<sup>26</sup> that will allow it to settle cases using a simplified procedure.<sup>27</sup> Direct settlements can be defined as formal instruments of discussion by which counsel of a firm suspected of breaching the EC competition rules and the EC are able to reach an agreement resolving charges against the firm for a violation of Article 81.<sup>28</sup> Direct settlements are an alternative, which accelerate the prosecution process, reward co-operation and deal with the Commission's backlog of cases.<sup>29</sup> After the Statement of Objections, the companies can be invited by the Commission to enter into a direct settlement. This is comparable to plea bargaining (a negotiated direct settlement) in the US.<sup>30</sup> In a direct settlement procedure, a party can only agree not to contest the Statement of Objections and accept a fine with rebate.<sup>31</sup> The use of settlement procedures in cartel cases is already occurring at EU Member State level.<sup>32</sup> Under the new settlement procedure, the Commission neither negotiates nor bargains the use of evidence or the appropriate sanction, but can reward the parties' cooperation to attain procedural economies. Such cooperation is different from the voluntary production of evidence to trigger or advance the Commission's investigation, which is already covered by the leniency policy.<sup>33</sup>

While the legal community has broadly welcomed the introduction of settlement procedures into the European cartel enforcement, the Commission should be mindful that its introduction does not detract from any other elements of its cartel enforcement regime.<sup>34</sup> An effective cartel settlement system requires sufficient benefits and incentives for both the government and the cartel participant, or else neither will commit to settlement.<sup>35</sup> The mere possibility of reduced sanctions will usually not be sufficient to induce a company to settle;

<sup>26</sup>See Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of the Council Regulation (EC) No 1/2003 in cartel cases, [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008XC0702\(01\):EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008XC0702(01):EN:NOT) (Settlement Notice), and Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32008R0622:EN:NOT> (visited July 15, 2008).

<sup>27</sup>X, (2008) 'Settlement Procedure for cartels introduced' EU Focus, 237/238, 6-8.

<sup>28</sup>F Souty, 'Direct Settlements' (2008) 2(14) C.L.I. 7. In the US, 90 per cent of its cartel cases are resolved through criminal plea bargaining. For the advantages of plea agreements see M. Hansen and others (2008), 'Breaking New Ground: Direct Settlement of EC Cartel Cases' The 2008 Antitrust Review of the Americas, 63.

<sup>29</sup>*Ibid*

<sup>30</sup>J. Koponen and J. Imgrund, 'Not quite settled, The Commission proposes a settlement procedure for cartel cases' (2007) 12(3) C.L.I. 6.

<sup>31</sup>See *above* n 24.

<sup>32</sup>For instance, the UK's Office of Fair Trading (OFT) used such procedures in the Independent Schools case (OFT Decision No CA98/05/2006). The Dutch Competition Authority (the NMa) has adopted a similar settlement approach to the OFT in relation to cartel behaviour in the construction sector. Under French competition law, the French Competition Council can grant fine reductions in relation to anti-competitive behaviour where a company does not contest the alleged infringements and offers commitments to modify its behaviour in the future. See *Ibid*. See also P. Riedel and S. Horwitz 'Competition settlements Towards an OFT policy' (2007) 9 (10) C.L.I. 6.

<sup>33</sup>Antitrust: Commission introduces settlement procedure for cartels (30/06/2008) <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1056&format=HTML&aged=0&language=EN&guiLanguage=en> (visited July 17, 2008).

<sup>34</sup>See Neelie Kroes, "The First Hundred Days" <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/05/205>, (visited July 5, 2008).

<sup>35</sup>Ann O'Brien, Senior Counsel to the Deputy Assistant Attorney General For Criminal Enforcement, Antitrust Division, U.S. Department of Justice, Cartel Settlements in the U.S. and EU: Similarities, Differences & Remaining Questions, 13th Annual EU Competition Law and Policy Workshop (June 6, 2008) <http://www.usdoj.gov/atr/public/speeches/235598.htm> - N\_23\_ (visited July 1, 2008).

the rewards must be transparent, predictable and certain. To maximise the goals of transparency, enforcers must not only provide explicitly stated standards and policies, but also clear explanations of prosecutorial discretion in applying those standards and policies.<sup>36</sup>

Under the EC settlement procedure, if parties, after seeing the evidence in the Commission file choose to acknowledge their involvement in the cartel and their liability for it, the Commission can reduce the fine imposed on them by 10%.<sup>37</sup> Many commentators regard the 10% settlement reduction offered by the Commission as insufficient to induce companies to settle.<sup>38</sup> However, this figure could be expected because of the Commission's crucial concern that its leniency programme offering higher possible reductions remains attractive. Another critical issue to the success of the Commission's settlement procedure will be the Commission's transparency in discussing the fine that a cartel participant can be expected to pay. Though the 2006 Fining Guidelines are in place, they are relatively new and they have not been applied in many cases. Therefore, the more transparency the Commission can provide as to how it will apply the Fining Guidelines, the more likely parties will be likely to settle.<sup>39</sup>

In dealing with direct settlements the Commission retains a broad discretion while deciding on whether or not to settle a case, with which parties to settle and whether or not to open or terminate the procedure.<sup>40</sup> It is also clear that investigated parties will not have any rights to settle and that the procedure involves 'discussions' as opposed to 'negotiations'; the Commission thus again retains complete discretion in this regard.<sup>41</sup> This is where the European direct settlement system differs from the successful US plea bargaining process, where a negotiated settlement procedure is followed. The settlement procedure seems to be tilted in favour of the Commission. While the Commission has the right to change its mind at any time throughout the proceedings, even after a defendant's formal settlement submission, defendants have limited room for manoeuvre. Further, absent a significant discrepancy between the formal submission and the statement of objections, defendants do not have the ability to withdraw a settlement request.<sup>42</sup>

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<sup>36</sup>*Ibid.*

<sup>37</sup>*Above* n 25.

<sup>38</sup>See for example, Freshfields Bruckhaus Deringer's comments on the European Commission's Draft Proposals for Settlement Proceedings in Cartel Cases, [http://ec.europa.eu/comm/competition/cartels/legislation/cartels\\_settlements/freshfields.pdf](http://ec.europa.eu/comm/competition/cartels/legislation/cartels_settlements/freshfields.pdf) (visited July 5, 2008), 2008; P.Edlind and R.Gerrits, "European Commission Adopts Cartel Procedure" [http://www.martindale.com/members/Article\\_Body.aspx?id=458718](http://www.martindale.com/members/Article_Body.aspx?id=458718) (visited July 12, 2008). See also *Above* n 170.

<sup>39</sup>*Above* n 33.

<sup>40</sup>*Above* n 28.

<sup>41</sup>*Ibid.*

<sup>42</sup>P.Edlind and R.Gerrits, "European Commission Adopts Cartel Procedure" [http://www.martindale.com/members/Article\\_Body.aspx?id=458718](http://www.martindale.com/members/Article_Body.aspx?id=458718) (visited July 12, 2008).

It will take some time to determine the impact and efficacy of the settlement procedure in practice. According to some commentators, the new settlement procedure can potentially reduce the number and scope of appeals brought against Commission decisions. However, success will largely depend on whether the Commission uses its considerable discretion in a transparent and consistent fashion.<sup>43</sup> Further, it is doubtful that a fine reduction of 10% will be a sufficient incentive for offenders to admit their participation in a cartel. Besides this, Commission officials have already explained that the Commission would only pursue a settlement when all parties to an alleged infringement would take part in the settlement procedure. For these reasons, even under the direct settlement system, there seems to be a lack of certainty, predictability and incentives, which poses questions concerning its efficiency.

