

NOTE

ENABLING COMPETITION THROUGH COOPERATION: COMBATTING CARTELIZATION IN EUROPE WITH A MORE COOPERATIVE ENFORCEMENT PROGRAM

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ABSTRACT

One of the largest problems facing competition authorities worldwide is the detection, investigation, and prosecution of business cartels, which collude in illegal practices like price-fixing and bid-rigging. While even the largest nations and enforcement bodies face difficulty confronting these practices, small nations face an even steeper battle towards eliminating these harmful practices because of their limited resources. A fully integrated cooperation body is a step towards relieving this problem through shared investigatory and adjudicatory resources in this field, and the European Union presents an ideal landscape for this solution.

Creating a strong, central competition authority inside the European Union with shared resources for both investigation and adjudication from all of the member states will produce the strongest possible results in both case efficiency and future deterrence to crime. A single investigation will allow all affected nations to determine their own affected market share and a single verdict will eliminate multiple jeopardy, a major deterrence to whistle-blowing. This cooperation will allow all member nations, large and small, to introduce appropriate fines for their affected markets, further decreasing the chance that businesses will undertake illegal activity in the future.

I. INTRODUCTION

In 2012, the European Commission (E.C. or the Commission) brought an enforcement action against companies who colluded in the sale of TV and computer monitor tubes, leading to fines totaling €1.47 billion.¹ This worldwide “business cartel” affected international economies and the prices available to consumers as it enacted price-fixing, market allocation, and other highly illegal

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1. Press Release, European Commission, Antitrust: Commission fines producers of TV and computer monitor tubes € 1.47 billion for two decade-long cartels (Dec. 5, 2012), http://europa.eu/rapid/press-release_IP-12-1317_en.htm [<https://perma.cc/SL3Y-CDZV>].

and predatory practices.² This exploitation lasted nearly a decade before a participating company whistle-blew on the actions to the E.C. in exchange for immunity from future fines.³ Why did it take one of the most powerful competition law enforcers so long to uncover such an egregious act, and what effects were felt by the public?

The years 2017 and 2018 had some of the lowest levels of cartel enforcement fines by competition authorities worldwide,⁴ a reality which could plausibly be changed by an increase in leniency applications. However, leniency applications in the E.C. are actually declining for two reasons. First, for smaller economies, cartelists little incentive to self-select into the lengthy leniency process when market shares are small because the small market shares result in smaller than average fines.⁵ Without the information given in leniency applications, investigating bodies in small and developing nations often do not have the infrastructure and resources to find cartelists and produce conclusive evidence.⁶ The same is true for nations with newer competition law authorities and therefore less experience and enforcement in the area.⁷

The second cause of the leniency application decline is that, although the E.C. allows cartel members to come forward and gain immunity through leniency, their leniency application may lead to them being prosecuted in an individual E.C. member state.⁸ This risk decreases the incentive to come forward and the number of leniency applications, demonstrating the need for a new strategy

2. *Id.*

3. *Id.*

4. "Fines totaled \$4.2 billion in 2017, about half the \$7.8 billion in 2016." MORGAN LEWIS, 2017 GLOBAL CARTEL ENFORCEMENT REPORT 1 (2017), https://www.morganlewis.com/documents/m/documents/cartel/cartel_report_2017_year_end_180091.pdf [<https://perma.cc/KCE6-GCCY>]; *Competition: fewer fines for cartels*, EUROPEAN DATA JOURNALISM NETWORK (Feb. 12, 2019), <https://www.europendatajournalism.eu/News/Data-news/Competition-fewer-fines-for-cartels> [<https://perma.cc/XXM4-UWKW>]. The low number of cartel enforcement fines can mainly be cited to the self-reporting mechanisms that guarantee immunity to those who whistle blow within their own nation, but not to international authorities. See Sandra Marco Colino, *The Perks of Being a Whistleblower: Designing Efficient Leniency Programs in New Antitrust Jurisdictions*, 50 VAND. J. TRANSNAT'L L. 535, 549 (2017).

5. See U. N. Conference on Trade and Development (UNCTAD), *Enhancing International Cooperation in the Investigation of Cross-border Competition Cases: Tools and Procedures*, U.N. Doc. TD/B/C.I/CLP/44, 3, 7 (Apr. 26, 2017) [hereinafter UNCTAD, *Enhancing International Cooperation*].

6. See *id.* at 3.

7. See *id.*

8. See Anu Bradford, *The Brussels Effect*, 107 NW. U.L. REV. 1, 22 (2012).

within the leniency program.⁹ Efforts to strengthen existing leniency systems, such as the anonymous self-reporting mechanism introduced by the E.C. in March of 2017,¹⁰ or the remote possibility of future international competition enforcement and cooperation, have the ability to tackle this issue head-on.¹¹

This Note analyzes current cartel enforcement in the European Union. Section II of this Note gives background on business cartels and how leniency programs work to eliminate this illegal practice. Section II also discusses the history of competition enforcement within the European Union and regionally specific issues with the current leniency system in place there. It then provides background on past and current international cooperation efforts in this field. Section III of this Note proposes a more encompassing European Union cartel enforcement body, which includes the integration of cartel reporting between different member states and shared leniency investigations, determinations, and resources. This new investigation and enforcement body would be an improvement over the current system in two ways. First, it would increase the quantity of leniency applications by eliminating the risk of double jeopardy. Second, it would reform the current leniency practices that are not accommodating to small nation competition law authorities, who will benefit greatly from a more unified system. Finally, Section IV concludes.

II. BACKGROUND

This Section presents background information on business cartel enforcement pertaining to leniency, first generally,¹² and then with respect to the European Union.¹³ It discusses problems with the current system within the European Union,¹⁴ and then maps the current state of international cartel enforcement in this region.¹⁵

9. *See id.*

10. Press Release, European Commission, Antitrust: Commission Introduces New Anonymous Whistleblower Tool (Mar. 16, 2017), http://europa.eu/rapid/press-release_IP-17-591_en.htm [<https://perma.cc/NNP6-776U>].

