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ANTI-CARTEL ENFORCEMENT IN A CONTEMPORARY AGE

Leniency Religion

Edited by
Caron Beaton-Wells
and Christopher Tran

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ANTI-CARTEL ENFORCEMENT IN A CONTEMPORARY AGE

Leniency policies are seen as a revolution in contemporary anti-cartel law enforcement. Unique to competition law, these policies are regarded as essential to detecting, punishing and deterring business collusion—conduct that subverts competition at national and global levels. Featuring contributions from leading scholars, practitioners and enforcers from around the world, this book probes the almost universal adoption and zealous defence of leniency policies by many competition authorities and others. It charts the origins of and impetuses for the leniency movement, captures key insights from academic research and practical experience relating to the operation and effectiveness of leniency policies and examines leniency from the perspectives of corporate and individual applicants, advisers and authorities. The book also explores debates surrounding the intersections between leniency and other crucial elements of the enforcement system such as compensation, compliance and criminalisation. The rich critical analysis in the book draws on the disciplines of law, regulation, economics and criminology. It makes a substantial and distinctive contribution to the literature on a topic that is highly significant to a wide range of actors in the field of competition law and business regulation generally.

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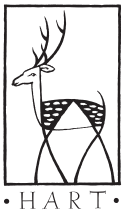

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FOREWORD BY FREDERIC JENNY

Professor, ESSEC Business School, Chair, OECD Competition Committee

Since the first leniency policy was established in the late 1970s in the United States, the US Department of Justice has forcefully and successfully advocated the adoption of such tools by competition authorities throughout the world. As a result, leniency policies have been one of the most important US legal exports in competition law enforcement. More than 50 nations have adopted a form of leniency policy.[1]

This book on leniency policies, co-edited by Caron Beaton-Wells and Christopher Tran, is important because it is the first book to question and extensively critique the most entrenched views of the competition community on the topic, namely that leniency policies for cartel violators are a necessary and essential tool of cartel enforcement and have been overwhelmingly successful.

The book is also timely because a serious discussion of leniency policies is long overdue. This discussion has not been encouraged by competition authorities which have tended to accept, mostly without reservation, the usefulness of leniency policies in the fight against cartels and have not shown a willingness to admit possible shortcomings or limits of this instrument or to publicly address trade-offs between this instrument and alternative instruments which could be used to tackle cartels.

Yet there are many questions which are worth raising with respect to the design and the effectiveness of leniency policies.

First, it appears that some policies are more successful than others. This raises questions about the design of leniency policies and suggests that there is no one-size-fits-all leniency policy. How such policies should be adapted to the legal and cultural environment of the countries in which they are implemented is therefore worth investigating.[2]

Second, the effectiveness of the leniency policies to deter cartel formation deserves careful scrutiny in spite of the conventional wisdom of competition authorities which claim that they are an effective tool in the deterrence of cartel conduct. Assessing the extent to which there is a deterrent effect of leniency policies is necessarily a complex exercise because the number and the characteristics of undetected cartels are unknown. Furthermore, two possible effects of leniency policies must be distinguished: the increase in the rate of detection of past cartels by competition authorities and the decrease in the rate of new cartel formation. Those two effects do not necessarily go together and, given the fact that the economic

[1] On the role of the US DOJ in promoting leniency policies throughout the world, see the chapter by Ann O'Brien on 'Leadership of Leniency'.

[2] On this see, for example, the chapter by Mark Williams on 'Leniency Policy with Chinese Characteristics' and the chapter by Steven Van Uytsel on 'Anti-Cartel Enforcement in Japan: Does leniency Make the Difference?'. On why the leniency policy of the EU may not be as successful as thought by many, see Andreas Stephan and Ali Nikpay on 'Leniency Decision-Making from a Corporate Perspective: Complex Realities'.

literature is largely inconclusive on the deterrent effect of leniency policies, more effort should be devoted to trying to assess their impact.[3]

Third, questions must be raised about the relationship between leniency policies and other instruments which could be used to deter cartels. The (possibly excessive) reliance of competition authorities on leniency policies in their fight against cartels, leads them to seek to immunise leniency applicants against any sanction that could possibly make them hesitant to report cartel activity. But this attitude is not always based on a careful consideration of the trade-offs between this instrument and other possible instruments, such as the criminalisation of cartels or the civil enforcement of competition laws. A more precise cost-benefit analysis of the alternative instruments which could be used to discourage cartel formation and the adoption of a more holistic approach to cartel deterrence is necessary to maximize social welfare.[4]

Fourth, the assumptions on which leniency policy rests can seem somewhat naïve and one could ask whether there would be benefits in basing leniency policies on more sophisticated or realistic models. Indeed, the underlying logic of leniency policies assumes that participation in a cartel or seeking leniency are corporate decisions uniquely dictated by a profit motive and that, therefore, it is enough to put cartelists in a 'prisoner's dilemma' about whether to report a cartel and to increase the potential cost for cartelists who decide not to report or lose the race to apply for leniency, so as to obtain an increase in the number of cartels reported and a decrease in the number of cartels formed. However, this view ignores, first, the fact that it is not obvious that participation in a cartel is always, or even usually, a corporate decision based on an expected profit calculus rather than a decision taken by low level 'rogue' employees who, in legal systems where cartel participation is not a criminal offence, may escape personal sanctions. It also ignores the fact that leniency policies may give an incentive to leniency applicants to over-report in some instances and to under-report in other instances. Finally it ignores the fact that when participation in a cartel is a corporate decision, if would-be cartelists are aware of the existence of leniency policies before they enter into cartel agreements, they may be able to game the system.[5]

Fifth, the way in which leniency policies for cartels affect the incentives of competition authorities and their strategies also merits a discussion.[6] It is undisputed that leniency

[3] For a thorough review of the economic literature on the effect of leniency policies, see the chapter by Catarina Marvao and Giancarlo Spagnolo on 'What do We Know about the Effectiveness of Leniency Policies? A Survey of the Empirical and Experimental Evidence'; for an assessment of the effect on leniency policies on the detection of cartels in Japan, see the chapter by Steven Van Uytsel on 'Anti-Cartel Enforcement in Japan: Does Leniency Make the Difference?'.

[4] On the complex relationship between leniency policies and criminalisation, see the chapter by Christopher Harding, Caron Beaton-Wells and Jennifer Edwards on 'Leniency and Criminal Sanctions in Anti-Cartel Enforcement: Happily Married or Uneasy Bedfellows' and on the relationship between leniency policies and civil enforcement, see the chapters by Daniel A Crane 'Why Leniency Does Not Undermine Compensation' and Laura Guttuso 'Leniency and the Two Faces of Janus: Where Public and Private Enforcement Merge and Converge'.

[5] On the realities of corporate decisions with respect to cartel participation, see Andreas Stephan and Ali Nikpay on 'Leniency Decision-Making from a Corporate Perspective: Complex Realities'; on the possibility that cartel members may strategically use the leniency policies, see Christopher Harding, Caron Beaton-Wells and Jennifer Edwards on 'Leniency and Criminal Sanctions in Anti-Cartel Enforcement: Happily Married or Uneasy Bedfellows'; on the possibility that leniency applicants may choose to over-report, see Ian S Forrester and Pascal Berghe on 'Leniency: The Poisoned Chalice or the Pot at the End of the Rainbow?'.