Another alternative instrument to leniency applications refers to commitment proceedings under Article 9 of the Regulation 1/2003.<sup>44</sup> Basically, when the Commission decides on the commitments for the company (to restore a situation on the market), there is no longer a basis for action by the Commission when the company fulfils these commitments with success.<sup>45</sup> However, this instrument is also not very satisfactory in addressing competition concerns as it undermines too much the deterrent effect of the competition policy and greatly affects third parties.<sup>46</sup>

Looking at the current scenario of anti-cartel enforcement in a holistic manner, for the many mid-sized companies in the EU with limited resources such rapid and numerous developments<sup>47</sup> can leave room for misunderstanding according to a senior competition law solicitor in London. These companies can easily get confused between leniency and settlement for instance. Although the Commission issues regular press releases and updates materials on its official website, this concern is still relevant.

## (B) IMMUNITY AND REDUCTION OF FINES

### I. IMMUNITY

The purpose of the immunity threshold is to articulate explicitly in the leniency policy the type of information and evidence the immunity applicants are required to submit.<sup>48</sup>

<sup>43</sup>J. Koponen, Partner Competition Group Linklaters, 'European Commission Adopts Settlement Procedure for Cartel Cases' June 30, 2008.

<http://www.linklaters.com/newsanddeals/newsdetail.asp?newsid=3601&navigationid=205> (visited July 1, 2008).

<sup>44</sup>See; Case COMP/38.381 *The Beers Commission decision*, February 22, 2006; Case COMP/38.173 *FA Premier League Commission decision*, March 22, 2006; Case COMP/38.348 *Repsol SPP Commission decision*, April 12, 2006; Case COMP/38.681 *Cannes Extension Agreement Commission decision*, October 4, 2006.

<sup>45</sup>E. Wind, 'Remedies and sanctions in Article 82 of the EC treaty' (2005) 26(12) E.C.L.R. 659-668.

<sup>46</sup>For more information, see above n 26. See also the fundamental right problems arising in Case T-170/06, *CFI Alrosa Company Ltd*, July 11, 2007.

<sup>47</sup>For instance, Direct Settlement, above n 24, Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of the Regulation No 1/2003

[http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006XC0901\(01\):EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006XC0901(01):EN:NOT), (visited May 20, 2008) and White Paper on Damages actions for breach of the EC antitrust rules, [http://ec.europa.eu/comm/competition/antitrust/actionsdamages/files\\_white\\_paper/whitepaper\\_en.pdf](http://ec.europa.eu/comm/competition/antitrust/actionsdamages/files_white_paper/whitepaper_en.pdf) (visited July 1, 2008).

<sup>48</sup>Competition: Commission proposes changes to the Leniency Notice. <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/357&format=HTML&aged=0&language=EN&guiLanguage=en>, (visited May 14, 2008).

IMMUNITY FOR ENABLING 'TARGETED INSPECTION'

On the face of it, the 2006 Leniency Policy has taken a clear position on the standard of evidence.<sup>49</sup> Paragraph 8 of the policy states that an undertaking seeking immunity is required to submit information and evidence that will enable the Commission to carry out a targeted investigation or enable the Commission to find an infringement of Article 81. However, the Commission has clearly raised the threshold for immunity from the earlier 2002 policy, which stated that an undertaking seeking immunity is required to submit evidence that may enable the Commission to carry out an investigation.<sup>50</sup> Further, the term 'targeted inspection' in the present policy should have been clearly defined and falls short of the aim of predictability and increases the Commission's discretion. Paragraph 9 lists the information that the undertaking must provide to carry out a targeted inspection. This stands in sharp contrast to the similar provision under paragraph 6 of the ECN's Model Leniency Programme<sup>51</sup>, which states that the undertaking should be in a position to provide the listed information. The list of information outlined in order to carry out a targeted inspection at the time of making the application under paragraph 9 of the 2006 EC leniency policy is also extremely extensive. On the other hand, the ECN's Model Leniency Programme requires a shorter and less detailed list. Some commentators are in fact of the opinion that the list of information is in some respects unclear and also goes significantly beyond the minimum amount of information which the Commission would require to launch a productive inspection.<sup>52</sup> The new policy could, therefore, actually deter potential applicants from joining the race to seek immunity which the leniency programmes are designed to promote all over the world.

IMMUNITY FOR ENABLING INFRINGEMENT OF ARTICLE 81

The new wording of Point 8(b) significantly raises the evidentiary bar from under the 2002 Policy. There is an additional requirement to provide 'contemporaneous, incriminating evidence of the alleged cartel'. This additional requirement could have the effect of deterring undertakings that have participated in a cartel but lack contemporaneous evidence, from making the application.<sup>53</sup>

In summary, the purposes of the Commission are not met. Moreover, the Commission by reserving a large amount of discretion and introducing new undefined concepts, has fallen short of the overall aim of transparency and predictability under the new policy. As the threshold for immunity is very high,<sup>54</sup> it could be likened to a form of 'Russian Roulette' as the conditions are difficult to achieve.

<sup>49</sup>N. Zingales 'European and American Leniency Programmes: Two Models Towards Convergence?' (April 3, 2008). Available at file://localhost/SSRN/ <http://ssrn.com:abstract=1101803>.

<sup>50</sup>Freshfields Bruckhaus Deringer Response to the European Commission's Draft Leniency Notice [http://ec.europa.eu/comm/competition/cartels/legislation/files\\_leniency\\_consultation/fbd.pdf](http://ec.europa.eu/comm/competition/cartels/legislation/files_leniency_consultation/fbd.pdf), (visited May 16, 2008).

<sup>51</sup>Europa, ECN Model Leniency Programme [http://ec.europa.eu/comm/competition/ecn/model\\_leniency\\_en.pdf](http://ec.europa.eu/comm/competition/ecn/model_leniency_en.pdf), (visited May 14, 2008).

<sup>52</sup>Baker and McKenzie Response to the European Commission's Draft Leniency Notice [http://ec.europa.eu/comm/competition/cartels/legislation/files\\_leniency\\_consultation/bakermckenzie.pdf](http://ec.europa.eu/comm/competition/cartels/legislation/files_leniency_consultation/bakermckenzie.pdf), (visited May 14, 2008).

<sup>53</sup>Linklaters Response to the European Commission's Draft Leniency Notice published on 29 September 2006 [http://ec.europa.eu/comm/competition/cartels/legislation/files\\_leniency\\_consultation/linklaters.pdf](http://ec.europa.eu/comm/competition/cartels/legislation/files_leniency_consultation/linklaters.pdf), (visited May 14, 2008).

<sup>54</sup>See the conditions mentioned in 2006 Leniency Notice, paragraphs 8-13.

## II. REDUCTION OF FINE

If immunity is not granted, the applicant can still apply for a fine reduction. For this, he must provide 'the Commission with evidence of the alleged infringement, which represents significant added value with respect to the evidence already in the Commission's possession'.<sup>55</sup> However, the Commission will not determine whether the applicant's evidence provided 'significant added value' until issuing the final prohibition decision<sup>56</sup> and will only then determine in which of the three bands for reduction of a fine the applicant falls.<sup>57</sup>

There is a lack of certainty in this process and the outcome is not predictable. This is because questions like; 'what is 'significant added value'?' and 'will the applicant reach the threshold for immunity?' have not been clearly explained. It could even result in certain companies providing as much information as possible to the Commission but finding themselves in a much worse position than if they had not approached the Commission.<sup>58</sup> Accordingly, some companies may decide not to approach the Commission in the first place.