11. *See* UNCTAD, *Enhancing International Cooperation*, *supra* note 5, at 2.

12. *See* Marco Colino, *supra* note 4, at 541–44.

13. Commission Notice on Immunity From Fines and Reduction of Fines in Cartel Cases (EC) No. 2006/C 298/11 of 12 Aug. 2006, § III(A) (26), 2012 O.J. (C 298) 17, 20 [hereinafter Commission Notice on Immunity].

14. *See* Bradford, *supra* note 8, at 22; *see also* DEVELOPMENT, TRADE, AND THE WTO: A HANDBOOK, VOL. 1, 461–62 (Bernard M. Hoekman & Aaditya Mattoo eds., 2002).

15. *See* A. Douglas Melamed, *International Cooperation in Competition Law and Policy*, 2 J. INT'L ECON. L. 423, 430–32 (1999).

A. *International Competition Law Enforcement and the Business Cartel*

Nations have long had a great interest in enforcing competition within their economies.¹⁶ Many have created the means of enforcement to act against those who exercise anticompetitive practices, with goals of eliminating this activity from their borders.¹⁷ This Section discusses one of those means of enforcement, leniency, and how it works to prevent business cartels.

1. Defining Business Cartel Activity and “Hard Core Cartels”

A major goal of competition law authorities internationally is the eradication of business cartels.¹⁸ Business cartels harm trade and efficiency in economies of all sizes as they collude on their business practices, market prices, market sharing, and other coordination “to their economic advantage and to the disadvantage of other market participants and consumers.”¹⁹ The most egregious of these cartel agreements are those of “hard core cartels,” which the Organization for Economic Cooperation and Development (OECD) defines as an “anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce.”²⁰

All nations have an interest in the elimination of “hard core cartels” because these practices harm consumers and economies “by raising prices and restricting supply, thus making goods and services completely unavailable to some purchasers and unnecessarily expensive for others.”²¹ These agreements are not simply collaboration for legal efficiency, but are instead illegal collusion with the intention of conducting predatory market practices.²² States share an interest in the benefits of a cartel-free market²³ and thus direct

16. See Consolidated Version of the Treaty on the Functioning of the European Union pmb., May 8, 2008, 2008 O.J. (C 115) 47, 49 [hereinafter TFEU].

17. See UNCTAD MENA Programme, *Competition Guidelines: Leniency Programmes*, U.N. Doc. UNCTAD/DITC/CLP/2016/3, 1 (June 22, 2016); Marco Colino, *supra* note 4, at 541, 546.

18. Org. for Econ. Cooperation and Dev. (OECD), Recommendation of the Council Concerning Effective Action Against Hard Core Cartels, C(98)35/FINAL, 3 (1998).

19. Christopher Harding, *Forging the European Cartel Offence: The Supranational Regulation of Business Conspiracy*, 12 EUR. J. CRIME CRIM. L. CRIM. JUST. 275, 277 (2004); See OECD, *supra* note 18, at 2.

20. See OECD, *supra* note 18, at 2.

21. *Id.* at 1.

22. *Id.* at 2.

23. *Id.* at 2–3.

competition policy to eradicate these “hard core cartels.”²⁴ It is essential to increasing competition that states cooperate to reach this benchmark.²⁵

2. The Leniency Tool and How It Works Against Cartelization

Leniency programs are incentive programs where cartel participants are “offered some kind of reward—usually immunity or a partial reduction in the penalty or penalties they would normally face for partaking in collusion—in exchange for the voluntary disclosure of information that serves as evidence of the existence of the cartel.”²⁶ Leniency programs serve as a major tool in the combatting of international, national, and local cartels.²⁷ They also incentivize cartelists to whistle blow to a state’s competition authority.²⁸ Whistleblowing can lead to vital information necessary to further investigate and dissolve a cartel.²⁹ Cartelists applying must self-report, cease all cartel activity, and provide the investigating jurisdiction with evidence.³⁰ Often, it is required that the evidence be enough to shut down the cartel in question.³¹ Cartel members are incentivized to come forward by decreased penalties, which often differ based on whether or not the competition authority is aware of the cartel’s existence.³² In most cases, the first applicant will receive a larger fine reduction, with subsequent applicants receiving smaller reductions, or no reduction at all in some jurisdictions.³³

The E.C. leniency program has remained fairly unchanged since its inception in 1996, with revisions in 2006 tweaking only fine levels and protocol.³⁴ The provisions of this framework are laid out by the Commission Notice on Immunity from fines and reduction

24. *Id.*

25. *Id.*

26. Marco Colina, *supra* note 4, at 541.

27. *See* UNCTAD MENA Programme, *supra* note 17 at 1.

28. *Id.*

29. *Id.*

30. UNCTAD, *The Use of Leniency Programmes as a Tool for the Enforcement of Competition Law Against Hardcore Cartels in Developing Countries*, U.N. Doc. TD/RBP/CONF.7/4, 3 (Aug. 26, 2010) [hereinafter UNCTAD, *The Use of Leniency Programmes*].

31. *Id.*

32. UNCTAD MENA Programme, *supra* note 17, at 1.

33. *See* UNCTAD, *The Use of Leniency Programmes*, *supra* note 30, at 3.

