Legal and Economic Analysis of Cartels, their Enforcement and the Leniency Program

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Abstract

Cartels are generally acknowledged as one of the most serious forms of anti-competitive behaviour between competitors. Due to the fact that competition authorities have faced difficulties in enforcing their competition policy with respect to cartels, the leniency program represents a legal, effective and often the only tool available for antitrust enforcers to detect the most serious types of agreements restricting competition. EU and US leniency programs share some common features, but there are also some differences which will be highlighted in the following paper, which will also provide an in-depth legal & economic analysis of cartel law enforcement on both sides of the Atlantic.

Keywords

Antitrust, Cartels, Leniency Program

I. Introduction

In the words of Barnett, cartels "*remain the supreme evil of antitrust, and antitrust enforcement authorities around the world are united in a commitment to pursue hard core anticompetitive conduct (that is, horizontal agreements among competitors not to compete such as price fixing, bid rigging and market allocation) that we know to be the most pernicious*".[2] In general, cartels are formed not to boost profits when times are good, but rather in times of economic and industry distress. Global economic crises produced calls for relaxed antitrust enforcement. It is common that increased prices are in a majority of cases accompanied by reduced output. Reducing antitrust enforcement may result in increased prices and reduced output. This could be followed by increased unemployment. Thus, antitrust law needs to be implemented as strictly during a period of economic crisis as it is in times of prosperity. Due to the fact that cartels are usually secretive, it is difficult to gather evidence to prove their existence. This evidence constitutes the main difficulty in the vast majority of cases. The detection, prohibition and punishment of cartels are the major challenges for antitrust authorities in EU and US. Both the EU and the US have leniency programs that grant amnesty to the firm that reports the illegal activity before the antitrust authorities have launched an investigation of the cartel. Leniency programs may have two possible effects. The first is that they may lead firms to refrain from colluding. The second is that they may have the opposite effect. Since the firms will be allowed to pay

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[2]Barnett (2007).

reduced fines, the unforeseen effect of such a program would be the ex ante pro-collusive effect. Having an effective leniency policy in the increasingly sophisticated and changing world of global antitrust law enforcement is becoming a necessary tool on both sides of the Atlantic.

II. Economic analysis of collusion

It is important to examine the difference between the legal and the economic concept of collusion. By collusion we understand a situation where market prices[3] are close to monopoly prices. Motta defines collusion as a situation where "*undertakings set prices which are close enough to monopoly prices*".[4] For the existence of collusion it is not needed to establish coordination among competitors, at least from an economic perspective. Collusion from an economic perspective may occur not only in so-called explicit collusion, but also in a so-called tacit collusion situation. This is not the case from a legal perspective, where coordination between firms in the form of an agreement or concerted practice,[5] together with the object or effect of distortion, prevention or restriction of competition[6], is needed.

The motive behind collusion is not only increased profit. Other factors, such as the exchange of information, also play a role. To that class of information that has the greatest collusive potential belongs information on prices as well as communication[7] about strategic future plans. In particular, when speaking about markets which are characterized by price competition, such sharing of information may have negative consequences. To find out whether the information exchange is restrictive or not, the EU Commission focuses its attention on the characteristics of the market on which the exchange takes place and also on the information exchange itself, such as the nature and type of information, the frequency of exchange, etc.[8] According to Motta, despite the efficiency reasons for information exchange, it is improbable that there will be a need for such an exchange in order to achieve these efficiencies.[9] Although information agreements (e.g. agreements

[3]Funta, Nebeský, Juriš (2012).

[4]Motta (2004).

[5]Chalmers, Hadjiemmanuil, Monti, Tomkins (2008).

[6]Grabitz, Hilf (2009).

