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Felix E. Mezzanotte

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COMMENTS ON ARGENTINA'S NEW LENIENCY PROGRAM

*Félix E. Mezzanotte**

I. INTRODUCTION

Argentina has passed a new competition law, *Ley de Defensa de la Competencia* ("LDC") that creates, for the first time, a leniency program ("ALP").[1] The goal of this article is to outline the ALP's key characteristics and analyze them critically. As a basis for this analysis, this article will look to the leniency policies in the United States ("US") and the European Union ("EU"). Additionally, the economic research investigating the effectiveness of leniency programs will also be utilized. From the vantage point of cartel enforcement policy, the decision to create the ALP is praiseworthy. When leniency programs are designed and implemented correctly, they can be a powerful tool for competition authorities ("CA") to defeat hard-core cartels, the most malign form of anticompetitive conduct.[2]

In a cartel, competition forces are missing because cartel members enter into agreements not to compete with each other. They may agree to fix prices, restrict supply, allocate markets, or rig bids, among other forms of collusion.[3] These cartel activities are harmful to the welfare of consumers and society. Cartelized markets are characterized by higher prices, lower quality of products or services, less innovation and diminished consumer choice.[4] In the US, for example, the activity of hard-core cartels for all time periods (since recording started) have imposed on US consumers price overcharges of 23.3% on average.[5] In Asia, price overcharges due to cartel activities are estimated to have reached up to US$ 500 billion through 1990 to 2007.[6] Although competition laws bar cartels, enforcing this prohibition has proved difficult. Cartels are outlaws; they operate secretly and conceal

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*Assistant Professor, School of Accounting and Finance, Hong Kong Polytechnic University. Address: M610, Li Ka Shing Tower, Hong Kong Polytechnic University, Hung Hom, Kowloon, Hong Kong. Email: affemezz@polyu.edu.hk. Claims and errors are the sole responsibility of this author.

[1] Ley de Defensa de la Competencia (Ley 27.442) [hereinafter *LDC*]. Passed by the Argentine National Congress on 9 May 2018 and published in the Official Bulletin on 14 May 2018; Decreto Reglamentario 480/2018 of 23 March 2018. This complements the LDC [hereinafter *LDCR*]. Argentina's leniency program ("ALP") has been regulated in Chapter VIII of the LDC.

[2] RICHARD WHISH & DAVID BAILEY, COMPETITION LAW Ch. 1,3,13-16) (Oxford Univ. Press 9th ed. 2018); KEITH N. HYLTON, ANTITRUST LAW: ECONOMIC THEORY AND COMMON LAW EVOLUTION 68-69 (Cambridge Univ. Press 2003); Kai-Uwe Kühn, *Fighting Collusion by Regulating Communication between Firms*, 16 ECON. POL'Y, no. 32, 169, 169-204 (Apr. 2001); Stephen Martin, *Competition Policy, Collusion and Tacit Collusion*, 24 INT'L J. OF INDUS. ORG. 1299, 1299-332 (2006).

[3] RICHARD WHISH & DAVID BAILEY, COMPETITION LAW, Ch. 1,3,13-16 (Oxford Univ. Press 9th ed. 2018).

[4] *Id.*

[5] *See* John M. Connor & Robert H. Lande, *Cartels as Rational Business Strategy: Crime Pays*, 34 CARDOZO L. REV. 427, 456-57 (2012) (Several studies have quantified diverse costs of collusion including "umbrella effects" by which firms outside the cartel end up charging the same prices as the cartel). *See also* John M. Connor & Robert H. Lande, *The Size of Cartel Overcharges: Implications for US and EU Fining Policies,* 51 ANTITRUST BULL. (WINTER) 983, 983-87 (2006).

[6] J. M. Connor, *Global Antitrust Prosecutions of International Cartel: Focus on Asia,* 31 WORLD COMPLETION 575-605, 595 (2002).

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evidence that may incriminate them.[7] Uncovering evidence of cartel conduct has been a major challenge to CAs. Leniency programs have proven instrumental because they are designed precisely to address the problem of detecting and convicting cartels.[8]

In leniency programs, one or more cartel participant is given the opportunity to avoid sanctions if they self-report the anticompetitive conduct.[9] More specifically, a cartel member is offered total, or partial immunity from sanctions in exchange for the member's confession of misconduct and full cooperation with the CA's investigation.[10] In the arsenal available to CAs, this strategy has thus far proved to be a formidable weapon to enforce the cartel prohibition.[11] First implemented by the US Department of Justice ("US DOJ") in 1978, and significantly reformed later in 1993, the US Corporate Leniency Program ("US CLP") has become the most prominent tool guiding cartel law enforcement in the United States.[12] The US DOJ has stressed that, '[t]he Antitrust Division's Leniency Program is its most important investigative tool for detecting cartel activity.'[13]

Over the years, leniency programs have been widely adopted by other countries around the world. As Hammond states, '[t]he single most significant development in cartel enforcement is the proliferation of effective leniency programs.'[14] This expansion of leniency programs globally has been perceived by the business community as a sign of increasingly effective antitrust law enforcement.[15] The European Union implemented its own leniency policy,[16] as did EU member states, Canada, Australia, Japan, the United Kingdom, and others.[17] In Latin America, several countries have followed suit and adopted a leniency

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[7] *See* MASSIMO MOTTA, COMPETITION POLICY: THEORY AND PRACTICE, at 137-230 (Cambridge Univ. Press 2004).

[8] *Id.*

[9] Wouter P.J. Wils, *Leniency in Antitrust Enforcement: Theory and Practice*, 30 WORLD COMPETITION: LAW & ECON. REV. 1 (2013).

[10] *Id.*

[11] Wouter P.J. Wils, *The Use of Leniency in the EU Cartel Enforcement: An Assessment after Twenty Years*, 39 WORLD COMPETITION: LAW & ECONOMICS REV. 3 (2016)

See generally Caron Beaton-Wells and Christopher Tran (eds.), *Anti-Cartel Enforcement in a Contemporary Age: Leniency Religion* (2015, Hart Publishing).

[12] *Coporate Leniency Program*, DEPARTMENT OF JUSTICE CORPORATE LENIENCY PROGRAM, https://www.justice.gov/atr/file/810281/download (last visited May 16, 2017).

[13] *Id.*

[14] Scott D. Hammond, Attorney General for Criminal Enforcement, *Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations*, JUSTICE NEWS (Mar. 29, 2006).

[15] Joan Ramón Borrell et al., *Evaluating Antitrust Leniency Programs*, XARA DE REFERENCIA EN ECONOMIA APLICADA (2012), http://www.ub.edu/ubeconomics/wp-content/uploads/2012/02/XREAP2012-01.pdf.

[16] *Commission Notice on Immunity from fines and reduction of fines in cartel cases*, OFFICIAL J. OF EUR. UNION ¶ 13, (Aug. 12, 2006)

https://eur lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:298:0017:0022:EN:PDF. *See also*, M Hellwig & K Hüschelrath, *Cartel Cases and the Cartel Enforcement Process in the European Union 2001-2015: A Quantitative Assessment*, 426-427 (ZEW DISCUSSION PAPER 16-063, WORKING PAPER 2016), https://www.econstor.eu/handle/10419/146903 (concluding that leniency policy is an important and effective tool of contemporary EU cartel policy).

[17] *Members*, INT'L COMPETITION NETWORK MEMBERS HTTPS://WWW.INTERNATIONALCOMPETITIONNETWORK.ORG/MEMBERS/ (LAST VISITED MAY 16, 2019).

policy such as Chile, Colombia, Peru, Brazil and Uruguay.[18] Consistent with international practices, Argentina has now embarked on the challenging, yet promising process of establishing its own leniency program.

