

The Role of Leniency Programs in Cartel Enforcement: A Critical Assessment

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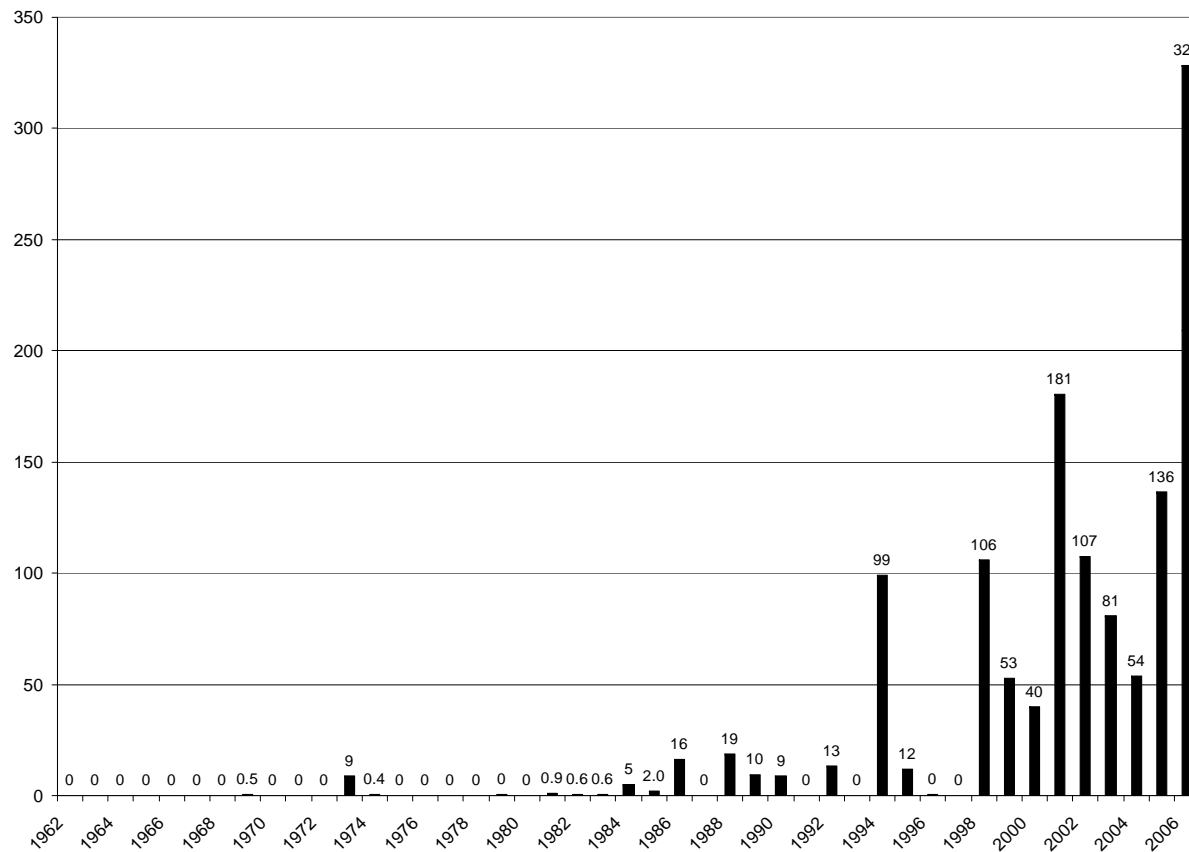
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Leniency in European Cartel Enforcement

- European programs effective since 1996 (revised in 2002 and 2006)
- Majority of cartel cases originate in leniency application
 - First time in *British Sugar* (initiated in 1992, decided in 1998)
 - Since then 41 of 53 infringements (against 11 own initiative, 1 complaint)
- Important for detection, investigation and conclusion of cartel cases
- Leniency programs heralded as a success (large number of applications)
- Recent developments make leniency even more attractive:
 - Exponential increase in recent fines
 - The 2006 fining and leniency guidelines are very explicit
- With leniency available, fines are a double-edged sword



Average Fine per Cartel Decision with a Fine



Source: Schinkel (2006)



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Implied Fine Formula in 2006 Fining Guidelines

$$F = \overbrace{(30\% \times \eta \times n + 25\% \times \kappa)}^{\text{Basic amount}} \times \overbrace{p^a Q^a}^{\text{Value of sales}} \times \overbrace{\theta^a \times \theta^m}^{\text{Adjustments}}$$

$0 < \eta \leq 1$	gravity (recitals 21-23)
n	number of years (recital 24)
$\frac{3}{5} \leq \kappa \leq 1$	'entrance fee' (recital 25)
$1 \leq \theta^a \leq 2$	aggravating circumstances (recital 28)
$0 < \theta^m \leq 1$	mitigating circumstances (recital 29)

Source: Bos and Schinkel (2006)



Explicit Discounts in 2006 Leniency Guidelines

(26) The Commission will determine in any final decision adopted at the end of the administrative procedure the level of reduction an undertaking will benefit from, relative to the fine which would otherwise be imposed. For the:

- first undertaking to provide significant added value: a reduction of 30-50 %,
- second undertaking to provide significant added value: a reduction of 20-30 %,
- subsequent undertakings that provide significant added value: a reduction of up to 20 %.



Some Critical Remarks 1/2: Sample Issues

- Unclear in what stage of the investigation leniency was applied for:
 - Detection versus efficient enforcement
 - Across jurisdictions
- Unclear what the quality of the applications is:
 - Old and dying cartels
 - ‘Cleaning-out-the-closet’-effect



Some Critical Remarks, 2/2: Strategic Issues

- Busy leniency program may over-burden the agencies:
 - Detection probability for active cartels may go down
 - Strategic abuse (‘throwing-a-bone’-effect)
- Political economy of enforcement:
 - Adverse selection of cases by the agency (hysteresis)
 - Risk of being too generous (as well as too strict – Stolt-case)
- Cartels may develop strategies around the leniency programs:
 - Impulse-response claims (1996 and 2003)
 - ‘Leniency-proof’ cartel agreements



Concluding Remarks

- Destabilizing cartels is a complex game (pre- and post-discovery)
- Cartels may be ahead of this game, agencies should be
- The number of leniency applications is not a good measure of success
- High perceived probability of independent discovery crucial
- European leniency program likely to be too generous
- Eminent further enforcement tools may cause conflicts:
 - Private enforcement ('vault effect'; private leniency program)
 - Plea bargaining (more 'expensive' than leniency)
 - Sanctions for individuals (blanket leniency and loyalty issues)
- Need for a coherent approach