34. *Compare* Guidelines on the Method of Setting Fines Imposed Pursuant to Article 23(2)(a) of Regulation No 1/2003 (EC) No. 2006/C 210/02 of 9 Jan. 2006, 2006 O.J. (C 210) 2, 4, *with* Commission Notice on Immunity *supra* note 13, at 4 (demonstrating that the leniency programme has not changed since 1996).

of fines in cartel cases.³⁵ A cartel's collusion activities are considered anticompetitive and thus illegal under Article 81 of the E.C.³⁶ The E.C. places great value on cartel whistleblowing information, which leads to the dissolution of a cartel because of the high level of secrecy these cartels often utilize.³⁷ The E.C. enforcement authority considers the gathering of cartel evidence to be part of the duty to inform a public interest.³⁸ It conveys that the "interests of consumers and citizens in ensuring that secret cartels are detected and punished outweigh the interest in fining those undertakings that enable the Commission to detect and prohibit such practices."³⁹

In order to qualify for a reduction of fines via leniency an entity must (i) disclose cartel participation⁴⁰ and (ii) provide evidence to the E.C. that "represents significant added value with respect to the evidence already in the Commission's possession."⁴¹ The first entity to represent "significant added value" evidence to the Commission is eligible for a fine reduction of thirty to fifty percent, the second is eligible for a reduction of twenty to thirty percent, and subsequent entities are eligible for up to twenty percent reduction.⁴²

While these fine and penalty reductions are an incentive to apply for leniency, other factors like predictability are also vital to success.⁴³ Predictability in the leniency process is an important factor in cartelists' decisions to participate in leniency programs because most will weigh the costs and benefits of whistleblowing.⁴⁴ One of the costs that cartelists will worry about is the possibility that the information placed in their leniency application could lead to their prosecution in another state or jurisdiction.⁴⁵ If a cartel member has a fear of evidence sharing between two states and believes that state A may prosecute them based on the information in their leniency application to state B, the cartel member may decide to not apply for leniency at all.⁴⁶ A cartel will also look at the possibility of

35. Commission Notice on Immunity, *supra* note 13, at 17.

36. *Id.*; TFEU, *supra* note 16, at 64–65.

37. Commission Notice on Immunity, *supra* note 13, at 17.

38. *Id.*

39. *Id.*

40. *Id.* at 20.

41. *Id.*

42. *Id.*

43. UNCTAD MENA Programme, *supra* note 17, at 6.

44. *Id.*

45. *Id.* at 5.

46. *Id.*

private civil lawsuits brought on the basis of the information that becomes public during the leniency proceedings.⁴⁷ Some jurisdictions, like the United States, have limited comity for standing in a private civil suit if the defendant cartel member was the one who filed and was granted leniency.⁴⁸ This practice takes away much of the disincentive to coming forward and strengthens the leniency program, though possibly not significantly.⁴⁹ The threat of punishment in both the jurisdiction of application and others is another major factor in a cartel member's decision of whether or not to apply for leniency.⁵⁰

B. *History and Legal Basis for the E.C. and Competition Law in the European Union*

1. The Creation of the E.C.

The foundation of the European Union's great interest in competition law was laid from its inception.⁵¹ The Treaty On the Functioning Of The European Union (TFEU) states in its preamble an interest in "recognising that the removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade and fair competition."⁵² The TFEU established the E.C., the body which handles both the investigation and prosecution of business cartels, including leniency decisions.⁵³ Additionally, the TFEU calls for the E.C. to follow a philosophy of the following:

- (a) the need to promote trade between Member States and third countries;
- (b) developments in conditions of competition within the Union in so far as they lead to an improvement in the competitive capacity of undertakings;
- (c) the requirements of the Union as regards the supply of raw materials and semi-finished goods; in this connection the Commission shall take care to avoid distorting conditions of competition between Member States in respect of finished goods;
- (d) the need to avoid serious disturbances in the economies of Member States and to ensure rational development of production and an expansion of consumption within the Union.⁵⁴

47. See UNCTAD, *The Use of Leniency Programmes*, *supra* note 30, at 8.

48. See *id.* at 9.

49. See *id.* at 8–9.

50. UNCTAD MENA Programme, *supra* note 17, at 5.

51. See generally TFEU, *supra* note 16, art. 3 (establishing a competency for setting "competition rules necessary for the functioning of the internal market").

52. *Id.* at 49.

53. *Id.*

54. *Id.* at 60.

These requests summarily describe a body designed to promote trade and competition within the European Union, while continuing to not harm their fellow members in the process.⁵⁵ While these factors call for not harming member economies, they do not explicitly say that the E.C. need aid the member states individually.⁵⁶

E.C. and the member states must form their economic policies around the ideals of “an open market economy with free competition.”⁵⁷ If the competition policies of the member states are found to be “distorting the conditions of competition,” the E.C. may consult them through directives to the appropriate practice, thus increasing both efficiency and effectiveness.⁵⁸ Nothing is said though of a member state who has policies in line with E.C. directives and lacks the resources to gain from these practices.⁵⁹

2. Cartel Activity in Europe

Cartels are especially rampant in Europe, making the European Union an imperative target for a more efficient cartel adjudication system.⁶⁰ About two-thirds of international cartels fix prices in Western Europe.⁶¹ For comparison, only twenty-five percent of international cartels operated in North America during the same period.⁶² In other words, “[g]iven that Western Europe and North America are similar in economic size, the propensity for cartelization in Europe is roughly triple the rate per dollar of GDP than it is in North America.”⁶³

These facts seem to reflect that Europe is less averse to competition violations than authorities in North America.⁶⁴ However, that perspective appears to conflict with the fact that European authorities impose fines and sanctions on cartels at a rate of nineteen times that of North America.⁶⁵ This includes both those sanctions by the E.C. and the authorities present within the individual E.U.

55. *Id.*

56. *Id.*

57. *Id.* at 96–97.

58. *Id.* at 95–96.

59. *Id.*

60. John M. Connor, *The Private International Cartels (PIC) Data Set: Guide and Summary Statistics, 1990-2013*, 22 (2014), <http://ssrn.com/abstract=2478271> [<https://perma.cc/Y2NM-XF9T>].