In the next section of this article, the characteristics of the ALP will be described including the application process for leniency, the qualification criteria, and the scope of immunity and penalty reductions. In section III, selected features of the ALP will be analyzed critically including the first confessor rule and the extent of the penalty reductions offered to runner-up applicants. Since leniency programs should not only detect, but also deter cartel activity, section IV of this article will look at the ALP's deterrent properties. Deterrence consists of precluding agents from breaking the law—more specifically in this paper, precluding agents from forming new cartels or achieving more stable cartels—by the fear of sufficiently heavy and prompt sanctions.[19] Deterrent effects influence the business conduct of agents *ex-ante* as they anticipate the costs of engaging in unlawful conduct.[20]

This article concludes that the ALP has, in general terms, adhered to international practices on leniency policy. The ALP offers to the first confessor (the first qualified applicant) ample immunity from sanctions, including exemptions from statutory civil fines, imprisonment and other criminal sanctions; such immunity is granted automatically. The first confessor may also receive immunity from civil antitrust lawsuits. To qualify as the first confessor, the applicant must satisfy less stringent requirements than those sought by the EU leniency program, and, especially, by the US CLP.

Perhaps the most important point made by this article draws from the ALP's treatment of runner-up applicants (second confessor, third confessor, and so on). While economic research is not incompatible with the first confessor being conferred a highly attractive immunity package, the same research also indicates that runner-up applicants receive only a minor, or no reduction in sanctions at all. Treating runner-up applicants too generously would reduce expected sanctions, thereby diminishing critically needed deterrent effects. The risk is that an aggressive leniency strategy, originally meant to achieve increased cartel detection and conviction, may well end up encouraging a more rapid formation of new cartels or causing ongoing cartels to become more stable. Hence, a leniency policy that reduces sanctions substantially for the benefit of runner-up applicants may ultimately prove counterproductive from a social perspective. This is a policy that the ALP has embraced.

On this basis, this article recommends that the chief enforcer of the LDC, the Competition Tribunal, resolve leniency applications submitted by runner-up applicants cautiously when reducing sanctions. In addition, economic research indicates that enforcers should undertake not only leniency but also non-leniency investigations. Non-leniency investigations are important because leniency programs are less effective in breaking up the most successful cartels. Non-leniency investigations are also capable of instilling the fear of detection and punishment, which is a crucial precondition for deterrence.

This article adds to the general discussion of comparative leniency policies, and more specifically, to our current understanding of the ALP.

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[18] *Id.*

[19] P Buccirossi et al., *Measuring the Deterrence Properties of Competition Policy: The Competition Policy Indexes*, 7 J. of Competition L. & Econ. 7(1) 165, 168 (2011).

[20] *Id.*

II. CHARACTERISTICS OF THE LENIENCY PROGRAM

A. Institutional Setting and Leniency Applications

Article 1 of the LDC states the standard antitrust prohibitions, namely the prohibition of anticompetitive agreements, unilateral conducts (abuse of a market dominant position), and concentrations that restrict competition.[21] A government agency called the National Competition Authority ("NCA") will be in charge of enforcing these prohibitions.[22] The NCA has been designed to function and make decisions independently.[23] The NCA will be composed of a Competition Tribunal ("Tribunal") and two Secretariats.[24] One Secretariat will conduct investigations on antitrust violations, while the other will perform the control of mergers.[25] The Tribunal will be the chief enforcer of the LDC.[26] It will manage and resolve the competition cases, impose sanctions on violators, and issue remedy orders. The Tribunal will also administer the ALP, and, to this purpose, hear and decide on applications for leniency.[27]

The specific legal rules governing the ALP are contained in Chapter VIII of the LDC.[28] Applications for leniency will only be accepted by the Tribunal when the applicant denounces hard-core cartel activities.[29] Such activities have been listed in Article 2 of the LDC and involve agreements between competitors that fix prices, restrict supply, allocate markets or rig bids.[30] According to the LDC, these agreements constitute an "absolute restriction" of competition and are presumed to be anti-competitive.[31] They are null and void, yielding no legal effects.[32] Aside from the conducts listed in Article 2 of the LDC, the ALP will apply to no other violation of the LDC.[33]

Leniency applications will be lodged before the Tribunal any time prior to the notification under Article 41 LDC.[34] This is a notification made by the Tribunal in the course of an investigation whereby the Tribunal informs the alleged violators that a competition case has been opened against them and gives details of the alleged violation.[35] Applications that are submitted after such notification has been served are ineligible and will be rejected by the

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[21] Antitrust Law (Law No. 27442) (Arg.).

[22] Antitrust Law (Law No. 27442) (Arg.) art. 18, 19.

[23] *Id.*

[24] Antitrust Law (Law No. 27442) (Arg.) art. 18.

[25] Antitrust Law (Law No. 27442) (Arg.) art. 30, 31.

[26] Antitrust Law (Law No. 27442) (Arg.) art. 18, 28.

[27] Antitrust Law (Law No. 27442) (Arg.) art. 28(a), 60.

[28] Antitrust Law (Law No. 27442) (Arg.) art. 60, 61.

[29] Antitrust Law (Law No. 27442) (Arg.) art. 60.

[30] Antitrust Law (Law No. 27442) (Arg.) art. 1, 2.

[31] Antitrust Law (Law No. 27442) (Arg.) art. 2.

[32] *Id.*

[33] *Id.*; Leniency in Antitrust Enforcement, *supra* note 9 (illustrating an inconsistency with current practices in the United States and Europe where leniency policy has been utilized to combat no more than hard-core cartels).

[34] Antitrust Law (Law No. 27442) (Arg.) art. 60.

[35] Antitrust Law (Law No. 27442) (Arg.) art 60, 41 (describing that the notified person or entity will then be entitled to prepare a defense against those allegations).

Tribunal.[36] In order to determine and manage the priority order of leniency applications, the Tribunal will create a National Registry.[37] This Registry will operate pursuant to the prescriptions set down in the LDC, LDCR and any other rules laid down by the Tribunal.[38]

The applicant for leniency can be a legal person (e.g., a company), or a physical person (e.g., a director of the company). Article 60 of the LDC permits leniency applications submitted by, "[a]ny physical or legal person that has or is engaged in conduct that contravenes Article 2 of this law…."[39] There seems to be no restrictions for an applicant to be eligible for leniency even if, at the time of submitting the application, the applicant was no longer a member of the reported cartel. Moreover, it does not matter whether the cartel being reported is still active at the time of the application, or instead, has already ceased to exist.

However, a joint application by two or more cartel participants is not permitted.[40] The application must be submitted on an individual basis. The exception to this rule is when an individual who is working for the company decides to apply for leniency by adding his/her name to the employer's application.[41] This is a scenario where the company applies for leniency (through a corporate application) in an attempt to gain leniency not just for the company, but for its employees as well. However, those natural persons included in the corporate application may benefit from leniency only if each individual meets the qualification criteria required for the granting of immunity, or penalty reductions, under Article 60 of the LDC.[42]

Importantly, the LDC has included provisions that preserve the confidentiality of the information contained in the application for leniency.[43] Unless the applicant explicitly authorises otherwise,[44] the Tribunal may not disclose the identity of the applicant or the evidence and other information submitted by the applicant to the Tribunal; the information must be kept confidential.[45] This confidentiality requirement also applies to materials requested to the Tribunal by other courts.[46] For example, court orders issued in civil suits for damages due to the cartel activities. If the Tribunal rejects an application for leniency, the confidentiality rule still applies.[47] The contents of the rejected application is inadmissible as evidence in court and may not be used by the NCA in its investigations.[48]

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[36] Antitrust Law (Law No. 27442) (Arg.) art. 60.

[37] LDCR, Decreto Reglamentario (Law No. 480/2018) (Arg.) art. 60(II) (*Registro Nacional de Marcadores*).

[38] *Id.*

[39] Antitrust Law (Law No. 27442) (Arg.) art. 60.

[40] Antitrust Law (Law No. 27442) (Arg.) art. 61.

[41] *Id.*

[42] *Id.* (the qualification criteria for the granting of immunity from, or reduction in, sanctions will be outlined in the next subsection of this article).

[43] Antitrust Law (Law No. 27442) (Arg.) art. 60(d); LDCR, *supra* note 37, at art. 60III(IV).

[44] Antitrust Law (Law No. 27442) (Arg.) art. 60(d).

