

Angus MacCulloch & Bruce Wardhaugh

The Baby and the Bathwater: The Relationship between Private Enforcement, Criminal Penalties, and Leniency Policy

Leniency and immunity programmes have proved to be impressive tools in ensuring the effectiveness of public antitrust enforcement in both the EU and US. Their effectiveness, particularly against cartels, has resulted in increasing levels of public antitrust enforcement since the 1990s.

Such programmes attempt to destabilise cartel activity by providing incentives in the form of an exemption from (or a reduced) penalty to those who cooperate by informing the authorities of the existence and extent of cartel activity. The beneficiaries of such programmes can be either individuals (particularly in jurisdictions which impose individual criminal liability for such behaviour—e.g. the UK, US and Canada) or to commercial entities (undertakings) involved in such practices. The latter practice is most prevalent in jurisdictions in which civil penalties are imposed upon offending organisations, but they can also be a feature of leniency/immunity programmes in jurisdictions which impose criminal penalties on those sorts of organisations (e.g. the US). An essential feature of leniency and amnesty programmes is the requirement that beneficiaries of the programmes cooperate fully with the authorities, and disclose all information they have regarding their (and others') participation in these activities.

Unfortunately the interaction of leniency programmes with private and public enforcement regime gives rise to certain (at least apparent) side effects. The interaction, in the case of private enforcement, gives rise to the fear that a beneficiary of a leniency application will have to hand over evidence (a proverbial “smoking gun”) to plaintiffs’ counsel which will in turn be used against the beneficiary of leniency in a subsequent (private) action for damages. This fear was at its extreme in the US when a leniency recipient could have still been liable for triple damages in subsequent proceedings. Since the potential for such an award can alter the expected cost calculation of remaining in the cartel, increasing the costs of defection, the efficacy of leniency and immunity programmes is hindered by private enforcement regimes. It is not only the fear of exposure to triple damages that may give rise to the potential leniency applicant’s view that the cost of defection is too high, European experience has shown that even the fear of (enhanced) exposure to single damages can lead to this calculation. To remove these fears, supplementary provisions of leniency programmes have been tweaked, in an attempt to re-balance the defect/cooperate equation. In the US, the federal Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA) benefits those who have been granted leniency by removing exposure to triple damages along with a decoupling of joint and several liability with co-defendants. At the European level, a response has been to prevent access to the public authority’s file by potential plaintiffs.

Additionally, even in spite of efforts to rebalance the defect/cooperate equation in favour of encouraging defection, there is nevertheless a real incentive for companies to “game” the system, in order to take advantage of the benefits of a leniency programme while attempting to minimise their

exposure to civil claims. The US *Stolt-Nielsen* case (E D Pa, 2007) and perhaps the UK case of *R v Burns and others* (BA/Virgin fuel surcharge) are examples of such opportunistic behaviour.

When interacting with a criminal enforcement scheme, leniency programmes may have the effect of making a contested case against other members of the cartel more difficult at trial. A jury will hear evidence from an immunised witness, whose testimony may appear to be tainted by blatant self-interest, or find it difficult to differentiate between the immunised witness and the accused, and be reticent to convict. The US cases of *Stolt-Nielsen* (supra) and *Northcutt* (S D Fla, 2008) are examples of this phenomenon. In spite of specific jury instructions to the effect that participation in a leniency programme or being a recipient to immunity had no bearing on the veracity of a witnesses' evidence, juries were unwilling to convict. Indeed, were this trend of acquittals to continue, it is foreseeable that in a good deal of cases individuals and companies which may have availed themselves of a plea bargain to resolve the matter, may choose have their day in court, and be vindicated. Such a trend may lead to the undermining of a leniency/immunity programme and public enforcement more generally.

Given the above perceptions, a social (or policy) choice needs to be made regarding the desired outcome of any antitrust enforcement scheme (which may contain administrative, criminal and private means of enforcement coupled with a leniency programme). The ideal system would deter cartels via the complementary means of public enforcement (ex ante prevention being preferable to ex post compensation). Private enforcement can remain an integral part of the system by acting (via follow-on claims) as a means of facilitating the compensation of those harmed by this activity, and by acting as a supplement to the public enforcement mechanism. This supplement can be effective when the public enforcement regime is unable to "prosecute" some activity (e.g. due to a higher than civil standard of burden of proof, or in virtue of priorities dictated by policy or workload). In the ideal system, a leniency programme would enhance public enforcement, both administrative and criminal, by providing appropriate incentives for defection, and would yield evidence which is probative in subsequent proceedings. (The evidence may not be necessarily be used in subsequent actions, rather its existence and threat of use may be sufficient to induce an out-of-court settlement or a plea bargain).

With this background, at the EU level we have seen the following in recent years:

1. An increase in the number of cartel cases detected and dealt with.
2. An increase in the level of fines - although the fining policy is independent of the leniency policy, the two policies are complementary.
3. According to official statements, the leniency programme is responsible for the increased detection rate.

However, in Europe, the tension between a leniency programme as an element of the administrative enforcement regime and private enforcement regimes is magnified by the centralised enforcement of the former (at the EU level) and the localised enforcement of the latter (at the Member State level). Although EU law requires an effective remedy for its breaches (here compensation for loss due to anticompetitive activities), the provision of this remedy is left to the Member States. As there is (nor, at present, can be, given the absence of EU legislation on point) no "one stop shop" for leniency applications, the process of applying for and securing leniency is an order of magnitude greater than in e.g. the US, given the number of jurisdictions involved.