Further, the Commission has maintained the reduction bands of the 2002 Leniency Policy.<sup>59</sup> It is important to bear in mind, the radical increase in fines since the 2006 Commission's new Fining Guidelines<sup>60</sup> became effective. Council Regulation 1/2003<sup>61</sup> provides that companies may be fined up to 10% of their total annual turnover. The revised Guidelines provide that fines may be based on up to 30% of the company's annual sales to which the infringement relates, multiplied by the number of years of participation in the infringement.<sup>62</sup> The dramatic increase in fine levels may appear attractive to an immunity applicant, however it results in a more severe treatment for reduction of fine applicants. They stand to suffer because even if they are granted a reduction in the fine, they do not receive as much reduction as before as the proportionate level of fines has been increased by the new fining policy. This could, thus, have a detrimental impact on applicants seeking a reduction of fines.

Nevertheless, one could find it necessary that cartel members cannot predict the fine and focus less on creating incentives to approach the Commission but focus more on avoiding firms being able to incorporate the amount of fines into their business plan.<sup>63</sup>

Under the 2002 policy, a requirement of full and continuous co-operation only existed in respect of applicants for immunity of fines. This duty has now been extended to the reduction of fine applicants under the 2006 policy. The reason put forward by the Commission is that this requirement is an essential feature of the Leniency Notice.<sup>64</sup> However, while the immunity applicant is aware early in the proceedings that he has conditional immunity, an applicant for reduction of fines needs to satisfy the cumbersome

<sup>55</sup>See, for instance, *above* n 15.

<sup>56</sup>2006 Leniency Notice, paragraphs 26 and 30.

<sup>57</sup>2006 Leniency Notice, paragraph 29.

<sup>58</sup>For instance, due to a later applicant who leapfrogged ahead of the earlier applicant or in case a company admitted being involved in a cartel but is not granted leniency.

<sup>59</sup>See paragraph 26 of 2006 EC leniency policy and paragraph 23 of 2002 EC leniency policy.

<sup>60</sup>Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of the Regulation No 1/2003, [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006XC0901\(01\):EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006XC0901(01):EN:NOT), visited May 20, 2008). (2006 Fining Guidelines).

<sup>61</sup>Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in the Articles 81 and 82 of the Treaty, OJ L1, 04.01.2003.

<sup>62</sup>Europa, Commission revises Guidelines for setting fines in antitrust cases <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/857&format=HTML&aged=0&language=EN&guiLanguage=en>, (visited May 20, 2008).

<sup>63</sup>R. Rothwell, 'News-Company + Commercial: Lawyers on their guard as EC unveils tough guidelines to punish cartels. (2006) 6(1) L.S.Gaz 103/276.

<sup>64</sup>Competition Commission proposes changes to the Leniency Notice <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/357&format=HTML&aged=0&language=EN&guiLanguage=en>, (visited May 14, 2008).



conditions of continuous co-operation without receiving any indication as to whether he will receive a reduction in fines until the statement of objections is notified.<sup>65</sup>

As is manifest from the above, the burden on the applicant for reduction has been increased compared to the past, which can act as a disincentive.

(C) INFORMATION UNCOVERED.

An admission for leniency is very easily known to others, as the admission is often made public. Even more specific information concerning the applicant can too easily be disclosed.

Under the leniency policy, corporate statements (oral or otherwise) can be used as evidence by the Commission.<sup>66</sup> Such a statement is binding and cannot be challenged by the applicant.<sup>67</sup> The Commission uses such self-incriminating statements in the prohibition decision and statement of objections. The latter are regularly included in private damages claims<sup>68</sup> or discovery requests in procedures<sup>69</sup> in the US. Some vital considerations for potential EU leniency applicants are whether these corporate leniency statements may be included in private damage claims or be discoverable in the US civil proceedings that are subject to extensive document discovery requirements under the Federal Rules of Civil Procedure.<sup>70</sup> These concerns arise even with the EC. The Commission has acknowledged the disincentive created for leniency applicants when the undertaking's corporate statements are used against it in civil proceedings.<sup>71</sup>

In the past; the Commission has regarded the issue of discovery seriously and has adopted a two-fold step. Firstly, it sought to intervene in the US civil litigation to oppose discovery of the EU leniency applications.<sup>72</sup> For instance, the Commission filed *amicus curiae* briefs in the US civil litigation relating to the Vitamins<sup>73</sup> and Methionine<sup>74</sup> case to contest the discoverability of corporate leniency statements. Secondly, after extensive discussions with the US Department of Justice (DOJ), the Commission began to allow oral immunity in leniency applications.<sup>75</sup>

<sup>65</sup> *Above* n 48.

<sup>66</sup> 2006 Leniency Notice, paragraph 31.

<sup>67</sup> 2006 Leniency Notice, paragraph 32.

<sup>68</sup> The ECJ stated that private damages claims should be available: Case C-453/99 *Courage Ltd v Crehan*; A.P. Komninos, 'New prospects for private enforcement of EC competition law: *Courage v Crehan* and the Community right to damages' (2002) 39 CML Rev. 469.

<sup>69</sup> J. Joshua, 'Competition law enforcement, Criminalisation, cartels, leniency and class actions: a look in the future' (2004) 22(3) C.L.I., 3-7.

<sup>70</sup> N. Levy and Donoghue, 'The EU Leniency Programme Comes of Age' (2004) 27 (1) W.Comp.75-79; K. Nordlander 'Discovering discovery - US discovery of EC leniency statements' (2004) 25(10) E.C.L.R. 646-659. See also *Intel Corp v Advanced Micro Devices, Inc*, 542 U.S. 241 (2004).

<sup>71</sup> D. Little, 'The European Commission's Revised Leniency Notice for Cartel Cases' (2007) 10 TCLR 136-144.

<sup>72</sup> M. Reynolds and D. Anderson, 'Immunity and leniency in EU cartel cases: current issues' (2006) 27 (2) E.C.L.R. 82-90.

<sup>73</sup> In *Re Vitamins Antitrust Litigation*, Misc. No. 99-197 (TFH). Brief of the Commission of *Amicus Curiae* stated that '...disclosure would do harm to the fundamental strengths of the leniency programme- confidentiality would be destroyed, leniency applications would be deterred, and candour with the Commission (Cartel Unit) would be chilled.'

<sup>74</sup> In *Re Methionine Antitrust Litigation*, Master File No. C-199-3491-CRB (N.D.Cal. filed 12/08/99).

<sup>75</sup> *Above* n 70.

The Commission has attempted to include in the 2006 leniency policy the essential elements of the procedure to protect corporate statements.<sup>76</sup> The process works in a way that oral statements will be recorded and verbatim written transcripts will be made of each statement.<sup>77</sup> The applicants who make oral statements will not retain or receive from the Commission any copies of these statements. Nevertheless, the moment the oral statement has been submitted, it will become a Commission document. This is designed so that the applicant retains no document on its statement that could be required by a third country court to be produced.<sup>78</sup> These steps diminish the risk that oral statements or other information provided by the company and contained in the Commission's file will be used in civil litigation, especially in the US.<sup>79</sup>

However, the wording of the 2006 leniency policy on mechanical or electronic copying of any information appears insufficient to exclude a person from recording the information contained in a corporate statement by means of dictation equipment or handwriting the information. It has also been argued that the Commission should have been more precise, specifying clearly that information obtained from access to the file can only be used in the administrative proceedings or any judicial appeal from those administrative proceedings.<sup>80</sup> Some authors are of the opinion that the Commission should follow the practice of the US DOJ and use the applications as 'road maps' for further evidence gathering as opposed to relying on them as primary evidence. The Commission could use its information-gathering powers to confirm the essential elements of the corporate statement without having to formally rely on the transcript as part of the Commission's file.<sup>81</sup>

One must realise that the US discovery requests for corporate statements can be addressed to the Commission or to the defendant and are granted more frequently.<sup>82</sup> Discovery requests should actually only be addressed to the defendant (and not the Commission) and only for the 'documents' under his control or in his possession.