61. *Id.*

62. *Id.*

63. *Id.*

64. *See id.*

65. *See id.* at 23.

member states.⁶⁶ However, when compared to the effect of cartel activity, the average monetary penalty on a cartel member is only 0.81% of affected sales.⁶⁷ Both North America and Europe do not fine cartels significantly in relation to the amount of fixed pricing worldwide, with cartel activity accounting for \$797 billion worldwide from 1990 to 2013.⁶⁸ Europe continues to be at an even higher risk of cartelization as overcharges are five times higher in that region than in North America.⁶⁹ This comparison paints a picture of Europe as a major victim of cartel activity, including price-fixing, which affects not just its members with larger economies, but its small, developing ones as well.⁷⁰

C. *Prevalent Issues in the E.C. Leniency Process and Subsequent Cartel Prosecution*

The E.C., while falling victim to major cartel activity, also faces enforcement issues unique to its current system, including the possibility of multiple jeopardy.⁷¹ These jurisdictional issues plague both large and small competition authorities within the E.C., yet those nations with smaller, younger authorities also face their own adversities within this system.⁷² This Section first addresses those cartel enforcement issues unique to the E.C., and then covers issues especially burdensome to small nations.

1. Leniency Issues Specific to the E.C.

The failure of the E.C.'s current enforcement system to shield whistleblowers from all possible prosecution is a major factor in the deficiency of the E.C. leniency system. Cartels that are prosecuted in the E.C. often face "multiple jeopardy" in leniency.⁷³ Currently, a decision in the Commission to grant leniency to a cartel member does not extend to the other jurisdictions under its purview, meaning that an individual member state may bring enforcement action against a cartel member that has been granted leniency in the E.C.⁷⁴ Combined with the loss of goodwill and reputation following public notice of the cartel enforcement action, the interna-

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *See id.*

71. *See* Bradford, *supra* note 8, at 22.

72. *See* UNCTAD, *Enhancing International Cooperation*, *supra* note 5, at 3.

73. *See* Bradford, *supra* note 8, at 22.

74. *See id.*

tional risks of applying for leniency are abundant and can carry over to all markets of which the entity is a member.⁷⁵ This can have larger effects on profit than a possible fine would, and might be a strong deterrent against entities coming forward as cartel members.⁷⁶

Entities operating in more than one region also potentially face litigation everywhere they operate because the E.C. does not give deference to the decisions of other competition authorities, such as those of the United States.⁷⁷ With the possibility of different decisions from similar laws, there is uncertainty for cartel members who may come forward with information, and thus an even smaller incentive to bet on the leniency program as a guilty entity.⁷⁸ A global standard, while not in the works, would do much to fix this issue.⁷⁹

Further, it seems the accessibility of leniency programs is tilted in favor of large companies. In most cases, leniency is used by the most sophisticated of international companies who have the most to pay for lawyers and advisors, ensuring that leniency will come out in their favor.⁸⁰ Leniency is often perceived as a “game,” and the players are generally large corporations who feel confident in the moves they make.⁸¹ This is detrimental to those smaller actors who may not have the resources to take advantage of the tools available or the funds to hire the counsel needed to be sure of leniency as a viable option.⁸² In South Korea, the imbalance of immunity granted to large multinational corporations has become so prominent that they have enacted provisions keeping a company from gaining immunity from leniency more than once in a five-year increment.⁸³

2. Leniency Issues Specific to Small Nations

After becoming the last Nordic country to enact a leniency provision in 2007, Denmark did not receive a single application from a

75. See Patricia Carmona Botana, *Prevention and Deterrence of Collusive Behavior: The Role of Leniency Programs*, 13 COLUM. J. EUR. L. 47, 53 (2006); Bradford, *supra* note 8, at 22.

76. Botana, *supra* note 75, at 53.

77. See Bradford, *supra* note 8, at 22.

78. See Thomas C. Fischer, *An American Looks at the European Union*, 19 EMORY INT'L L. REV. 1489, 1516 (2005).

79. See *id.*

80. Caron Beaton-Wells, *Criminal Sanctions for Cartel Conduct: The Leniency Conundrum*, 13 J. COMPETITION L. & ECON. 125, 144 (2017).

81. *Id.*

82. *Id.* at 144–45.

83. *Id.* at 145.

cartel member for seven more years, in 2014.⁸⁴ Even then, the cartel consisted of only two members and dealt with building cleaners, not a large corporation.⁸⁵ This deal eventually was null as both cartel members received immunity for different reasons.⁸⁶ In the same year, 2014, Denmark issued its largest cartel fine in history, a meager _1.3 million on a member of a thirty-member construction cartel in Copenhagen.⁸⁷ Meanwhile, the E.C. imposed a fine in 2014 on an automotive bearing cartel totaling over €953 million.⁸⁸ Comparing the size and magnitude of fines brought against cartels in Denmark with those brought by the E.C., it is clear that leniency favors enforcement authorities with long-term experience and size.⁸⁹ Even small nations with economic wealth have trouble finding the resources to implement strong cartel enforcement and leniency programs.⁹⁰

Developing and small economy nations often do not gain from having leniency programs because their competition authorities lack resources and are often not able to detect business cartels.⁹¹ Younger, smaller competition authorities often do not have a substantive role in international cartel investigations, even cooperative investigations, because those international investigations are normally conducted by and between the largest competition authorities.⁹² The incentives for larger competition authorities to avoid sharing information with smaller competition authorities are an essential cause of the limited participation by smaller or newer

84. *Denmark: Immunity in a Cartel Case Granted for the First Time*, DANISH COMPETITION & CONSUMER AUTHORITY (Mar. 7, 2014), <https://www.en.kfst.dk/nyheder/kfst/english/news/20140307-denmark-immunity-in-a-cartel-case-granted-for-the-first-time/> [https://perma.cc/QS5H-RAYW].

85. *Id.*

86. Michael Klocker, *After 7 Years With a Leniency Programme in Place Applications Are Finally Being Made in Denmark*, NORDIC COMPETITION BLOG (Jan. 9, 2014), <http://www.nordiccompetitionblog.com/?p=266> [https://perma.cc/JQ32-7T7B].

87. GLOBAL COMPETITION REVIEW, GCR RATING ENFORCEMENT 2015: DENMARK 59 (2015), <https://www.kfst.dk/media/1786/gcrdenmark2014.pdf> [https://perma.cc/3EYD-Y5GP].