[7]The principle of attorney-client privilege was established in the ECJ 1979 AM&S case. C-155/79, para. 27. In the case of Akzo Nobel Chemicals Ltd. the ECJ held that "written communications which may be protected by legal professional privilege must be exchanged with an independent lawyer, that is to say one who is not bound to his client by a relationship of employment." C-550/07 P, para. 43. In the US, in-house legal advice is protected by attorney-client privilege. Lewis M. et. al. v. Wells Fargo & Co. In Pritchard v. County of Erie Case the US Court decided that, in order to protect an in-house counsel's communication, this communication must be made for the purpose of providing legal advice, and the communication was intended to be confidential. Pritchard v. County of Erie (In re County of Erie). Thus, only in-house counsel's communications in their legal role, but not the one relating to his or her business function are protected by the attorney-client privilege. Minutes from business meetings are not under the attorney-client privilege only because an attorney was presented. Also emails, where in-house counsel was copied, sent by the firm when doing the business do not become privileged. US Postal Serv. v. Phelps Dodge Refining Corp.

[8]DG Competition, Commission's Information Note (2006).

[9]Motta (2004).

among competitors to fix prices[10] or output, divide markets by allocating customers,[11] etc.) are seen as illegal, in particular in oligopolistic markets, there is no per se rule against the exchange of information. Agreements which are not seen as per se illegal are analyzed under the rule of reason doctrine. They include agreements that might be considered per se illegal, under the condition that they are reasonably necessary to achieve procompetitive benefits. Thus, there are situations where information exchange will have a larger welfare impact, e.g. when speaking about markets where concentration is not very large. Information exchange can improve investment decisions, which could result in better quality or an overall ability to respond to demand changes. It could be considered procompetitive when firms are able to accurately manage demand and supply forecasts and therefore better allocate resources.

Difference between the collusion concepts

Collusion[12] can occur for several reasons under EU and US law. A distinction can be made between explicit collusion, tacit collusion or a combination of the two.[13] The most harmful type of anti-competitive co-operation is *explicit collusion*. Kantzenbach, in reference to explicit collusion, refers to capacity collusion and market-area collusion. He understands capacity collusion to mean a "*collective limitation of the amount of productive capacity in a particular market: either existing capacity is closed down or an expansion of capacity which would be efficient under competitive conditions is suppressed* . . . , while market area collusion represent . . . *agreements or tacit understandings which divide up markets either by product type or by region.*"[14]

Explicit collusion exists when supracompetitive prices are acquired through express communication about an agreement. Collusion can be described as explicit if firms formally agree to the strategies they will follow. In other words, explicit collusion arises in cases where two or more firms jointly use their economic power by raising prices, restricting output or dividing markets.[15] Explicit collusion is seen as illegal. We understand conscious parallelism to mean a form of tacit collusion[16] where each firm in an oligopoly is operating in a manner that is in accordance with the interests of the entire group of firms in order to maintain high prices or to avoid price competition. Conscious parallelism exists when supracompetitive prices are reached without express communication between firms. A good example of conscious parallelism is, if one of two petrol stations raises prices to a supracompetitive level and the other one follows this decision. The concept of conscious

[10] United States v. Trenton Potteries Co.

[11] Palmer v. BRG of Georgia, Inc.

[12] Phlips (1995).

[13] US antitrust law has identified three types of collusion, namely explicit collusion, conscious parallelism and tacit collusion (Lande, Marvel, 2000).

[14] Kantzenbach (1996).

[15] As Posner (1976) mentioned, "*if the major frms in a market have maintained identical or nearly identical market shares relative to each other for a substantial period of time, there is good reason to believe that they have divided the market (whether by fixing geographical zones or sales quotas or by an assignment of customers), and thereby eliminated competition, among themselves.*".

[16] In the EU, under tacit collusion, we understand collective dominance.

