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How To Catch A Thief—Corporate
Leniency And The Irrepressible
Challenge Of Cartel Detection;
Finding A Better Way

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I. INTRODUCTION

Perhaps it can be traced back to 1879, when Eugen Richter, a member of the German Parliament, stood in the Reichstag and, borrowing from the vocabulary of war, denounced as a "cartel" an open and notorious arrangement among rail, truck, and locomotive producers to charge their domestic customers more than foreign ones.² Or maybe it was the original Trust Buster, Teddy Roosevelt, who a decade or so later shined an early spotlight on those illicit combinations that gave original embodiment to the "if you can't beat them, join them" mentality. However it began in earnest, when the gavel started to come down on this early cartel activity, it did little to make cartels go away. It merely sent them underground. It has been a game of detection ever since.

Here we are, more than a century later. The world is far smaller. Information and transparency much greater. International cooperation so much stronger. And global cartel enforcement uniformly more aggressive. But the questions remain: Are we really in a better place? Have we made any real strides in stemming the unremitting tide of cartel activity? The answers are far from clear.

We certainly have new and more sophisticated tools at our disposal to uncover these unlawful gatherings. And the world's attention to stopping this enduring scourge would appear to be at an all-time high. Just look at the global scorecard of cartel enforcement successes updated and expanded on an almost weekly basis. It seems like virtually every country is getting into the fray, promising to do their part to root out competitive mischief from their shores.

Yet, cartels continue to thrive. We read about them all the time. And those are only the ones we know about. We can only wonder about the ones that escape our view. To be sure, there are many. One recent study pegs the cartel detection rate as low as 13 percent, meaning for every cartel we stop, there are roughly eight more (and likely many more than that) carrying on

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² Ervin Hexner, *International Cartels* (Chapel Hill: University of North Carolina Press, 1945). Before being commandeered in the vernacular of competition law, cartels were historically defined as agreements between nations at war, particularly with respect to prisoner exchanges. *See, e.g.*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2010).

with impunity.³ Regardless of any progress we have made in detection, we clearly have a long way to go.

So is the much heralded, universally adopted, corporate leniency program really the best way to get us there? There is little question that these programs have had some success. For the past decade and more, numerous corporations around the world have lined up with their *mea culpas* to avail themselves of these regulatory absolutions. And the lines seem to be getting longer all the time. But do these programs go far enough, and are they worth the cost? Or are they more of an albatross, getting in our way, diverting us from other avenues that depend less on the complicity of the wrongdoers and more on the exertions of the victims or, better yet, those tasked with protecting us from this blight. Perhaps it is time to take a step back and reconsider where we are in cartel detection and reassess what has up until now been the unquestioned primacy of corporate leniency in the competition enforcement scheme.

II. CORPORATE LENIENCY

Over the past decade and more, corporate leniency has been the detection tool of choice among the world's more enlightened competition regimes. And, to some extent, for good reason. What better way to uncover these secret schemes than by enticing their participants to step out and come clean? And what better way to dissuade competitors from getting together in the first place than by forging an inherent tension among conspirators? No longer can they rest easy that their interests in concealment are wholly aligned. With a leniency escape hatch, the pressure to jump ship before someone else does is ever present.

The Antitrust Division of the U.S. Department of Justice introduced the first leniency program in 1978. Under that program, the first company to report its participation in a conspiracy would receive total immunity from criminal prosecution and fines. However, this innovation met with only limited success. A leniency applicant had to report the illegal conduct prior to the start of a DOJ investigation in order to be eligible. Whether such an investigation had begun would of course be unknown to the applicant until after it submitted to leniency. Not a risk many would be wise to take. Moreover, the DOJ retained broad discretion to deny immunity if it chose to. The roll-of-the-dice nature of the program deterred many potential applicants. Indeed, the DOJ received only about one application each year until it significantly revised its policy in 1993.