[6] On how leniency policies could or should affect the strategy of competition authorities, see the chapter by Leslie M Marx and Claudio Mezzeti on 'Leniency, Profiling and Reverse Profiling in Multi-Product Markets: Strategic Challenges for Competition Authorities'; see also the chapter by Ian S Forrester and Pascal Berghe on 'Leniency: The Poisoned Chalice or the Pot at the End of the Rainbow?'.

policies allow competition authorities to sanction cartels they would have had much more difficulty uncovering without this instrument (even if one can argue that what they catch are often dying cartels or terminated cartels rather than the newly formed cartels and that there is little evidence that cartel formation is deterred). As a result they have an incentive to emphasize the number of cartels they have sanctioned and the level of sanctions they have imposed as the ultimate indicator of their effectiveness. In fact, the number of cartel convictions is a flawed indicator of performance for a competition authority. Indeed, in an ideal world, an effective competition authority would deter cartel formation and therefore would have very few opportunities to sanction them. Thus the use of leniency policies may be considered as a deceptive way for competition authorities to 'look good'. Reliance on leniency applications to beef up their cartel detection statistics and the level of the sanctions they impose may entail a long run social cost if, over time, competition authorities lose the ability to start ex-officio investigations of cartels or devote insufficient resources to advocacy functions.[7]

Sixth, in view of accumulated experience, the design of leniency policies and the strategy of competition authorities with respect to leniency applicants deserve careful analysis. For example, the observation that some firms are repeat offenders and in some countries have repeatedly successfully applied for leniency raises troubling questions both about the deterrent effect of the leniency policies they have benefited from and about the trade-offs involved in allowing offenders to repeatedly benefit from leniency. Related to this is the question of the treatment of compliance policies in leniency policies. A number of competition authorities neither reward the existence of compliance policies in firms found guilty of cartel behaviour nor impose the adoption (or the reinforcement) of compliance policies as a condition for leniency. One possibility is that those competition authorities want to lighten the burden on would-be leniency applicants so as to maximise the chances that they will come forward and are, therefore, reluctant to impose any constraint as a condition to obtaining leniency. But this advantage has to be carefully weighed against the possible disadvantage of encouraging serial offenders to form new cartels with the knowledge that they can ultimately once more apply for leniency if need be.[8]

All of these fundamental questions (and more) are raised and thoroughly discussed in this book which is undoubtedly the most comprehensive scholarly work on leniency policies produced so far. The book also contains a number of innovative and well thought through suggestions about possible ways to improve the design of leniency policies and to solve some of the trade-offs previously mentioned.

This book should be required reading for all legal scholars, economists and competition authorities seeking to acquire a deeper insight into the issues related to leniency policy.

[7] See the chapter by William Kovacic on 'A Case for Capping the Dosage: Leniency and Competition Authority Governance'.

[8] For an example of a case where the existence of a compliance programme helped the firm apply for leniency, see the chapter by Howard Bergman and Daniel Sokol on 'The Air Cargo Cartel: Lessons for Compliance'; on the use of a compliance programme as a condition for leniency, see the chapter by Brent Fisse on 'Reconditioning Corporate Leniency: The Possibility of Making Compliance Policies a Condition for Immunity' and the chapter by Joe Murphy on 'Combining Leniency Policies and Compliance Programmes to Prevent Cartels'. On the advisability of rewarding whistle-blowers, see the chapter by Maurice Stucke on 'Leniency, Whistle-Blowing and the Individual: Should We Create Another Race to the Competition Agency?'.

It is a priceless contribution for those who would like leniency policies to be more than a wonderfully clever gadget simplifying the lives of competition authorities by allowing them to sanction aging cartels without having to face the legal risks or the resource costs of extensive investigations. It points out directions for research which could help us to improve the effectiveness of the instrument, make it more legitimate and integrate it better with other enforcement tools in the design of an overall enforcement strategy against cartels.

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Part I

Introduction

1

Leniency Policies: Revolution or Religion?

CARON BEATON-WELLS

I. BACKGROUND

Deterring, detecting and prosecuting cartel conduct is a high priority for competition authorities worldwide. This conduct involves various forms of agreement, arrangement or practice between competitors that eliminate or subvert processes of competition and thereby have the potential to increase prices, reduce consumer choice and stifle innovation. Cartel conduct is widely seen as in the category of anti-competitive conduct most harmful to consumer and economic welfare. Serious or so-called 'hard-core' cartels usually involve secrecy and deception by participants, with the deliberate aim of avoiding discovery. They are therefore difficult to detect and, as documentary evidence is rarely available, difficult to prosecute even when detected. Such activity is also often highly lucrative. It is therefore problematic to deter, even in the face of the toughest sanctions.

The challenges associated with anti-cartel law enforcement have prompted the widespread adoption by competition authorities of a distinctive tool—the leniency policy (also referred to as an immunity policy or an amnesty policy). Providing the first eligible cartel member with full exemption from penalties and public proceedings, this is a tool generally employed only in respect of cartel conduct and not in relation to any other type of anti-competitive activity. It is also difficult to identify equivalent policies in the enforcement armoury of agencies administering the law against other forms of illegal or criminal conduct.

Based on the game theoretic model known in economic theory as the 'prisoner's dilemma', the use of a leniency policy in anti-cartel law enforcement is justified by authorities generally on the grounds that it is the most effective and least costly mechanism for detecting and prosecuting activity that is systematic, deliberate and covert. It is also seen as contributing to the deterrence of cartel conduct. These benefits are regarded by governments and competition authorities as outweighing any adverse effects in terms of lower penalties, and hence reduced general deterrence, overall as well as any adverse political, moral or other implications.

Over the last decade more than 50 jurisdictions have adopted some form of leniency policy in their anti-cartel enforcement programmes. At least on paper, there is a substantial degree of similarity in the criteria for eligibility, processes for decision-making, and outcomes provided for in such policies. There thus may be said to be a theoretical 'model' or orthodoxy in relation to the design and implementation of leniency policies around the world, based

initially on the United States Department of Justice Antitrust Division's experience, followed closely by the experience of the European Commission and other jurisdictions, and reflected in the approach endorsed by international and regional organisations such as the Organisation for Economic Cooperation and Development, the International Competition Network and the European Competition Network.

Enforcers are often zealous in their support for and advocacy of such policies, and at times defensive in the face of criticisms or perceived threats to their operation. At least traditionally there has also been a high degree of support for leniency policies amongst practising lawyers and economists, as well as amongst scholars and other commentators in competition law circles. Given their distinctiveness, proliferation and support, the adoption of leniency policies may be described as a 'revolution', a conceivably apt description in what has been referred to by enforcers as 'the war against cartels'.

In designing and reviewing the operation of a leniency policy there are fairly standard criteria seen by competition authorities as essential to ensuring 'optimal' effectiveness, namely severe sanctions, fear of detection, and transparency and predictability in the policy's eligibility criteria, implementation and consequences. However, competition authorities rarely attempt to measure or assess the effectiveness of such instruments directly or systematically against the objectives of facilitating greater detection, prosecution and deterrence of cartel conduct than would otherwise be possible. Rather, the achievement of these objectives appears largely to be taken as 'given', provided the policy fulfils the standard criteria.