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.*

B. Benefits from Leniency: Qualification Requirements

The ALP offers two types of benefits: (1) the immunity from sanctions or (2) a reduction in sanctions.[49] To qualify for immunity, the applicant must satisfy each and all the seven conditions listed below:

(1) the applicant is the first-in-time provider of relevant information or evidence to the Tribunal;[50]

(2) the Tribunal has no information in relation to the antitrust violation; or if an investigation into the applicant's cartel is underway, the Tribunal has insufficient evidence of the antitrust violation at the time of the application;[51]

(3) the applicant must adduce information or evidence that, in the view of the Tribunal, is admissible, credible and adequate to determine the existence of the antitrust violation confessed;[52]

(4) the applicant must cease and desist from the unlawful conduct (unless the Tribunal decided differently in order to protect the investigation);[53]

(5) the applicant must provide full, continuous and diligent cooperation, starting from the time of the submission of the application until the end of the proceedings;[54]

(6) the applicant must not hide, destroy or falsify evidence of the anticompetitive conduct prior to or following the submission of the application for leniency;[55] and,

(7) the applicant has not divulged or made public his intention to apply for leniency, except for the case in which the applicant had divulged information to other competition authorities.[56]

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49 Antitrust Law (Law No. 27442) (Arg.) art. 60(a), 60(b).
50 Antitrust Law (Law No. 27442) (Arg.) art. 60(a)1.
51 *Id.*
52 *Id.*
53 Antitrust Law (Law No. 27442) (Arg.) art. 60(a)(2).
54 Antitrust Law (Law No. 27442) (Arg.) art. 60(a)(3).
55 Antitrust Law (Law No. 27442) (Arg.) art. 60(a)(4).
56 Antitrust Law (Law No. 27442) (Arg.) art. 60(a)(5).

The rules stated in the LDCR add that the applicant will have to explicitly recognize not only the applicant's participation in one or more of the conducts listed in Article 2 of the LDC, but also the applicant's duty to cooperate with the Tribunal throughout the leniency proceedings.[57] The extent of such duty to cooperate will ultimately be decided by the Tribunal and a breach of this scope constitutes sufficient cause for the Tribunal to reject the application for leniency.[58]

When requirements 1 through 3 are not fully met, (e.g., the company is a second-in-time applicant) the application for immunity will fail. Nevertheless, it is within the Tribunal's discretion to allow an applicant a reduction in sanctions. The Tribunal may afford the applicant sanction reductions if the applicant provides new evidence that has not already been produced by the Tribunal in addition to satisfying the other requirements listed in Article 60(a) of the LDC.[59]

C. Sanctions Against Participants in Hard-Core Cartels

In order to understand the scope of the immunity and penalty reductions offered by the ALP, a brief overview of the powers given to the Tribunal to impose sanctions on hard-core cartels and on other anticompetitive conduct is necessary.

The Tribunal may impose statutory civil fines, which may take the form of a fine imposed on a physical person, or imposed on a legal entity, such as a corporation.[60] Article 55(b) of the LDC sets out two formulas to calculate the total fine amount.[61] In the first formula, the fine may equal up to 30% of the violator's yearly turnover, multiplied by the number of years of anti-competitive conduct. This amount cannot surpass thirty percent of the yearly, national and consolidated turnover of the violator. In the second formula, the fine may equal double the economic benefit obtained by the violator from the unlawful conduct. The Tribunal will calculate both of the formulas, whichever is the higher amount is the fine that will be used. But if, for some reason, neither of the formulas can be calculated, the LDC sets a fine cap of 200 million *Unidades Móviles*.[62]

In order to determine the fine amount to be imposed, the Tribunal will consider several factors: the gravity and duration of the violation, the harm caused, gross illegal profit, the deterrent effects, the value of the assets involved, the violator's market share and size of the affected market, the violator's intent, and the degree of cooperation by the violator with the Tribunal and/or the Secretariat in the antitrust investigation.[63]

In addition to the statutory civil fine, the Tribunal may also issue disqualification orders affecting a violator for a period of up to ten years.[64] The cartel's victims are entitled to obtain redress from any harm they were caused by filing a stand-alone, or a follow-on, lawsuit

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[57] LDCR, *supra* note 37 at art. 60 (III).

[58] *Id.*

[59] Antitrust Law (Law No. 27442) (Arg.) art. 60(b)1.

[60] Antitrust Law (Law No. 27442) (Arg.) art. 55.

[61] Antitrust Law (Law No. 27442) (Arg.) art. 55(b).

[62] Antitrust Law (Law No. 27442) (Arg.) art. 55(b), 85 (the fine was originally capped at 200 million *Unidades Móviles* [1 *Unidad Móvil* = 20 *AR$*]; this cap will be adjusted yearly following the consumer price index IPC).

[63] Antitrust Law (Law No. 27442) (Arg.) art. 56.

[64] Antitrust Law (Law No. 27442) (Arg.) art. 58.

in civil court.[65] The participation in hard-core cartel activities can also give rise to criminal liability which could result in imprisonment. However, criminal liability is governed under the Argentine Penal Code, therefore, criminal liability may only be determined by proceedings in a Criminal Court, but not before the Tribunal.[66]

Importantly, Article 55 of the LDC starts with the statement, '[t]he human or legal persons who do not comply with the provisions of this law will be subject to the following sanctions....'[67] This rule empowers the Tribunal to impose not only corporate fines against cartel participants, but also fines against the natural persons who engaged, or participated, in the prohibited conduct.[68] It has been recommended that the Tribunal use this statutory power to impose fines on physical persons, like corporate directors, especially in hard-core cartel cases.[69]

It is worth noting that physical persons can be subject to other types of sanctions in addition to fines, such as, disqualification orders,[70] damages[71] and criminal sanctions.[72] Criminal sanctions against a physical person can result in imprisonment of up to two years for violating Article 300 of the Argentina Penal Code,[73] and/or under Article 309 of the Argentine Penal Code up to four years of imprisonment, a fine, and up to five years of disqualification for the violation.[74]

A physical person can also be found to be jointly liability for the corporate fine imposed under the first part of Article 58 of the LDC.[75] In a joint liability situation the Tribunal imposes a corporate fine and the liability for the payment of such a fine turns out to be jointly held by the cartel participant and its representatives, who are generally physical persons.[76] More specifically, a legal entity's representatives will be jointly liable to pay for the corporate fine if their conduct has contributed, assisted, or permitted the antitrust violation, be it by action, or culpable omission of duties. A legal entity's representative could include one, or all, of the following: directors, managers, controllers, and legal representatives.[77]

Although the sanctions imposed on physical persons pursuant to Article 58 of the LDC's joint liability fine appear to address a different scenario than the sanctions on physical persons imposed pursuant to Article 55(b) of the LDC, this distinction does not emerge with

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[65] Antitrust Law (Law No. 27442) (Arg.) arts. 62-65.

[66] Código Penal (Criminal Code Act No. 11.179, 1984) (Arg.) arts. 300 and 309.

[67] Antitrust Law (Law No. 27442) (Arg.) art. 55; LDCR, supra note 37 at art. 56.

[68] *See Argentina – Peer Review of Competition Law and Policy*, §§ 2.1.1, 6.3, 13 [hereinafter *OECD 2006 Report*], OECD (2006) www.oecd.org/daf/competition/Argentina-CompetitionLawPolicy.pdf. The same interpretation was made in the OECD Peer Review Study of competition law and policy in Argentina based on Competition Act (No. 25.156) (Arg.) art. 46 of 1999. "Finally, the law permits the imposition of fines on natural persons for conduct violations subject to the same maximum [as per fines on legal entities], but no such fines were imposed in the recent cases."

[69] *Id.*

[70] Antitrust Law (Law No. 27442) (Arg.) art. 58.

[71] Antitrust Law (Law No. 27442) (Arg.) arts. 62-65.

[72] Código Penal, *supra* note 68, at arts. 300 and 309.

[73] *Id.* at art. 300.

[74] *Id.* at art. 309.

[75] Antitrust Law (Law No. 27442) (Arg.) art. 58.