The 1993 Corporate Leniency Program succeeded in buttoning up these flaws by making amnesty essentially automatic for the first applicant. It does not matter if an investigation has commenced. As long as the DOJ is not already aware of the applicant's complicity, and the applicant complies with its obligations under the program, the DOJ must honor the leniency. On those rare occasions when it has not, the courts have stepped in to enforce the leniency.⁴ In 1999,

³ E. Combe, C. Monnier & R. Legal, *Cartels: The Probability of Getting Caught in the European Union*, BEER paper n° 12 (March 2008) (reviewing 86 cartel decisions adopted by the European Commission between 1969 and 2007 and concluding that the annual probability of detection in the EU was between 12.9 and 13.2 percent). *See also* P. Bryant & E. W. Eckard, *Price Fixing: The Probability of Getting Caught*, REV. ECON. & STATISTICS, (1991) (reviewing 184 price-fixing cartels prosecuted by the U.S. Department of Justice between 1961 and 1988 and finding that, in any given year, a cartel's chance of being uncovered was only between 13 and 17 percent).

⁴ *See United States v. Stolt-Nielsen S.A.*, 524 F.Supp.2d. 609 (E.D. Pa. 2007). This action involved the DOJ's attempt to revoke a leniency agreement with Stolt-Nielsen on the grounds that the company had failed to take prompt and sufficient action to terminate its anticompetitive conduct. The DOJ proceeded to prosecute the

the Antitrust Division further refined its leniency program with Amnesty Plus. This provides for leniency even for applicants not first in line if they disclose their participation in a second, unrelated conspiracy. They will receive amnesty for their participation in the second conspiracy and a substantial additional cooperation discount for the first conspiracy.⁵

With such a sound leniency program in place, the number of leniency applicants in the United States has risen sharply. According to the U.S. Government Accountability Office, there were roughly 80 leniency applications over the past five years alone.⁶ And the U.S. program has served as a useful export to other countries looking to beef up their cartel enforcement efforts. Canada adopted a leniency program in 1991, South Korea in 1997, Brazil in 2000, India in 2002, and Australia in 2005, to name a few. By last count, roughly thirty countries have some form of leniency program. Even China's nascent competition regime features a leniency program.

Outside the United States, the European Union would appear to have the most developed leniency program. First adopted in 1996, the Commission's Leniency Notice provided for a three-tiered leniency system. The first company to adduce "decisive evidence" of a cartel's existence would receive a fine reduction of 75 to 100 percent if it provided this information before the Commission opened an investigation, and of 50 to 75 percent if it provided it after. These reductions could be further reduced to between 10 and 50 percent if the applicant failed to meet other requirements of the program.

The European Commission's 1996 leniency program suffered from some of the same flaws as the original U.S. program. Would be applicants would not know whether the Commission had already begun an investigation. And the Commission enjoyed wide discretion in deciding what constituted "decisive evidence." These issues were addressed in part by the Commission's 2002 Leniency Notice, which gave full immunity to the first company to report a cartel; replaced the "decisive evidence" requirement with slightly less stringent evidentiary thresholds; and would apply even if the Commission had already gathered some evidence on its own. The Leniency Notice was amended further in 2006 to further clarify the conditions for leniency and reduced fines.

III. THE PITFALLS OF CORPORATE LENIENCY

So why question these programs now? They have been tried and tested. The kinks smoothed out. Gaining worldwide adoption. Casting a global net over cartel activity. And, most importantly, seemingly doing their job. In fact, by most accounts, corporate leniency has been the most effective tool in uncovering cartels. This prevailing view, however, ignores the many shortcomings in the corporate leniency model. It is a model that relies on and essentially rewards the very wrongdoers that should be punished. It is difficult to harmonize with, and has the potential to impede, private enforcement activity. And it fosters a reactive rather than proactive

company for its participation in the conspiracy that it had reported. Stolt-Nielsen ultimately succeeded in dismissing the action and securing its originally bargained-for leniency.

⁵ Fine reductions are also available to companies that do not come in first in the race to self-report. However, these reductions are not strictly speaking part of the Corporate Leniency program. Instead, the Department of Justice may recommend a reduced sentence pursuant to the U.S. Sentencing Guidelines. The sentencing Court is not bound by the Sentencing Guidelines and has the discretion to follow or ignore the prosecutors' recommendations.

⁶ See <http://www.gao.gov/new.items/d11619.pdf>.

mindset on the part of the regulator serving to lull us into a sense of enforcement complacency. All of which begs the question—can we find a better way?