Similarly, the approach taken by authorities (and many commentators) to leniency policy adoption and review tends to be inward-looking, focused on the policy in a fairly discrete and isolated way and with a tendency to overlook or neglect deeper evaluation. More searching assessments of such policies would include consideration of the extent to which the policy has implications for or effects on other aspects of the overall system for enforcement and compliance (such as settlements, private actions for damages, advocacy and outreach activities and compliance programmes), as well as the extent to which the policy is reconcilable with the competition authority's general approach to governance and its institutional values (such as transparency, consistency, proportionality and fairness).

There is a large body of theoretical and empirical economic research that has sought to establish the 'optimal' design of leniency policies and test for their 'success' in cartel detection, prosecution and deterrence. While valuable on its own terms, this research has acknowledged limitations relating to data availability and methodology. Moreover, it is often jurisdiction-specific and, even within a single jurisdiction, has produced mixed if not contradictory results.

More generally, the economic literature does not reveal how a leniency policy is actually perceived by the business sector in general, by leniency applicants or prospective applicants and their advisers and by competition authorities and their political masters. The economic research has also not explored the role and impact of leniency policies in a broader policy setting, in which other interconnected aspects of enforcement are at work and in which general considerations of agency governance are relevant.

There have been a number of published commentaries in recent years questioning the value of leniency policies, cautioning against over-reliance or myopia in their use, and drawing attention to the potentially deleterious effects of such policies on private enforcement, on criminal trials, and on engendering a culture of compliance amongst the business

community. However, there has yet to be a systematic review or analysis that maps the emergence of the leniency phenomenon over the last two decades and interrogates its effects, both positive and negative, for contemporary anti-cartel enforcement. This book makes a modest start in filling that gap.

II. AIMS OF THIS BOOK

Leniency policies are widely regarded as having revolutionised anti-cartel law enforcement in the contemporary era. However, the generally unquestioning, inward-looking and universalist approach taken to such policies by competition authorities and parts of the practising profession has as much the hallmarks of religion as of revolution.

The general aims of this book are:

1. to chart the origins, impetuses and evolution of the leniency phenomenon in anti-cartel enforcement over the last two decades;
2. to highlight the worldwide proliferation of leniency policies and consider the extent to which there is convergence or divergence in the design and application of such policies across jurisdictions, as well as the opportunities and challenges raised by such trends;
3. to capture key insights available from both academic research and practical experience over this period concerning the impact and effectiveness of leniency policies from a range of stakeholder perspectives;
4. to examine the extent to which the 'theory' underpinning leniency policies, in terms of the way in which they are perceived and used, matches practice—particularly from the perspective of leniency applicants; and
5. to provide a critique of leniency policies with a particular emphasis on exploring aspects of and trends in their operation and effects that have received relatively little attention to date.

In order to fulfil these aims, the book draws on the extensive experience and expertise of contributors from a range of disciplines (law, economics, regulation and criminology) and jurisdictions, and from both academic and professional backgrounds. The authors include scholars who have dedicated substantial research time and energy to exploring various aspects of the leniency phenomenon, competition authority officials who have been closely involved in developing and administering leniency policies, and practitioners who have advised numerous clients on leniency applications and have navigated the leniency process from beginning to end.

III. STRUCTURE OF THE BOOK

The chapters in the book are organised in eight Parts that reflect three principal themes explained below:

— leniency proliferation and permeation (Part A);
— leniency stakeholders (Part B); and
— leniency in broader view (Part C).

A. Leniency Proliferation and Permeation

The origins and evolution of leniency policies are mapped and explored in Part II of the book—Leniency Convergence and Divergence. This Part of the book charts the spread of leniency policy across numerous competition law regimes, led by the United States, from the early 1990s. Drawing on the leniency experience in China by way of case study, it is intended also to highlight the fact that there are important differences in the way in which the policy has permeated particular jurisdictions.

In Chapter 2, 'Leadership of Leniency', Ann O'Brien of the US Department of Justice's Antitrust Division sets out the history of the US Corporate Leniency Policy, the challenges faced and lessons learnt over time by Department of Justice enforcers regarding the building blocks of an effective leniency policy, and the critical role played by the US in 'converting' other competition authorities to leniency adoption. O'Brien points to the 'results' of leniency policies as evidence of these policies initiating 'a golden age of cartel enforcement' throughout the competition law world.

In Chapter 3, 'Leniency Policy with Chinese Characteristics', Asian competition law scholar Mark Williams critically examines the adoption of leniency policy in China. The chapter highlights the importance of observing leniency policy, if not competition law adoption generally, with a keen eye on the economic, political, institutional and legal context of the jurisdiction in question. While the proliferation of such policies may not be in question, at least in terms of the number of jurisdictions in which they have been adopted, Williams' chapter underscores the need for caution in making any claim of convergence in the way in which such policies are implemented and used across jurisdictions. His chapter describes the 'idiosyncratic approach' by the Chinese authorities to the use of this enforcement tool and postulates a range of explanations for the approach by reference to several China-specific factors, including bureaucratic rivalry between agencies and a desire for achieving 'quick wins', a lack of enforcement resources, industrial policy considerations and cultural perceptions of the appropriate role of government and official decisions in this jurisdiction.

B. Leniency Stakeholders

Parts III, IV and V of the book explore leniency policy from the perspective of key stakeholders: the competition authority, the corporation and the individual. A general theme that emerges from the chapters in these Parts of the book is that the practical realities of such policies, in relation to the way in which they are perceived and acted upon, as well as their effects, are far more complex than the theory suggests.

i. Competition Authorities

The chapters in Part III—Leniency and the Competition Authority—explore and test the extent to which the claims often made by competition authorities concerning the effectiveness of leniency policies are supportable. The contribution made by such policies to the core mission of authorities in undertaking enforcement action against cartel conduct is critically examined. Stepping back from operational activity, however, consideration is also

given to the place of leniency policies in evaluating the performance of competition authorities as public bodies with substantial power and influence, and corresponding obligations to act transparently, proportionately, fairly and with accountability.

There is now a substantial body of economic literature on leniency policy. The literature has focused predominantly on the effectiveness of leniency policies in aiding fulfilment of competition authority objectives in detecting, prosecuting and deterring cartel conduct. In Chapter 4, 'What Do We Know about the Effectiveness of Leniency Policies? A Survey of the Empirical and Experimental Evidence', economists Catarina Marvão and Giancarlo Spagnolo review the key empirical and experimental studies which have been undertaken into leniency policy to date, highlight the main findings and compare their results. The conclusions reached in the chapter may be disconcerting for leniency policy supporters. Marvão and Spagnolo assess the empirical studies as having produced 'mixed results'. In their view, evidence of deterrence impact is, in general, rather weak. More generally, the authors regard it as unclear whether leniency policies are increasing welfare by generating a strong deterrence effect, or whether they are reducing welfare through the significant administration and prosecution costs that they generate, without any compensating increase in deterrence. The experimental studies reviewed in the chapter highlight the significance of severe sanctions for effective deterrence (consistent with the theory underpinning leniency policy), but also highlight the risk of such policies being 'gamed'—specifically through their use by cartel members to punish deviations, and thereby stabilise collusive arrangements. Marvão and Spagnolo emphasise the importance of data for robust empirical work in this field, and call on competition authorities to collect and disseminate data that will facilitate more meaningful empirical research.