Likewise, since disclosure rules are a matter of national law, the degree of access that prospective plaintiffs may have over the information contained in leniency applications will vary as between Member States (see Case C-360/09 *Pfliderer*, 14 June 2011, n.y.r.). Additionally, a recent CFI decision permitting access to the Commission's investigation file in the hydrogen peroxide cartel may have implications for the development of disclosure obligations on the Commission, and subsequent repercussions for the efficacy of its leniency programme (Case T-138/08 *CDC Hydrogene Peroxide*, 15 December 2011, n.y.r.). The multi-jurisdictional element and the lack of coordination among European Member States in their public enforcement regimes, coordination of leniency applications, and lack of harmonisation of private recovery regimes complicates any calculation of the expected costs and benefits of the cooperate/defect decision. This possibly unnecessary complexity calls out for reform.

In the United Kingdom, we might expect relatively little result from a leniency programme. A leniency programme is only effective if there is a realistic threat of an effective public enforcement system. Given the OFT's record with both criminal and administrative matters, it would appear that little credible threat exists. Nevertheless, there have been many applications for leniency. Indeed, according to the OFT, in the construction cartel (cover-pricing) case, 37 out of the 57 investigated companies applied for some type of leniency. In fiscal year 2010-11 the OFT received 41 leniency applications. Additionally, the November 2011 consultation (OFT803con) shows the OFT's recognition that further enhancements to the leniency programme are necessary (at pp 23 -26), particularly in regard to realigning the immunity conditions for individuals and the undertakings with which the individuals are associated, and the need to accept that the law had been infringed as a condition of leniency. The need for reform to leniency and immunity programmes in the UK is not merely apparent, but something for which proposals are invited.

An instructive example might be the 2004 Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA) introduced in the US, which enhanced the leniency destabilisation calculus by detrebling and decoupling joint and several liability from the damage exposure faced by successful leniency applicants. Although originally passed with a sunset clause expiring in 2009, ACPERA's life has twice been extended, with a present expiry date of 2020. As such this piece of legislation has provided a nice laboratory to observe the effects of a leniency programme and its interaction with public and private antitrust enforcement.

With the laboratory experiment of the US regime and the results of the EU and UK regimes at hand, we can next ask how the latter two regimes can be improved. However, prior to answering the question, we note that "improvement" is a value laden concept—thus the issues are always (1) improvement relative to *what* standard and (2) *why that particular* standard. In talk about improving an antitrust enforcement regime, we need to identify not only the goal of the regime which we seek to improve, but also justify why it is that particular goal which is our focus.

Our argument is that the emphasis in antitrust enforcement should be focused on effective public enforcement. This is based on the recognition that public enforcement has a deterrent effect, seeking to prevent the occurrence of conduct before it has a chance to do harm. This is in contrast to the reactive nature of private enforcement, which seeks to redress harm after it has occurred. The deterrent effect which public enforcement has complements the recognition of the nature of markets as being a fundamental principle of distributive justice in a liberal society. This latter point,

we have argued elsewhere, justifies the use of the criminal law to prevent this sort of market abuse, thus underscoring the legitimacy of the primacy of the public enforcement regime.

The public enforcement of a competitive regime through administrative sanctions imposing punitive fines on undertakings and criminal sanctions for individuals with a credible threat of imprisonment, both coupled with complementary leniency programmes, will maximise the destabilising effect on cartels. Ultimately, when a co-operate/defect decision is mandated by any enforcement regime (whether public or private) which imposes penalties only on a corporate entity; the decision will be made as to what is in the corporation's best interests. Imposing a fine or other financial penalty on an individual does not change this calculation, given the ease with which an individual can be indemnified (or otherwise compensated). The addition of a credible threat of imprisonment, however, significantly alters the calculus. It will be a rare individual who is willing "to take one for the team" and voluntarily serve a period of imprisonment. A public enforcement regime with a credible threat of imprisonment thus further destabilises any cooperative arrangement by injecting an element of (individual) self-interest into the equation. The resulting calculus is not one of cost-benefit to the company, but one of cost-benefit to the potentially affected (imprisoned) individual.

Intuitively, there would little negative effect on, and possible positive enhancement to, the availability of evidence for subsequent private damage claims. Any fear of additional exposure to such damages is merely added—by the individual facing a potential period of incarceration—to the company's exposure, and likely discounted accordingly. Indeed, in these circumstances, discounting the costs of providing this information to the company is likely to enhance the accessibility of the information.

The obvious downside to the use of a leniency programme is that which has been evidenced in the US, namely the possibilities of juries not convicting on the evidence of an immunised witness. In the context of a criminal trial, however, this should not be an insurmountable problem. First, corroborating evidence (possibly documentary) is required. Presumably access to this sort of material can be obtained directly (or indirectly) through the leniency programme (via the immunised witness and/or other applicants for immunity). Second, from the perspective of prosecuting such a matter, the use of such witnesses is no different from the use of immunised witnesses in other organised crime and conspiracy matters. Indeed, given the background of these witnesses, a jury may potentially be more receptive to their evidence than to the usual sort of witness found in organised crime matters. "Selling" this testimony is thus also a matter of witness handling and effective trial advocacy skills. But there is also an argument that in the case of individual criminal liability blanket immunity from prosecution is not the correct leniency reward. Criminal leniency should be shaped to best ensure that there is a credible threat of successful prosecution – automatic immunity, as opposed to some other form of reward, may not be the best way to secure that threat.

The effective integration of a leniency programme with private and public enforcement regimes, in our opinion, requires the existence of a credible threat via deterrent corporate and individual sanctions. At the EU level, these do not currently exist. At the UK level, any threat of criminal sanctions is hollow. Accordingly, any enhancement of a leniency programme (whether designed to supplement a public or a private means of enforcement) must go hand in hand with credible sanctions. These sanctions should be shaped in a way so as to elicit evidence of others' conduct. The

present system of blanket immunity is therefore not the solution. We therefore suggest reform along this direction.