

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**Global Forum on Competition**

**SANCTIONS IN ANTITRUST CASES**

**Paper by Caron Beaton-Wells**

**-- Session IV --**

**1-2 December 2016**

*This paper by Caron Beaton-Wells (Professor of Competition Law, Director, Global Competition and Consumer Law Program, University of Melbourne Law School) was submitted as background material for Session IV at the 15th Global Forum on Competition on 1-2 December 2016.*

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**JT03405723**

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## CRIMINAL SANCTIONS FOR CARTEL CONDUCT – THE LENIENCY CONUNDRUM

-- Paper by Caron Beaton-Wells \* --

### Summary

While a significant number of jurisdictions now have criminal sanctions available for cartel conduct, there remains substantial debate about whether such sanctions, particularly jail sentences for individuals, are a legitimate and effective addition to the anti-cartel enforcement arsenal.

The debate is multi-faceted and in part this reflects the reality that '[c]riminal sanctions raise the stakes for any legal system, for they send ripples through each element of the legal process.' One such element is the leniency policy. Leniency policies are generally regarded as the most valuable tool available to competition authorities in detecting, investigating, prosecuting and, ultimately, deterring 'hard core' cartel conduct.

It is telling to observe that the international proliferation of criminal regimes and of leniency policies has been temporally convergent – both having taken place over the last 10-15 years. Yet the relationship between these two important and, in many respects, controversial phenomena is still to be fully understood.

On one view, cartel criminalisation and cartel leniency may be seen as mutually reinforcing. Having criminal sanctions may be regarded as enhancing the effectiveness of a leniency policy and in turn, an effective leniency policy may be seen as aligned with the interests of bringing serious criminals to justice.

On another view, cartel criminalisation and cartel leniency may be seen as in tension with and even potentially undermining of each other. Leniency effectiveness may in fact be impaired by the threat of criminal sanctions and in turn, leniency policies may be damaging to the integrity and effectiveness of the criminal law.

One approach to navigating this complex set of issues involves examining the relationship from instrumental and normative perspectives. In any jurisdiction that relies on a leniency policy and is deciding whether to introduce criminal sanctions, consideration should be given to the way in which the policy and a prospective criminal regime will work together from each of these perspectives.

From an instrumental perspective, a key question is whether criminal sanctions enhance or impair the effectiveness of a leniency policy. In addressing this question, the following considerations may be taken into account:

- in terms of cartel detection: i) there is limited empirical evidence to support the view that the availability of criminal sanctions materially increases the quantity or quality of applications received under a leniency policy; and ii) there is some empirical evidence to suggest that in certain circumstances the availability of criminal sanctions may reduce the number of applications received under a leniency policy;

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- in terms of cartel investigation and prosecution: i) in a criminal setting, evidence may be less available on account of the reluctance of individuals facing prosecution to cooperate with leniency investigations; and (ii) reliance on leniency witnesses may be hazardous to the successful outcome of a jury trial;
- in terms of cartel deterrence, predictions of increased deterrence as a result of combining criminal sanctions with a leniency policy are problematic in the absence of awareness by the business community of the law and sanctions that apply and of the role of the leniency policy in determining their application; and
- overall, any assessment of leniency benefits for enforcement must take account of the significantly higher costs associated with a criminal system, particularly where plea-bargaining is not available.

From a normative perspective, a key question is whether a leniency policy enhances or impairs the effectiveness of a criminal regime, that is whether a leniency policy weakens the capacity of the criminal law to appropriately and legitimately label and punish conduct that warrants criminal treatment. In addressing this question, the following considerations may be taken into account:

- the retributive compromise and associated unfairness involved in a leniency policy risks damaging public confidence in or support for the legal system and its administration which may in turn undermine the legitimacy of the competition authority;
- these facets of a leniency policy may also limit the prospects of normatively-based compliance with cartel laws by the business sector (that is, compliance on the grounds that business people regard the law and its enforcement as right and just); and
- the combination of a leniency policy and a criminal regime produces inconsistencies in policy and practice that may impair the role of the criminal law in educating business people and the wider public as to why cartel conduct should be treated as criminal.

In general terms, this analysis suggests that the instrumental benefits of a cartel leniency-cartel criminalisation combination are questionable and that the combination may come at a normative cost. This leaves open the conclusion that criminal sanctions and leniency policies are uncomfortable if not unnatural allies in the war against cartels.

## 1. Introduction

1. Despite continuing emphasis on corporate fines as the primary method of cartel sanctioning, over the last decade there has been a discernible movement across a wide range of jurisdictions towards the introduction and toughening of sanctions against individuals for cartel conduct.<sup>1</sup> In particular, there has been a focus on criminalising this conduct with a specific view to allowing for the sentence of imprisonment against individual offenders.

2. This trend has been championed by the authorities in the United States (US), where jail has been the sanction of choice for ‘hard core’ cartelists since the 1990s.<sup>2</sup> Over the last 10-15 years, more than 30

<sup>1</sup> See generally, OECD, *Cartels: Sanctions Against Individuals* (Policy Roundtable No DAF/COMP(2004)39, 10 January 2005).

<sup>2</sup> Connor reports that since the early 1990s the number of prison sentences for price fixing in the US has increased at a more rapid rate than the number of corporate criminal fines. See J Connor, ‘Problems with Prison in International Cartel Cases’ at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2166414](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2166414), 20 June 2011, 2. Moreover, sometime in 2000-2002, the US DOJ appeared to consciously shift policy from increasing corporate fines to more and increasingly severe prison sentences. See S 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) 3.

countries have criminalised cartel conduct in some form. Significantly, the vast majority have done so since 1995, over 20 since 2000, and the list appears to be growing.<sup>3</sup>

3. That said, it is important to recognise that there is considerable disuniformity in the way in which cartel offences have been designed and extent to which criminal sanctions been applied across jurisdictions.<sup>4</sup> Moreover, there are countries in which cartel conduct has been decriminalised<sup>5</sup> and others in which criminalisation has been seriously considered and decided against.<sup>6</sup> This unevenness in adoption, maintenance and application suggests that characterisations of cartel criminalisation as a global trend or movement may be premature or optimistic.<sup>7</sup>

4. Cartel criminalisation raises a host of issues and has generated a large body of commentary and research, much of which reflects the substantial divergence of opinion regarding both its legitimacy and effectiveness across the competition law world. In broad terms, it is possible to identify two key and recurring themes in the debate about justifications or rationales for criminal cartel sanctions:

- criminalisation as a measure to enhance the achievement of enforcement objectives, as in objectives relating to cartel detection, prosecution and deterrence (**an instrumental justification**);
- criminalisation as a measure to appropriately label and punish conduct that is inherently criminal, as in seriously harmful and/or morally wrong (**a normative justification**).

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<sup>3</sup> For a map showing countries that have adopted or, as at 2014, were in the process of adopting a criminal regime, see A Stephan, 'Four key challenges to the successful criminalization of cartel laws' (2014) 2(2) *Journal of Antitrust Enforcement* 333, 335.

<sup>4</sup> There are jurisdictional variations in the types of cartel conduct to which criminal liability applies (e.g. some jurisdictions apply it to bid-rigging only); the elements of the cartel offence (e.g. some jurisdictions have canvassed dishonesty as the mental / fault element of the offence); the subjects of criminal liability (e.g. some jurisdictions apply criminal liability to both companies and individuals, and some to individuals only); the range of penalties or sentences that are available and their maxima (e.g. some jurisdictions have criminal fines as well as or in the alternative to custodial sentences for individuals, and in respect of the latter maxima range from 1 to 14 years imprisonment); the types of agencies involved in criminal investigation and prosecution (e.g. some jurisdictions reserve these functions for a central prosecuting agency, whereas some allow for competition authorities to do this work, and in others there is joint responsibility between agencies) and the extent to which cartel offences are prosecuted or successfully prosecuted (e.g. outside of the US, the number of jurisdictions in which criminal cartel cases have been prosecuted is low and the record of convictions and custodial sentences is patchy).

<sup>5</sup> In Germany, for example, where there were criminal sanctions for various types of anti-competitive behaviour between 1923 and 1958. Between 1958 and 1997, no criminal sanctions applied under specific legislation until, in 1997, a bid-rigging offence was introduced to the Criminal Code (having been prosecutable prior to that time under general fraud provisions). From the 1950s onwards, cartel criminalisation has been the subject of regular debate in Germany. The reasons for ongoing resistance to its extension beyond bid rigging are explained in F Wagner von Papp, 'What if all Bid Riggers Went to Prison and Nobody Noticed? Criminal Antitrust Law Enforcement in Germany' in C Beaton-Wells and A Ezrachi (eds) *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing, 2011), ch 7, 157.

<sup>6</sup> Recent examples of these include Indonesia and New Zealand. See OECD, 'Sanctions in Antitrust Cases', Background Paper by the Secretariat, Global Forum on Competition, Session IV, 1-2 December 2016, 32.