In Chapter 5, 'Anti-Cartel Enforcement in Japan: Does Leniency Make the Difference?', Steven Van Uytsel analyses the experience to date with the Japanese leniency policy. His analysis reinforces the need for conservatism and rigour in evaluating competition authority claims of leniency policy 'success' based on numbers of applications and quantum of penalties applied in consequence of leniency applications. Van Uytsel examines Japanese Fair Trade Commission data on the ratio between grants of immunity and fine reduction, the number of firms that have made multiple leniency applications in respect of a single cartel, the number of decisions following international investigations and the number of listed and non-listed firms that have received leniency. Based on his analysis of the data, Van Uytsel casts doubt on the extent to which the Japanese leniency policy has facilitated the detection and the deterrence of cartels. However, he also concludes that the leniency policy has assisted the Japanese Fair Trade Commission in broadening its enforcement activities beyond its traditional focus on bid rigging.

As experience with leniency policies has developed, competition authorities have made adjustments, adding and removing features with a view to bolstering their effectiveness. In Chapter 6, 'Leniency, Profiling and Reverse Profiling in Multi-Product Markets: Strategic Challenges for Competition Authorities', economists Leslie M Marx and Claudio Mezzetti report on their study of one such adjustment which involves profiling or reverse profiling in relation to collusion by firms operating in multiple markets. Marx and Mezzetti's statistical analysis of the effects of such practices on leniency incentives proves the truism that for every action there is a reaction. They conclude that, contrary to what are likely to be widely held assumptions about the impact of profiling and reverse profiling, in some settings the latter in fact may incentivise firms to apply for leniency, and thereby enhance the capacity of leniency policies to facilitate cartel detection, to a greater extent than the former. That

said, Marx and Mezzetti also acknowledge the potential for reverse profiling to invite policy gaming by leniency applicants. From a more general perspective, the chapter illustrates how leniency policies facilitate, if not necessitate, strategic decision-making and manoeuvring on the part of both leniency administrators and leniency applicants (a theme reinforced in subsequent chapters).

In Chapter 7, 'A Case for Capping the Dosage: Leniency Policy and Competition Authority Governance', former US Federal Trade Commissioner and the leading global voice on institutional aspects of competition law practice, William Kovacic acknowledges that leniency has proven to be a powerful law enforcement tool, and one that is rightly a source of deep pride on the part of competition authorities. However, he cautions that leniency also has side-effects—in particular, in creating distortions in the way in which authorities approach performance measurement, and in the potential for authorities to overlook or underestimate cartelist adaptability. Kovacic argues that in light of these considerations, the question for competition authority leaders is not whether to rely on leniency, but how much; in other words, as he puts it, 'the issue is one of dosage'. Kovacic sets out important steps that competition authorities can take to account for the creative evolutionary nature of cartel conduct and to apply additional policy instruments that will supplement the deterrence strategies of the authority, including development of and investment in robust research and advocacy agendas.

ii. Corporations

The chapters in Part IV of the book—Leniency and the Corporation—analyse the availability and application of leniency policies from the perspective of corporations as prospective leniency applicants and beneficiaries.

In Chapter 8, 'Leniency Decision-Making from a Corporate Perspective: Complex Realities', Andreas Stephan and Ali Nikpay test key assumptions in the theoretical underpinnings and orthodox assessments of leniency policy. In particular, they challenge the notion that firms act rationally, weighing the costs and benefits, and monolithically, undertaking this weighing exercise at a corporate level in deciding whether to enter, remain in or exit a cartel, including in deciding whether to apply for leniency. Reinforcing views expressed by chapter authors in Part III of the book, Stephan and Nikpay draw on data from European cartel cases to argue that leniency policies are being used strategically, that corporate applicants are not reporting in response to the threat of detection and sanction, but rather as a means of gaining a competitive advantage over rivals in their markets. They also make the argument that unlike cartel conduct (which is often undertaken at the individual rather than the corporate level), the decision to apply for leniency is very much a corporate decision and one that must often be made with limited information and is beset with significant risks and uncertainties. In this precarious decision-making climate, the authors conclude that it is a misnomer to characterise leniency applications as involving a 'race' to the competition authority.

In Chapter 9, 'Leniency: The Poisoned Chalice or the Pot at the End of the Rainbow?', European General Court judge Ian S Forrester and his co-author, Pascal Berghe explore similar themes to those explored in Chapter 8. They explain how the leniency practices of the European Commission incentivise corporate leniency applicants to provide, at best distorted, at worst, untruthful versions of the cartel facts, and they point to the dangers of exclusive reliance on leniency statements in promoting abuses of the system. Consistent with the observations and conclusions of several others in the book, Forrester and Berghe

portray the decision to apply for leniency by a corporation as a difficult one that has to be made strategically. In contrast to the portrayal by competition authorities of the decision as relatively simple, at least under 'optimal' leniency conditions, the authors argue that there are numerous and often unquantifiable considerations at stake and, in accounting for all such considerations, corporations may well determine that applying for leniency is not the best strategy in the circumstances. They point out in this context that the consideration set is particularly complicated, and the risks compounded, where it is necessary for a prospective applicant to assess the pros and cons of leniency in multiple jurisdictions. Paradoxically, they conclude that the proliferation of competition law regimes and leniency policies may represent the most serious threat to the effectiveness of such policies.

While Chapters 8 and 9 take a corporate perspective on the decision to apply for leniency, in Chapter 10, 'Reconditioning Corporate Leniency: The Possibility of Making Compliance Programmes a Condition of Immunity', corporate compliance and competition law practitioner/scholar Brent Fisse illustrates the value of taking such a perspective in exploring how leniency policies can and should be used to modify the future behaviour of corporations that have made leniency applications. Fisse argues that, in addition to a high risk of detection, significant sanctions and transparency and certainty in design and implementation, an essential condition for an effective leniency policy should be that it require the corporate applicant to undertake the establishment of an adequate compliance programme. His survey of competition authority practice around the world exposes the extremely limited extent to which compliance programmes are addressed in leniency policies. This is problematic in various respects, not least in that it is contradictory of the ultimate aim of preventing cartel conduct and, if anything, promotes cartel recidivism and repeat leniency game playing. Like the authors of the preceding chapters, Fisse criticises economic theories of corporate incentivisation, observing that they have tended to mask the relevance and potential of compliance programmes in the context of leniency policies. He sets out a proposal for a 'compliance condition' in such policies, identifying the elements of such a condition based on principles of enforced self-regulation and individual accountability.

iii. Individuals

Individuals play a potentially crucial role in the operation and effectiveness of leniency policies. Reflecting this, Part V of the book—Leniency and the Individual—is dedicated to individuals as key stakeholders in the leniency field.

In Chapter 11, 'Leniency, Whistle-Blowing and the Individual: Should We Create Another Race to the Competition Agency?', behavioural economist Maurice E Stucke draws attention to the fact that many leniency policies seek not just to engender a race between corporate cartel members to the competition authority, but also a race between the corporation and its individual employees. He argues that, based on the available evidence, it appears that neither race has proven sufficient to deter cartels. In response, Stucke explores the possibility of encouraging a third race, namely a race between cartel participants and cartel outsiders (whistle-blowers). Stucke highlights the potential benefits and strengths of such a strategy, involving the offer of bounty payments to individuals who blow the whistle on cartel conduct, and dispels the concerns or objections most commonly voiced about such policies. At the same time, just as the chapters in Part IV of the book underscored the importance of understanding corporate motivations, so too it is essential, Stucke argues, to appreciate what motivates individuals as whistle-blowers. He calls into question the extent

to which whistle-blowers are driven by financial incentives, as distinct from social, ethical or moral considerations, and explores the implications for the design and promotion of whistleblowing policies, by both competition authorities and corporations.