[76] *Id.*

[77] *Id.*

sufficient clarity from the text of the LDC.[78] Article 55(b) of the LDC entails the imposition of a monetary sanction on a physical person who engaged in anticompetitive conduct, whereas Article 58 of the LDC draws from a jointly liable corporate fine. Clarification will be needed as to how the individual fine in Article 55(b) of the LDC, on the one hand, and the jointly liable corporate fine in Article 58 of the LDC, on the other hand, may interact in the practice of enforcement, as this point is relevant, among other things, for the purposes of leniency and deterrent effects. A clarification as to the full range of persons encompassed in the term "physical person" as stated in Article 55 of the LDC will also be helpful.

D. Scope of the Immunity and Penalty Reductions

The first confessor—who is the first applicant that satisfied the qualification criteria in Article 60(a) of the LDC, will receive immunity from sanctions.[79] Under this *immunity*, the first confessor (a legal entity [e.g., the company] or a physical person [e.g., a company's director]) will be automatically and fully exempted from the statutory civil fine that otherwise would have been imposed by the Tribunal pursuant to Article 55(b) of the LDC.[80]

The first confessor will also automatically gain immunity from any imprisonment, and gain immunity to any criminal sanctions arising under Articles 300 and 309 of the Argentine Penal Code.[81] At the discretion of the Tribunal, this first confessor may also be fully exempt from paying for any damages arising from civil lawsuits.[82] However, this latter benefit will not follow if (1) the victim is a direct or indirect customer or supplier, or (2) the victim is another person and the members of the confessor's cartel are unable to pay the full extent of damages.[83] In this latter scenario, if cartel participants, other than the first confessor, find themselves in a situation of impossibility to fully redress the harm caused by the cartel activity, the first confessor will not be allowed to escape from the joint liability of cartel participants in relation to the payment of civil damages.[84]

Article 60(b) of the LDC grants *penalty reductions* to qualified runner-up applicants. The Tribunal will have the discretion to grant between 20 and 50% reduction in the statutory civil fine that otherwise would have applied absent leniency.[85] The ALP permits the benefit of immunity from any imprisonment and other criminal sanctions arising under Articles 300 and 309 of the Argentine Penal Code.[86] This immunity appears to be granted to the runner-up applicants in the same terms as they are granted to the first confessor.[87] This means that as

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[78] *Compare* Law Antitrust Law (Law No. 27442) (Arg.) art. 58., *with* Antitrust Law (Law No. 27442) (Arg.) art. 55(b).

[79] Antitrust Law (Law No. 27442) (Arg.) art. 60(a) (the LDC uses the word "exemption" in place of "immunity").

[80] *Id.*

[81] Antitrust Law (Law No. 27442) (Arg.) art. 61.

[82] Antitrust Law (Law No. 27442) (Arg.) art. 65.

[83] *Id.*

[84] Antitrust Law (Law No. 27442) (Arg.) art. 65.

[85] Antitrust Law (Law No. 27442) (Arg.) art. 60(b).

[86] Antitrust Law (Law No. 27442) (Arg.) art. 61.

[87] *Id.*

far as criminal sanctions are concerned, the LDC has made no clear distinction between first and runner-up confessors, the exemptions applying to all of them the same way.[88]

Article 65 of the LDC allows the Tribunal to authorise discretional reductions in the amount of damages resulting from civil antitrust lawsuits to runner-up applicants.[89] This benefit will be subject to the same restrictions as those imposed on immunity recipients who are customers, suppliers, or who share joint liability because they are cartel members.[90]

If an applicant in the course of leniency proceedings acknowledges that it has committed a second antitrust violation, this applicant may be granted immunity from sanctions in relation to this second antitrust violation.[91] This immunity for the second violation is still contingent on satisfying all the qualification requirements from point 1 to point 7 listed above under subsection 60(a) of the LDC. In addition, if the applicant did not qualify for immunity for its first violation, the applicant will be entitled to receive an extra benefit which consists of a one-third reduction of the fine that would have corresponded to the first self-reported antitrust violation.[92]

The rules governing the ALP are unclear in a few instances. For example, immunity for the first confessor does not cover all the possible sanctions that could be imposed by the Tribunal. Moreover, it is apparent that the Tribunal has powers to impose disqualification orders, but the extent to which such orders may be included in the immunity package, or penalty reductions, is not evident either.

III. ANALYSIS OF THE LENIENCY PROGRAM'S KEY FEATURES

A. Application for Leniency by Physical Persons

The ALP entitles not only legal entities, but also physical persons to apply for leniency on their own behalf. This feature of the ALP is not found in the EU leniency program, which does not include the case of applications made by physical persons. As Wils explains, "As the European Commission has currently no powers to impose penalties on individuals other than undertakings, the grant of immunity to an undertaking does not concern its directors or employees and there exists no other immunity policy for individuals."[93]

Unlike the EU leniency policy, the US DOJ created in 1994 an Individual Leniency Program, which has been administered in concert with the US CLP. This Individual Lenience Program entitles individuals working for a company to come forward on their own behalf and become first confessors.[94] However, if those individuals would rather join in the company's confession, the US CLP has been designed to allow such possibility. The US CLP confers a more lenient treatment not only to the company applicant, but also to all its officers, directors, and employees who come forward in the company's confession. They must admit their

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[88] *Id.*

[89] Antitrust Law (Law No. 27442) (Arg.) art. 65.

[90] *Id.*

[91] Antitrust Law (Law No. 27442) (Arg.) art. 60(c).

[92] *Id.*

[93] Leniency in Antitrust Enforcement, *supra* note 9.

[94] *Individual Leniency Policy*, U.S. DEP'T JUSTICE (Aug. 10, 1994) https://www.justice.gov/atr/individual-leniency-policy.

involvement in the anticompetitive conduct, and cooperate fully with the DOJ's investigation.[95]

The LDC does empower the Tribunal to impose fines and disqualification orders on physical persons.[96] In turn, the ALP allows physical persons to apply for leniency on their own.[97] This is congruent with the direction adopted by the US DOJ. Moreover, the ALP sets out a mechanism for joint application whereby individuals working for the company may join in the company's application, again similar to the US leniency policy. Unlike the US CLP, the joint application contemplated in the ALP has been made available to a narrower set of individuals. The US CLP confers immunity to any employee of the company who joined the company's application, whereas the benefits from the ALP's regime of joint application apply only to those individuals working for the company as representatives.[98]

It has been suggested that the range of persons eligible to profit from the ALP's system of joint application should be widened to encompass not only the company's representatives, but also any employee who is willing to confess participation in the cartel and fully cooperate with the Tribunal's investigation. Commenting on an early draft of the LDC, the International Bar Association stressed this point as follows:

> In the US, UK and other countries, individuals have sufficient incentives to cooperate because of the threat of being subject to individual fines. The same incentives exist in Argentina and, thus, extending blanket immunity to individuals employed by a corporate cartel participant should not have an adverse effect on the National Competition Authority's ability to obtain cooperation from the relevant officers and employers.[99]

A shortcoming in the ALP may stem from the absence of a more elaborated definition of the term "physical persons" in the LDC. This term has been stated at the forefront of article 55 and article 60 of the LDC regarding sanctions and the ALP, respectively. As defined in such provisions, whether the term 'physical persons' encompasses solely the group of individuals who are representatives of a company (e.g., directors, managers, controllers and legal representatives) or, more broadly, refers to any physical person working for a company has not been obvious.

If all company's employees were included in the term "physical persons," two possible scenarios would follow. First, any employee of a company, regardless of the role they performed working for it, would be entitled to apply for an individual application of leniency and entitled to qualify as first confessor or runner-up applicant under Article 60 LDC. Second, in the alternative, any employee could choose to join in the company's application for leniency after satisfying the criteria set down by the LDC. These options made available to the employees of a cartel participant would be justified to the extent those

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[95] *Id.*

[96] *See* Part II, II §§ A,C of this article.

[97] *Id.*

[98] Antitrust Law (Law No. 27442) (Arg.) art. 61.

[99] Antitrust Committee, International Bar Association, *Cartels, Mergers and Litigation Working Groups Comments on the Argentine Antitrust Draft Bill*, at 9, (Oct. 14, 2016) https://www.ibanet.org/Document/Default.aspx?DocumentsUid=ab4576e8-d750-4ded-ae82-387f99f6a44.

very employees can be subject to individual sanctions due to their participation in cartel activities.