parallelism has been examined for the first time by the US Supreme Court in the Interstate Circuit as an "*acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act.*"[17] *Concerted action* can be put in between the two concepts mentioned above. It refers to a situation where supracompetitive prices are obtained by direct communication, but the participating firms do not close any agreement. This can happen through a public announcement by a firm which wants to follow a particular pricing policy but without existence of an affirmative response from other firms. As a consequence, a common policy regarding the price rise is adopted. Conscious parallelism and concerted action are both forms of tacit collusion which occur only on oligopolistic markets. We refer to this form of collusion when two or more firms align their behaviour as if they were engaged in explicit collusion. The US Supreme Court stated in Brooke Group decision that, "*tacit collusion, sometimes called oligopolistic price coordination or conscious parallelism, describes the process, not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions.*"[18] Tacit collusion has to be dealt with under Article 101 TFEU as an agreement between undertakings. E.g. in the *Hoffmann La Roche*[19] judgment, the Court of Justice of the EU appeared to "*exclude the possibility that tacit collusion could be addressed under Article 102 TFEU*". Also, explicit collusion is usually banned under antitrust laws, such as Section 1 of the Sherman Act or Article 101 TFEU. The effects of tacit collusion are regarded by economists to be similar to explicit collusion. Explicit, or non-cooperative,[20] collusion has an advantage over tacit collusion. If a firm increases the price believing that the new price is the right price for a particular segment, it will lose its current market share till the competition follows this increase. But when the firm decreases the price for a particular segment, other firms may see this as the launch of a price war.

Factors that facilitate collusion

It is common that certain markets are more susceptible to collusion than others. Therefore, the aim must be to examine which factors make collusion easier and thus more likely to occur. These factors include a low number of competitors in the industry, high entry barriers, product homogeneity, contractual agreements as well as market transparency and exchange of information. With a high number of firms, coordination becomes more difficult and each firm gets a smaller share of the pie generated by collusion. In a situation of the absence of barriers to entry, any attempt to maintain supracompetitive prices would cause market entry. We can imagine a situation that there are many firms on the market which have identical size and capacity. When it comes to a collusive situation, each of the

[17] Interstate Circuit, Inc. v. United States.
[18] Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.
[19] C-85/76.
[20] Green, Porter (1981).

firms will set a high price and get a small share of the profit. If one of the firms sets the price below the price level of its rivals, it can win the whole market for itself. In a study by Scherer and Ross[21] we can see reasons why collusion becomes difficult with more firms in the market. Firstly, the total output has to be divided between the firms (more firms means less output for each firm). Secondly, along with the increase of firms, there is a correspondingly lower risk of detection. Lastly, along with the increase of firms, coordination will be more difficult. It is the market shares that most facilitate collusion. Legal practitioners maintain that homogeneous products, which makes products and prices more readily comparable, create a greater possibility for reaching collusion than differentiated products.[22] Thus, product homogeneity can have an ambiguous effect[23] on the stability of collusion and may contribute to reducing market transparency. Market stability can also contribute to enhancing market transparency.[24] In the EU, Article 101 (1) TFEU regulates co-operative agreements that may affect trade between member states and has the objective or effect of preventing, restricting or distorting competition.[25] Finally, market transparency increases through better information sharing. Is collusion easier or more difficult to sustain due to transparency? In general, less information about competitor prices makes collusion difficult to sustain. This is because cartels will not be able to evaluate the situation on the market, whether an abrupt decrease in sales has occurred due to deviation by one of the participants or due to a negative shock in demand. Lack of transparency can lead to a price war. And vice versa, high producer transparency can allow antitrust authorities to detect cartels. Low consumer transparency creates an efficient barrier to entry. Thus, the abovementioned factors, which facilitate collusion, have an effect on cartel stability.[26]

III. Legal analysis of cartels

When analyzing cartels, it must be noted that the legal concept of collusion differs from the economic concept. This is because the legal concept requires co-ordination between firms in the form of an agreement or concerted practice (together with the object of the restriction of competition). While Art. 101 TFEU does not provide the definition of a cartel, the European Commission Notice on Immunity from fines and reduction of fines in cartel cases comprises a paragraph where it is stated that cartels are "*agreements and/or concerted practices between two or more competitors aimed at coordination their competitive behaviour on the market and/or influencing the relevant parameters of competition through practices such as the fixing of purchase or selling prices or other trading conditions, the allocation of production or sales quotas, the sharing of markets including*