C. Leniency in Broader View

Parts VI, VII and VIII of the book critically examine the interactions between leniency policies and other aspects of the overall system of enforcement—specifically, criminal sanctions for cartel conduct, private actions for damages and compensation for cartel victims, and corporate compliance programmes.

i. Crime

Part VI—Leniency and Crime—focuses on the dual emergence of and relationship between leniency and criminal sanctions for cartelists. Leniency policy and cartel penalisation are each significant trends in their own right. Each has been the subject of considerable attention by enforcers, practitioners and scholars over the last two decades. Yet their relationship is poorly understood.

In Chapter 12, 'Leniency and Criminal Sanctions in Anti-Cartel Enforcement: Happily Married or Uneasy Bedfellows?', Christopher Harding, Caron Beaton-Wells and Jennifer Edwards consider different theories that may explain the dynamics in the cartel leniency–cartel criminalisation relationship and, in particular, that address the question as to whether the relationship suggests a largely instrumental justification for criminalisation (that is, using criminal sanctions to bolster leniency policies), as distinct from a more normative justification (that is, using criminal sanctions to reflect and punish the harmful and delinquent nature of cartels). Whichever theory is favoured, the authors argue that the relationship is problematic, replete with ambiguities, tensions and contradictions that threaten the legitimacy and effectiveness of both competition and criminal law enforcement. In making this case, Harding, Beaton-Wells and Edwards canvas the fragility of the economic policy justifications for singling out certain types of cartel conduct for criminal treatment; the retributive compromise and foreclosure inherent in a leniency-driven strategy of enforcement; the ways in which leniency policy underscores and may even reinforce the otherwise immoral (cheating) behaviour said to attract the moral opprobrium associated with criminal sanctions; the ways in which leniency policy shapes and distorts the relationship between cartelists as prospective leniency applicants and competition authorities; and the potential for leniency policy to be 'gamed' by cartelists and the associated risk of business capture of the legal process.

ii. Compensation

Part VII—Leniency and Compensation—focuses on the relationship between leniency policy and private enforcement of anti-cartel laws, a subject that has also attracted substantial commentary and controversy in competition law circles. In keeping with the divergence of views generally on this topic, the chapters in this Part of the book present two quite different perspectives.

In Chapter 13, 'Why Leniency Does Not Undermine Compensation', Daniel A Crane charts the key developments and major debates surrounding the impact of private enforcement on leniency policies in the United States and Europe in recent years—debates that have centred on the threat that disclosure of leniency documents is said to pose to the attractiveness of leniency policies from the perspective of applicants. He explores the role of private actions for damages in contributing towards corrective justice and considers the extent to which compensation for cartel victims should be prioritised as a goal of an antitrust system. Consistent with his previous writings, Crane argues that the apparent conflict between leniency policies and private actions should be resolved in favour of the former. His primary thesis is that given the claimed success of leniency policies in achieving deterrence, it is ill-advised to weaken such policies with the aim of pursuing compensatory objectives which, in his view, are unlikely to be meaningful given the nature of the harms perpetrated by cartel activity.

In Chapter 14, 'Leniency and the Two Faces of Janus: Where Public and Private Enforcement Merge and Converge', former UK enforcement official Laura Guttuso takes a quite different starting point. In her view, the prevailing preoccupation with the threat that private actions are perceived to pose to deterrence-driven public enforcement objectives is 'both overdone and overly reductionist'. Her analysis of the relationship between leniency policy and compensation proceeds from the premise that utilitarian theories of optimal deterrence and economic efficiency do not capture adequately rights-based considerations associated with deontological concepts of fairness and justice. Such considerations, she argues, are equally vital to an informed and complete debate on private enforcement, and its relationship with enforcement by competition authorities. Drawing also on the experience in the United States and Europe, Guttuso probes the claimed conflict between the two enforcement mechanisms and argues that there is merit in a more holistic strategy that accommodates in a complementary way measures that facilitate deterrence, compensation and corrective justice.

iii. Compliance

Part VIII—Leniency and Compliance—focuses on the relationship between leniency policy and corporate compliance with anti-cartel laws. Like Part VII, the chapters in this Part present contrasting perspectives on the topic.

In Chapter 15, 'The Air Cargo Cartel: Lessons for Compliance', competition law scholars and practitioners Howard Bergman and D Daniel Sokol provide a case-study based on Lufthansa's experience as the leniency applicant in one of the largest international cartels detected to date, the air cargo cartel. The case study is revealing of the potential for a positive mutually reinforcing relationship between leniency policies and compliance programmes. Lufthansa's experience is drawn on by the authors as an illustration of how these two mechanisms can 'work hand in hand' to achieve the objectives of cartel detection and prevention. Effective and robust compliance programmes place companies in a position to take advantage of leniency, saving them from incurring significant penal sanctions, including substantial fines and jail sentences for employees. To derive the benefits from leniency, however, Bergman and Sokol point out that a company needs to invest proactively in compliance and create an ethical business culture that truly values it. The benefits of effective compliance for companies, they argue, are both financial (saving money) and non-financial (doing the right thing).

In Chapter 16, 'Combining Leniency Policies and Compliance Programmes to Prevent Cartels', compliance professional and advocate, Joseph Murphy, expresses similar views to those of Bergman and Sokol on the ingredients of an effective compliance programme (and the need for compliance to be embedded in an ethical corporate culture), as well as on the potential for leniency policies to contribute to a corporate environment that is favourable to compliance. However, like Brent Fisse (in Chapter 10), he is critical of the widespread failure by competition authorities to recognise and take steps to exploit the potential of such policies to incentivise and foster corporate compliance efforts. Focusing in particular on the approach taken by authorities in the United States and Europe, Murphy describes the damaging effects of the intransigence to date by these agencies in their attitudes towards compliance programmes and specifically, their resistance to giving credit for such programmes in the context of penalty and sentencing decisions. Drawing on the contrasting approach taken by the Canadian Competition Bureau and the World Bank in its anti-corruption programme, Murphy makes a case for incorporating compliance programmes into leniency policies as a means not only of enhancing cartel prevention but ultimately if not more importantly of sending the 'right' message to the business community about the importance of ethics in commercial activity.

IV. REFLECTIONS

Collectively, the contributions in this book provide a multi-dimensional critique of an enforcement policy that, despite its distinctiveness, has hitherto largely escaped the close and critical attention that it warrants. Identifying the need for such a critique does not entail or imply any questioning of the economic harmfulness of cartel conduct, the challenges involved in its detection, prosecution or deterrence, or even necessarily the legitimacy and benefits of leniency policies in aiding the achievement of those ends. Rather, the intention is to offer a balanced and wide-ranging retrospective account of the experience over the past two decades in the adoption and administration of leniency policies. With the benefit of such an account there is an opportunity to step back and reflect on the 'results' to date and to the extent possible, look forward and consider potential long-term effects of the prevailing approach, including effects that may be counter-productive or even damaging to the core mission of anti-cartel laws and their enforcement.