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<sup>76</sup>Competition: Commission proposes changes to the Leniency Notice <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/357&format=HTML&aged=0&language=EN&guiLanguage=en>, (visited May 14, 2008).

<sup>77</sup>S. Suurnakki and M. Centella, 'Commission adopts revised Leniency Notice to reward companies that report hard core cartels' (Spring 2007) Competition Policy Newsletter 7-15.

<sup>78</sup>*Ibid.*

<sup>79</sup>*Above* n 15.

<sup>80</sup>Freshfields Bruckhaus Deringer Response to the European Commission's Draft Leniency Notice [http://ec.europa.eu/comm/competition/cartels/legislation/files\\_leniency\\_consultation/fbd.pdf](http://ec.europa.eu/comm/competition/cartels/legislation/files_leniency_consultation/fbd.pdf), (visited May 16, 2008). See also M. Bloom 'Despite Its Great Success, the EC Leniency Programme Faces Great Challenges' in Ehlermann C. and Atanaisu I. (ed), *European Competition Law Annual 2006: Enforcement of Prohibition of cartels*, Hart, Oxford, 2007.

<sup>81</sup>Berwin Leighton Paisner Response to the European Commission's Draft Leniency Notice [http://ec.europa.eu/comm/competition/cartels/legislation/files\\_leniency\\_consultation/blp.pdf](http://ec.europa.eu/comm/competition/cartels/legislation/files_leniency_consultation/blp.pdf), (visited May 20, 2008).

<sup>82</sup>See, for instance, *Re Vitamins Antitrust Litigation*, Misc. No. 99-197 (D.D.C. 17 Sept. 2002) and K. Nordlander, 'Discovering discovery-US discovery of EC leniency statements' (2004) 25(10) E.C.L.R. 646-659.

The consequences for a defendant if the 'duty' to disclose is not fulfilled can include a fine or dismissal or even appear in the US Court assuming that he lost that particular point of issue ('adverse findings').<sup>83</sup> This means that not discovering can harm the defendant. If the Commission (who actually does not have the duty to discover) refuses to discover the documents in its possession directly to the US litigant(s), the current leniency programme does not protect the defendant and does not allow him to automatically obtain a copy of the certified documents he handed over to the Commission in order to discover. It seems that under the current leniency policy, whether discovery takes place or not, the defendant can experience a range of negative consequences. On top of that, the US courts do not hold back to order discovery. Even in case of an EC non-disclosure rule of the information concerning leniency applications, the US courts might still be able to order discovery.<sup>84</sup>

Following from the above, it seems that the leniency policy is still open to abuse by foreign complainants who seek to obtain the US discovery.<sup>85</sup>

Not only from overseas, but also even within the EC, discovery implications arise as other cartel authorities (NCAs) could easily obtain such information. Although provisions in the Co-operation Notice create some 'legitimate expectations' upon which parties should be able to rely vis-à-vis the Commission, they might not be binding in relation to NCAs.<sup>86</sup> The one nuance in the Notice itself states that the information will only be made available to those NCAs that are committed to respect the principles of the ECN Notice.

Furthermore, the question arises whether whistleblowers should also fear information unveiled to private damages claims. The Commission regards private action damages for loss suffered from infringements of the EC antitrust law, as an integral part of the enforcement of competition law in the EC.<sup>87</sup> One could read in the Article 10 of the EC Treaty the duty for the Commission to co-operate with the national courts of the Member States. However, the Commission's Cooperation Notice states that the Commission would not unveil information voluntarily transmitted by a leniency applicant to the national court without his/her consent.<sup>88</sup>

It can be inferred from the issues discussed in this part that sometimes, a leniency applicant, even after receiving immunity from the Commission, is in a worse position than other cartel members who challenged the investigation by the Commission.<sup>89</sup> The Commission itself has stated that a leniency applicant, as a result of his co-operation, should not be in a worse position than those members of a cartel that did not co-operate.<sup>90</sup>

<sup>83</sup>See, for instance, *Ins. Co. of Ireland v Compagnie des Bauxites de guinea*, 456 U.S. 694 (1982); *Societe Internationale v Rogers*, 357 U.S. 197 (1958); § 442 (2) (c) of the Third Restatement of Foreign Relations Law of the United States (1986).

<sup>84</sup>See, Ziegler, 'What to do When the American Subpoena Arrives' (1991) 10(5), I.F.L.Rev. 27-29.

<sup>85</sup>See for instance: *Intel Corp v Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004). This case involved an EC investigation and it was ruled that the US courts could order discovery under Section 1782 even if the matter was not discoverable in the foreign court.

<sup>86</sup>A. Burnside and H. Crossley, 'Cooperation in competition: a new era?' (2005) 30(2) E.L.Rev. 234-260.

<sup>87</sup>J. Phaessant, 'Private damages actions, damages claims' (2006) 2(6) C.L.I. 5.

<sup>88</sup>Commission Notice on cooperation within the Network of Competition Authorities, (2004) O.J. C101/43, paragraph 40.

<sup>89</sup>Above n 15.

<sup>90</sup>European Commission Green Paper, *Damages actions for breach of the EC antitrust rules* and Commission Staff Working Paper, Annex to the Green Paper (December 19, 2005) COM (2005) 672 final.

Only a few unclear steps have been adopted to protect leniency applicants from these pitfalls.<sup>91</sup> These include, *inter alia*, the following:

Firstly, it was already mentioned that under the 2006 leniency policy, some protection measures were incorporated and resulted in certain information not being unveiled to parties under certain conditions.<sup>92</sup>

Secondly, under the ECN notice, 'basic information' in a leniency procedure in an ECN Member State may not be circulated amongst the ECN members. This rule actually leads to the problem of 'forum shopping'. Companies can choose to blow the whistle within the jurisdiction where the sanction is probably the lightest. This is a result of Member States being free to choose their own national sanctions and demonstrates that in order for the 'borders' of the current leniency to be broadened, a more integrated approach is necessary.

It is also interesting to mention that under the Modernisation Regulation, which came into effect on May 1, 2004, the Commission has relinquished its role as primary enforcement mechanism for competition law, with respect to the Articles 81 and 82 EC.<sup>93</sup> According to former competition commissioner Mario Monti, this is the most important legislative initiative in Europe in the competition field since the adoption of the Merger Regulation in 1989.<sup>94</sup> The key implication of modernisation is that the Commission intends to focus upon serious infringements such as cartels. Modernisation ensures that when national authorities within the EU apply national competition law to cases that may affect trade between Member States, they also need to apply EC law, and national law may not lead to a different outcome from the EC law in Article 81 cases. However, it is significant to note that while the same substantive law will be applied in this way in all Member States, the procedures and sanctions remain national.<sup>95</sup> The Commission's enforcement powers have been remarkably increased, such as provisions, which allow it to carry out unannounced inspections in private homes<sup>96</sup> as well as company headquarters; it may seal premises and offices to ensure evidence is not destroyed and ask for oral explanations.<sup>97</sup>

<sup>91</sup>See, for instance, European Commission, Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and the Council Regulation 139/2004, (2005) O.J. C325/7; Commission Staff Working Paper, Annex to the Green Paper, paragraph 233-236; 2006 Leniency Notice, paragraph 33-34.

<sup>92</sup>See, Articles 33-35 of the 2006 Leniency Notice. There is some form of improvement over the years. See, for instance, October 21, 1997, revised version of the European Commission's notice on access to the file, Official Journal of the EU (C259/8).

<sup>93</sup>D. Gerber and P. Cassinis (2006) 'The 'modernization' of European Community competition law: achieving consistency in enforcement: Part 1' 27(1) E.C.L.R. 10-18.