<sup>7</sup> Cf C Harding, 'Business Collusion as a Criminological Phenomenon: Exploring the Global Criminalisation of Business Cartels' (2006) 14 *Critical Criminology* 181; G Shaffer and N Nesbitt, 'Criminalizing Cartels: A Global Trend?' (2011) 12 *Sedona Conference Journal* 313; C Beaton-Wells and A Ezrachi (eds) *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing, 2011).

5. Instrumental justifications for criminalisation thus are concerned with the benefits that a criminal regime promises in terms of more effective enforcement. Normative justifications are concerned with the question whether cartel conduct should be treated as criminal, because of its harmful effects and/or because of its morally objectionable nature, independently of the question as to whether criminalisation would serve enforcement ends.

6. Over the same period that the criminalisation trend has developed momentum, more than 50 jurisdictions have adopted leniency policies (or immunity or amnesty policies as they may also be called) in support of their enforcement activities relating to cartel conduct.<sup>8</sup> Competition authorities generally regard this policy as the single most important tool at their disposal for effective cartel law enforcement.<sup>9</sup>

7. Based on the game theoretic model known as the ‘prisoner’s dilemma’,<sup>10</sup> the use of leniency policies in enforcement is justified on the basis that they are the most effective and least costly mechanism for detecting and prosecuting activity that is generally systematic, deliberate and covert.<sup>11</sup> Leniency policies are seen also as contributing to the deterrence of cartel conduct.<sup>12</sup> These benefits are generally regarded by competition authorities as outweighing any adverse effects in terms of lower penalties overall as well as any unpalatable political or moral implications.<sup>13</sup>

8. It is thus possible to say that since the late 1990s, leniency policies and criminal sanctions have each featured significantly in the discourse and, to a large extent, the practice of anti-cartel enforcement across the globe. The dual emergence of leniency and criminalisation policies in this field is not a coincidence. However, the reasons for and implications of this development are significantly under-explored.

9. Invoking Kovacic’s wisdom concerning interdependencies amongst elements of an enforcement system,<sup>14</sup> the premise of this paper is that in any debate concerning criminal cartel sanctions, particularly

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<sup>8</sup> See S 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) 3. For a discussion of the development of leniency policies, and in particular the role and the experience of the US Department of Justice in this development, see A O’Brien, ‘Leadership of Leniency’, in C Beaton-Wells and C Tran (eds), *Anti-Cartel Enforcement in a Contemporary Age: Leniency Religion* (Hart Publishing, 2015), ch 2, 17.

<sup>9</sup> On trends in the adoption of leniency policies or revisions to such policies in recent years, see International Competition Network, ‘Trends and Developments in Cartel Enforcement’ (9th Annual ICN Conference, Istanbul, 29 April 2010) 7.

<sup>10</sup> See generally C R Leslie, ‘Antitrust Amnesty, Game Theory, and Cartel Stability’ (2006) 31 *Journal of Corporation Law* 453-488.

<sup>11</sup> T O Barnett, ‘Seven Steps to Better Cartel Enforcement’, in Claus-Dieter Ehlermann and Isabella Atanasiu (eds), *European Competition Law Annual 2006: Enforcement of Prohibition of Cartels* (Hart Publishing, Oxford, 2007)141-52, 141, 146–8.

<sup>12</sup> G Spratling, ‘Detection and Deterrence: Rewarding Informants for Reporting Violations’ (2001) 69 *George Washington Law Review* 798-823; G Spagnolo, *Divide et Impera: Optimal Leniency Programs* (Discussion Paper, Stockholm School of Economics, 12 January 2005); W Wils, ‘The Use of Leniency in EU Cartel Enforcement: An Assessment After Twenty Years’ (2016) 39(3) *World Competition* 327, 337-338.

<sup>13</sup> W Wils, ‘Leniency in Antitrust Enforcement: Theory and Practice’ (2007) 30 *World Competition: Law and Economics Review* 25.

<sup>14</sup> W Kovacic, ‘Criminal Enforcement Norms in Competition Policy: Insights from U.S. Experience’ in C Beaton-Wells and A Ezrachi (eds) *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing, 2011), ch 3, 45, 48.

regarding the instrumental and/or normative justifications for such sanctions, it is essential to take account of the relationship between criminalisation and leniency. That relationship and its implications for a jurisdiction contemplating a criminal regime are the focus of this paper.

10. The paper is structured as follows. Part 2 examines the extent to which the strengthening of leniency policies bolsters the case for criminalisation. The analysis tests the proposition that leniency effectiveness provides an instrumental justification for criminal sanctions. Part 3 examines the extent to which there are tensions between the use of leniency policies and criminal sanctions. The analysis explores the possibility that leniency policies undermine justification for criminalisation on normative grounds. Based on these analyses, Part 4 summarises the considerations that need to be taken into account by a jurisdiction that relies on leniency and is deciding whether to introduce criminal sanctions.

## **2. Cartel leniency and cartel criminalisation – instrumental considerations**

11. Insofar as the recent wave of cartel criminalisation coincides with the era of leniency policies, there is a strong sense that leniency policies may be seen as providing an instrumental argument in favour of criminalisation. Certainly it is the view of the US Department of Justice (DOJ) that the threat of criminal sanctions, jail time for individuals especially, enhances the effectiveness of such policies. According to the DOJ:

*The first prerequisite to creating an effective amnesty program is the threat of severe sanctions for those who lose the race for amnesty. Since cartel activity is treated as a criminal, civil and/or administrative offense depending on the jurisdiction, authorities around the world rely on a range of sanctions.. [However], all else being equal, a jurisdiction without individual liability and criminal sanctions will never be as effective at inducing amnesty applications as a program that does.<sup>15</sup>*

12. This view appears to have been influential in other jurisdictions also. In Australia, for example, one of the principal justifications for criminalising cartel conduct was that it would make the leniency policy of the Australian Competition & Consumer Commission (ACCC) more effective.<sup>16</sup>

13. The argument that the risk of criminal prosecution provides a powerful inducement to firms and executives to take advantage of leniency is intuitively appealing. However, as an instrumental justification for criminalisation, it also warrants close scrutiny. Specifically it should be considered whether criminal sanctions necessarily aid a leniency policy in achieving namely enhanced cartel detection, investigation and prosecution, and ultimately deterrence.

### **2.1 Cartel detection**

14. There is limited empirical evidence to support the view that having criminal sanctions available materially increases the number of applications received under a leniency policy. There is an impressive body of economic research that has sought to test the effect on leniency uptake of different eligibility

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<sup>15</sup> S Hammond, 'Cornerstones of an Effective Cartel Leniency Programme' (2008) 4(2) *Competition Law International* 4. See also the argument in S Hammond, 'When Calculating the Costs and Benefits of Applying for Corporate Amnesty, How Do You Put a Price Tag on an Individual's Freedom?', Speech at the 15<sup>th</sup> Annual National Institute on White Collar Crime, 8 March 2001.

<sup>16</sup> See G Samuel, 'The Relationship between Private and Public Enforcement in Detering Cartels' (International Class Action Conference 2007, Sydney, 25 October 2007) 8.

conditions and rewards (as to the latter, the level of fines particularly).<sup>17</sup> However, there does not appear to have been a study that focuses specifically on the effect of criminal sanctions on leniency detections.

15. The US experience is said to attest to the value of criminal sanctions from a leniency perspective. However, that experience of itself is not revealing of the extent to which leniency uptake would be lower in the US in the absence of criminal penalties. One way of using the US experience to test the proposition that criminal sanctions improve leniency detections would be to compare detection rates under the DOJ's leniency policy before criminal enforcement became active in the US and afterwards.<sup>18</sup>

16. Further, it needs to be acknowledged that there are jurisdictions in which there is a leniency policy but not criminal sanctions and in which the leniency policy is likely to be thought of nevertheless as having been a success. The EU is the most obvious example. In that jurisdiction, fines against undertakings are the only available sanction. Since 1996, the proportion of cases uncovered through the European Commission's (EC) leniency policy has steadily increased to 10% in the 1996-2000 period to 91% in the 2011-2015 period.<sup>19</sup> In Germany, where there are criminal sanctions for bid rigging only,<sup>20</sup> between 2001 and 2014, the Bundeskartellamt (the German Federal Cartel Office) received 513 leniency applications (that is, 36 applications on average per year).<sup>21</sup> The leniency policy in that jurisdiction does not apply to bid rigging offences.<sup>22</sup> The South African Competition Commission has received more than 500 applications under its leniency policy in the last ten years.<sup>23</sup> Criminal sanctions were introduced in 2016.