88. Press Release, European Commission, Antitrust: Commission fines producers of car and truck bearings € 953 million in cartel settlement (Mar. 19, 2014), http://europa.eu/rapid/press-release_IP-14-280_en.htm [https://perma.cc/3XEP-L9ME].

89. See UNCTAD, *The Use of Leniency Programmes*, *supra* note 30, at 9–10. Further, compare with the worldwide average fine amount imposed on cartels between 1990–2013 of \$124 million. Connor, *supra* note 60, at 20.

90. See *Denmark: Immunity in a Cartel Case Granted for the First Time*, *supra* note 84.

91. See UNCTAD, *Enhancing International Cooperation*, *supra* note 5, at 3.

92. See Pierre M. Horna, *David & Goliath: How Young Competition Agencies Can Succeed in Fighting Cross-border Cartels*, 6–7 (Univ. of Oxford Ctr. for Competition Law and Policy, Working Paper CCLP (L) 45, 2017).

competition authorities. One reason for the lack of information sharing is the distrust between different competition authorities who do not work together on a regular basis. This distrust can make sharing information difficult unless there is a previous agreement in place, which new competition authorities often do not have.⁹³ Another reason for a lack of information sharing by larger authorities is that smaller, new authorities often have broad, time-intensive requests to supplement their own lack of resources.⁹⁴ However, there is consensus that cooperation among competition agencies actually enables international convergence of competition policy and programs.⁹⁵ In 1998, the OECD even made strong recommendations for increased international cooperation in cartel investigation and enforcement.⁹⁶ Cooperation can enhance resource capabilities as well as greater flexibility with those resources in regards to cartelization investigations.⁹⁷

Further limiting factors of a smaller competition authority's ability to operate a leniency program is the fact that cartelists prefer to apply for leniency with larger competition authorities. Most cartels do not apply for leniency in small and developing nations because "[c]artelists make strategic choices in selecting jurisdictions in which to apply for leniency program[s] and have little incentive to apply in a small jurisdiction where they face low exposure regarding the detection of cartels or time-consuming procedures."⁹⁸ Thus, smaller competition authorities most often learn of an international cartel's existence from the reports and actions of larger nations or even the media.⁹⁹ The refusal of cartelists to file leniency applications with smaller competition authorities means that the smaller authorities cannot gain access to important information for an investigation.¹⁰⁰ The authorities are left with both small investigative resources, and without the added benefit of evidence and information directly from the cartelists.¹⁰¹

93. See UNCTAD, *Enhancing International Cooperation*, *supra* note 5, at 8; Horna, *supra* note 92, at 8.

94. See Horna, *supra* note 92, at 8–9.

95. Int'l Competition Network, *Defining Hard Core Cartel Conduct, Effective Institutions, Effective Penalties*, in BUILDING BLOCKS FOR EFFECTIVE ANTI-CARTEL REGIMES, VOL. 1, 2 (2005); see DEVELOPMENT, TRADE, AND THE WTO, *supra* note 14, at 462.

96. See Int'l Competition Network, *supra* note 95, at 12; OECD, *supra* note 18, at 4.

97. See Int'l Competition Network, *supra* note 95, at 38.

98. *Id.* at 3, 7.

99. See UNCTAD, *Enhancing International Cooperation*, *supra* note 5, at 3.

100. *Id.*

101. See *id.* at 7.

Cartelists choose to not file leniency applications with smaller competition authorities for a myriad of reasons. Many cartel members weigh the costs and benefits of choosing to undergo investigation through a leniency application in a country, and may even choose to leave the market altogether if the market share is small enough to be less valuable than a possible fine.¹⁰² Often, cartelists must weigh which programs to apply for leniency in because the information from that investigation may lead to the cartel being exposed to other jurisdictions, who would then not grant leniency to the cartelist.¹⁰³ Penalties are also often less in small developing economy countries with less experienced competition law authorities.¹⁰⁴ This can lead to cartelists taking the chance of not applying for leniency because the deterrent factor is not sufficient.¹⁰⁵ Further, many cartelizing companies in small economies will be in small spaces, both in terms of population and geography.¹⁰⁶ Cartel members may be more personally connected to the people and community around them than in large international business cartels, and could face more than just business goodwill issues if they come forward.¹⁰⁷

One solution to these problems is the sharing of sensitive information from large to small competition authorities, which can help equalize the leniency field and grant detection and enforcement opportunities to small nations which may suffer at a greater expense from a cartel going unseen.¹⁰⁸ However, laws in place to protect sensitive information often get in the way of this cooperation.¹⁰⁹ Currently, many jurisdictions require cartel members filing for leniency to grant permission for sensitive information to be shared with other authorities.¹¹⁰ It is, however, against a cartelist's interests to allow vital evidence to be shared with a different jurisdiction's authority, unless they are undergoing leniency agreements in both states.¹¹¹ As seen to an extent in the E.U.-Switzerland cooperative agreement, not requiring this consent allows for greater resource sharing and increased enforcement.¹¹²

102. *Id.* at 4.

103. *See* UNCTAD, *The Use of Leniency Programmes*, *supra* note 30, at 10.

104. *See id.*

105. *See id.* at 9–10.

106. *See id.* at 9.

107. *See id.*

108. *See* UNCTAD, *Enhancing International Cooperation*, *supra* note 5, at 4.

109. *Id.* at 4–5.

110. *See id.* at 5.