<sup>94</sup>See M. Monti, European competition for the 21st century, in Annual Proceedings on the twenty-seventh Annual Fordham Corporate Law Institute on International Antitrust Law and Policy on October 19 and 20, 2000 (2001) as cited in M. Bloom, 'The Great Reformer: Mario Monti's Legacy in Article 81 and Cartel Policy', (2005) 1 Competition Policy International 55-78. For a detailed Commission's perspective of the Regulation see S. Blake and D. Schnichels 'Leniency Following Modernisation: Safeguarding Europe's Leniency Programmes' (2004) 2 Competition Policy Newsletter 7-12.

<sup>95</sup>M. Bloom, 'The Great Reformer: Mario Monti's Legacy in Article 81 and Cartel Policy' (2005) 1 Competition Policy International 55-78.

<sup>96</sup>For instance in *Graphite Electrodes* (2002) O.J. L100/1 home faxes were used to contact competitors in order to avoid the Commission's powers of investigation. In *SAS/Maersk* [2001] O.J. L265/15, documents relating to a market-sharing agreement were kept at home. Under the Modernisation Regulation such evidence will be within the realms of the Commission's powers of inspection.

<sup>97</sup>The Commission's powers of inspections have been laid out in Articles 20 and 21 of the Modernisation Regulation. See also G. Monti, *EC Competition Law*, Cambridge, New York, (2007); C. Kerse and N. Kahn *EC Antitrust Procedure*, Sweet and Maxwell, London, (2005).

There is the clear possibility that information might disappear overnight or that documents can be kept at home and these changes thus provide useful powers to conduct cartel investigations.<sup>98</sup> These radical changes have impacted the Commission's leniency policy and have also been described as a contributing factor to the growth in cartel decisions.<sup>99</sup> However, the Modernisation Regulation did not introduce a 'one-stop shop' for leniency applicants. One possible reason can be that some Member States do not (yet) have a leniency policy and they are sometimes viewed with distaste.<sup>100</sup> Another reason that can be advanced is that it may have been considered virtually impossible to make such a system function to the required standards of reliability and certainty. Multiple leniency 'entry points' would in all likelihood be necessary because the Commission would be unable to handle all incoming cases.<sup>101</sup>

Ultimately, when protection measures fail, it might be helpful to refer to the principle of International Comity<sup>102</sup>, given that the Commission clearly stated that

'access to the file is only granted to the addressees of a statement of objections on the condition that the information thereby obtained may only be used for the purposes of judicial or administrative proceedings for the application of the Community competition rules at issue'<sup>103</sup>

This is similar to a judgment, which must be respected by other courts.<sup>104</sup> However, this principle is insufficient as it refers to a balancing test on a case-by-case basis and cannot provide the necessary certainty for the parties that the information will not now nor in the future, be disclosed to any US litigants or NCAs.

#### (D) PUNISHMENT AND LENIENCY

The leniency policy tends to be increasingly lenient towards whistle blowers and co-exists with the zero-tolerance policy in cartel matters. The latter tends to increase cartel fines for those who did not blow the whistle correctly, not at all or not in time. The Commission has for instance, imposed increasing levels of fines on cartel members including record level of fines in serious cartels, see for instance, the following cases: Cartonboard, Polypropylene, Graphite Electrodes and Vitamins.<sup>105</sup> Both policies share the aim of deterrence.

<sup>98</sup>R. Clarke and E. Morgan, 'Horizontal Agreements and Restrictive Practices Policy in the UK and EU', in R. Clarke and E. Morgan (ed) *New Developments in UK and EU Competition Policy*, Edward Elgar Publishing Limited, UK (2006).

<sup>99</sup>G. Olivier, 'The fight against secret horizontal agreement in the EC Competition Policy', in Annual Proceedings on the Thirtieth Annual Fordham Corporate Law Institute on International Antitrust & Policy on October 23 and 24, 2003 (2004) as cited in M. Bloom, (2005) 'The Great Reformer: Mario Monti's Legacy in Article 81 and Cartel Policy', 1 *Competition Policy International* 55-78.

<sup>100</sup>A. Jones and B. Sufrin, *EC Competition Law*, 3rd edition, Oxford, United States (2008).

<sup>101</sup>F. Arbault and E. Sakkars 'Cartels' in Nikpay A. and Faull J., (ed) *The EC Law of Competition*, Oxford, Great Britain (2007).

<sup>102</sup>For applications, see; *Re Emory v Grenough*, 3 U.S. (3Dall.) 369, 370 (1797); *Hartford Fire Ins. Co v California*, 509 U.S. 764, 817 (1993); *Société Nationale Industrielle Aérospatiale v United States District Court*, 482 U.S. 522, 544 (1987).

<sup>103</sup>Commission Notice on immunity of fines and reduction of fines in cartel cases (2006) OJ. C298/17, paragraph 34.

<sup>104</sup>In this restrictive sense, see also; Brief of the Commission of *Amici Curiae* the European Communities, page 13, *Re Vitamins Antitrust Litigation*, F. Supp. 2d (D.D.C. 2002).

<sup>105</sup>For example in *Vitamins* [2003] OJ L6/1 the approximate total fine was 855.23 million.

According to a study<sup>106</sup>, only 13% of cartels are detected and investigations are very expensive. There seems to be a deterrence gap.

A minority of the EC Member States have introduced a criminal cartel offence to close this gap in deterrence.<sup>107</sup> Member States were free to do so as Article 5 of the Regulation 1/2003<sup>108</sup> allows them to impose ‘any other penalty provided for in the national law’.

Introducing criminal sanctions or any other sanction is not the right answer, as it merely contributes to intimidating parties who apply for leniency. This could be why most EC Member States nowadays tend to abandon criminal sanctions and focus more on leniency policies and administrative fines instead.<sup>109</sup>

Indeed, the deterrence gap introduced the need to apply a stronger leniency policy. With this knowledge, it has been ruled that ‘a very serious infringement...application of the Leniency Notice serves the important policy aim that it is of even more importance to encourage whistleblowers than to punish participants in a cartel.’<sup>110</sup> However, this statement would suggest a need to choose between punishment and leniency.<sup>111</sup>

When chosen for punishment, the fine must be set correctly and therefore, outweigh the illegal profits enjoyed from the cartel membership.<sup>112</sup> The Commission’s discretion still leaves a great lack of transparency and certainty in the Commission’s fining system.<sup>113</sup> However, discretion is necessary to set a sufficiently high level of fines. Some authors state that, even if companies would have to pay up to ten times the ‘illegal cartel profits’ in fines and damages (as is the case in the US), there would still be under-deterrence for cartels.<sup>114</sup> Even with higher fines, the effective level of deterrence seems very difficult to reach.<sup>115</sup>

In 2006, the EC announced new guidelines for setting antitrust fines.<sup>116</sup> The new guidelines are expected to further systemise the EC’s significant increase in the level of fines over the last decade. These guidelines do not change the legal maximum amount that the EC can assess under the Article 23(2). Fines will now be based on a percentage of the yearly sales in the relevant sector for each company participating in the infringement. The Commission may impose a fine representing up to 30% of such sales. For members of hard-core cartels, the guidelines further introduce an ‘entrance fee’ just for joining the cartel, which is independent of the duration of the infringement and thus, of any illegal gains it may have resulted in. In addition, repeat offenders risk a doubling of the fine, as do ringleaders and undertakings that refuse to cooperate or obstruct the Commission’s investigations.<sup>117</sup> In order to fully reflect the duration of the infringement, this amount will

<sup>106</sup>P. Bryant and E. Eckard, ‘Price Fixing: The Probability of Getting Caught’ (1991) 73 *The Review of Economics and Statistics*, 531. See also: DTI, *A world Class Competition Regime* Cm. 5233 (2001) (The Stationery Office, London), paragraph. 7.7.