17. It is impossible to say whether the number of leniency applications in these and other jurisdictions with administrative sanctions would have been higher had criminal sanctions been available. Some insight might be gained from a comparison of the number of leniency applications received in a jurisdiction with administrative sanctions only (such as the EU) with the number of leniency applications received in a jurisdiction with criminal sanctions (such as the US) over the same period. The author is not

<sup>17</sup> See eg G Spagnolo, *Divide et Impera: Optimal Leniency Programs* (Discussion Paper, Stockholm School of Economics, 12 January 2005).

<sup>18</sup> This would involve comparing the number of leniency applications under the DOJ's leniency policy for some period prior to the intensification of its criminal enforcement program with the number for an equivalent period thereafter (see n 2 above). Any such comparison would be complicated and possibly invalidated by the changes that were made to the leniency policy and other aspects of the enforcement regime over that period.

<sup>19</sup> W Wils, 'The Use of Leniency in EU Cartel Enforcement: An Assessment After Twenty Years' (2016) 39(3) *World Competition* 327, 334. Granted, the sanctions levied by the EC are 'severe' by any measure such that some might even characterise them as quasi-criminal. Between 2012 and 2016, a total of €8,609,180,000 in cartel fines was imposed by the Commission, the highest cartel fine per case imposed to date was the fine of €2,926,499,000 imposed on a trucking cartel in 2016, and the highest fine per undertaking to date was the fine of €1,499,806,000 of imposed on Daimler in connection with that cartel. See European Commission, *Cartel Statistics*, as at 19 July 2016, <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf>. For the period between 2007 and 2013, the average fine stood at €348,000,000 per infringement decision (Stephan and Nikpay, 147).

<sup>20</sup> These sanctions were introduced in 1997 and apply under the German Criminal Code (see n 4 above).

<sup>21</sup> See [www.bundeskartellamt.de/EN/Banocartels/Leniency\\_programme/leniencyprogramme\\_node.html](http://www.bundeskartellamt.de/EN/Banocartels/Leniency_programme/leniencyprogramme_node.html).

<sup>22</sup> See F Wagner von Papp, 'What if all Bid Riggers Went to Prison and Nobody Noticed? Criminal Antitrust Law Enforcement in Germany' in C Beaton-Wells and A Ezrachi (eds) *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing, 2011), ch 7, 158, 175-177.

<sup>23</sup> See South African Competition Commission Annual Reports at <http://www.compcom.co.za/annual-reports/>.

aware of any such studies and, in any event, controlling for the influence of jurisdictional differences and other variables would pose challenges for the robustness of any conclusions that may be drawn from such a comparison.

18. Another approach would be to compare the number of leniency applications received in a jurisdiction before the introduction of criminal sanctions with the number received after criminal sanctions have been introduced. This comparison has been done by the author in relation to Australia and it was found that in the early years after criminal sanctions were introduced in that jurisdiction, the number of markers and proffers received under the ACCC's leniency policy fell.<sup>24</sup> This was in direct contradiction of the prediction made by the authority Chairman that criminalisation would give the policy a 'hefty boost'.<sup>25</sup> It would be helpful if a similar comparison were undertaken in other jurisdictions – in due course, in South Africa, for example.

19. However, the difficulty with such comparisons lies in the interpretation of their results. One possible interpretation of a decline in leniency applications post-criminalisation is that the introduction of criminal sanctions has deterred cartels from forming and thus there are relatively fewer cartels to report than prior to criminalisation. A further possibility is that the introduction of criminal sanctions has had the opposite effect, having in fact stabilised existing cartels, prompting cartel members to adopt greater vigilance and internal punishment mechanisms for defection, given that the stakes of detection of the cartel are now much higher. Yet another is that reporting is now seen as far more risky than it was when cartel conduct was a civil contravention, having regard to the fact that full immunity is available to the first-in only; subsequent co-operators are left to negotiate on the charge and/or the sentence with the Commonwealth Director of Public Prosecutions. Such possibilities, of course, can only be speculated upon.

20. There is some empirical evidence that criminalisation may reduce rates of reporting under leniency policies. Accounts by competition lawyers in the United Kingdom (UK) are said to indicate that in that jurisdiction there is, amongst the defence bar at least, 'a real concern that the criminal offence may be discouraging firms from applying for leniency'.<sup>26</sup> Apparently, this is because 'they have no way of being sure that the immunity prize is still available and so coming forward may actually expedite the successful prosecution of their employees.'<sup>27</sup> In the UK undertakings face fines only and those which miss out on full immunity are able to receive substantial discounts for cooperation. However, there is no such certainty of reward for individuals who cooperate after immunity has been awarded to another party. Any cooperation can be taken account in sentencing only.

21. A similar effect may be observable at a global level. Specifically, there appears to be emerging something of a paradox as a result of the proliferation of leniency policies at the same time as the escalation of sanctions around the world. In the case of a cross-border cartel affecting many markets, the spread of leniency policies makes it difficult - if not impossible - to be the first leniency applicant in all

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<sup>24</sup> The ACCC's leniency policy was introduced in 2005 and criminal sanctions were introduced in 2009. In the four year period between 2005 and 2009, 47 markers were received (56% of the total markers received between 2005 and 2013), whereas in just under four years since 2009, 36 have been received (43% of the total markers). 28 proffers were made between 2005 and 2009 (57% of the total proffers), and 21 since 2009 (42% of the total proffers). See C Beaton-Wells, 'Immunity policy for cartel conduct: revolution or religion? An Australian case-study' (2014) 2(1) *Journal of Antitrust Enforcement* 126, 136-7.

<sup>25</sup> See Samuel, above n 16.

<sup>26</sup> A Stephan, 'Four key challenges to the successful criminalization of cartel laws' (2014) 2(2) *Journal of Antitrust Enforcement* 333, 345.

<sup>27</sup> Ibid.

relevant jurisdictions. In the common situation of a dawn raid on several industry members in one jurisdiction, it is virtually certain that approaches will be made to several authorities by a few leniency applicants around the same time. Hence it is unlikely that any of the suspected firms can be confident of being first to confess anywhere.

22. Paradoxically then, the multiplication of sanctions and leniency policies may pose a serious threat to leniency effectiveness as a device for cartel discovery. As two seasoned leniency advisors have pointed out:

*Leniency is based on the absolute certainty that the first company to apply will receive total immunity from sanctions. In the absence of such certainty, leniency policies risk not being successful. Companies may indeed be ready to apply for leniency if there are good chances of not being fined at all. They may be much more reluctant if they can secure only a reduction in the fine - in such a case, they may prefer to trust their defences. This is even more the case when criminal sanctions are taken into account. The possibility of avoiding jail time constitutes a significant incentive to apply for leniency. By contrast, some may not be so prepared to cooperate if jail sentences are a certainty and the only question is for how long and where.<sup>28</sup>*

23. The incentive to cooperate is undermined further in the face of multiple prosecutions of the same individuals in multi-jurisdictional cartel cases. Such a scenario cannot be dismissed as entirely theoretical given that international law does not recognise double jeopardy or *ne bis in idem* principles and it is unclear whether in such a case authorities should or would take the prosecution of an individual in another jurisdiction into account either in deciding to prosecute or in assessing sentence.<sup>29</sup>

24. Finally, while the focus of the preceding discussion has been on the contribution that criminal sanctions may or may not make to the volume of leniency applications, consideration might also be given to the question whether such sanctions improve the quality of such applications. Specifically, it may be asked whether the threat of criminal prosecution means that reporting happens sooner and the leniency policy is thus more effective in disrupting active cartels than it would be otherwise. There is empirical evidence to suggest that leniency policies tend to detect cartels that are no longer active.<sup>30</sup> However, this

<sup>28</sup> See the argument made to this effect in I Forrerster and P Berghe, 'The Poisoned Chalice or The Pot at the End of the Rainbow' in C Beaton-Wells and C Tran (eds), *Anti-Cartel Enforcement in a Contemporary Age: Leniency Religion* (Hart Publishing, 2015), ch 9, 169. See also T Carmeliet, 'How Lenient is the European Leniency System? An Overview of Current (Dis)Incentives to Blow the Whistle' (2011-12) 48 *Jura Falconis* 463, 471-2.

<sup>29</sup> See the discussion in OECD, *Cartels: Sanctions Against Individuals* (Policy Roundtable No DAF/COMP(2004)39, 10 January 2005), 9, [6]. Notably, however, it was reported in the context of the roundtable discussion that the US has made arrangements with other jurisdictions investigating the same cartel to ensure that only one jurisdiction would prosecute an individual and impose a jail sentence (112).