111. *Id.*

112. *See id.*

This agreement does not require consent from cartel members in the exchange of information gathered in investigations, but it still requires the leniency seeking party's consent to share information which was gathered directly from them.¹¹³ This issue of information sharing requirements, coupled with the fact that cartels do not often apply for leniency in small nations, shows exactly how developing and small nation competition authorities may have leniency programs that are not successful in the investigation and prosecution of cartels within their markets.¹¹⁴

D. *The Beginnings of Bilateral and Multilateral Agreements in Competition Law and Difficulties in Cooperation*

Cooperation agreements are generally common only in the most developed and oldest of competition authorities.¹¹⁵ In fact, in an OECD survey it was revealed that a majority of non-OECD members have little experience with international cooperation in regards to competition law.¹¹⁶ This includes informal cooperation,¹¹⁷ which relates to the issue of trust mentioned above.¹¹⁸

Some developed nations with older authorities have had established bilateral and multilateral agreements for decades, but these are still fairly superficial and have many limitations.¹¹⁹ Germany and the United States signed a bilateral antitrust agreement in 1976, not to change actual legal systems or laws, but to simply lay groundwork for cooperation and to increase the ability to work together on common interests.¹²⁰ Agreements between the U.S. Department of Justice (DOJ) and European Union's E.C. allowed the two organizations to share confidential information, with consent, during the merger of MCI and WorldCom, increasing efficiency and assuring the same remedy in both economies.¹²¹ As stated previously, the European Union and Switzerland have an agreement which allows them to share information which has been gathered in the course of an investigation into a cartel, with limita-

113. See *id.* at 5–6.

114. See *id.* at 4–7.

115. See Horna, *supra* note 92, at 3, 11–12, 22–23.

116. See *id.* at 12.

117. *Id.* at 11.

118. See UNCTAD, *Enhancing International Cooperation*, *supra* note 5, at 8; Horna, *supra* note 92, at 8.

119. See, e.g., UNCTAD, *Enhancing International Cooperation*, *supra* note 5, at 5; Marek Martyniszyn, *Inter-Agency Evidence Sharing in Competition Law Enforcement*, 19 INT'L J. EVIDENCE PROOF 11, 20–22 (2015); Melamed, *supra* note 15, at 426.

120. Melamed, *supra* note 15, at 426.

121. *Id.* at 427.

tions on which information can be shared, and what each body can do with it.¹²²

The E.C. also houses the European Competition Network (ECN), an existing cooperation agreement between E.C. members and the E.C.¹²³ This network embraces independence and decentralization,¹²⁴ though it does allow for shared investigation resources.¹²⁵ The optional nature and complete division of the member states' competition systems and that of the E.C.¹²⁶ distinguish the ECN agreement in place from the fully integrated cooperative body proposed later in this Note.¹²⁷

A bilateral mutual legal assistance treaty (MLAT), another cooperation agreement possibility, obligates countries to share information in criminal matters, such as documents in foreign locations.¹²⁸ While there is no personal criminal liability in the E.C., this type of agreement is used in the United States for price-fixing and similar investigations.¹²⁹ Specifically concerning the competition law realm is the International Antitrust Enforcement Assistance Act of 1994, a United States' law, which allows for MLAT type agreements to be signed for non-criminal antitrust investigations, and which could be used as the basis for a similar European Union provision.¹³⁰

The United States and European Union currently have a positive comity agreement.¹³¹ Positive comity refers to when a competition law issue arises, but is found to be most prevalent in a foreign jurisdiction, and the competition authority will refer the matter to the authority in the relevant jurisdiction.¹³² The original competition authority may then either accept the foreign authority's findings or proceed to conduct its own investigation.¹³³ Competition law cooperation is also enabled, and could be expanded, by the OECD,

122. UNCTAD, *Enhancing International Cooperation*, *supra* note 5, at 5.

123. *European Competition Network*, EUR. COMM'N, http://ec.europa.eu/competition/ecn/more_details.html (last updated Apr. 4, 2012) [<https://perma.cc/P69R-FFPL>].

124. Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities, No. 15435/02 ADD 1, 1, http://ec.europa.eu/competition/ecn/joint_statement_en.pdf [<https://perma.cc/F5YP-WRJL>].

125. *European Competition Network*, *supra* note 123.

126. See Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities, *supra* note 124, at 1.

127. See *infra* Section III.

128. Martyniszyn, *supra* note 119, at 20–23; Melamed, *supra* note 15, at 427.

129. See Melamed, *supra* note 15, at 427.

130. See *id.*; Martyniszyn, *supra* note 119, at 20–22.

131. See Melamed, *supra* note 15, at 428.

132. See *id.*; Fischer, *supra* note 78, at 1516.

133. See Fischer, *supra* note 78, at 1516; Melamed, *supra* note 15, at 428.

the United Nations Conference on Trade and Development, and the World Trade Organization (WTO).¹³⁴ Most of these organizations have produced policy recommendations and technical cooperation but do not move towards collaboration of local competition laws and enforcement.¹³⁵ In 1993, an international antitrust agreement was presented at the WTO and OECD by the Max Planck Institute called the Draft International Antitrust Code (Draft Code).¹³⁶ It called for an International Antitrust Panel and an International Antitrust Authority, the judicial and enforcement groups respectively, where enforcement would be brought similarly to how it is currently reached in the WTO dispute resolution system.¹³⁷ The Draft Code would encourage states to pursue their own competition laws in harmony with the minimum requirements of the agreement, but this was not well received and did not pass WTO consensus agreement.¹³⁸

A truly international agreement would be difficult as many developing nations tend to pass policies that favor small and medium firms in their jurisdiction,¹³⁹ and leniency tends to favor larger actors.¹⁴⁰ Because of regional differences, as well as differences of countries depending on size of economy and population, it would be very difficult to find a set of laws that would satisfy the underlying goals of every country's competition philosophy.¹⁴¹

III. ANALYSIS

A stronger international body of competition law is greatly needed.¹⁴² However, there is a difficult balance in creating an authority for cooperation that will both aid smaller and larger nations' competition authorities, while being fair and effective in the dissemination of information and leniency measures,¹⁴³ because of the differing goals, laws, and approaches taken by

134. See Melamed, *supra* note 15, at 430.

135. See *id.* at 430–32.

136. Andrew D. Mitchell, *Broadening the Vision of Trade Liberalisation*, 24 *WORLD COMPETITION* 343, 356 (2001).

137. *Id.* at 357.

138. *Id.* See Marrakesh Agreement Establishing the World Trade Organization art. IX (1), Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement].

139. See Jurgita Malinauskaite, *Harmonisation in Competition Law in the Context of Globalisation*, 21 *EUR. BUS. L. REV.* 369, 377 (2010).