[21] Lipczynski, Wilson, Goddard (2005).
[22] Utton (2011).
[23] Ross (1992).
[24] Kühn (2001).
[25] Joined Cases 56 and 58/64, para. 4; Also in US, in 1897, the US Supreme Court ruled co-operative agreements as illegal. See Binder (1988).
[26] To the market structure factors, which cannot be influenced by the cartel, belongs seller concentration, buyer concentration or fluctuation in demand. On the contrary, to internal factors affecting the stability belong the different goals of members of the cartel, as well as a couple of non-economic factors (e.g. leadership).

bid-rigging, restrictions of imports or exports and/or anti-competitive actions against other competitors."[27] From a legal point of view, Art. 101 (1) TFEU[28] is the governing rule prohibiting cartels. Nevertheless, the TFEU comprises some exemption in the form of agreements of minor importance and block exemptions (Art. 101 (3) TFEU).

Analysis of legal and economic elements

Whether or not collusive behaviour can be seen as an agreement, different elements have to be analyzed, especially concurrence of will, at least two undertakings and voluntarily. The concept of an agreement under Art. 101 TFEU was defined by the General Court in the *Bayer AG v Commission of the European Communities* case, judging that the proof of an agreement must be founded upon "*the direct or indirect finding of the existence of the subjective element that characterizes the very concept of an agreement, that is to say a concurrence of wills between economic operators on the implementation of a policy, the pursuit of an objective, or the adoption of a given line of conduct on the market, irrespective of the manner in which the parties' intention to behave on the market in accordance with the terms of that agreement is expressed.*"[29] For proof of the existence of an agreement it is sufficient that the undertakings have expressed their joint intention to conduct themselves on the market in a specific way.[30] Unilateral conduct[31] of an undertaking falls within the scope of Art. 102 TFEU. Proof of participation in the agreement is examined in each case where a particular party has participated on a regular basis in meetings[32] where an anti-competitive agreement was concluded. The boundary line between the concept of an agreement and the concept of concerted practice[33] is that the concept of concerted practice requires the existence of concentration on the market. A concerted practice pursues an anti-competitive object for the purposes of Article 101 (1) TFEU. In *A. Ahlström Osakeyhtiö and others v Commission case* the Court of Justice held that the concept of concerted practice "*refers to a form of coordination between undertakings which, without having been taken to the stage where an agreement properly so-called has been concluded, knowingly substitutes for the risks of competition practical cooperation between them.*"[34] The Court of Justice accepted in the *Hüls AG* case that the concept of concerted practice requires the undertakings' concerting with each other, conduct on the market, and a relationship of cause and effect between the two.[35]

[27] Commission Notice on Immunity from fines and reduction of fines in cartel cases, (2006/C 298/11), para. 1.
[28] Art. 101 (1) TFEU stipulates that "all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market . . . are prohibited.".
[29] Case T-41/96, para. 3.
[30] Case T-191/06, para. 97.
[31] Craig, de Búrca (2006).
[32] Case T-9/89, para. 121.
[33] The so called *Dyestuffs* case was the first one in EC Competition law in which the concept of concerted practice was used. See C-48-69. In the US Antitrust law we can start with the US Supreme Court decision in the case Interstate Circuit Inc. v. United States.
[34] Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, para. 65.
[35] Case C-199/92 P, para. 161.

In the *T-Mobile Netherlands BV* decision, the Court of Justice held that a single meeting between the participating undertakings is sufficient for a presumption of a causal connection between the concerted practice and the conduct of the undertaking on that market. In the examination of whether concerted practice has an anti-competitive object, there does not need to be a "*direct link between that practice and prices charged to final consumers.*"[36] Also, a situation where only one firm discloses information and the other firm accepts it could be construed as concerted practice.[37] A concerned practice does not have all the elements of an agreement, but may inter alia arise out of co-ordination, which becomes apparent from the behaviour of the participants.[38] In the US, the Supreme Court held in the *Williamson Oil Co. v. Philip Morris* case that, although the existence of the so-called plus factors in addition to conscious parallelism would be sufficient to prove the existence of concerted practice, these plus factors must be able to eliminate the possibility that the firms under investigation might have acted independently.[39] Thus, a collusive outcome might be reached without any agreement (or communication) between firms to coordinate their behaviour. The term competitors generally includes actual and potential competitors. If firms are active on the same relevant market then the firms are treated as actual competitors. A firm is seen as a potential competitor of another firm if, "*in the absence of the agreement, in case of a small but permanent increase in relative prices it is likely that the former, within a short period of time, would undertake the necessary additional investments or other necessary switching costs to enter the relevant market on which the latter is active.*"[40] The analysis of Article 101 (1) TFEU has to be based by an analysis of the economic context of the agreement, examining the nature and content of an agreement and the market power and other market characteristics.