<sup>30</sup> See A Stephan and A Nikpay, 'Leniency Decision-Making from a Corporate Perspective: Complex Realities' in C Beaton-Wells and C Tran (eds), *Anti-Cartel Enforcement in a Contemporary Age: Leniency Religion* (Hart Publishing, 2015), ch 8, 139, 150. According to Stephan and Nikpay's research, based on 43 EU cartel cases revealed through the leniency policy between 2002 and August 2014, where published information is available about the date the investigation was opened and the date the cartel infringement came to an end, the empirical evidence suggests that only in two cases did the reporting through leniency clearly occur while the cartel was still operating. It is hard to draw conclusions from the cartels that ended at around the same time as the leniency application, but in the majority of cases (23) in this sample the cartel had ceased to operate *prior* to a firm self-reporting in return for immunity. Cf the figures in W Wils, 'The Use of Leniency in EU Cartel Enforcement: An Assessment After Twenty Years' (2016) 39(3) *World Competition* 327, 339, indicating that of the 58 cartels detected exclusively through leniency 34 (ie 59%) were ongoing at the time of the leniency application.

evidence has arisen in the context of the EU, where only administrative sanctions against undertakings applies. Again, a comparison of the rate of ‘quality’ detections in the US and the EU could be helpful in this regard.

## 2.2 *Cartel investigation and prosecution*

25. Leniency policies are justified not only on the grounds of enhancing detection, but also on the basis that they yield crucial evidence that aids in the investigation and prosecution of cartelists (that is of course, prosecution of those who were not first to report). There can be no doubt that the information supplied by a leniency applicant places a competition authority at a significant advantage in encouraging other cartel members to come forward and cooperate and in negotiating admissions and discounts with them. Often the value of the information provided by second and third-in parties is crucial.<sup>31</sup> However, there is a question as to the extent to which this prosecution benefit is undermined in the context of criminal sanctions.

26. As previously mentioned, in a criminal regime where subsequent co-operators face substantial uncertainty regarding the rewards for cooperation, there is a greater likelihood that such parties will choose to contest the charge. This is particularly likely in jurisdictions where the prosecuting authority has or is perceived to have limited resources for costly time consuming trials and/or a poor record in enforcement of the cartel offence. It is even more so in jurisdictions where the practice of plea-bargaining is anathema<sup>32</sup> and in jurisdictions where the prosecutorial body is independent of the competition authority and not required or not receptive to taking account of recommendations from that authority.<sup>33</sup>

27. Indeed, in some jurisdictions, a crown witness system and plea bargaining are not only unknown, they are regarded with deep suspicion. As has been explained in relation to Germany:

*The Kantian tradition .. is not easily swayed by utilitarian arguments. Arguments advanced against immunity provisions are (1) that they infringe the rule of law, because they prevent imposing the sanction that justice requires; (2) that they infringe the principle of equality; (3) that they infringe the principle of mandatory prosecution; (4) that they destabilise the public trust in a just legal order, (5) that deals with criminals are immoral, and (6) that such provisions foster unreliable evidence.<sup>34</sup>*

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<sup>31</sup> As observed by US lawyer and former DOJ official Gary Spratling: ‘You [an enforcer] can lose a case with just a leniency applicant. You can never lose if you have applicant number two and number here as well’, cited in F Samadi, ‘Spratling: Enforcers must be kinder to leniency applicants’, *Global Competition Review*, 28 April 2015.

<sup>32</sup> While US legal culture is known for its embrace of plea negotiation and avoidance of contested trials, the same is not true of many other jurisdictions, especially in Europe. For descriptions of the range of approaches taken to plea bargaining or settlement in cartel cases, see OECD, [Plea Bargaining/Settlement of Cartel Cases](#) (Policy Roundtable No DAF/COMP(2007)38, 22 January 2008).

<sup>33</sup> On the need for coordination between competition authorities and public prosecutors, see OECD, [Cartels: Sanctions Against Individuals](#) (Policy Roundtable No DAF/COMP(2004)39, 10 January 2005), 9, [5].

<sup>34</sup> See F Wagner von Papp, ‘What if all Bid Riggers Went to Prison and Nobody Noticed? Criminal Antitrust Law Enforcement in Germany’ in C Beaton-Wells and A Ezrachi (eds) *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing, 2011), ch 7, 158, 176. Plea bargaining is also foreign in the Nordic legal context where the principle of mandatory prosecution applies (see P Gunsberg, *Criminalizing Business Cartels in Europe – A Comparative Perspective*, Doctoral dissertation, University of Helsinki, 2015, ch 9 (copy on file with author).

28. Uncertainty for subsequent co-operators in the context of a criminal regime has implications too for the relationship between a firm seeking leniency and its employees on whom it is reliant for the information that will determine its eligibility. It may be the case that sanctions against individuals, combined with derivative immunity, facilitate leniency applications by firms. Given repercussions for individual executives should leniency not be obtained, the interests of the firm and its employees are aligned. This means that the firm can rely on cooperation from its employees to fulfil in turn its disclosure and cooperation obligations on which leniency is conditioned. However, while such an argument has force in relation to the first-in leniency applicant, it can break down where a second or third-in firm is seeking a discounted fine while the best that its employees can hope for is a sentence that affords sufficient weight in mitigation to cooperation. In some jurisdictions, not only is the incentive for these employees to assist their employer reduced, but such assistance may even pose a risk of providing information that may assist the prosecution in a subsequent trial.

29. Aggravating this picture is the reality that in common law systems involving trial by jury, juries may be sceptical of if not hostile towards prosecutorial witnesses who have admitted to involvement in the offence and are escaping sanctions entirely or benefitting from reduced sanctions in return for their testimony. The point is expressed succinctly by US commentators:

*This arms defense counsel to argue that the jury's sense of fair play and justice should be offended by the disparate treatment. It is not difficult to understand why juries simply do not like to rely on witnesses who have not had to accept responsibility for their own conduct and who have an obvious incentive to blame others in order to escape punishment.*<sup>35</sup>

30. Jury resistance to the testimony of leniency witnesses is seen as especially problematic in a trial concerning a two-party cartel. This was reflected in criticism of the UK Office of Fair Trading's (OFT) failed prosecution of British Airways executives in connection with the air cargo cartel. Virgin Atlantic had secured immunity from administrative fines and its employees had received no action letters. This meant that only half of those responsible were facing criminal prosecution and sanctions, while the other half not only escaped these repercussions, but also continued working in the industry. The situation attracted adverse press coverage (for both Virgin and the OFT),<sup>36</sup> and there were concerns expressed as to how it would play with the jury. As two UK observers pointed out:

*...one of the central problems is that the defendants and the witnesses are essentially as culpable as each other; the only thing that separates them is the speed at which they made it to the authorities with a leniency/immunity application.*<sup>37</sup>

31. In a more recent UK trial that was contested through to verdict, jury distrust of leniency witnesses again appears to have been a factor. Of the individuals who were prosecuted, one pleaded guilty

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<sup>35</sup> FJ Warin, DP Burns and JWF Chesley, 'To Plead or Not to Plead? Reviewing a Decade of Criminal Antitrust Trials' *Antitrust Source* (July 2006) 5. See also K Edghill, 'Is the UK Cartel Offence Dead or Is There a Problem with Immunity: The Role of Immunity as a Prosecutorial Tool in Criminal Cartel Offences in the United Kingdom and Australia' (9th Annual Competition and Consumer Workshop, Adelaide, 15 October 2011).

<sup>36</sup> See, eg, Robert Peston, 'Where's Branson's Apology?' (1 August 2007) BBC News, at [http://www.bbc.co.uk/blogs/thereporters/robertpeston/2007/08/wheres\\_bransons\\_apology.html](http://www.bbc.co.uk/blogs/thereporters/robertpeston/2007/08/wheres_bransons_apology.html).

<sup>37</sup> A MacCulloch and B Wardhaugh, 'The Relationship in Competition Law between Private Enforcement, Criminal Penalties, and Leniency Policy' (2012) *Unpublished paper*, 16, cited in A Stephan, 'Four key challenges to the successful criminalization of cartel laws' (2014) 2(2) *Journal of Antitrust Enforcement* 333, 345.

to the offence and received a suspended jail sentence and a community service order.<sup>38</sup> The remaining two defendants pleaded not guilty and were acquitted by a jury following a three week trial in June 2015.<sup>39</sup> The Competition and Markets Authority's (CMA) case relied, in part at least, on the evidence of immunised employees of the leniency applicant and also on the evidence of the defendant who had pleaded guilty. In reflecting on the outcome of the case, one of advisors for the acquitted defendants has observed: 'immune witnesses are more trouble than they are worth!'.<sup>40</sup> CMA Senior Director, Stephen Blake, has been more guarded in his comments but has acknowledged nevertheless that:

*...in any criminal case involving immunity or in which a defendant has offered to co-operate and give evidence, these issues will need to be given careful consideration when weighing up the prosecution strategy, including which witnesses to call and therefore the extent to which the prosecuting authority chooses to rely on immunised witnesses or the evidence of a co-defendant.*<sup>41</sup>

32. Relatedly, a prosecutor will need to consider the risk of a leniency witness giving testimony that is not as compelling or may even be inconsistent with prior accounts given in leniency negotiations. Of course the same risk applies in the case of any witness who turns Crown's evidence. But it will be accentuated in a context where post-trial the witness is likely to continue working in the industry and hence may be concerned to do the least damage possible to their reputation and relations with industry contacts and colleagues.<sup>42</sup>

### 2.3 *Cartel deterrence*

33. One of the most commonly cited arguments in favour of cartel criminalisation is that criminal sanctions, and the threat of a jail sentence in particular, are the most potent deterrents of this type of activity.<sup>43</sup> As previously stated, leniency policies are also considered to contribute towards deterrence.<sup>44</sup>

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<sup>38</sup> Competition and Markets Authority, 'Director sentenced to 6 months for criminal cartel', *News story*, 14 September 2015.