140. See UNCTAD, *Enhancing International Cooperation*, *supra* note 5, at 7.

141. See Malinauskaite, *supra* note 139, at 377.

142. See Martyniszyn, *supra* note 119; DEVELOPMENT, TRADE, AND THE WTO, *supra* note 14, at 461–62.; Int'l Competition Network, *supra* note 95.

143. See DEVELOPMENT, TRADE, AND THE WTO, *supra* note 14, at 461–62.

nations of different sizes and regions.¹⁴⁴ This Section proposes a more tailored solution: a stronger cartel enforcement body within the E.C. that acts as both an investigatory and adjudicatory tool for all member states, especially those smaller states lacking a strong competition authority.

A cartel enforcement body in the European Union, with more scope than the E.C., would allow all member states to have a greater share of investigative resources and confidential information, as well as eliminate the multiple jeopardy issue that is currently present.¹⁴⁵ Because the European Union and E.C. already have adjudicatory power and legal precedent granting authority over the member states,¹⁴⁶ this body would undergo a more streamlined integration into current practices than a body with a wider scope.¹⁴⁷ A regionally tailored, yet fully integrated, cartel enforcement body within the European Union is the best choice to increase cartel whistleblowing, fine collection and elimination, and grant the same leniency resources to smaller nations with newer competition authorities that are already aiding larger more established competition authority states.¹⁴⁸ This Section first proposes a regionally tailored, yet fully integrated cartel enforcement body within the European Union, paying close attention to conflicts in policy and issues affecting small nations. It goes on to address issues of trust between competition authorities and counterarguments to this proposal.

A. *Solutions to the Issue of Cooperative Leniency in the European Union*

Within the European Union, and elsewhere, proposals for leniency cooperation in international authorities often do not allow the sharing of information gained from leniency investigations outside of simple identification of the leniency recipients.¹⁴⁹ This problem could be solved through a regionally tailored, fully integrated cartel enforcement body beginning with a single shared

144. See Malinauskaite, *supra* note 139, at 377.

145. See Bradford, *supra* note 8, at 22.

146. Michael Rosenfeld, *Comparing Constitutional Review by the European Court of Justice and the U.S. Supreme Court*, 4 INT'L J. CONST. L. 618, 619 (2006).

147. See Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities, *supra* note 124, at 1.

148. See UNCTAD, *Enhancing International Cooperation*, *supra* note 5, at 2 (prescribing cooperation in cartel enforcement and describing the existing cooperation between the E.U. member states, the foundation upon which this note's solution builds).

149. See Martyniszyn, *supra* note 119, at 14.

leniency application and continuing with a cooperative investigation, using resources from all member states to determine the cartel members, cartel activity, and effects within each of the member economies.¹⁵⁰ Once investigated, an adjudicatory panel regime,¹⁵¹ consisting of a member from each state, will vote on binding decisions of both leniency and prosecution. Leniency decisions by the panel will apply to all member states, as will prosecution determinations, allowing all members to bring individualized fines and sanctions based on the affected market share found in the prior investigation.¹⁵² The cooperating states would then agree to not prosecute those who accept leniency agreements in other jurisdictions. This keeps other authorities from prosecuting those who came forward willingly, but diminishes the resources that come with having the information they traded in a different jurisdiction.

This solution is the most effective and practical one because it extends leniency to those who have been granted it in other jurisdictions and increases the sharing of confidential cartel information across the borders of all states in agreement. These results would allow for more cartels to be discovered and terminated because cartel members would be incentivized to come forward with information on operating cartels. The cartel members would be incentivized to apply for leniency and volunteer information because if they did not, then they could be given fines and appropriate sanctions across all jurisdictions under the cooperative authority.

A further incentive to come forward would be that this cooperative agreement would remove a leniency applicant's worry about facing multiple prosecutions. Under this cooperative agreement, the E.C. decisions would now be released as binding adjudicatory decisions from the courts. Thus, member countries of the European Union would be precluded from pursuing charges against those actors who were granted leniency. Therefore, increasing leniency cooperation through a regionally tailored, fully integrated cartel enforcement body would ensure that information from the E.C. and other member states are shared across borders and lead to the dismantling of international cartels and a higher number of cartel discoveries and fines.¹⁵³

150. See *id.*

151. See Joost Pauwelyn & Luiz Eduardo Salles, *Forum Shopping Before International Tribunals: (Real) Concerns, (Im)Possible Solutions*, 42 CORNELL INT'L L.J. 77, 84 (2009).

152. See UNCTAD, *Enhancing International Cooperation*, *supra* note 5, at 3–4

153. See UNCTAD, *Enhancing International Cooperation*, *supra* note 5, at 2–4.

B. *Addressing the Issues of Large and Small Authorities*

The proposal will need to weigh the possibilities of hard versus soft legal harmonization and the probability that the scope of the agreement would be narrow because of the differing interests between large developed countries and smaller developing economies.¹⁵⁴ The ability to find and dissolve a larger number of cartels with cooperation appeals to smaller economies because a smaller number of successful cartels could greatly affect the economy and consumer welfare in these nations.¹⁵⁵ This would have to be weighed with the fact that leniency tends to favor the larger actors and those working on a more global scale.¹⁵⁶

A tailored European Union investigatory and adjudicatory cartel enforcement body would allow countries to choose to participate in the leniency and enforcement investigations and determinations without some of the downfalls of other international agreements, like the WTO requirement of consensus voting.¹⁵⁷ The past proposed Draft Code and other decisions within like bodies show an attempt at competition law cooperation, but required consensus¹⁵⁸ to adopt new measures make coming to determinations extremely inefficient.¹⁵⁹ To combat this issue, the proposed European Union cartel enforcement body will make decisions via an adjudicatory panel consisting of a single delegate from each member state, where decisions of leniency and prosecution must be made by a vote of more than half plus two members.¹⁶⁰ This voting structure ensures that both small and large economies in the European Union have a voice in the judgments and neither can make decisions for the other, as all countries will have an equal vote.¹⁶¹