Cartel enforcement in EU law

As already mentioned above, Art. 101 (1) TFEU is the governing rule regarding cartel prohibition. The Council Regulation (EC) No 1/2003[41] comprises rules governing the enforcement of Art. 101 TFEU and the Commission's Directorate-General for Competition[42] is the principal enforcer of cartel prohibition. Also, the national competition authorities from EU Member States have enforcement rights. EU Law allows the parallel

[36] C-8/08, para. 3 and 62.

[37] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, (2011/C 11/01), 14. 1. 2011, para. 62

[38] Fairhurst (2010).

[39] Williamson Oil Co. v. Philip Morris USA; The court delineated 11 plus factors, (1) signaling of intentions; (2) permanent allocations programs; (3) monitoring of sales; (4) actions taken contrary to economic self-interest; (5) nature of the market; (6) strong motivation; (7) reduction in the number of price tiers; (8) opportunities to conspire; (9) pricing decisions made at high levels; (10) the smoking and health conspiracy; and (11) foreign conspiracies.

[40] Guidelines on the applicability of Article 101, supra note 37, para. 10.

[41] Tichý, Arnold, Zemánek, Král, Dumbrovský (2010).

[42] The Council Regulation (EC) No 1/2003 has given the European Commission the power to inspect residential premises during the investigation. "An inspection decision is binding on the company, and a search warrant is therefore necessary only if the company refuses to submit to the inspection, and the assistance of the national authority is required." See Albath, Nilsson-Bottka, Wessely (2009).

investigation of alleged cartel conduct. The European Commission in practice starts an investigation due to market intelligence, a complaint, a reference from national competition authorities from EU Member States and/or a leniency application. Firms which are located outside of the EU but conduct business which has an effect on competition within the EU may be investigated under Art. 101 TFEU. Council Regulation (EC) No 1/2003 provides for one-off financial penalties of up to 1% of the total turnover of a company where a company intentionally or negligently fails to comply with a formal investigatory measure by the Commission. Regulation 1/2003 also gives the Commission the power to impose periodic penalty payments of up to 5% of the average daily turnover of a company where the Commission seeks to compel a company to answer a formal request for information fully or to submit to an inspection. The European Commission may impose penalties not exceeding 1% of the total turnover in the preceding business year if a firm has intentionally or negligently failed to comply with a formal investigatory measure.[43] The European Commission may impose, in cases where it seeks to coerce the firm to answer a formal request fully, a periodic penalty payments not exceeding 5% of the average daily turnover in the preceding business year per day and calculated from the date appointed by the Commission decision.[44] The European Commission may impose financial penalties on a firm, which shall not exceed 10% of its total turnover in the preceding business year, if it has intentionally or negligently infringed Art. 101 TFEU. The final decision must consider the gravity as well as the duration of the infringement,[45] but on the other hand, the financial situation of a firm does not need to be considered when determining the fine. "*In exceptional cases, the Commission may, upon request, take account of the firm's inability to pay in a specific social and economic context. A reduction could be granted solely on the basis of objective evidence that imposition of the fine as provided for in these Guidelines would irretrievably jeopardise the economic viability of the firm concerned and cause its assets to lose all their value.*"[46] In the EU, the European Commission may impose fines for a violation of Art. 101 TFEU within five years from the day on which the infringement ceased.

The first Leniency Notice was issued by the European Commission in 1996. In 2002, the European Commission announced a revised corporate leniency policy. Under the 2006 Commission Notice on Immunity from fines and reduction of fines in cartel cases (the 2006 Leniency Notice), conditional immunity from fines[47] is available to only one company, namely to the first one.[48] Motta and Polo found that the leniency program, in order to have an effect, has to be open to firms which have cooperated with the Antitrust Authority before and after an investigation has started. It may induce a pro-collusive reaction by reducing the expected fines and it is seen as the second option after fines and inspections.