<sup>39</sup> Competition and Markets Authority, 'CMA statement following completion of criminal cartel prosecution', *News story*, 24 June 2015.

<sup>40</sup> A Stephan, 'The UK Steel Tanks Criminal Cartel Trial: Implications for Criminalisation and Leniency', Presentation at Competition Law & Economics Network Seminar, University of Melbourne Law School, 14 July 2016.

<sup>41</sup> S Blake, 'The UK steel tanks criminal cartel trial: implications for criminalisation and leniency', Speech at Pros and Cons Conference, Swedish Competition Authority, Stockholm, 13 December 2015, at <https://www.gov.uk/government/speeches/stephen-blake-on-the-uk-steel-tanks-criminal-cartel-case>.

<sup>42</sup> On the professional 'after-life' of a sanctioned cartel member, see C Harding and J Edwards, *Cartel Criminality: The Mythology and Pathology of Business Collusion* (Ashgate, 2015), 224-5.

<sup>43</sup> Again, it has been the US that has been the strongest proponent of this argument. See, eg, S Hammond, 'Ten Strategies for Winning the Fight Against Hardcore Cartels', Speech at the No. 3 Prosecutor's Program. Cf OECD, *Cartels: Sanctions Against Individuals* (Policy Roundtable No DAF/COMP(2004)39, 10 January 2005), 7, acknowledging that there is no systematic empirical evidence on the deterrence impact of individual sanctions but that: '[u]ltimately, countries that use, or decide to introduce, sanctions against individuals in cartel cases do so because they accept as self evident that corporate sanctions alone cannot ensure adequate deterrence, and that individual sanctions, including imprisonment, can be useful instruments in the fight against cartels. Among OECD members, there is a trend toward accepting that sanctions against individuals can contribute to more effective anti-cartel enforcement.'

<sup>44</sup> This is despite the fact that the economic research on leniency policies and deterrence has produced mixed results: see C Marvao and G Spagnolo, 'What do we know about the effectiveness of leniency policies? A

One could conclude from this that the combination of criminal sanctions and a leniency policy would super-charge deterrence, that deterrence in a jurisdiction with this combination would be stronger than in a jurisdiction with administrative sanctions and a leniency policy. Of course it is not possible to empirically test that proposition.

34. A further difficulty with any such conclusion is that deterrence works largely at the level of the individual who is deciding whether to embark on or continue engaging in a course of conduct that involves breaking the law. It is well-established in research relating to deterrence and compliance that decisions about whether comply with or break the law will depend on multiple factors.<sup>45</sup> Critically, though, deterrence will depend on the extent to which the potential offender knows the law and the sanctions applicable to the conduct in question, the extent to which there is a perceived risk of detection of the conduct and the extent to which there is a perceived risk that, if detected, enforcement action will be taken and sanctions applied.<sup>46</sup> In theory, business people contemplating engaging in cartel conduct should regard the risk of that conduct being detected, and hence the risks and costs of such engagement, as greater in light of a leniency policy. However, the deterrent value of a leniency policy in this regard is premised also on the potential cartelists' awareness of the policy.

35. There is research which suggests, at least in the context of one jurisdiction where criminal sanctions apply, that a significant proportion of the business community do not know the law and the sanctions applicable to cartel conduct and that knowledge of the availability of imprisonment as a sanction is particularly low. Further, even when knowledge exists, the likelihood of detection and enforcement action is also perceived as low, albeit somewhat higher when the potential offender knows that criminal sanctions apply.<sup>47</sup> There does not appear to be any published research to date that indicates the degree to which business people are aware of leniency policies. However, if there is low awareness that cartel conduct is illegal or criminal in a jurisdiction, then it appears safe to assume that there is equally low awareness of the leniency policy.<sup>48</sup>

36. In sum then, it would seem problematic to assume that, of itself, the availability of criminal sanctions together with leniency will enhance cartel deterrence in a jurisdiction. However, it may well do so where there is a high degree of awareness by the business community concerning the law and the sanctions that apply and the role of the leniency policy in determining their application.

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survey of the empirical and experimental evidence' in C Beaton-Wells and C Tran (eds), *Anti-Cartel Enforcement in a Contemporary Age: Leniency Religion* (Hart Publishing, 2015), ch 4, 80.

<sup>45</sup> See generally C Parker and V Nielsen (eds), *Explaining Compliance: Business Responses to Regulation*, (Edward Elgar, 2011).

<sup>46</sup> See C Parker and V Nielsen, 'Deterrence and the impact of calculative thinking on business compliance with competition and consumer regulation' (2011) 56(2) *Antitrust Bulletin* 377.

<sup>47</sup> This research has been undertaken in Australia. For a summary see C Beaton-Wells and C Parker, 'Education Before Enforcement? Key Insights from Cartel Research' (2012) 40 *Australian Business Law Review* 455; C Beaton-Wells and C Parker, 'Justifying criminal sanctions for cartel conduct: A hard case' (2013) 1(1) *Journal of Antitrust Enforcement* 198.

<sup>48</sup> Many competition authorities have taken measures specifically to address this issue, using a range of media to bring the existence and significance of the leniency policy to the attention of the business sector. An increasingly popular measure in this regard is the use of video. See, eg ACCC (2012), *The Marker*, at <https://www.youtube.com/watch?v=louVP9VvFlg>; Netherlands Competition Authority (2008), *Leniency in Cartel Cases*, at <https://www.youtube.com/watch?v=5diFAaJdweI>; Singapore Competition Commission (2012), *Golden Glasses*, at <https://www.youtube.com/watch?v=OQlvYRPhUyc>; Swedish Competition Authority (2010), *Be the First to Tell – A Film about Leniency*, at <https://www.youtube.com/watch?v=r99qzC8aHA>

## 2.4 Enforcement costs

37. Finally, any assessment of the benefits of a criminal system for the capacity of leniency policies to deliver enhanced cartel enforcement must take account of the offsetting costs of the system. The onerous evidentiary standards and requirements of a criminal system mean that the cost of enforcement in such a setting is considerably higher than in an administrative or civil system. While the cost may be managed where US-style plea bargaining is employed and hence, in the majority of cases, a full blown investigation and trial is avoided,<sup>49</sup> it is difficult to identify jurisdictions outside of the US that endorse or apply plea bargaining in the same way or to similar extent.

38. Moreover, in systems with administrative sanctions for undertakings and criminal sanctions for individuals, the cost of delays and possible disruption to the administrative proceeding as a result of a criminal prosecution must also be taken into account. Proceedings against the undertakings may be stayed pending the outcome of the criminal trial. Further, should the criminal trial result in acquittal, there may be grounds on which the undertaking may seek to resist payment of a fine.<sup>50</sup>

## 3. Cartel leniency and cartel criminalisation – normative considerations

39. The previous Part of this paper examined whether the interaction between leniency policies and a criminal regime provides instrumental support for the case for cartel criminalisation. In the context of an inquiry into whether criminalisation is justified, it is also incumbent on policymakers and enforcers to consider whether leniency policies sit comfortably with the normative function or force of the criminal law. In other words, there should be consideration of the impact of leniency policies on the criminal law's capacity to label and punish conduct appropriately and legitimately and, in the process, educate others as to why such conduct should be treated as criminal.

40. There can be little argument that a normative dimension of criminality features heavily in if not underpins the US system of antitrust law - a system that originated in and continues to reflect a genuine widely held conviction regarding the delinquency of this kind of business behaviour. As one experienced US commentator has observed:

*The energetic American approach to prosecuting individual cartel participants has gradually evolved over more than a century and is based on some politics and public psychologies that others may regard as peculiarly American. ... what still seems distinguish the United States is public willingness—almost without debate—to treat individuals who participate in cartels as*

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<sup>49</sup> Apparently approximately 90% of US cartel cases are resolved through plea bargaining in lieu of trial: S Hammond, 'The US Model of Negotiated Plea Agreements: A Good Deal with Benefits for All' (October 2006).