A threshold concern of corporate leniency is the moral underpinnings on which it rests. Is it ever just to give full immunity to an individual or entity that is a self-confessed outlaw? Is it ever just to punish in widely different ways two participants in the same conspiracy simply because one reports its conduct, not out of any sense of remorse, but simply out of fear of getting caught? These questions highlight the ethical paradox inherent in these leniency systems. Cartels are viewed as the most egregious form of competitive misconduct. Yet it is for this type of conduct that antitrust enforcers around the world are most willing to let certain perpetrators completely off the hook. They have apparently decided that, when it comes to cartels, the end justifies the means.

This is not necessarily the best or even a proper approach to govern competition enforcement. Nor is the willful abandonment of prosecutorial discretion that is a necessary component of these programs. The ability to exercise discretion should be a cornerstone of any sound enforcement regime. How else to ensure that the punishment fits the crime; that regulators have the flexibility to shape their enforcement approach to the particular facts at issue? With corporate leniency, however, there is no room for discretion. The program must be predetermined and uniformly applied or, as history has shown, it will not work.

Leniency programs also can be difficult to square with private enforcement efforts. The threat of being ensnared in a private action serves as a real deterrent to those thinking about seeking leniency. This threat is particularly real if the very evidence turned over in the leniency process can be used as the foundation for the private action. A recent decision of the EU's top court has brought this perverse dynamic into particularly sharp focus. In *Pfleiderer AG v Bundeskartellamt*⁷ the Court of Justice found that nothing in EU law precludes a private plaintiff from accessing the documents relating to a leniency process.

The only way to deal with this clash of public and private enforcement is to soften the potential blow of private enforcement for leniency applicants. The United States has taken a step in this direction with the Antitrust Criminal Penalty Enhancement and Reform Act, which limits liability in private actions to single damages (from treble damages) for those cooperating in leniency programs. For other jurisdictions, this inherent conflict may serve to discourage the more widespread adoption of an active private enforcement model. Again, one has to question how far the government should go in exonerating these malefactors. Government leniency is one thing. Impeding the rights and potential recovery of the injured party in a private proceeding is quite another.

Finally, leniency programs also arguably foster a reactive state of competition enforcement. In spite of the secret nature of cartels, there are often public markers of their existence—such as from aberrant patterns or practices in pricing, production, distribution, innovation, or collaboration, to name just a few—that an active enforcer can uncover. This is especially true in this current information age where unlimited amounts of data are within a keystroke's reach and where an infinite array of blogs and reports are widely available on virtually every industry.

⁷ Case C-360/09, *Pfleiderer v. Bundeskartellamt*, judgment of June 14, 2011, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009J0360:EN:NOT>

Most antitrust regimes engage in at least some measure of this affirmative snooping. Some have gone so far as to investigate entire industries of which they have found cause to be suspicious. But there is real concern that the focus on leniency has diverted regulatory attention away from these more proactive kinds of enforcement techniques.

There are many additional enforcement tools that exist that are certain to be equally or even more effective than leniency, but without the drawbacks inherent in the leniency model. The problem is that none of them have been able to emerge from out of the shadows of leniency. As long as leniency reigns supreme, these other programs may remain relegated to the sidelines. It is time to take a step back and give these alternative tools a more considered deliberation.

IV. WHERE WE GO FROM HERE

Let us start by giving serious consideration to a full-fledged, all-encompassing whistle-blower regime. The United States has taken great strides in promoting and expanding the whistle-blower program that Abraham Lincoln introduced a century and a half ago to ferret out those nasty war profiteers during the Civil War. Under the False Claims Act, a whistle-blower who provides information that leads to the government prosecution of a fraudster found to have bilked the U.S. treasury is entitled to a rich reward. The take is based on a sizable chunk of the government's recovery (upwards of 20 percent), which can easily amount to tens of millions of dollars or more.

The United States has expanded the scope of its whistle-blower initiatives even further under the recently passed Dodd-Frank Act. That brought enforcement proceedings by the SEC and CFTC, the U.S. agencies responsible for overseeing securities and commodities trading, under the whistle-blower umbrella. The beauty of these programs is that they provide a huge incentive for private actors—and not for those who engaged in the wrongdoing—to come forward and provide the government with information that it would otherwise be unlikely to obtain. They have all of the benefits of the leniency model, but few of the drawbacks. No amnesty to a guilty party. No conflict with private litigation. An unadorned enticement for industry insiders to step forward.