<sup>107</sup>OECD, *Cartels: Sanctions Against Individuals*, DAF/COMP (2004) 39.

<sup>108</sup>*Above* n 59.

<sup>109</sup>*Above* n 70.

<sup>110</sup>A. McDougall and A. Verzariu, ‘Vitamins litigation: unavailability of exemplary damages, restitutionary damages and account of profits in private competition law claims’ (2008) 29(3) *E.C.L.R.* 181-184; Case *Devenish Nutrition Ltd v Sanofi-Aventis SA* (2007) *EWHC* 2394 (Ch).

<sup>111</sup>Also in this sense (but than chosen for deterrence), see; W.P.J. Wils, ‘EC Competition Fines: To Deter or not to Deter’ (1995) 15 *Yearbook of European Law* 23.

<sup>112</sup>R. Posner, *Economic Analysis of Law* (Aspen, 1998), 421; S. Hammond, ‘An Inside Look at a cartel at Work: Common Characteristics of an International Cartel’, speech delivered to ABA Section of Anti-trust Law (Washington DC, April 6, 2000); S. Gale, ‘The leniency regime and the fight against cartels by the Directorate General for Competition’ (2004) 25(11) *Comp. Law*. 324-330.

<sup>113</sup>I. Van Bael, ‘Fining a la Carte: The Lottery of EC Competition Law (1995) *E.C.L.R.* 237; M. Furse, ‘Article 15(2) of Regulation 17: Fines and the Commission’s Discretion’ (1995) *E.C.L.R.* 110; Spink, ‘Enforcing EC Competition Law: Fixing the Quantum of Fines’ (1999) *J.B.L.* 219.

<sup>114</sup>J. Connor, ‘Optimal Deterrence and Private International Cartels’ (2005) unpublished paper. (This is partly because of plea-bargains and out-of-court settlements)

<sup>115</sup>For examples, see; J. Rayner, ‘Practice Area: EC Competition: Trading blows’ (2006) *L.S.Gaz.* 103/33 16-18.

<sup>116</sup>*Above* n 58.

be multiplied by the number of years of participation in the infringement.<sup>118</sup> This, thus, represents a significant toughening in relation to long lasting infringements.

The level of fines that is large enough to discourage prospective cartel members from engaging in a cartel has been a controversial aspect in the EU. Some commentators have argued that the fines are too low and after the new guidelines the reaction is that they are too high.<sup>119</sup> Other authors have argued that the legal maximum fine specified in Article 23(2) of the Regulation 1/2003 seriously constrain the Commission in reaching its objective and applying its new fining method effectively.<sup>120</sup> Moreover, fines are the main tools in the EC's enforcement of the EC competition law, unlike the US where the Antitrust Division has long emphasised that the most effective way to deter and punish cartel activity is to hold individuals accountable by seeking jail sentences.<sup>121</sup> In the case of the Commission therefore, its central component of enforcement effort, its leniency policy is itself reliant upon sanctions being substantial enough to induce an infringing firm into revealing a cartel to the Commission in return for immunity.<sup>122</sup>

The EC also recognises the concern that some fines may lead to insolvency.<sup>123</sup> One of the downsides of it is that since the US investigations of international cartels normally precede those of the EC, by the time an international firm faces punishment from the EC, it is in a better position to argue a danger of bankruptcy by making reference to fines and settlements for private damages already incurred in the US. It is also possible that Community judges will be unwilling to accept further increases in fines.<sup>124</sup> The Community courts have always acknowledged the setting power of the Commission within the framework of the Regulation 1/2003, but they have also added that the fines should be imposed respecting the principle of proportional justice.<sup>125</sup>

<sup>117</sup>L.Bos and M. Schinkel, 'On the scope for the European Commission's 2006 fining guidelines under the legal maximum fine', 2 (4) *Journal of Competition Law and Economics* 673-682.

<sup>118</sup>Competition: Commission revises Guidelines for setting fines in antitrust cases (June 28, 2006) <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/857&format=HTML&aged=0&language=EN&uiLanguage=en> (visited June 2, 2008).

<sup>119</sup>M. Motta 'On cartel deterrence and fines in the European Union' (2008) 29 (4) *E.C.L.R.* 209-220. See also Buccirosi, Paolo and Spagnolo, Giancarlo, 'Optimal Fines in the Era of Whistleblowers - Should Price Fixers Still Go to Prison?' (December 12, 2005). Lear Research Paper No. 05-01 Available at SSRN: <http://ssrn.com/abstract=871726>.

<sup>120</sup>*Above* n 115.

<sup>121</sup>S. Hammond (2008) Recent Developments, Trends, and Milestones In The Antitrust Division's Criminal Enforcement Program, <http://www.usdoj.gov/atr/public/speeches/232716.htm>, (visited July 1, 2008).

<sup>122</sup>S. Stephan, 'The bankruptcy wildcard in cartel cases' (2006) *J.B.L.* 511-536.

<sup>123</sup>'Financial constraints consideration'. See *Ibid.* The Commission's treatment of SGL Carbon AG demonstrates the application of a 'financial constraints' consideration. SGL was fined for its involvement in three different cartels: *Graphite Electrodes* [2002] O.J. L100, *Specialty Graphites Case C-37/667*, COM (2002) 5083 final, and *Carbon & Graphite* [2004] O.J. L125/45. In both the Specialty Graphites cartel and the Carbon & Graphite cartel decisions, the Commission granted a 33 per cent discount. In Carbon and Graphite cartel decision, the Commission stated that 'for the reason that SGL is both undergoing serious financial constraints and has relatively recently been subject to two significant fines by the Commission for participation in cartel activities'.

<sup>124</sup>*Above* n 117.

<sup>125</sup>*Ibid.*

Thus, it seems that even with the discretionary powers, the Commission cannot introduce the 'correct' level of deterrence through punishment. The problem could be overcome by increasing the level of detection. Many authors agree that the required level of punishment and the level of detection are in direct correlation.<sup>126</sup> It can be argued that there is actually no choice between severe punishment and lenient leniency policy but that the one needs the other to be effective. Therefore, leniency and punishment should go hand in hand and be integrated as one policy. Only the 'correct' punishment in combination with the 'right' probability of detection (through investigations<sup>127</sup>) leads to a sufficient level of deterrence.<sup>128</sup> Such conclusion also finds support in the OECD's report noting 'the 'carrot and stick' approach to cartel investigation. This approach requires that the 'stick'- the possible sanction is sufficiently severe to give effect to the 'carrot'-the opportunity to avoid the sanction- by cooperating.<sup>129</sup> The Leniency policy is the carrot and the fining policy the stick.

Unfortunately, the Commission has chosen to separate each component into separate policies.<sup>130</sup> Fines are increased<sup>131</sup> up to a certain maximum in a separate policy next to the increase of detection<sup>132</sup>. The result is two incoherent systems. The leniency policy could thus start to live its own life and become more inconsistent with the 'zero tolerance policy'. This has happened not only at the EC level but also at various national levels. For instance, under some leniency policies a whistle blower can now not only obtain immunity but also receive a reward for having blown the whistle after participating in a cartel.<sup>133</sup>

#### (E) LACK OF HARMONISATION

EC leniency rules come into play as soon as the cartel may have a (negative) influence, (directly or indirectly, actually or potentially) on interstate trade.<sup>134</sup> Even when the Commission has competence, Member States remain free to choose whether or not to adopt different national leniency programmes. This results in a lack of harmonisation and multi-stop leniency procedures.