<sup>50</sup> In the civil case brought against British Airways in connection with the air cargo cartel, BA had agreed to pay a fine of £121.5 million under an early resolution agreement. The case would have been concluded (any appeals withstanding) sometime in 2008, but instead was stayed pending the outcome of the criminal case. This was to ensure the civil case could not prejudice the criminal case in any way. Almost three years of delays ensued, which were partly due to pre-trial challenges by the four defendants. By the time the trial collapsed in May 2010, it had cost the taxpayer an estimated £1.5 million. BA then resiled on its early resolution agreement, the Chief Executive of IAG saying, '... given the way the criminal trial collapsed, we don't believe there are any grounds for that level of fine', and ultimately BA paid less than half of the original fine: £58.5 million. This account is given in A Stephan, 'Four key challenges to the successful criminalization of cartel laws' (2014) 2(2) *Journal of Antitrust Enforcement* 333, 349.

*serious, criminals who that should be treated in the same way as embezzlers, stock swindlers and other economic thieves.*<sup>51</sup>

41. Thus it could be said that the early adoption of its Corporate Leniency Policy, in 1993, at about the same time as criminal law enforcement ramped up in the US,<sup>52</sup> was a development supported by a strong normative sense of cartel criminality. While the leniency policy allowed a serious offender to escape sanctions, this outcome may be seen in that jurisdiction as morally defensible because the policy is important, if not essential, to ensuring that cartelists generally are caught and punished as criminals.

42. It is also evident that US officials have actively encouraged other jurisdictions to criminalise. This agenda has been vigorously pursued in DOJ speeches and addresses around the world since the 1990s.<sup>53</sup> There is some evidence of the successful conversion of both members of government and competition authorities in some jurisdictions to the view of cartel conduct as inherently criminal in the sense of morally objectionable and the consequent need for new criminal law to deal with the matter.<sup>54</sup>

43. In other jurisdictions, however, there has been resistance to adopting moral characterisations of cartel conduct and in part this has explained opposition to criminalisation. This is especially so in continental Europe. Some jurisdictions have considered (often on several occasions) but decided against criminalisation at a legislative level,<sup>55</sup> even after confident albeit informal expectation that criminalisation was imminent.<sup>56</sup>

44. Moreover, in some countries which have enacted new cartel offences, there has been some judicial reluctance to make use of more severe sanctions, and especially to use prison terms for (the small number of) convicted individuals — for instance, in Canada, Ireland, Japan and South Korea, there has

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<sup>51</sup> See D Baker, ‘Punishment for Cartel Participants in the US: A Special Model?’ in C Beaton-Wells and A Ezrachi (eds) *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing, 2011), ch 2, 27.

<sup>52</sup> See n 2 above.

<sup>53</sup> These speeches are available on the DOJ website: see DOJ, ‘Criminal Policy Speeches’, [www.justice.gov/atr/public/speeches/speech\\_criminal.htm](http://www.justice.gov/atr/public/speeches/speech_criminal.htm). The US was also the sponsor of the OECD’s 1998 recommendation calling for tougher action on ‘hard-core’ cartels: see Organisation for Economic Co-operation and Development, ‘Recommendation of the Council Concerning Effective Action against Hard Core Cartels’, C(98)35/FINAL (14 May 1998) [www.oecd.org/daf/competition/2350130.pdf](http://www.oecd.org/daf/competition/2350130.pdf). See also the discussion of the US advocacy role in C Harding, ‘Business Collusion as a Criminological Phenomenon: Exploring the Global Criminalisation of Business Cartels’ (2006) 14 *Critical Criminology* 181, 196.

<sup>54</sup> The US experience was particularly influential in the decisions made to introduce criminal sanctions for cartel conduct in the UK (see S Wilks, ‘Competition Policy’ in D Coen, W Grant and G Wilson (eds), *The Oxford Handbook of Business and Government* (Oxford, Oxford University Press, 2010)) and Australia (see C Beaton-Wells, ‘Criminalising Cartels: Australia’s Slow Conversion’ (2008) 31 *World Competition* 205). In both countries places where the criminalisation campaign was heavily imbued with moral overtones and the need to recognise cartels as delinquent in the same way as other white collar crimes and to punish them accordingly.

<sup>55</sup> These include Switzerland, Sweden, Finland, Belgium, the Netherlands, Germany (apart from bid-rigging) and Austria (also apart from bid-rigging).

<sup>56</sup> For instance, in Belgium, the amendment of the *Competition Act* in 2013 introduced administrative fines for individuals but stopped short of any criminal law sanctions. The Swiss Parliament rejected proposed changes to the federal law on cartels (including the introduction of criminal sanctions) in September 2014. In New Zealand cartel offences and criminal sanctions were included in the Commerce (Cartels and Other Matters) Amendment Bill 2011 but removed from the bill in December 2015.

been a tendency to use suspended prison terms or a preference for imprisonment ‘served in the community’.<sup>57</sup>

45. Such instances of legislative or judicial reluctance to endorse criminal treatment of cartelists may reflect ambivalence towards an instrumental use of criminal law. It may also be consistent with limited evidence of a sea change in popular or wider opinion regarding the inherent delinquency or criminality of cartel conduct. Survey research in a range of countries suggests there is weak grass roots agreement with the notion that price fixers should be treated as criminals in several countries.<sup>58</sup> In the most recent study, canvassing public views on various aspects of the law and sanctions relating to price fixing in the UK, Germany, Italy and the US, support for imprisoning individual cartel offenders lay between 26% and 36%, despite the fact that a large proportion of respondents recognised the harmfulness in the conduct and also regarded it as immoral or unethical in some way.<sup>59</sup>

46. Furthermore, in theoretical terms, there is a vigorous debate and many unanswered questions regarding both the relevance of and appropriate normative basis for criminalising business collusion.<sup>60</sup> Analogies with classic criminal offending in the form of theft and fraud are not seen as wholly convincing and much of the justification offered for criminalisation is in terms of the harmful economic effects of cartel strategies rather than the nature of the conduct itself.<sup>61</sup> In other words, the weight of condemnation is consequentialist rather than retributive, *mala prohibita* more than *mala in se*, which reinforces an impression that the drive for criminalisation is instrumental, to serve the interests of enforcement rather than affirm a strong moral judgment.

47. Normative justifications for cartel criminalisation based on characterisations and condemnation of this conduct as either extremely harmful and/or morally egregious are difficult to reconcile with a policy that enables an admitted offender to escape sanctions. The difficulty lies in foreclosing or surrendering the retributive imperative to label and punish a law breaker in the interests of achieving wider enforcement objectives.<sup>62</sup> It is not a moral or ethical dilemma unique to leniency policies but is particularly acute in this

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<sup>57</sup> A Stephan, ‘Four key challenges to the successful criminalization of cartel laws’ (2014) 2(2) *Journal of Antitrust Enforcement* 333, 334. It appears that custodial sentences for price fixing have been served in only three jurisdictions to date: the US, UK and Israel.

<sup>58</sup> See A Stephan, ‘Survey of Public Attitudes to Price-Fixing and Cartel Enforcement in Britain’ (2008) 5 *Competition Law Review* 123; C Beaton-Wells and C Platania-Phung, ‘Anti-Cartel Advocacy — How Has the ACCC Fared?’ (2011) 33 *Sydney Law Review* 735; V Brisimi and M Ioannidou, ‘Criminalizing Cartels in Greece: A Tale of Hasty Developments and Shaky Grounds’ (2011) 34 *World Competition* 157.

<sup>59</sup> See the results and discussion in A Stephan, ‘Survey of Public Attitudes to Price Fixing in the UK, Germany, Italy and the USA’ (2015) *CCP Working Paper 15-8*.

<sup>60</sup> See the debate regarding the relevance of and bases for moral characterisations of cartel conduct in P Whelan, ‘[Cartel Criminalisation and the Challenge of Moral Wrongfulness](#)’ (2013) 33(3) *Oxford Journal of Legal Studies* 535; A Stephan, ‘[Why Morality Should Be Excluded from the Cartel Criminalisation Debate](#)’ (2012) 3 *New Journal of European Criminal Law* 127; B Wardhaugh, *Cartels, Markets and Crime: A Normative Justification for the Criminalisation of Economic Collusion* (Cambridge University Press, 2013).

<sup>61</sup> See, eg, OECD, ‘Report on the Nature and Impact of Hard Core Cartels and Sanctions against Cartels under National Competition Laws’, DAF/COMP(2002)7 (9 April 2002) [www.oecd.org/competition/cartels/2081831.pdf](http://www.oecd.org/competition/cartels/2081831.pdf); JM Connor, AA Foer and S Udwin, ‘Criminalizing Cartels: An American Perspective’ (2010) 1 *New Journal of European Criminal Law* 199.

<sup>62</sup> See the concern about retributive injustice associated with leniency policies acknowledged in W Wils, ‘The Use of Leniency in EU Cartel Enforcement: An Assessment After Twenty Years’ (2016) 39(3) *World Competition* 327, 344.

context given that such policies promote complete immunity based solely on the timing of the confession without regard for the nature and effects of the specific conduct or the culpability of the individual confessor.