B. Adoption of the First Confessor Rule

The ALP offers immunity only to the first applicant that meets the qualification criteria set out in Article 60(a) of the LDC.[100] Immunity will be granted even if the confessor applied for leniency after the Tribunal had started an investigation into the applicant's cartel.[101] Granting immunity even after the Tribunal had begun an investigation is a valuable feature of the ALP that finds consistency with international practices.

In the past, the US CLP had granted immunity to the first confessor solely on a discretionary basis and only if the DOJ's investigation had not been started. However, this state of things changed following the 1993 reform of the US CLP.[102] Since 1993, the US DOJ has offered to the first confessor two types of leniency benefits: either (1) Type A Leniency, or (2) Type B Leniency.[103] In Type A Leniency, the first confessor receives immunity automatically if the confession is made before the DOJ acquired information or collected evidence from any source (such as from an anonymous complainant, a private civil action or a press report) about the existence of the cartel, and the applicant meets the qualification requirements. In Type B Leniency, the DOJ has already received information or collected evidence about the cartel's operations before the cartel member's confession takes place.[104] In this scenario, the first confessor may still obtain immunity, but it is not guaranteed as the DOJ will administer such immunity on a discretional basis.

The changes introduced by the 1993 reform of the US CLP, namely automatic immunity under Type A Leniency and the possibility of a first confessor obtaining Type B Leniency, improved the performance of the US leniency program significantly. From 1978 to 1993, the DOJ received, on average, one application for leniency per year. Those applications neither led the DOJ to detect any international cartels, nor any large domestic cartels. However, after the 1993 reform, the leniency application rate experienced a twenty-fold increase, and those leniency investigations had a meaningful impact.[105]

Type B Leniency is justified because the probability that a cartel member will apply for leniency increases significantly after the CA has started an investigation.[106] The beginning of an investigation increases both the probability that a cartel member will be caught and convicted, and the expected cost of sustaining the cartel. At this stage, it becomes more likely that a cartel member will give up its participation in the cartel especially if immunity is offered.[107] In terms of cost savings from law enforcement, Type A Leniency will yield greater savings to the CA than Type B Leniency. The CA prefers to obtain confessions

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[100] Antitrust Law (Law No. 27442) (Arg.) art. 60.

[101] Antitrust Law (Law No. 27442) (Arg.) art. 60(a).

[102] DEPARTMENT OF JUSTICE CORPORATE LENIENCY PROGRAM, *supra* note 12.

[103] *Id.*

[104] *Id.*

[105] Hammond, *supra* note 14.

[106] Massimo Motta & Michele Polo, *Leniency Programs and Cartel Prosecution,* 21 INT'L. J. OF INDUS. ORG. 347-379 (2003); Zhijun Chen & Patrick Rey, *On the Design of Leniency Programs* 56 THE J. OF L. & ECON. 917-957 (Nov. 2013).

[107] *Id.*

by cartel members as early as possible before it has begun any enforcement efforts on its own volition.[108] This is perhaps the reason why the Type A Leniency under the US CLP has been designed to provide a stronger incentive to self-report than the Type B Leniency.[109]

Looking at the first confessor rule in the European Union, the EU Leniency Notice states that:

> The Commission will grant immunity from any fine which would otherwise have been imposed to an undertaking disclosing its participation in an alleged cartel affecting the Community if that undertaking is the first to submit information and evidence which in the Commission's view will enable it to: (a) carry out a targeted inspection in connection with the alleged cartel; or (b) find an infringement of Article 81 EC [now Article 101 TFEU] in connection with the alleged cartel.[110]

Here, it does not really matter whether the first confessor submits its application before, or after, the start of an investigation by the Commission. In either situation immunity may be granted under the same incentives and qualification criteria.[111]

Under the ALP, immunity will be granted automatically to the first confessor.[112] Unlike the US CLP, which makes a distinction between Type A and Type B leniency, the ALP makes no such distinction. As it stands today, and compared with the US CLP, the ALP offers automatic immunity to the first confessor either before, or after the Tribunal has gathered information or evidence about the confessor's cartel. This ALP regime comes closer to the system currently in force in the European Union.

It is worth noting that a CA's antitrust investigation may target a cartel that is still active or a cartel that has already broken up. The EU enforcement experience has shown that many qualified applicants for leniency came forward well after the cartel dissolved.[113] It has been reported that out of 113 cartels detected by the EU Competition Commission between 2001 and 2015, fifty-seven cartels were detected when they were still active, their breakdown caused, not by natural reasons, but by the Commission's enforcement actions.[114] The other fifty-six cartels, however, had cracked for natural reasons prior to the Commission's detection. These reasons included the entry of new players to the market, disputes among

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[108] MASSIMO MOTTA, COMPETITION POLICY, *supra* note 7.

[109] P. Chappaatte & P. Walter, *United Kingdom,* THE CARTEL AND LENIENCY REV. 345-46 (2017) (Dissimilar incentives are also applicable to first confessors in the UK leniency program. Type A Immunity and Type B immunity for first confessors; Type C penalty reductions for runner-up applicants).

[110] *Commission Notice on Immunity from fines and reduction of fines in cartel cases,* OFFICIAL J. OF EUR. UNION ¶ 8, (Aug. 12, 2006) https://eur lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:298:0017:0022:EN:PDF (illustrating that the EU had not guaranteed the full amnesty from sanctions to first confessor before the 2002 reform) (straight brackets added).

[111] *Id.* ¶10-13.

[112] *See* §§ II.B., II.D. of this article.

[113] Michel Hellwig & Karl Hurschelrath, *Cartel Cases and the Cartel Enforcement Process in the European Union 2001-2015: A Quantitative Assessment,* 62 The Antitrust Bulletin 400-38 (2017), https://journals.sagepub.com/doi/10.1177/0003603X17708357.

[114] *Id.*

cartel member and disruptions caused by new technologies, among other reasons for the natural dissolution of cartels.[115]

C. Requirements to Qualify as First Confessor

The ALP has less strict criteria for first confessors than the US CLP when determining if they will be given leniency. For example, to qualify for Type A Leniency under the US CLP, there are two conditions, among a set of conditions, that must be satisfied by the applicant: "[w]here possible, the corporation makes restitution to injured parties" and "[t]he corporation did not coerce another party to participate in the illegal activity and clearly was not the leader, or originator of, the activity."[116] Neither of these two conditions has been used by the ALP in the LDC.

Under the LDC and ALP, restitution is not a condition for the applicant to qualify as the first confessor.[117] The first confessor's civil responsibility to the victims of the cartel conduct would be decided by a civil court, unless the Tribunal had given the first confessor an exemption from paying civil damages.[118] In contrast, the US CLP does not grant the first confessor immunity from civil antitrust lawsuits. Even in those instances where the first confessor is not required to pay restitution, the general rule has been that the first confessor could still be liable to compensate private plaintiffs in civil court for damage claims.[119]

However, the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 ("ACPERA") has limited the level of responsibility for the first confessor under the US CLP. ACPERA limited the first confessor's level of civil responsibility by disallowing both joint liability and treble damages to be entered against the first confessor. In the words of the ACPERA, the claimant cannot recover damages exceeding, "the portion of the actual damages sustained by such claimant which is attributable to the commerce done by the applicant in the goods or services affected by the violation."[120] If the first confessor wants to avoid both joint liability and treble damages, they must also meet ACPERA's qualification criteria.

The ALP is also more lenient than the US CLP in its treatment of cartel ringleaders and of coercion situations exercised by cartel members. The ALP empowers the Tribunal to grant immunity regardless of whether the first confessor has been the single leader of the cartel, or has coerced another member to participate in the illegal activity.[121] To an extent, the APL has mimicked the EU leniency program which does not preclude the cartel ringleader

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[115] *Id. See*, Andreas Stephan, *An Empirical Assessment of the European Leniency Notice*, 5 J. OF COMPETITION L. & ECON. 537-61, 544-45 (2009). A high percentage of the leniency applications under the EU Leniency Notice submitted during the period 1996-2007 also involved a cartel that had ceased to exist; the author describes EU leniency cases and examines the reasons why an applicant would denounce a cartel that had already ceased to exist.