<sup>126</sup>See, for instance, W. Wils, *The Optimal Enforcement of EC Anti-Trust Law. Essays in Law and Economics* (Kluwer Law International, 2002), page. 39; P. Buccirosi and G. Spagnolo, 'Optimal Fines in the Era of Whistleblowers, Should Price Fixers Still Go to Prison' (2005) Lear Research Paper 05-01, p. 26; CH. 7 of the White Paper that preceded the Enterprise Act 2002 in the UK.

<sup>127</sup>These are very costly and time consuming; ICN Cartel Working Group, *Anti-Cartel Enforcement Manual* (Bonn, 2005), page 4.

<sup>128</sup>*Above* n 124 Ch. 8; W. Landes, 'Optimal Sanctions for Antitrust Violations' (1983) 50 U.Chi.L.Rev. 652; A. Polinsky and S. Shavell, 'The Fairness of Sanctions: Some Implications for Optimal Enforcement Policy' (1998) 167 *Stanford Law and Economics Working Paper*; G. Becker, 'Crime and Punishment: An Economic Approach' (1968) 16 *J.Pol.Econ.* 169.

<sup>129</sup>OECD, *Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programmes 2002* <http://www.oecd.org/dataoecd/41/44/1841891.pdf>, (visited May 30, 2008).

<sup>130</sup>The 2006 Leniency Notice and the 2006 Guidelines on fines seem to evolve both in opposite directions, ie greater leniency versus harsher punishment.

<sup>131</sup>See 2006 Fining Guidelines, *Above* n 58. (In brief, they result in higher fines, harsher treatment for recidivists and there is greater weight of the duration of the conduct on the fine.)

<sup>132</sup>*Above* n 6.

<sup>133</sup>For instance, see Times Online, 'OFT offers whistle blowers £100,000 reward' (Feb. 29, 2008) <[http://business.timesonline.co.uk/tol/business/industry\\_sectors/industrials/article3458691.ece](http://business.timesonline.co.uk/tol/business/industry_sectors/industrials/article3458691.ece)> (visited March 28, 2008).

<sup>134</sup>See, in this respect also; *Procureur de Roi v Benoit and Gustave Dassonville*, ECJ Case 8/74, July 11, 1974; E.C.R. 00837 (concerning free movement of goods).



At least 20 different leniency programmes are in use across the EC.<sup>135</sup> The fundamental differences<sup>136</sup> between these leniency regimes (or other cartel rules in Member States without a leniency programme) and the EC leniency system influence the efficacy of the EC leniency programme in a negative way. Additionally, obtaining leniency from the Commission does not automatically result in immunity when the Commission refers the case to the NCAs.<sup>137</sup> In a commendable development, the ECN members have adopted a model leniency programme, which encourages national competition authorities to adopt leniency programmes with certain key features that ECN members believe should be common to all leniency programmes.<sup>138</sup> While the programme does not harmonise leniency policies and procedure in the EU, it does introduce a model for a new procedure for a uniform summary leniency application system in cartel cases relating to more than three Member States. However, the model leniency programme is not legally binding.

The ECN members are expected to assess the state of convergence with the Model Programme this year.<sup>139</sup> Besides this, the fact that some Member States have chosen to criminalise cartel offences discourages whistle blowers from coming forward, as they fear criminal prosecution.<sup>140</sup> The Member States of the EC are free to apply such criminal sanctions, a freedom which is expressly laid down in the Regulation 1/2003 under paragraph 8. The result is that cartel participants will not apply (for leniency) to the Commission or will be forced to apply to several<sup>141</sup> authorities (as an application for leniency to a certain cartel authority is only limited to the leniency from that authority)<sup>142</sup>.

However, in the UK<sup>143</sup>, which has in place a criminal statute, the possibility for an overlap seems to be remote. The OFT has expressly mentioned that with regard to 'no-action' letters<sup>144</sup> where an undertaking has been granted 100 per cent leniency by the

<sup>135</sup>Even outside the EC, leniency programmes rise: K. de Araujo, P. Pugliese and A. Castillo, 'European Union and Brazil: leniency in cartel cases- achievements and shortcomings' (2003) 24(9) E.C.L.R. 463-474.

<sup>136</sup>For instance, whether leniency is available for vertical agreements or not.

<sup>137</sup>See Regulation 1/2003, articles 11 and 12 and Commission Notice on co-operation within the Network of Competition Authorities, (2004) O.J. C101/43, paragraphs 39-42.

<sup>138</sup>*Above* n 15.

<sup>139</sup>Europa, The European Competition Network launches a Model Leniency Programme <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/356&format=HTML&aged=0&language=EN&guiLanguage=en>, (visited May 30, 2008).

<sup>140</sup>A. MacCulloch, 'The cartel offence and the criminalisation of United Kingdom competition law' (2003) J.B.L. 616-627.

<sup>141</sup>See, for instance, *above* n 68.

<sup>142</sup>D. Henry, 'Leniency programmes: an anaemic carrot for cartels in France; Germany and the UK?' (2005) 26(1) E.C.L.R. 13-23.

<sup>143</sup>The Enterprise Act 2002 introduces the cartel offence, a criminal offence for individuals who dishonestly engage in cartel agreements. Section 188 of the Enterprise Act is an offence of dishonesty relating to hard-core cartels. For a commentary of the UK's cartel offence see, J. Joshua, 'The UK's new cartel offence and its implications for EC competition law: a tangled web' (2003) 28 (5) E.L.Rev. 620-641; B. Rodger 'The Competition Act and the Enterprise Act Reforms: Sanctions and Deterrence in UK Competition Law' in G. Dannecker and O. Jansen (eds) *Competition Law Sanctioning in the European Union* Kluwer, The Hague (2004).

<sup>144</sup>Under Section 190 (4) of the Enterprise Act 2002, immunity from prosecution is available for individuals in the form of 'no-action' letters. A no-action letter will prevent a prosecution being brought against an individual in England and Wales or Northern Ireland for the cartel offence except in circumstances specified in the letter. See OFT guidance 'The Cartel Offence, Guidance on the issue of no-action letters for individuals'.

Commission, the UK will normally be prepared to issue no-action letters to those named employees, directors, ex-employees or ex-directors on whose behalf an approach is made.<sup>145</sup>

Moreover, potential conflicts between the Commission's programme and other Member State criminal statutes are also remote as in general, criminal enforcement has not been at the forefront of Member State enforcement.

There is, however, a strong view gaining ground for treating cartels as serious crimes and cartel members as criminals.<sup>146</sup> The recent sentencing, on June 11, 2008, of 3 former executives to significant terms of imprisonment for their part in a global cartel to fix the price of marine hoses is expected to send a powerful message around the UK business community that the courts will not tolerate serious anti-competitive behaviour such as bid-rigging, customer sharing and price fixing.<sup>147</sup>

An overview of the initiatives taken to deal (in part) with the above-mentioned pitfalls;

(1) As discussed earlier, following Regulation 1/2003, NCAs of Member States have since May 1, 2004, powers to apply competition rules within their territory.<sup>148</sup>

(2) ECN members have agreed on a Model Leniency Programme.

However, this is not legally binding and does not harmonise leniency policies and procedures in the EC.<sup>149</sup> If the unpredictability between the EC Member States and the Commission ensues, it will kill leniency policies.<sup>150</sup> In that context, the ECN Notice states that some information (albeit only the 'basic' information) relating to a leniency application, and circulating amongst ECN members, may not be used by another ECN member to initiate its own proceedings.<sup>151</sup>

<sup>145</sup>*Ibid.*, paragraph 3.6 as cited in Reynolds.

<sup>146</sup>For instance see T. Barnett 'Seven steps to better Cartel enforcement'; M. Bloom 'Despite Its Great Success, the EC Leniency Programme Faces Great Challenges'; W. Wils 'Is Criminalization of EU Competition Law the Answer?'; to be found in C. Ehlermann and I. Atanaisu (ed) *European Competition Law Annual 2006 : Enforcement of Prohibition of cartels*, Hart, Oxford (2007).