C. *An Answer to the Difficulty of Information Sharing in Enforcement*

Countries have a hard time sharing confidential information when investigating on the basis of leniency, for legal reasons as well as time management and the inability to fulfill all information

154. See Malinauskaite, *supra* note 139, at 377.

155. UNCTAD, *Enhancing International Cooperation*, *supra* note 5, at 4.

156. See *id.* at 2–3.

157. See Marrakesh Agreement, *supra* note 138, at 159; Mitchell, *supra* note 136, at 357.

158. Marrakesh Agreement, *supra* note 138, at 159.

159. Mitchell, *supra* note 136, at 357; see Marrakesh Agreement, *supra* note 138, at 159.

160. See Marrakesh Agreement, *supra* note 138, at 159.

161. See *id.*; *Share of Member States in EU GDP*, EUROSTAT (Oct. 4, 2017), <http://ec.europa.eu/eurostat/web/products-eurostat-news/-/DDN-20170410-1> [https://perma.cc/VX4P-YKQL?type=image].

requests.¹⁶² There is a great need for an agreement about the sharing of confidential information and evidence during competition proceedings, especially as administrative programs often cannot access documents that are labeled confidential abroad.¹⁶³ This cooperative body would remove those boundaries to sharing information between the member states as the investigation would be handled by a single central body, and both large and small, developed and developing, member states would take part in the investigation and collection of information.¹⁶⁴ All states would vote on the verdict after the investigation, and then have the option for individualized fines upon indictment.¹⁶⁵ Because all member states are taking part in full in the cartel enforcement process, it eliminates the trust issues that unfamiliar bodies often have towards each other's information requests¹⁶⁶ as well as the cost of information sharing issues that occur between small and large actors.¹⁶⁷

D. *Counterargument: An Intercontinental Agreement*

As with any proposal for a new administrative cooperative body, there are concerns that are not unique to this type of competition agreement, including the question of who will be the member states of such a body. A proposal to expand the proposed agreement and to include non-European Union competition authorities like those present in the United States and beyond would reach many barriers to efficiency and effectiveness.¹⁶⁸ If this leniency cooperation were to expand from a regional system to a more intercontinental agreement, including countries like the United States, the nations would have to agree on the stance of prosecuting natural persons because the United States maintains this practice, while the E.C. does not.¹⁶⁹ A provision similar to the one prohibiting the use of exchanged information in the prosecution of natural persons in the E.U.-Switzerland agreement could possibly work,¹⁷⁰ but this fundamental disagreement of authority policy

162. See Horna, *supra* note 92, at 8–9.

163. See Martyniszyn, *supra* note 119, at 14.

164. See UNCTAD, *Enhancing International Cooperation*, *supra* note 5, at 8; see also *supra* Section III.A.

165. See UNCTAD, *Enhancing International Cooperation*, *supra* note 5, at 8; see also *supra* Section III.A.

166. See UNCTAD, *Enhancing International Cooperation*, *supra* note 5, at 8.

167. See Horna, *supra* note 92, at 8–9.

168. See Marco Colino, *supra* note 4, n.99 at 553; Melamed, *supra* note 15, at 427–28.

169. See Marco Colino, *supra* note 4, n.99 at 553; Melamed, *supra* note 15, at 427–28.

170. See Martyniszyn, *supra* note 119, at 20.

and practice would make the system almost impossible without either the United States or other nations changing their stance on the individual criminal prosecution issue to match others.¹⁷¹

IV. CONCLUSION

If state competition authorities, both large and small, are to lessen the presence of business cartels and their predatory price practices, cooperation is key. The European Union is a jurisdiction especially in need of this increased cooperation as it is home to the largest amount of cartel activity and price-fixing in the world.¹⁷² It is also unique as there is already a structure in place in the European Union that consists of both large and small countries, hosting both the oldest and some of the youngest competition authorities.

There are several problems with the current E.C. system, which more cooperation could fix. First, multiple jeopardy amongst member states for those cartelists who wish to apply for leniency and trade evidence for avoided prosecution stands in the way of a more effective system and leads to lower levels of leniency applications and more cartel activity going undetected.¹⁷³ Second, declining leniency applications is also hard on small nations and younger competition authorities as they do not have the structure and investigative power to hold their own investigations into international cartel activity, and often do not have the benefit of the information which comes from leniency applications.¹⁷⁴ Third, confidentiality also keeps the different authorities from sharing information that could lead to cartel prosecutions with each other.¹⁷⁵

An international cooperative body between the members of the European Union that is fully integrated, more encompassing and powerful than the E.C., will solve most of these issues because it can be both the investigative and adjudicative body for these countries.¹⁷⁶ Leniency applications will be made to the cooperative body as a whole, and the investigation will have access to all member nations needed to produce evidence. This solves the confidentiality issue and spreads the resources between both small and large

171. See Marco Colino, *supra* note 4, n.99 at 553; Melamed, *supra* note 15, at 427–28. See also Martyniszyn, *supra* note 119, at 20 (highlighting the limitations of MLATs if the “dual criminality requirement” is not present, that is if “the conduct at stake is [not] treated as a crime in both jurisdictions”).

172. See Connor, *supra* note 60, at 22.

173. See Bradford, *supra* note 8, at 22.

174. UNCTAD, *Enhancing International Cooperation*, *supra* note 5, at 4.

175. See *id.* at 8.

176. See *supra* Section III.A.

economy states, allowing small nations with newer competition resources to also have a chance in removing the predatory pricing that comes from cartels from their markets.¹⁷⁷ Decisions made regarding prosecution or leniency by the cooperative body will be final, and individual nations will be allowed to prescribe their own sentencing to those cartels found to have been present in their jurisdiction.¹⁷⁸ This new competition body in Europe will accomplish the goals of reduced cartel action from stricter deterrence, as well as succeed in sharing resources with smaller economies.

177. *See supra* Sections III.B, C.

178. *See supra* Section III.A.