[116] DEPARTMENT OF JUSTICE CORPORATE LENIENCY PROGRAM, *supra* note 12, § A.

[117] Antitrust Law (Law No. 27442) (Arg.) art. 60(a).

[118] Antitrust Law (Law No. 27442) (Arg.) art. 65.

[119] DEPARTMENT OF JUSTICE CORPORATE LENIENCY PROGRAM, *supra* note 12.

[120] *See Frequently Asked Questions About the Antitrust Division's Leniency Program and Model Leniency Letters*, DEPT. OF JUSTICE 18, pg. 18 www.justice.gov/opa/blog-entry/file/933351/download (last visited May 16, 2019) (describing ACPERA s213(a)).

[121] Antitrust Law (Law No. 27442) (Arg.) art. 60(a).

from applying either.[122] But the UE leniency program does reject applicants that have acted coercively within the cartel, "[a]n undertaking which took steps to coerce other undertakings to join the cartel or to remain in it is not eligible for immunity from fines. It may still qualify for a reduction of fines...."[123] Again, Article 60(a) of the LDC does not enumerate an eligibility condition requiring the absence of coercion.

D. Leniency for Runner-Up Applicants

Leniency programs that offered highly attractive reductions in sanctions have shown higher cartel detection rates. However, strong sanction reductions also create problems of cartel deterrence. This is undesirable because leniency programs that yield limited deterrent effects are less effective in reducing the rate of cartel formation or persistence.[124] The danger is that leniency benefits, if not well designed, may increase cartel detection at the expense of cartel deterrence.[125] It is within this rationale that the question of how much leniency should be granted to the first confessor, on the one hand, and to the runner-up applicants, on the other hand, has proved controversial. A proposed way of dealing with this problem has been for leniency programs to provide strong incentives only to the first confessor and less attractive deals to runner-up applicants.[126]

Nevertheless, international practices on runner-up applicants have differed. The EU Leniency program allows for a penalty reduction in relation to "those undertakings that provide the Commission with evidence that adds significant value to that already in the Commission's possession."[127] The first company in providing this evidence will benefit from a fine reduction in the range of 30 to 50%. The second company will benefit from a reduction of 20 to 30%, whereas the fine reduction for later recipients will be no more than 20%.[128] Empirically, the work of Hellwig and Hüschelrath reports that fine reductions to runner-up applicants in the EU from 2001 to 2015, on average, amounted to 29%; from 2011 to 2015, the average fine reduction was 32%.[129] In Broos et al., the average fine reduction equaled to

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[122] G Spagnolo & C Marvão, *Cartel and Leniency: Taking Stock of What We Learnt*, § IV.C (WORKING PAPER Jan. 16, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2850498 (illustrating that experimental studies suggest that this policy of inclusion of ringleaders is preferred from the perspective of cartel deterrence, although available evidence is not yet conclusive).

[123] *Commission Notice on Immunity*, *supra* note 110.

[124] Joseph E. Harrington Jr & Myong-Hun Chang, *When Can We Expect a Corporate Leniency Programs to Result in Fewer Cartels?* (May 2015) 58 J. OF LAW & ECON. 417-449 (May 2015).

[125] *Id.*

[126] *Id.*

[127] Commission Notice on Immunity, *supra* note 110.

[128] *Id.* ¶ 26.

[129] Michel Hellwig, *supra* note 113. In the UK, runner-up applicants can receive a reduction of up to 50 percent of the total financial penalty that would have been imposed under the UK Competition Act. Moreover, it is within the CA's discretion to grant immunity in relation to criminal sanctions or director's disqualification orders in favor of runner-up applicants, P. Chappaatte, Cartels and Leniency Review- United Kingdom Chapter, SLAUGHTER & MAY 345-46 (Jan. 2017) http://www.slaughterandmay.com/what-we-do/publications-and-seminars/publications/client-publications-and-articles/t/the-cartels-and-leniency-review-united-kingdom-chapter//.

nearly 38% between May 2004 and May 2014.[130] In some cases, even when no applicant had qualified for immunity, cartel members were nonetheless able to qualify for a reduction in fines.[131]

Unlike the EU leniency policy, the scope of the US CLP is narrower so that no applicants other than the first confessor will be accepted.[132] Those companies or individuals, other than the first confessor, that engage in cartel activities may nonetheless still benefit from a penalty reduction in plea or cooperation agreements negotiated within the frame provided by the US Sentencing Guidelines. As Wils explains, "[t]he U.S. Department of Justice's practice is to agree cooperation discounts with an average in the order of 30 to 35 [percent] for companies that are the second to cooperate ... [a] third cooperating company receives a significantly lower discount, the fourth even less, and so on."[133]

The treatment of runner-up applicants in the ALP resembles more closely the EU model, rather than the US model. The ALP states that those applicants that do not qualify for immunity under Article 60(a) of the LDC may still receive a reduction in sanctions provided that they present additional evidence not yet in the Tribunal's possession, fully cooperate with the Tribunal's investigation, and meet the qualification criteria.[134] As presented in the LDC, the ALP offers runner-up applicants a fine reduction of 20 to 50%.[135]

In order to do so, the Tribunal must first set the amount of the fine applicable to the violator, pre-leniency. In setting the amount of the pre-leniency fine, the Tribunal may consider factors that mitigate the fine, for example the violators cooperation with the antitrust investigation.[136] After completing the calculation of this fine, the Tribunal will decide whether the applicant qualifies for leniency. If so, the magnitude of the fine reduction will be determined by taking into account, among other factors, the chronological order of the applications.[137] With the purpose of determining the order of the submitted applications, the Tribunal will set up a marker system.[138]

It is noted that cooperation with the Tribunal may potentially benefit the violator twice. First, as a factor that mitigates the pre-leniency fine level, and, second, as a necessary requirement to obtain a fine reduction by way of leniency. On top of the statutory civil fine reduction, the ALP offers a runner-up applicant immunity on criminal sanctions (arts. 300 and 309 of the Argentine Penal Code) and partial immunity from civil antitrust lawsuits. A

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[130] *See* S Broos et al., *Analyse Statistique des affairs d'ententes dans l'EU (2004-2014)*, 67 REVUE ÉCONOMIQUE 79, 85 (2016) (Fr.).

[131] Use of Leniency in the EU Cartel Enforcement, *supra* note 11 (describing Case AT.39780 *Envelopes*, where there was no immunity recipient yet four out of the five undertakings fined by the Commission received reductions of between 10 and 50 percent on account of leniency). *See also* Case At.39780-Envelopes, EUROPEAN COMMISSION (Oct. 12, 2014) http://ec.europa.eu/competition/antitrust/cases/dec_docs/39780/39780_3528_6.pdf.

[132] DEPARTMENT OF JUSTICE CORPORATE LENIENCY PROGRAM, *supra* note 12.

[133] Leniency in Antitrust Enforcement, *supra* note 9.

[134] Antitrust Law (Law No. 27442) (Arg.) art. 60(b).

[135] *Id.*

[136] Antitrust Law (Law No. 27442) (Arg.) art. 56.

[137] Antitrust Law (Law No. 27442) (Arg.) art. 60(b)2.