48. The retributive compromise involved in combining criminal cartel sanctions and leniency policies has several implications that bear consideration. First, there may be a risk of alienation of public support for the competition law system and its associated rules, through an adverse moral reaction to an evidently serious and admitted offender being rewarded in this way. An Australian survey of public opinion in relation to cartel conduct in 2010 revealed that a large proportion of the public regard it an ‘unacceptable’ to give leniency to the first company to report a cartel, even if the authorities would not otherwise have found out about the cartel.<sup>63</sup> In the survey of public opinion in the US and three European countries referred to above, views appear to be more divided. However, even in the US, only just over 50% of the respondents regarded leniency as justifiable on the grounds that it would expedite case resolution and allow for resources to be allocated to other cases.<sup>64</sup> These results may reflect a tension between leniency policies and the community’s basic sense of fairness and this tension in turn may undermine public confidence in the system.

49. The tension may be aggravated by the fact that leniency policies entail the exercise of substantial administrative power and, in many jurisdictions, in a way that is non-transparent.<sup>65</sup> In most jurisdictions, there is no legislative basis for or authorisation of the policy and no judicial oversight of its administration. Leniency deals are done behind closed doors and avenues for holding agencies accountable for the manner in which these deals are done may be limited. These aspects of policy administration, together with the outcome that sees a serious offender walk free, may pose challenges to an authority’s legitimacy and in turn to its capacity to attract support for its wider mandate and activities.

50. Second and relatedly, perceived unfairness or unacceptable compromise involved in leniency policies may have consequences for the readiness of members of the business sector to comply with cartel laws voluntarily. In particular, it may have adverse implications for normative compliance, where compliance is internalised by a sense of duty and does not require activation by some external force or pressure. A normative motivation to comply can be based on a belief that a law is just or right in the sense that obeying the law leads to an outcome that fits with moral or ideological values. However, it can be based just as much on a belief that the agency that enforces the law is legitimate, which in turn rests on the extent to which the agency’s policies and procedures are seen as just.<sup>66</sup>

51. Leniency policies arguably reduce law enforcement to a ‘game’ - the company that is first to ‘the confessional’ wins, and winner takes all. The outcome is determined by timing only, and sometimes as a matter of days or hours. Neither the circumstances in which the leniency beneficiary came to be first, nor

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<sup>63</sup> See the results of this and other aspects of the survey in C Beaton-Wells and C Platania-Phung, ‘Anti-Cartel Advocacy — How Has the ACCC Fared?’ (2011) 33 *Sydney Law Review* 735.

<sup>64</sup> See A Stephan, ‘Survey of Public Attitudes to Price Fixing in the UK, Germany, Italy and the USA’ (2015) *CCP Working Paper 15-8* 1, 24-25. In the other surveyed countries, Germany and Italy, public support for leniency was 50% and 41% respectively. Interestingly it was highest (63%) in Britain.

<sup>65</sup> See eg the critique of a lack of transparency by the ACCC in connection with administration of its leniency policy in C Beaton-Wells, ‘Immunity policy for cartel conduct: revolution or religion? An Australian case - study’ (2014) 2(1) *Journal of Antitrust Enforcement* 126, 161-164.

<sup>66</sup> On the role and significance of fairness in competition law and enforcement and its relationship with compliance more generally, see C Beaton-Wells, ‘Substance and process in competition law and enforcement: Why we should care if it’s not fair’, in Nihoul, P and Skoczny, T (eds), *Procedural Fairness in Competition Proceedings*, Edward Elgar, 2015.

the compliance commitment of the beneficiary relative to other parties to the offending conduct, are relevant. Moreover, in most jurisdictions, the leniency prize does not include any requirement to implement, improve, or update a compliance program.<sup>67</sup> Nor does it generally require the leniency beneficiary to take reasonable steps to make restitution to the victims of the cartel.<sup>68</sup> One might ask whether such a scenario is damaging to respect for the law and its enforcement.

52. The operation of leniency policies may be seen as unfair, and hence problematic from a normative compliance perspective, in another respect. The experience in some jurisdictions is that leniency policies are invoked by recidivists, usually large multinational corporates that have been involved in international cartels. This is no doubt a reflection of the fact that these firms are well resourced and advised, experienced in how to play the leniency ‘game’.<sup>69</sup> The effect of this is that such policies tend to favour major international companies at expense of domestic, often smaller, businesses that do not have the same legal resources at their disposal.

53. In Korea, the backlash from the public and small to medium-sized business sector to this phenomenon has been such that the Korean Fair Trading Commission (KFTC) has amended its leniency policy to prevent a company from receiving immunity more than once in five years.<sup>70</sup> It has been explained to the author by a KFTC official that the principal reason for this change was the concern that the policy was seen as being exploited unfairly by large multinational companies operating in multiple markets and repeatedly applying for immunity, leaving domestic companies to ‘cop the full brunt of penalties time after time’.<sup>71</sup>

<sup>67</sup> See B Fisse, ‘Reconditioning Corporate Leniency: The Possibility of Making Compliance Programmes a Condition of Immunity’ in C Beaton-Wells and C Tran (eds), *Anti-Cartel Enforcement in a Contemporary Age: Leniency Religion* (Hart Publishing, 2015), ch 10, 179.

<sup>68</sup> As observed by Wils, ‘requiring restitution to injured parties as a condition for leniency may also help to assuage justice concerns’, in See the concern about retributive injustice associated with leniency policies acknowledged in W Wils, ‘The Use of Leniency in EU Cartel Enforcement: An Assessment After Twenty Years’ (2016) 39(3) *World Competition* 327, 345.

<sup>69</sup> Recidivism is a striking feature of US and EU cartel enforcement: see, eg, J M Connor, ‘Recidivism Revealed: Private International Cartels 1990–2009’ (2010) 6(2) *Competition Policy International* 101; G J Werden, S D Hammond and B A Barnett, ‘Recidivism Eliminated: Cartel Enforcement in the United States Since 1999’, (2011) 10(1) *Competition Policy International*; W Wils, ‘Recidivism in EU Antitrust Enforcement: A Legal and Economic Analysis’ (2012) 35(1) *World Competition* 5-26; C Veljanovski, ‘Deterrence, Recidivism and European Cartel Fines’ (2011) *Journal of Competition Law and Economics* 871. See the data presented as to corporate repeat players as defendants and successful leniency applicants in EC cartel proceedings between 2001 and 2012 in C Harding, C Beaton-Wells and J Edwards, ‘Leniency and Criminal Sanctions in Anti-Cartel Enforcement: Happily Married on Uneasy Bedfellows’ in C Beaton-Wells and C Tran (eds), *Anti-Cartel Enforcement in a Contemporary Age: Leniency Religion* (Hart Publishing, 2015), ch 12, 233, 257-258. Cf the observation that the number of (detected) recidivists in EC proceedings has declined in recent years and that, on balance, excluding recidivists from leniency policies does ‘not appear to be a good idea’ in W Wils, ‘The Use of Leniency in EU Cartel Enforcement: An Assessment After Twenty Years’ (2016) 39(3) *World Competition* 327, 346-348.

<sup>70</sup> See C S Chung and S B Park, ‘Revamped Korean leniency regime: no more cheap way out for repeat cartelists and second-in-line confessors’ (2012) 3 *International Antitrust Bulletin* 8-9.

<sup>71</sup> Until recently, the Greek competition authority also excluded recidivists from leniency, as reported in W Wils, ‘The Use of Leniency in EU Cartel Enforcement: An Assessment After Twenty Years’ (2016) 39(3) *World Competition* 327, 346.

54. To some extent, aspects of leniency policy design may counteract such concerns or effects by carving out ringleaders, instigators and coercers within cartels from the benefits of leniency.<sup>72</sup> Under its Corporate Leniency Policy, the DOJ has excluded ‘leaders’ and ‘originators’,<sup>73</sup> and there has been a similar history of such exclusion in the European context, largely codified through the European Competition Network Model Leniency Programme.<sup>74</sup> This exclusion rests in part on not rewarding especially ‘bad’ cartelists - those who lead, design, enforce and encourage the activity - as dominant participants in what may be regarded as a joint criminal enterprise.<sup>75</sup> It also derives from concern about potential ‘gaming’ of leniency policies.<sup>76</sup>

55. Third, the combination of criminal sanctions and leniency policies produces inconsistencies, contradictions even, between policy and practice. From a normative perspective, criminal sanctions are most often justified on the grounds that cartel conduct causes substantial economic harm – to competitors, consumers, the economy and society in general. However, conduct involving abuse of dominance or mergers and acquisition might have the same if not a greater adverse impact economically and yet rarely if ever are criminal sanctions suggested for these categories of competition law violation. Even within the realm of horizontal coordination, there may be conduct that involves oligopolistic interdependence and/or facilitating practices that too has anti-competitive effects and yet would not be illegal, let alone criminal. These distinctions may be readily understood by economists and lawyers working in the field. However, they arguably emit mixed messages for non-specialist audiences, and most relevantly for the business sector. If such inconsistency undermines the cogency and integrity of criminal enforcement then arguably it weakens also the legitimacy of leniency policies in aid of such enforcement.