Reflecting on the book as a whole, several key themes emerge as common. First, claims of leniency policy effectiveness in cartel detection and deterrence must be viewed conservatively. While competition authority anecdotes regarding the impact of leniency on enforcement programmes, and figures concerning the number of cartels detected through leniency applications, are not be discounted, both empirical research and practical experience cast increasing doubt on the extent to which leniency policies are achieving cartel deterrence. Perhaps more disturbingly, one of the most common themes amongst contributions in the book is that leniency policies are not only failing to deter cartel activity, but are in fact promoting it. Such policies are being seen as a strategic opportunity by cartelists to stabilise and enforce collusive arrangements.

Secondly, and conceivably relatedly, there is a clear discrepancy between the 'theory' of how leniency policy works and the reality of how it operates in practice. It is evident that competition authorities consistently recognise key principles that should underpin

an effective leniency policy—severe sanctions, a credible independent threat of detection and transparency and certainty in policy administration and outcomes. However, it is also apparent that outside of the United States, there is divergence in the way in which such policies are in fact interpreted and applied. To some extent, the discrepancies need to be understood as a function of differences in legal and enforcement systems, in institutions and cultures, and more generally in the political economy of competition law regimes. These differences suggest that while, superficially at least, the leniency policy trend may be geographically prolific, the manner in which it permeates individual enforcement regimes is best analysed on a jurisdiction-by-jurisdiction basis.

Moreover, there is disjuncture between the way in which leniency policies are theorised as affecting the perceptions and attitudes of cartelists and the way in which corporations and individuals in fact perceive and behave in response to such policies. Several contributions in the book suggest that leniency policy architects underestimate and over-simplify the decision-making task confronting prospective leniency applicants, both at corporate and individual levels. It is clear that this task cannot be reduced to a basic cost-benefit analysis. In part this is because many of the variables relevant to the analysis are either unknown or are unquantifiable. However it also appears that what may be counted by some as reflecting the 'success' of the leniency policy phenomenon is tilting the equation against leniency applications. The proliferation of these policies across multiple jurisdictions makes it virtually impossible in some cases that an applicant will be 'first' in all places. Over-reliance on leniency at the expense of investment in other detection tools undermines the perceived threat of detection, independent of such policies. The growth in private actions for damages spurred by leniency-driven competition authority enforcement action has heightened the risks and disincentives weighed by potential applicants in connection with leniency decisions. These factors, amongst others, suggest caution at least is warranted in predicting the long-term sustainability and effectiveness of the leniency revolution.

Thirdly, the conception and administration of leniency policies has been too narrow and insular. While in some instances the relationship between leniency and other aspects of the enforcement system has been recognised, the discourse regarding the dynamics in and implications of these relationships has lacked sophistication and has often been one-sided, predominantly in favour of protecting leniency incentives.

In the case of criminal or penal sanctions for cartel conduct, much of the commentary has focused on such sanctions as critical to the effectiveness of leniency policies. Relatively less attention has been given to what this means for the legitimacy and ultimately the effectiveness of the cartel criminalisation project. In the case of private actions for damages, the debate has centred on the threat that such actions pose to leniency policies. Yet, arguably, a more holistic assessment of the contributions that private enforcement and public enforcement (entailing, but not limited to enforcement based on leniency policy) can make to the objectives of deterrence and compensation is called for. In the case of compliance, the potential for leniency policies and corporate compliance measures to be mutually reinforcing has been largely missing from the leniency discourse. This is at the expense of engendering a business culture in which ethical as well as legal values and behaviour are fostered.

Sound policy and effective public administration over the long term require that the interaction and interdependencies between leniency policies and other facets of the overall enforcement system be acknowledged and carefully examined. This needs to be done even if the outcomes involve tempering the leniency policy faith.

Part II

Leniency Convergence and Divergence

2

Leadership of Leniency

ANN O' BRIEN*

I. INTRODUCTION

The Antitrust Division of the United States Department of Justice (DOJ, or Antitrust Division) is the undisputed market leader of leniency. DOJ prosecutors came up with the core concept of exchanging leniency for cooperation against other cartel members, and then revised and honed their leniency policy to exponentially increase its effectiveness and crack the world's largest cartels. From their enforcement bully pulpit,[1] DOJ prosecutors preached the benefits of leniency, and the members of the bar, the business community and cartel enforcers around the world listened and followed suit.

Leniency policies have revolutionised cartel enforcement. Whether you call it leniency, amnesty or immunity,[2] all must call the core concept of leniency a wildly successful idea. The advent and proliferation of leniency policies has transformed the way competition authorities around the world detect, investigate and prosecute cartels. The smoke-filled walls of restaurants and hotel rooms where executives reached secretive price-fixing agreements were previously impenetrable to cartel enforcers, and many such agreements undoubtedly went undetected for decades. Even if enforcers caught a whiff of the suspicious smoke, proving such secretive agreements was all but impossible for cartel enforcers without an insider to recount what happened within those walls. Leniency policies destabilised cartels and allowed cartel enforcers to get inside those walls, sometimes literally with covert recordings. Leniency policies allowed cartel enforcers to obtain the specifics of when, where and how cartel agreements were reached, allowing them to crack cartels, prosecute

* The views expressed in this chapter do not necessarily reflect those of the United States Department of Justice.

[1] The phrase 'bully pulpit' was first used by the original 'trustbuster' Theodore Roosevelt in the early twentieth century to explain his view of the presidency: 'I suppose my critics will call that preaching, but I have got such a bully pulpit!' See 'Did You Know?' (PBS) www.pbs.org/wgbh/americanexperience/features/general-article/tr-know/. The phrase is now defined as 'a prominent public position (as a political office) that provides an opportunity for expounding one's views': (*Merriam-Webster Online*) www.merriam-webster.com/dictionary/bully pulpit.

[2] The terms 'immunity', 'leniency' and 'amnesty' are used in different jurisdictions. Under the United States Corporate Leniency Policy, only one company and its cooperating employees can qualify for leniency for antitrust violations, which under the policy means no criminal conviction, no criminal fine and no jail time for cooperating executives. See DOJ, 'Corporate Leniency Policy' (10 August 1993) www.justice.gov/atr/public/guidelines/0091.pdf. In other jurisdictions, including Australia and the European Union, leniency policies offer a 100 per cent reduction of fines for the first cooperating company (referred to as 'full immunity') and a possible fine reduction for cooperating companies that do not win the race for full immunity (referred to as 'leniency'). For the purposes of this chapter, 'leniency' is used as it is in the United States Corporate Leniency Policy.

participants and end the harm caused to consumers. Smoke-filled rooms may have given way to virtual meetings and email, but leniency policies have continued to uncover even the most sophisticated cartels.

This chapter proceeds as follows. Section II describes the history of the DOJ's leniency policy and the spread of leniency policies to other jurisdictions. Section III explains in more detail how the DOJ went about building an effective enforcement strategy and an effective leniency policy. Section IV then discusses a range of issues relating to transparency, including the typical elements of a leniency policy, international convergence, ongoing differences in the treatment of subsequent cooperators and the challenges presented by joint agency investigations of cartel and other unlawful conduct. Section V concludes.