Several countries have some form of whistle-blower program, but they are typically limited to protecting the whistle-blower from retaliation. Or they provide only a token financial reward, not really worth the effort and potential backlash of becoming a government snitch. Even the U.S. program does not go far enough. Outside of the securities and commodities arena, it applies only when the government has lost money from the payment of a false claim. Inside information on cartels and other competitive transgressions are not covered unless the government is directly harmed.

Whistle-blower programs have been hugely successful in ferreting out corruption that otherwise would never have been discovered. They are tailor-made for cartel detection. Yet for whatever reason, they do not exist outside the limited context of individual leniency programs that exonerate individual cartel participants for revealing their employer's misdeeds. A more broad-based whistle-blower program, with the financial bounty that comes with it, could do so much more to enlarge our detection capabilities. It would put everyone on watch, not just the miscreants involved in the illegal activity. And it would in no way conflict with any private enforcement proceedings that might follow.

Which leads to the next most obvious cartel detection tool that has been largely ignored outside the United States. That is private enforcement. In the United States, Congress

recognized early on that the government would not have the resources to adequately enforce the competition laws alone. It enlisted the support of the public to serve as "private attorneys general" to assist in the enforcement. Congress did so through the bounty of treble damages and with attorneys' fees and costs awarded to successful plaintiffs. Private antitrust plaintiffs heeded the call to service and have, as Congress hoped, become an indispensable part of U.S. antitrust enforcement. The number of private antitrust actions for any given year dwarfs the number of government actions, in some years by as much as a factor of 20.

There are numerous benefits to the private attorney general model. Perhaps the strongest is that it provides a much-needed supplement to the significant resource constraints of the government. This applies with particular force when it comes to cartel detection. The government only has so many attorneys and so much money it can devote. These constraints often delay government action or, more importantly, cause the government to limit the matters it investigates, and ultimately the cases it brings. Private enforcement can fill in this vacuum and, as is often the case in the United States, tip off the government to schemes that may have otherwise remained concealed.

A final example of where we can go from here is to more broadly adopt proactive regulatory efforts to uncover cartel activity. This would include more rigorous industry monitoring, more active review of the trade press and consumer blogs, and deeper dives into those industries with a history of collusion or that have, through coordination or consolidation, become particularly prone to it. We can also better employ the ever more sophisticated tools of economic analysis that are available, or through a little tinkering, can be made available to study a host of market indicators for signs of competitive wrongdoing.⁸ That is exactly what South Korea has done, with some success, with its Bid Rigging Indicator Analysis System that automatically and statistically analyzes various bid-rigging indicators.

V. CONCLUSION

The point in all of this is not that corporate leniency as a system of cartel detection has failed. To the contrary, it has been successful as a vehicle for detecting and, in some measure, deterring cartels. That is why these programs have been adopted and expanded upon in so many countries. With the harsher sanctions being imposed on both corporate and individual cartel participants, cartel enforcement is arguably at an all-time high. The real question though is not whether leniency programs are good or bad in the abstract. It is whether the almost obsessive focus on these programs has distracted or dissuaded enforcers from doing more.

Successful cartel enforcement cannot truly be measured by the number of leniency programs and leniency applicants. Nor can it be measured by the total amounts of monetary fines or the length and frequency of jail sentences. It can only be measured by the level of cartel activity that remains. And the fact is that cartels continue to flourish. So while leniency programs and the threat of tough sanctions certainly have a role to play here, there is a lot more that can be done. It is time for antitrust enforcers to move on to new innovations, more actively encourage and enlist the help of those not involved in the wrongdoing, and ultimately rediscover the merits of proactive enforcement.

⁸ See Joseph Harrington, *Behavioral Screening and the Detection of Cartels*, EURO. COMPETITION L. ANNUAL (2006); CLAUS-DIETER EHLERMANN & ISABELA ATANASIU, ENFORCEMENT OF PROHIBITION OF CARTELS (2007).