[43] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, O.J. L 001, Art. 23.

[44] Council Regulation (EC) No 1/2003, supra note 43, Art. 24.

[45] Veljanovski (2007).

[46] Inability to pay under paragraph 35 of the 2006 Fining Guidelines and payment conditions pre- and post-decision finding an infringement and imposing fines, SEC(2010) 737/2, para. 3.

[47] Svoboda (2010).

[48] The 2006 Commission Notice on Immunity from fines and reduction of fines in cartel cases, OJ C 298, para. 8.

They also highlighted the fact that collaborative firms should not pay any fines.[49] Under the 2006 Leniency Notice to obtain Immunity under point 8 (a) an applicant must provide the European Commission with information which allows it to "*carry out a targeted inspection in connection with the alleged cartel.*" Point 8 (b) Immunity is applicable in cases where the European Commission has started an investigation on its own initiative. Another important element of point 8 (b) is the first firm is able to provide the European Commission with contemporaneous evidence of a cartel conduct. Under the Leniency Notice, the European Commission will provide full immunity from fines to the first firm under the condition that the applicant will provide at a minimum a corporate statement including detailed information about the alleged cartel agreement as well as contemporaneous evidence. To qualify for full immunity, the firm has to fully cooperate with the European Commission, make available for interviews all employees, provide evidence of the possession of the relevant information, and terminate involvement in the cartel.[50] Apart from full immunity, partial leniency is available to firms that provide information of significant added value. The first firm is entitled to a 30–50% fine reduction, the second firm to a 20–30% fine reduction and subsequent firms to a 20% fine reduction. In practice, in particular the definition of the significant added value information is of great difficulty. E.g., written evidence is seen as sufficient to establish the significant added value level. The European Commission will decide whether to give a marker on a case-by-case basis. An applicant for a marker has to provide sufficient information about the alleged cartel, the duration and nature of the conduct, etc. Under EU Law there is neither a leniency plus nor a penalty plus policy as there is in the US. Finally, there is the possibility of reaching a fixed 10% settlement discount.[51] This fixed settlement discount is different from leniency, where the reductions in fines are higher and may vary.

IV. Cartel enforcement in US law

The statutory prohibition of cartels in US law is contained in the Sherman Act in §1 stating that "*every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.*"[52] In the US, the Antitrust Division of the Department of Justice is the main cartel enforcer. It is important to mention that, due to the fact that the Sherman Act regulates only activity concerning trade or commerce as mentioned above, non-commercial restraints are not subject to prosecution. According to 15 U.S.C. §6a, sections 1 to 7 of the U.S.C. shall not apply to foreign cartels conduct unless it does not result in a "*direct, substantial, and reasonably foreseeable effect*" on US trade or commerce. In practice, cartelists are "*frequently adept at concealment, which can include*

[49] Motta, Polo (2003).
[50] Králik (2011).
[51] Commission Decision relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement, COMP/39.579, para. 18.
[52] Sherman Act § 1, 15 U.S.C. § 1 as amended by the Antitrust Criminal Penalty Enhancement and Reform Act of 2004.

actively obstructing a prosecutor's investigation." In cases of obstruction of investigation "*the punishment should be on par with punishment for the original offense.*"[53] A firm participated in a cartel may be fined up to 100 million USD.[54] For individuals, the fines are up to 1 million USD and jail sentences of up to 10 years.