II. THE HISTORY AND PROLIFERATION OF THE UNITED STATES LENIENCY POLICY

The original version of the United States' Corporate Leniency Policy dates back to 1978. The original policy relied on the core concept of providing a pass from prosecution in exchange for self-reporting and cooperation against other cartel members in an effort to detect secretive cartels, but it failed to provide the incentives necessary to incite self-reporting of large-scale hard-core cartel conduct. For this reason, the original US Corporate Leniency Policy was rarely utilised. The DOJ reported that, on average, it received only about one leniency application per year under the original policy, and it did not result in the detection of even one international or large domestic cartel.[3]

In August 1993, the DOJ revised its Corporate Leniency Policy to increase incentives for corporate cartel participants to come forward and cooperate.[4] Three major revisions were made to the policy: (1) leniency is automatic for qualifying companies if there is no pre-existing investigation; (2) leniency may still be available even if cooperation begins after an investigation is underway; and (3) all officers, directors and employees who come forward with the company and cooperate are protected from criminal prosecution. These revisions were intended to make the Corporate Leniency Policy more transparent and predictable, in an effort to raise incentives for companies to report criminal activity and cooperate.

The changes produced the desired results. The DOJ reported that the leniency application rate jumped from one per year prior to 1993 to an average of one per month by 2003.[5] By 2010, the DOJ reported a nearly twenty-fold increase in the leniency application rate from the rate under the original policy.[6] The DOJ has proclaimed its revised Corporate Leniency Policy its most effective investigative tool, and cites astonishing statistics showing the results

[3] See SD Hammond, 'The Evolution of Criminal Antitrust Enforcement over the Last Two Decades' (The 24th Annual National Institute on White Collar Crime, Miami, 25 February 2010) 2, www.justice.gov/atr/public/speeches/255515.pdf.

[4] See Antitrust Division, US Department of Justice, 'Corporate Leniency Policy' (n 2).

[5] See JM Griffin, 'The Modern Leniency Program after Ten Years: A Summary Overview of the Antitrust Division's Criminal Enforcement Program' (The American Bar Association Section of Antitrust Law Annual Meeting, San Francisco, 12 August 2003) 8, www.justice.gov/atr/public/speeches/201477.pdf.

[6] See Hammond, 'Evolution' (n 3) 3.

it has continued to produce for two decades.[7] For instance, according to DOJ statistics as of 2010, companies had been fined more than $5 billion for US antitrust crimes since 1996, with over 90 per cent of this total tied to investigations assisted by leniency applicants.[8]

Cartel enforcers around the globe witnessed the overwhelming success of the DOJ's revised Corporate Leniency Policy and began to follow suit. Today, more than 50 jurisdictions have leniency policies.[9] Canada was quickest to follow the DOJ's lead and has had some form of leniency in place since 1991;[10] the European Commission's first Leniency Notice was adopted in 1996.[11] However, like the DOJ's pre-1993 leniency policy, some of these early policies lacked sufficient transparency and predictability to induce self-reporting effectively. After Canada issued its Immunity Bulletin in 2000[12] and the European Commission issued its revised Leniency Notice in 2002,[13] the 'Big Three' corporate leniency policies—those of the United States, the European Union and Canada—underwent substantial convergence. Other jurisdictions reaped the benefits of the experience of early adopters of leniency, and designed their own leniency policies after the successfully revised policies of these three major jurisdictions.

Today there is substantial convergence on general leniency principles. This convergence in leniency policies has resulted in companies regularly seeking leniency simultaneously in the United States, Europe, Canada and in a growing list of other jurisdictions where the applicants have exposure. The proliferation of leniency policies has led to the detection and dismantling of the largest global cartels ever prosecuted, with record-breaking fines in jurisdictions such as Australia, Brazil, Canada, the EU, Japan, Korea, the United Kingdom and the United States.

III. BUILDING AN EFFECTIVE LENIENCY POLICY

A. Converting Sceptics

While the motto 'If you build it they will come' proved true for Kevin Costner's character in the movie *Field of Dreams*, in the field of leniency, the same is not true. The architects of the revised US Corporate Leniency Policy in 1993 were Antitrust Division 'Hall of Famers'—Gary Spratling, Jim Griffin and John Orr. However, revising the policy to increase incentives was just the first step in making it truly effective. Then the hard work began.

[7] Since 1994, the DOJ has also had a leniency policy for individuals to establish a way for individuals to come forward when their employers do not. See DOJ, 'Leniency Policy for Individuals' (10 August 1994) 1, www.justice.gov/atr/public/guidelines/0092.pdf. The Individual Leniency Policy is primarily intended to create the possibility of a race to the prosecutor's door between a whistle-blowing employee and his or her recalcitrant company. Although this dynamic is important in keeping the pressure on companies to come forward quickly, the Individual Leniency Policy is rarely utilised. This chapter will therefore focus on corporate leniency. For a discussion of the Individual Leniency Policy, see ME Stucke, 'Leniency, Whistle-Blowing and the Individual: Should We Create Another Race to the Competition Agency?', ch 11 in this volume.

[8] See Hammond, 'Evolution' (n 3) 3.

[9] ibid.

[10] See Competition Bureau Canada, 'Immunity Program Review' (Consultation Paper) (February 2006) 1, http://apps.americanbar.org/antitrust/at-committees/at-ic/pdf/spring/06/129.pdf.

[11] See Commission Notice on the non-imposition or reduction of fines in cartel cases [1996] OJ C207/4.

[12] See Competition Bureau Canada, 'Immunity Program Review' (n 10) 1.

[13] See Commission Notice on immunity from fines and reduction of fines in cartel cases [2002] OJ C45/3.

The first task was addressing the sceptics. And the scepticism began at home. The concept of a formalised immunity policy was unique in US law enforcement, and no such voluntary disclosure programme existed within the DOJ. Giving up prosecution of the first company to 'rat out' its conspirators was initially unsettling, even to many prosecutors. The prisoner's dilemma presented by the leniency policy results in keeping the first cartelist to self-report out of prison—and that bothered those who were dedicated to bringing criminals to justice. The DOJ recognised, however, that the grant of leniency with no criminal conviction, fine or prison sentences for antitrust violations was necessary to induce cartel participants to turn on each other and self-report.[14]

The DOJ obtained leniency buy-in by convincing prosecutors that leniency policies crack highly secretive antitrust cartels that would otherwise go undetected and unabated. The discovery and termination of the cartel conduct through leniency policies not only ends cartels and the ensuing harm to consumers, but because cartels are by definition conspiracies that involve more than one participant, leniency policies also provide the valuable insider information necessary to successfully prosecute the remaining cartel participants. This in turn may lead to recovery of damages for victims.

The antitrust bar was also initially sceptical of the novel Corporate Leniency Policy, and many private practitioners took a wait-and-see approach to evaluate how the agency would apply the new policy.[15] The DOJ took to the proverbial pulpit and 'seized every available opportunity to educate the bar and the business community on the merits of the [Leniency] Program and, more importantly, built a solid record of applying the program consistently and fairly'.[16] The DOJ quickly converted members of the antitrust bar, who saw the advantages of the policy.[17] Members of the criminal antitrust bar became an important part of the success of the US Corporate Leniency Policy because they recognised the value to their clients of early reporting to the DOJ, and were on the lookout for cartel conduct.