Many countries are now following the US practice of punishing executives responsible for cartel behaviour with criminal sanctions, including prison time. Today, among other jurisdictions, Canada, Japan, Israel, Ireland, Korea and Australia have adopted, or are in the process of adopting, laws that provide for such criminal sanctions. See D.Vann and E. Litwin, 'Recent developments in international cartel enforcement'

[http://www.gettingthedealthrough.com/narrative\\_chapter.php?id=36&sector\\_id=9](http://www.gettingthedealthrough.com/narrative_chapter.php?id=36&sector_id=9), (visited July 1, 2008).

<sup>147</sup>Office of Fair Trading (2008) Three imprisoned in first OFT criminal prosecution for bid rigging

<http://www.offt.gov.uk/news/press/2008/72-08> (visited July 15, 2008). See also Pinsent Masons LLP, United Kingdom: First UK Prison Sentences For Criminal Price-Fixing Will Encourage Greater Competition Law Compliance [http://www.mondaq.com/article.asp?articleid=62488&email\\_access=on&login=true](http://www.mondaq.com/article.asp?articleid=62488&email_access=on&login=true) (visited July 15, 2008).

<sup>148</sup>This is due to the Council Regulation 1/2003. See S. Blake and D. Schnichels, 'Leniency following modernisation: safeguarding Europe's leniency programmes' (2004) 25(12) E.C.L.R. 765-770.

<sup>149</sup>It only introduces a model for procedure for a uniform leniency application system in cartels concerning more than three Member States: European Competition Network, Model Leniency Programme; see also Commission Memorandum Competition: the European Competition Network launches a Model Leniency Programme—frequently asked questions (September 2006) Memo/06/356; X, 'EC competition law—Cooperation within the European Competition Network' (2003) 9 (11) C.L.I. 11-15.

<sup>150</sup>A. Nourry and M. Jephcott, 'The interaction of EC and national leniency systems, Closing the gap between the two regimes is critical' (2005) 10(7) C.L.I. 4.

<sup>151</sup>*Above* n 84.

(3) One could read in the Article 10 of the EC Treaty the duty for NCAs to reduce their fines correspondingly with the European Commission.<sup>152</sup>

(4) It can be stated that the Article 10 of the EC Treaty includes the obligation for the EC Member States to avoid double fines in order to not jeopardise the objectives of the Treaty and the leniency policy.<sup>153</sup>

However, the principle of *non bis in idem*, i.e. the principle that a person cannot be sanctioned more than once for the same unlawful conduct to protect one and the same interest<sup>154</sup>, has not shown to protect a whistle blower against other authorities or private damages claims after being granted immunity or being fined by the Commission. First of all, this principle will not be applicable towards other authorities; this is because this principle does not apply between sovereigns.<sup>155</sup> Secondly, the principle refers to facts and the Commission and the NCAs focus more on the effects in a particular territory instead of facts. There is also no *non bis in idem* with private damages claims as these seek only recovery for the loss and do not refer to the legal interest of punishment.

#### (F) GAPS

The following examples illustrate that the 2006 Leniency Notice offers no solution to a number of issues:

It is, for instance, stated that only the first whistleblower can obtain immunity. But who is the 'first' when several cartel participants approach the Commission together by all signing the same paper with the attached proof, in which they admit their participation in a cartel? To illustrate by way of example, when a cartel consists of five participants and four of them apply for leniency, it is clearly inconsistent with the competition goals if the Commission were to help create a smaller oligopoly by granting immunity to those four and would thus pose a large market disadvantage for the remaining participant.

Secondly, it is sometimes difficult to draw the distinction between a leniency applicant and someone complying with an obligation to provide information under the Regulation 1/2003. For instance, cases where the Commission's request for information is responded by providing the information. Some see this form of co-operation not as leniency or they draw a distinction between 'request for documents' and 'request for answers'.<sup>156</sup> Another approach would focus on the company's co-operation with the Commission, as increasing the speed of the procedure and the detection levels are the main goals of any leniency policy. Others take into account whether the Commission's request for information would go beyond the Commission's investigatory powers or whether it demonstrates a spirit of co-operation and facilitates to establish an infringement.<sup>157</sup> In any event, in the case where providing information to the Commission after being requested to do so, would not be seen as an application for leniency, this could include a provision to the effect that the participant that provided this information, unlike his competitors who were equally members of the cartel, can no longer be the first one to blow the whistle.

<sup>152</sup>See, J. T. Lang, 'The implications of the Commission's leniency policy for national competition authorities' (2003) 28(3) E.L.Rev. 430-435

<sup>153</sup>See, for instance, *Ibid.*

<sup>154</sup>*Archer Daniels Midland Co v Commission of the European Communities* (2006) 5 C.M.L.R. 28.

<sup>155</sup>See, for instance, Case T-59/02 *Archer Daniels Midland v Commission*, judgment of September 27, 2006; Case C-397/03 P *Archer Daniels Midland v Commission*, judgment of May 18, 2006; Case C-308/04 P *SGL Carbon v Commission*, judgment of June 29, 2006.

<sup>156</sup>C. Perrin, 'The graphite electrodes cartel, Advocate General Geelhoed's opinion on a company's duty to provide information to the Commission' (2006) 4(13) C.L.I. 5.

<sup>157</sup>*Ibid.*

Thirdly, no form of ‘amnesty plus’ standard, (however successful in the US), is incorporated in the current EC Leniency policy.<sup>158</sup> Such a standard provides incentives for a company found engaging in one market to admit its involvement in a second unrelated market, as the application of this standard rewards the co-operation to unveil a cartel in both markets with granting immunity in one market and a reduction of fines in the other market.<sup>159</sup> EC leniency applicants would have to apply to the Commission for leniency twice, but in terms of legal certainty<sup>160</sup> it is not clear whether the Commission would find it ‘justified’ to grant substantial leniency to the same applicant twice.

### 3. CONCLUSION

It seems that many concerns, which were present after the 2002 Leniency Notice, have not or not sufficiently been resolved by the 2006 Leniency Notice.<sup>161</sup> This article has given several reasons as to why the current leniency policy might well have failed to reach its aims and is therefore not as lenient as one would have hoped.

The first problem referred to gaps in the leniency policy. Another problem centred on inconsistencies resulting from the separation between the leniency policy and the zero tolerance policy in cartel matters. Also, uncertainties in relation to NCAs, civil damages claims and the US discovery procedures seemed to be problematic. Last but not the least, there is a lack of EC leniency harmonisation.

This has resulted in uncertainty, unpredictability, and the rise of alternative methods to leniency. This article has demonstrated why applicants will still think twice before they blow the leniency whistle.

<sup>158</sup>The OECD advised to incorporate the ‘amnesty plus’ standard: OECD Committee on Competition Law and Policy (2001) *Report on Leniency Programmes to Fight Hard-Core Cartels*, DAFNE/CLP 13 at 31.

<sup>159</sup>D. McElwee, ‘Should the European Commission adopt “amnesty plus” in its fight against hard-core cartels?’, (2004) 25(9) E.C.L.R. 558-565.

<sup>160</sup>See, in this context; G.R. Spratling, *Transparency in Enforcement Maximises Cooperation from Antitrust Offenders* (1999) <[www.usdoj.gov/atr/public/speeches/3952.htm](http://www.usdoj.gov/atr/public/speeches/3952.htm)> (visited 27 March 2008).

<sup>161</sup>See, for instance, J. P. Azevedo, ‘Crime and punishment in the fight against cartels: the gathering storm’, (2003) 24(8) E.C.L.R. 400-407.