The Conditional Leniency Policy was adopted by the US DOJ's in 1978. The program was not very successful because it did not lead to detection of any single international cartel. It was revised in 1993 for corporations (in 1994 for individuals) and contributed to an increase in the prosecution of corporations. There are two types of leniency, the so-called Type A leniency and the Type B leniency. In the first case, a firm is eligible for a leniency before the Antitrust Division has started an investigation. Another prerequisite is that the Antitrust Division has no evidence about illegal activity, the applying firm has stopped its participation in the criminal activity, the firm provides the Antitrust Division with full cooperation during the investigation and the firm was not a leader in the conspiracy. Type B leniency will be applied when the Antitrust Division has evidence about a possible violation. In this case, the firm has to be the first to qualify for leniency and also there will be no unfairness regarding the grant of leniency.[55] There is also a so-called marker system which has the following procedure. The so-called marker system, well known in US Antitrust law,[56] means that the applicant firm can secure first place in the queue when providing information concerning "*its name and address, the parties to the alleged cartel, the affected product and territory, the estimated duration of the alleged cartel and the nature of the alleged cartel conduct. The applicant should also inform the Commission on other past or possible future leniency applications to other authorities in relation to the alleged cartel and justify its request for a marker.*"[57] The marker system is available only to immunity applicants. Under the marker system, while an applicant holds a marker, no other applicant can step ahead of the applicant with the marker. When the applicant firm is late to qualify for amnesty, there is still an option to qualify for a so-called "amnesty plus" leniency which is aimed at multimarket cartels where firms are part of a cartel on more than one market. It should encourage firms convicted in one market to report collusive agreements in other markets. If it qualifies for leniency in the second market, the firm receives an extraordinary discount[58] for the conspiracy in the first market. The extraordinary discount for the conspiracy depends on several factors, like the

[53] Barnett (2006).

[54] "The fines to which antitrust defendants have agreed in order to settle criminal price-fixing indictments have skyrocketed in recent years. In light of a more expansive corporate amnesty policy that increases the probability of uncovering concealable antitrust violations, and hence reduces the magnitude of the appropriate fine, the ceilings today may well be high enough that the optimal penalty can be imposed through criminal sanctions alone." See Lopatka, Page (2003).

[55] In 2007, the US DOJ for the first time revoked granted leniency for failure to meet the conditions of the Leniency Policy. United States v. Stolt-Nielsen S.A. (Stolt-Nielsen III).

[56] The list of information to be provided in order to obtain a marker includes an indication that the client has participated in a criminal antitrust violation; the general nature of the conduct discovered; identification of the industry, product, or service involved; and identification of the client. See Hammond (2009).

[57] Commission Notice on Immunity from fines and reduction of fines in cartel cases, OJ C 298, 8. 12. 2006, para. 15.

[58] In United States v Crompton Corporation, No. the examined firm received a 59% reduction in its fine.

significance of the reported violation, etc. The Antitrust Division may also impose the so-called "Penalty +" policy in cases where the firm which is under investigation for its participation in a cartel and which has evidence of its involvement in a separate cartel but has not betrayed this second cartel. This firm will be subject to more rigorous penalties.

V. Conclusion

With the increasing integration of markets, the cross-border activities of firms have also increased. Cartels increase prices by removing or reducing competition. Their negative effect leads to a loss of social welfare as a result of price increases. As a result, they have a damaging effect on the wider economy. Detecting and taking enforcement action against firms involved in cartels is one of the main enforcement priorities for antitrust authorities around the globe.

The Leniency Program is not the only solution in the arsenal of the antitrust authorities that leads to the deterrence of cartels. The overall idea behind Leniency seems sensible not only from a legal but also from economics perspective. The Leniency Program offers immunity from sanctions to firms that report information on cartel to the antitrust authority and cooperate with it. The benefit of the Leniency Program is in the increase probability of detection of cartels and the facilitation of prosecution. The EU Leniency Program grants a reduction of the fine only to a firm that comes forward before an investigation has begun. Similarly, the US Amnesty Program grants leniency only before an investigation has begun. Due to the application of the principle of "first come, first served", a firm cannot be sure if they will be the first to inform the antitrust authority. Thus, the structure of the Leniency Program creates uncertainty for firms as to whether they will benefit from the Program or not (in particular after the US District Court decision in United States v. Stolt-Nielsen). A critique of the Leniency Program from a legal perspective may be the lack of credibility of the information provided by the whistle-blower. The possibility of abuse exists, but the respective antitrust authorities are aware of this and thus handle the program with a high level of care.

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