After the conversion of early sceptics, the DOJ began the more difficult and prolonged work of implementing its criminal enforcement programme in a way that maintained leniency incentives, while holding cartelists who lost the race for leniency accountable. Under the leadership of Criminal Deputy Assistant Attorneys General Spratling, Griffin and Hammond, the DOJ spent the next two decades building and implementing with precision a 'carrot and stick' enforcement strategy. This involved coupling rewards for voluntary disclosure and timely cooperation pursuant to the Corporate Leniency Policy with severe sanctions for those who do not come forward and cooperate.

B. The Carrot of Leniency

Leniency policies work because they destabilise cartels and create a race to the cartel enforcer's door. If cartel members have a significant fear of detection and the consequences of getting caught are too severe, then the rewards of self-reporting become too important to

[14] Hammond, 'Evolution' (n 3) 2.

[15] See GR Spratling, 'The Corporate Leniency Policy: Answers to Recurring Questions' (ABA Antitrust Section 1998 Spring Meeting, Washington DC, 1 April 1998) 1, www.justice.gov/atr/public/speeches/1626.pdf.

[16] GR Spratling, '"Making Companies an Offer They Shouldn't Refuse": The Antitrust Division's Corporate Leniency Policy—An Update' (Bar Association of the District of Columbia's 35th Annual Symposium on Associations and Antitrust, Washington DC, 16 February 1999) 1, www.justice.gov/atr/public/speeches/2247.pdf.

[17] See ibid.

risk losing the race for leniency to another cartel member. This dynamic is often referred to as a prisoner's dilemma. The DOJ has also referred to it as the 'empty seat at the table' scenario.[18] Imagine five members of a cartel are scheduled to hold a meeting, but when the meeting starts there is an empty seat at the table. One of the conspirators unexpectedly has not arrived at the meeting and is not returning phone calls. Those in attendance immediately become nervous, wondering where the missing cartel member is and whether he has already reported the others to the authorities. Should they try to get to the prosecutor's office first? A decision to wait, even a day, could cost them many millions of dollars in fines, and potentially, their liberty, in the United States and a growing number of other jurisdictions. These questions, and the attendant destabilisation of cartels created by leniency policies, are what leads conspirators directly to the prosecutor's door.

Corporations and their counsel must have confidence in a leniency policy, or they will not come forward, and there will be no race at all. Over two decades of DOJ experience in the United States has shown that for a leniency policy to be effective, it must have three major cornerstones:

1. heightened fear of detection;
2. severe sanctions; and
3. transparency in enforcement policies.[19]

These pillars of leniency are based on simple risk versus reward principles. If cartelists think they will not get caught, they will simply continue the conduct, and certainly not voluntarily report it. The empty seat won't bother them at all. Similarly, if sanctions are not severe enough, a cartelist will simply weigh the benefits of cartel conduct against minimal sanctions and continue to reap the benefits of cartel conduct. Non-deterrent sanctions simply become the price of doing business as a cartelist. The stick must be big enough to make the carrot worth wanting.

C. The Stick of Deterrent Sentences

Over the last two decades, the DOJ has obtained steadily increasing corporate fines and longer jail sentences for individuals. The current sentencing levels in US criminal cartel cases took 40 years to attain. Criminal violations of the Sherman Act became a felony in 1974, with a maximum of three years' of imprisonment, which went unchanged for three decades. Fine levels were initially set at $1 million for corporations and $100,000 for individual defendants in 1974, and were increased gradually in 1984 and 1990.[20] In addition, since 1984, fines in excess of the statutory maximum may be imposed pursuant to 18 USC § 3571(d), which provides for a fine of up to twice the gain derived by, or twice the loss caused by, the cartel. In June 2004, recognising the rising threat to US businesses and consumers

[18] Hammond, 'Evolution' (n 3) 4.

[19] See SD Hammond, 'Cornerstones of an Effective Cartel Leniency Programme' (2008) 4(2) *Competition Law International* 4.

[20] The maximum individual fine for criminal Sherman Act violations was increased to $250,000 in 1984 through a combination of the Comprehensive Crime Control Act, Pub L No 98-473, 98 Stat 1976 (1984) and the Criminal Fine Enforcement Act, Pub L No 98-596, 98 Stat 3134 (1984), and the maximum corporate fine remained $1 million. In 1990, the Sherman Act was amended to raise the statutory maximum fines to $10 million for corporations and $350,000 for individuals. See Antitrust Amendments Act, Pub L No 101-588, 104 Stat 2880 (1990).

posed by cartels, Congress significantly raised the maximum penalties for criminal Sherman Act violations by increasing the statutory maximum corporate fine to $100 million, the statutory maximum individual fine to $1 million, and the maximum jail term to 10 years.[21]

As penalties for Sherman Act offences in the United States have steadily increased, the DOJ has worked hard to obtain increasingly higher corporate fines commensurate with the harm caused by cartels. In fiscal year 1991 the average corporate fine for an antitrust offence in the United States was a little less than $320,000 and the largest corporate fine ever imposed for a single Sherman Act count was $2 million.[22] Corporate fines grew steadily in the 1990s, and in 1996 US corporate fines reached a new order of magnitude when the Archer Daniels Midland Company paid a $100 million fine for its participation in the lysine and citric acid conspiracies. Gary Spratling, then a Deputy Assistant Attorney General of the DOJ's Antitrust Division, talked about the '$10 Million Club' of corporations paying US antitrust criminal fines of more than $10 million, and predicted that the historic Archer Daniels Midland Company fine was only the tip of the antitrust fine iceberg.[23] This prediction quickly proved true as corporations started to agree to pay fines of over $100 million, and then to plead guilty and pay a record $500 million criminal fine for leading a conspiracy.

The DOJ has continued to crack the world's largest international cartels and obtain nine-figure fines. As is evident from the latest statistics, the '$100 Million Club' has continued to grow, with the DOJ obtaining 27 fines of $100 million or more.[24]

D. The Big Stick of Individual Accountability

Large corporate fines, however, are only one piece in the deterrence puzzle of US cartel enforcement. Since the late 1990s, the Antitrust Division has emphasised deterrence through individual accountability, and statistics demonstrate that individuals who violate US antitrust laws are being sent to jail with increasing frequency and for longer periods of time. The DOJ's prosecution of the vitamin cartel was a watershed—not just in terms of record corporate fines but also because there was a plea agreement with a Swiss vitamin executive that for the first time called for the imposition of a prison sentence for a foreign national who had participated in an international cartel affecting the United States. Previously, foreign defendants prosecuted for their participation in international cartels, such as the lysine and citric acid cartels, had pleaded guilty, but the plea agreements did not include jail time. The DOJ typically did not seek a jail sentence, because a no-jail deal was necessary to secure access to an important foreign witness or key foreign-located documents. Thereafter, however, the DOJ had the ability to successfully investigate and prosecute foreign nationals who violate US antitrust laws, due to both the success of the US Corporate Leniency Policy

[21] See Antitrust Criminal Penalty Enhancement and Reform Act, Pub L No 108-237, § 215, 118 Stat 661, 668 (2004).

[22] See Hammond, 'Evolution' (n 3) 4.

[23] See GR Spratling, 'The Trend towards Higher Corporate Fines: It's a Whole New Ball Game' (The Eleventh Annual National Institute on White Collar Crime, New Orleans, 7 March 1997) www.justice.gov/atr/public/speeches/4011.pdf.

[24] See Antitrust Division, DOJ, 'Sherman Act Violations Yielding a Corporate Fine of $10 Million or More', www.justice.gov/atr/public/criminal/sherman10.html.