56. Further in support of criminalisation, policy-makers, legislators and enforcement agencies employ a strong rhetoric of the normative badness of cartel behaviour.<sup>77</sup> This rhetoric often portrays cartel conduct as tantamount to cheating. Cartelists may be said to cheat the public and the market, presenting themselves as competitors but actually not competing, so deceiving other competitors, consumers and

<sup>72</sup> See the observation to this effect in W Wils, ‘The Use of Leniency in EU Cartel Enforcement: An Assessment After Twenty Years’ (2016) 39(3) *World Competition* 327, 345.

<sup>73</sup> DOJ, ‘Corporate Leniency Policy’ (10 August 1993) 2, (condition A.6). For a survey of the economic literature on ringleaders, see C Marvão and G Spagnolo, ‘What Do We Know about the Effectiveness of Leniency Policies? A Survey of the Empirical and Experimental Evidence’, in C Beaton-Wells and C Tran (eds), *Anti-Cartel Enforcement in a Contemporary Age: Leniency Religion* (Hart Publishing, 2015), ch 4, 57.

<sup>74</sup> The most recent iteration of this programme confines the exclusion to cartel coercers. See European Competition Network, ‘ECN Model Leniency Programme’ (November 2012) [8]. In several other jurisdictions, recent reforms have also seen the carve-out restricted to coercers. See eg, ACCC, ‘ACCC Immunity and Cooperation Policy for Cartel Conduct’ (Policy Document) (September 2014) [16(iv)]; Commerce Commission New Zealand, ‘Cartel Leniency Policy and Process Guidelines’ (12 April 2011) [3.06(v)] Competition Bureau Canada, ‘Immunity Program under the *Competition Act*’ (Bulletin) (7 June 2010) [15].

<sup>75</sup> W Wils, ‘Leniency in Antitrust Enforcement: Theory and Practice’ (2007) 30 *World Competition* 25, 51. For discussion of the concept of a cartel as a joint criminal enterprise, see C Harding, *Criminal Enterprise: Individuals, Organisations and Criminal Responsibility* (Portland, Willan Publishing, 2007) 252.

<sup>76</sup> There is research suggesting that strategic use of immunity policies cannot be discounted. See, eg, NH Miller, ‘Strategic Leniency and Cartel Enforcement’ (2009) 99 *American Economic Review* 750; U Blum, N Steinat and M Veltins, ‘On the Rationale of Leniency Programs: A Game-Theoretical Analysis’ (2008) 25 *European Journal of Law and Economics* 209; D Sokol, ‘Cartels, Corporate Compliance, and What Practitioners Really Think about Enforcement’ (2012) 78 *Antitrust Law Journal* 201, 203.

<sup>77</sup> See C Harding, ‘A Pathology of Business Cartels: Original Sin or the Child of Regulation?’ (2010) 1 *New Journal of European Criminal Law* 44.

market expectations in general. However, cartelists who take advantage of leniency policies are also cheating, only this time on their co-conspirators. Hence cheating in one domain is condemned, whereas cheating in another is not only encouraged but highly rewarded.<sup>78</sup>

57. Somewhat ironically, it is also recognised that some cartelists will cheat on the cartel without reporting to the authorities, that is by secretly deviating from the agreed terms of the collusive arrangement and re-initiating a degree of competition. It is also increasingly acknowledged that there may be circumstances in which cartelists engage in strategic leniency, that is, again they seek to cheat on their former cartel allies but this time by reporting in order to impose costs on and obtain a competitive advantage over their rivals.<sup>79</sup> Cheating on the cartel by competing is officially welcome but cheating through gaming the leniency system is frowned upon.

58. In consequence, again, there are conflicting messages that inevitably impair the capacity of the criminal law to educate business people and the wider public about what conduct warrants condemnation and why. A further potential consequence is that leniency policies, by their nature, may reinforce if not promote the very qualities of cheating and deception that underpin the illegal conduct in the first instance - qualities that in large part have been emphasised by competition authorities as justifying criminal or penal sanctions. The result is a multiplication of inconsistencies which is difficult to reconcile with good public policy.

#### 4. Conclusions

59. While a significant number of jurisdictions now have criminal sanctions available for cartel conduct, there remains substantial debate about whether such sanctions, particularly jail sentences for individuals, are a legitimate and effective addition to the anti-cartel enforcement arsenal.

60. The debate is multi-faceted and in part this reflects the reality that '[c]riminal sanctions raise the stakes for any legal system, for they send ripples through each element of the legal process.'<sup>80</sup> One such element is the leniency policy. Leniency policies are generally regarded as the most valuable tool available to competition authorities in detecting, investigating, prosecuting and, ultimately, deterring 'hard core' cartel conduct.

61. It is telling to observe that the international proliferation of criminal regimes and of leniency policies has been temporally convergent – both having taken place over the last 10-15 years. Yet the relationship between these two important and, in many respects, controversial phenomena is still to be fully investigated and understood.

62. On one view, cartel criminalisation and cartel leniency may be seen as mutually reinforcing. Having criminal sanctions may be regarded as enhancing the effectiveness of a leniency policy and in turn, an effective leniency policy may be seen as aligned with the interests of bringing serious criminals to justice. On another view, cartel criminalisation and cartel leniency may be seen as in tension with and even potentially undermining of each other. Leniency effectiveness may in fact be impaired by the threat of criminal sanctions and in turn, leniency policies may be damaging to the integrity and effectiveness of the criminal law.

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<sup>78</sup> See the discussion in C Harding, C Beaton-Wells and J Edwards, 'Leniency and Criminal Sanctions in Anti-Cartel Enforcement: Happily Married on Uneasy Bedfellows' in C Beaton-Wells and C Tran (eds), *Anti-Cartel Enforcement in a Contemporary Age: Leniency Religion* (Hart Publishing, 2015), ch 12, 233, 249-250.

<sup>79</sup> See n 76 above.

<sup>80</sup> W Kovacic, 'Criminal Enforcement Norms in Competition Policy: Insights from U.S. Experience' in C Beaton-Wells and A Ezrachi (eds) *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing, 2011), ch 3, 45, 46.

63. This paper proposed one approach to navigating this complex set of issues, that is, by examining the relationship from instrumental and normative perspectives. In any jurisdiction that relies on a leniency policy and is deciding whether to introduce criminal sanctions, consideration should be given to the way in which the policy and a prospective criminal regime will work together from each of these perspectives.

64. From an instrumental perspective, a key question is whether criminal sanctions enhance or impair the effectiveness of a leniency policy. In addressing this question, the paper proposed that at least the following considerations be taken into account:

- in terms of cartel detection:
  - there is limited empirical evidence to support the view that the availability of criminal sanctions materially increases the quantity or quality of applications received under a leniency policy;
  - there is some empirical evidence to suggest that in certain circumstances the availability of criminal sanctions may reduce the number of applications received under a leniency policy;
- in terms of cartel investigation and prosecution:
  - in a criminal setting, evidence may be less available on account of the reluctance of individuals facing prosecution to cooperate with leniency investigations;
  - reliance on leniency witnesses may be hazardous to the successful outcome of a jury trial;
- in terms of cartel deterrence, predictions of increased deterrence as a result of combining criminal sanctions with a leniency policy are problematic in the absence of a high degree of awareness by the business community of the law and sanctions that apply and of the role of the leniency policy in determining their application; and
- overall, any assessment of leniency benefits for enforcement must take account of the significantly higher costs associated with a criminal system, particularly where plea-bargaining is not available.

65. From a normative perspective, a key question is whether a leniency policy enhances or impairs the effectiveness of a criminal regime, that is whether a leniency policy weakens the capacity of the criminal law to appropriately and legitimately label and punish conduct that warrants criminal treatment. In addressing this question, the paper proposed that at least the following considerations be taken into account:

- the retributive compromise and associated unfairness involved in a leniency policy risks damaging public confidence in or support for the legal system and its administration which may in turn undermine the legitimacy of the competition authority;
- these facets of a leniency policy may also limit the prospects of normatively-based compliance with cartel laws by the business sector (that is, compliance on the grounds that business people regard the law and its enforcement as right and just); and
- the combination of a leniency policy and a criminal regime produces inconsistencies in policy and practice that may impair the role of the criminal law in educating business people and the wider public as to why cartel conduct should be treated as criminal.

66. In general terms, this analysis suggests that the instrumental benefits of a cartel leniency-cartel criminalisation combination are questionable and that the combination may come at a normative cost. This leaves open the conclusion that criminal sanctions and leniency policies are uncomfortable if not unnatural allies in the war against cartels.