[138] LDCR, *supra* note 37, at art 60(II). *See also* Commission Notice on Immunity, *supra* note 110, ¶ 14-22 (providing an overview of the Marker System in the EU leniency policy).

plaintiffs' inability, due to confidentiality, to access data from leniency applications provides an additional protective measure to runner-up applicants from civil damage lawsuits.[139]

From the vantage point of deterrence, it can be argued that this benefit package offered to runner-up applicants is too generous. As mentioned earlier in this section, granting a substantially lenient treatment to runner-up applicants may reduce expected fines deeply enough to curtail deterrent effects severely.[140] As suggested by economic research, the first confessor should be granted full immunity and runner-up applicants should either get no reduction in sanctions, or reductions should be small enough to protect the leniency program from abuse by cartel members.[141] Even keeping leniency application data confidential by restricting its use in court for the benefit of runner-up applicants has been singled out as a policy making the leniency program less effective from a deterrence standpoint.[142]

The possibility that overly generous leniency programs end up fuelling more collusive than deterrent effects has been voiced in the literature.[143] In terms of Wils, "[a]t the stage of the formation and maintenance of cartels, cartel participants will try to adapt their organization to the leniency policies, so as to minimize the destabilizing effect, or even (if the leniency policies are badly designed) to exploit the leniency polices to their advantage."[144] More generally, the work of Spagnolo and Marvão has examined the relationship between cartel detection and deterrence. The authors stressed that an exceedingly benevolent treatment of runner-up applicants may engender an undesirable discrepancy between the goals of CAs and those of society:

> Using the amount of cases, of successful convictions, or of fines collected as a measure of output or performance creates a natural incentive to win many easy cases, possibly abusing leniency policy (and plea bargaining) by being too generous, so as to win more cases more easily. An overly generous leniency policy offering fine reductions to several reporting firms may make a competition authority appear very successful in terms of the number of cases won, of firms convicted, or amount of fines collected, while reducing social welfare by decreasing cartel deterrence (because firms expect a lenient treatment if caught) and increasing the amount of prosecution costs (because there are more prosecuted cartels).[145]

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[139] *See* § II.D. of this article.

[140] Harrington, *supra* note 124.

[141] H Houba, E Motchenkova and Q Wen, *The Effects of Leniency on Cartel Pricing*, 15 B.E. J. OF THEORETICAL ECON. 2, 351-389 (Apr. 17, 2015). "We provide policy recommendations on how to improve the design of antitrust policy and leniency, how to eliminate adverse EFFects, and what is necessary to prevent cartel formation in the first place ... Both current ex-ante and ex-post leniency programs in most EC countries could be improved by abolishing the reduced fine for the second-reporting firm, similar to the current US system. On the other hand, single (or the first-) reporting firm should be granted full immunity."; Zhijun Chen, *supra* note 106.

[142] P Buccirossi, *supra* note 19 (evaluating critically, among other things, the approach adopted by the EU Directive 2014/104/EU on rules governing actions for damages).

[143] Zhijun Chen, *supra* note 106 (reviewing the literature on potential abuse of leniency policy); Spagnolo, *supra* note 122.

[144] Leniency in Antitrust Enforcement, *supra* note 9.

[145] Spagnolo, *supra* note 122.

This suggests that a high rate of cartel detection resulting from leniency need not lead one to conclude that the program has been working effectively. From the perspective of social welfare, leniency programs should aspire to achieve cartel detection yet in ways that avert concerns of limited deterrent effects. The next section of this article will analyze to what extent deterrence can be measured in real world, and identify a number of policy tools that, working side by side with the ALP, can help alleviate concerns of limited deterrence.

IV. THE EFFECTIVENESS OF LENIENCY PROGRAMS: MITIGATING CONCERNS OF LIMITED CARTEL DETERRENCE

Benefits derived from leniency programs include higher rates of cartel detection and conviction, higher fine amounts, less labor spent on discovering evidence of misconduct, and faster resolution of cases compared with non-leniency cases.[146] Although these observable benefits suggest that lenience programs are effective tools to combat cartels, questions as to the effectiveness of such programs have remained. More particularly, the ability of leniency programs to deter has been contested. A crucial problem has been that deterrence levels are difficult to measure because the actual size of the cartel population in society cannot be observed.[147]

Since cartels are illegal, and thus keep their activities secret, cartel conduct is unobservable and difficult to detect by the CA. Therefore, measuring the extent to which the cartel population in society has been enlarged, maintained or curtailed, following the introduction or modification of a leniency program, has been elusive.[148] While the importance of cartel deterrence is evident, the problem of unobservable cartel population casts doubt on how deterrent effects should be accounted for when evaluating the effectiveness of leniency programs. A higher occurrence of cartel detection—which can be observed and initially deemed to be a positive outcome—may be explained by the leniency program's effectiveness, or by a growing (yet unobserved) number of cartels in society.[149]

Some studies have attempted to measure the cartel population despite it being generally unobservable. For example, Klein measured the impact of the EU leniency program by looking at the competition intensity of an industry, in which it was concluded that leniency programs are effective tools for cartel detection and destabilization.[150] Other empirical studies have looked at short and long-term changes of observable cartel characteristics, such as, the number of cartel members, cartel duration, and scope of the cartel in the country after the introduction or reform of a leniency program. Unfortunately, these studies have been

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[146] Steffen Brenner, *An Empirical Study of the European Corporate Leniency Program*, 27 INT'L J. OF INDUS. ORGANIZATION 6, 639-645 (Nov. 2009); Massimo Motta & Michele Polo, *Leniency Programs and Cartel Prosecution*, 21 INT'L. J. OF INDUS. ORG. 347-379 (2003).

[147] Harrington, *supra* note 124; Spagnolo, *supra* note 122.

[148] *Id.*

[149] *Id.*

[150] Gordon Klein, *Cartel Destabilization and Leniency Programs – Empirical Evidence* (ZEW DISCUSSION PAPER NO 10-107), (2010) (Eur.) https://www.zew.de/en/publikationen/cartel-destabilization-and-leniency-programs-empirical-evidence/?cHash=d8630970f307cf20c7cebc712ca9ce57. The author used OECD data covering 23 countries during a 20-year period. Measures of price-cost margin at industry level proxied for the intensity of competition. Results showed that leniency programs had a positive and significant impact on the intensity of competition.

tainted by selection bias as they relied only on data collected from cartels that were caught by the CAs.[151] After reviewing existing empirical research, Spagnolo and Marvão found out inconclusive findings on the extent to which leniency programs have proved effective and welfare enhancing:

> Our conclusion from reviewing the empirical work is that much more empirical work is required. Judging from the very limited empirical evidence available, it is still not well established whether leniency policies, as currently implemented in different countries, are doing any more than facilitating competition authorities' work. That is, it is unclear whether they are actually increasing welfare by generating a strong deterrence effect, or whether they are actually reducing welfare through the larger administration and prosecution costs they generate, without any compensating increase in deterrence. The most favorable evidence available is for the United States, where sanctions are much tougher, and this is consistent with what theory would predict.[152]

Despite the problem of measuring deterrent effects, a substantial body of theoretical and experimental research has helped identify conditions where leniency programs are more likely to have a greater chance of detecting cartel activity and, concomitantly, avoid limited cartel deterrence.

There is a consensus that high sanctions are a crucial element of cartel deterrence for the effectiveness of leniency programs. This means leniency programs should operate in a context where the sanctions imposed on those who infringe antitrust law, except for the first confessor in leniency cases, are substantial.[153] The potential crowding-out effects arising from mounting numbers of leniency investigations are another relevant factor. Non-leniency investigations should be preserved by the CA as part of its enforcement and budgetary policy. One of the reasons for this is that members of the most successful cartels are unlikely candidates for leniency applications.[154] Another reason is that in the absence of non-leniency investigations, the credibility of the CA's enforcement capacity will be construed as weak by cartel participants who become less fearful of being apprehended and convicted.[155]

Crowding-out effects in actual cartel enforcement have become a reality. In the European Union, for instance, the percentage of decisions by the EU Competition Commission based on non-leniency investigations has substantially decreased over time. From 1996 to 2000, non-leniency cases constituted 90% of the total number of cartel decisions that resulted with fines. This percentage has progressively fallen to roughly 9% from 2011 to 2015.[156] Spagnolo and Marvão noted the "particularly generous use of the leniency tool" by EU enforcers and reckoned that leniency was used in 52% of all EU fines

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[151] Spagnolo, *supra* note 122.

[152] *Id.*

[153] *Id.*

[154] *Id.*

[155] The Use of Leniency in the EU Cartel Enforcement, *supra* note 11.

[156] *Id.*

imposed on cartels from 1998 to 2014; this is, on average, four leniency recipients per convicted cartel.[157]

Wils has argued that ex-officio (non-leniency) investigations are fundamental where a CA wants to preserve its credibility in the sense of being capable, on its own initiative, to detect and punish cartel activity. Without such credibility, the author claims, the fear of detection and conviction of cartel conduct vanishes, rendering the success of a leniency program unwarranted.[158] Wils recommends that the European Commission maintain focus on ex-officio investigations, "[i]t is thus important that the European Commission keeps signaling that it welcomes information from informants, including of course anonymous informants, and follows up leads provided by informants so as to continue detecting cartels without leniency, and thus ensure the continued success of its leniency programme."[159]

There are also a number of structural features in competition laws that may help alleviate concerns of limited deterrence. Competition laws show adequate deterrent properties where they create a CA independent from the government.[160] If a government exerts influence on the functioning of the CA, the CA's decisions will more likely put aside objective parameters of market rivalry or efficiency and be guided instead by short-term political gains as reflected in the government's interests and priorities.[161] Similarly, a CA that is influenced by business lobbies will more likely make decisions that are in line with their business.[162] A rule of law that stands for the CA's independence will have the desirable effect of setting the CA free from political and/or business interference, enabling it to plan its own enforcement priorities based on relevant parameters of market conditions and efficiency.

The deterrent properties of competition laws are also enhanced when the law bars hard-core cartels on a *per se* basis, equip the enforcer with strong investigatory-powers, like the ability to conduct down raids and issue interim measures, and grant a private right of action for civil damages.[163] High level of sanctions that may be imposed on corporations as well as natural persons are also factors enhancing deterrence, especially on hard-core cartels.[164]

It is a promising sign that most of the features identified in this section as alleviating concerns of limited deterrence have been incorporated into the LDC, which has, in terms of institutional quality, achieved a strong leap forward. In terms of sanctions, the LDC has increased significantly the fine levels for antitrust violations compared to prior levels.[165] The

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[157] Spagnolo, *supra* note 122.

[158] Use of Leniency in the EU Cartel Enforcement, *supra* note 11.

[159] *Id. See also* Hammond, *supra* note 14.

[160] P Buccirossi, *supra* note 19.

[161] Stefan Voigt, *The Effects of Competition Policy on Development - Cross-Country Evidence Using Four New Indicators* 45 J. OF DEV. STUDIES 8, 1225-48 (2009); Tay-Cheng Ma, *Competition Authority Independence, Antitrust Effectiveness, and Institutions*, 30 INT'L REV. OF L. & ECON. 3, 226-35, 231(2010) (the author finds that *de facto*, but not *de iure* independence is a relevant factor in explaining the effectiveness of antitrust enforcement).

[162] P Rey, *Toward a Theory of Competition Policy* 82-123, *in* ADVANCES IN ECONOMICS AND ECONOMETRICS: THEORY AND APPLICATIONS, EIGHTH WORLD CONGRESS (Cambridge Univ. Press, Dewatripont et al. eds., 2003).

[163] P Buccirossi, *supra* note 19 at 171-180.

[164] *Id.*

[165] Pablo Trevisán and Eduardo Stordeur, Jr., *2016: Argentina Returns to the World of Antitrust and Competition Enforcement*, 1 INT'L ANTITRUST BULLETIN 25-26 (Mar. 2017).

LDC has also been designed to strengthen the independence of the NCA. One of the most cited and emphasized innovations in the LDC is perhaps the NCA's increased independence.[166]

As examined in Section II of this article, the LDC has identified in Article 2 conducts which are "absolutely restrictive of competition," whose anticompetitive effects are presumed by law. Enforcers have also been given strong investigatory powers, including the ability to conduct down raids and issue interim measures. Under the prior competition law, the CA had already been granted strong investigatory powers, which the LDC has at the very least preserved. Both stand-alone and follow-up basis for private enforcement of antitrust violations are regulated under the LDC, so that victims of those violations may exercise their right to be compensated for their losses.

One is inclined to argue that all these features included in the LDC, which will work hand-in-hand with the ALP, may well generate a framework that promotes cartel deterrence. Still, the actual implementation of the ALP and the competition law enforcement will have to be watched closely as the new legal framework for competition law in Argentina is implemented. Among other aspects, it is difficult to think of the Tribunal conducting only leniency investigations during the first years of the ALP implementation. On the contrary, one would expect to see the Tribunal, in addition to conducting leniency investigations, also prosecuting cartels ex-officio.

V. CONCLUSION

The success of a cartel enforcement policy in Argentina will be measured not only in terms of how many cartels are being detected and fines imposed, but also in terms of cartel deterrence: making sure that cartels form less rapidly or have shorter lives. This is a challenge that the LDC has attacked head-on, not only by creating the ALP, but also by augmenting the deterrent properties of the competition regime which the ALP will use to operate. This entails a promising step towards the distant goal of defeating cartels.

Within this framework, it is expected that the ALP will play a critical role in cartel enforcement policy. To this end, an adequate design of the ALP will greatly advance this goal. The contribution of this article has been precisely to disentangle the diverse components of the ALP in order to critically analyze the ALP's vital characteristics and potential to function effectively. Relying on comparative leniency policy, the analysis produced in this article indicates that the ALP has largely adhered to international practices, although there is room for improvement.

Prior experience from other jurisdictions that implemented a leniency program suggests that the ALP will increase cartel detection and conviction rates in Argentina. The current design of the ALP has so intended by granting aggressive benefits in terms of immunity and sanction reduction. The applicant that qualifies as first confessor is rewarded

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[166] *Id.* "Another objective of the Draft [Competition] Bill was the creation of an independent authority with sufficient powers to make its own decisions, control its budget, and function without interference from political authorities. (straight brackets added); Examen Voluntario Entre Homólogos del Derecho y la Política de la Competencia: Argentina, UNCTAD, 37-38, (2017) https://unctad.org/es/PublicationsLibrary/ditcclp2017d1_es.pdf (Sp.); *Directorate for Financial and Enterprise Affairs Competition Committee*, DAF/COMP/GF/WD, (2016) www.argentina.gob.ar/sites/default/files/independencia_de_las_agencias_de_competencia.pdf.

with immunity from civil fines, imprisonment and other criminal sanctions and, possibly, from civil damages and disqualification orders. Immunity will be given whether or not the application for leniency has been submitted before or after the Tribunal has collected evidence on the applicant's cartel. It also makes no difference if the first confessor played the role of ringleader or coerced other cartel participants to act unlawfully.

The economic research generally agrees that the first confessor should be given full immunity. However, this research also explains that cartel deterrence can be reduced if leniency programs overprotect runner-up applicants. This article has argued that this overprotective feature is present in the ALP insofar as the reductions in penalties given to second, third, and so on, qualified applicants are too benevolent. For these reasons, this article has recommended that the Tribunal, in exercising its discretional powers, adopt a restrictive stance when granting benefits for runner-up applicants by minimizing penalty reductions.

In consistency with this point of view, this article has also considered an additional set of policy prescriptions aimed at preventing ineffective leniency programs. In particular, these programs should operate in a context where sanctions against violators of competition law are tough and non-leniency cartel investigations are conducted by the CA. In this respect, the Tribunal has been given extensive powers under the LDC to impose a variety of sanctions and, therefore, the Tribunal should exercise those powers with decisive force. It has also been recommended that the Tribunal conduct non-leniency cartel investigations. These investigations are necessary because lenience programs, even if successful, are unlikely to uncover the most profitable cartels. Moreover, those investigations enable the CA to instill in market players the essential fear of being caught and severely punished should they engage in cartel conduct.

As a final consideration, clarification is needed in relation to the scope of the term "physical persons" as it pertains to the LDC, and more specifically, in the ALP. Whether this term includes any of the cartel participant's employees is still unclear. Clarification is also necessary as to whether physical persons are entitled to submit leniency applications on their own behalf (using an individual application for leniency) or, in the alternative, by joining in the company's application (using a joint application for leniency). The power of CAs to impose sanctions on natural persons, a power also granted by the LDC to the Tribunal, has long been viewed as a critical tool for cartel deterrence. This is an important reason to justify further clarification and discussion on the liability of physical persons under the LDC.