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The Perks of Being a Whistleblower: Designing Efficient Leniency Programs in New Antitrust Jurisdictions

Marco Colino, Sandra

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Sandra Marco Colino*

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Introduction

In 1978, the United States Department of Justice (DOJ) introduced a new method to detect cartels known as the Corporate Leniency Policy. The rationale behind the system, also referred to as amnesty or immunity program,[1] was rather straightforward: the DOJ would vow not to punish a company involved in an illegal cartel in exchange for a confession and cooperation which would enable the indictment of other cartel members. Although the policy was largely unused in its original formulation, it planted the seed of what would arguably become the most influential leniency programme in the world. The current policy, fruit of a revision that took place in the 1990s, has helped enforcers obtain evidence against a myriad of cartels, and has inspired multiple other countries to follow suit. To date, leniency has brought down collusive practices in over 50 jurisdictions, including the United States (US), Canada and the European Union (EU).[2] Leniency has even made it to Hollywood. The movie *The Informant!* (2009), directed by Steven Soderbergh, stars Matt Damon as Mark Whitacre, an employee at Archer Daniels-Midland (ADM) who worked undercover for the FBI for three years and helped expose a major price-fixing conspiracy in the lysine industry.

In the secret recordings of the conversations inside ADM, the president is infamously heard talking about the company's motto: "[o]ur competitors are our

* Assistant Professor, Faculty of Law, Chinese University of Hong Kong. Director, Centre for Financial Regulation and Economic Development (CFRED). Deputy Director, European Union Academic Programme in Hong Kong (EUAP). I would like to express my gratitude to my dear friend, the late Dr. Stanley Wong, for his on-point feedback and invaluable advice in the writing process of this paper. I am also thankful to Prof. Rosa Greaves for her suggestions, and to my students – Mr. Phil Baumann and Mr. Yanyu Lai in particular – for their insightful queries and comments. All errors are mine alone.

[1] The terms 'amnesty' and 'immunity' refer to complete protection from the penalties that would otherwise have been imposed on the company. The former is more frequently used in the US, and the latter in the EU. See, for instance, Eleanor Fox and Daniel Crane, *Global Issues in Antitrust and Competition Law*, Thomson Reuters (2010), p. 93.

[2] Scott D. Hammond, *The Evolution of Criminal Antitrust Enforcement over the Last Two Decades*, 24th Annual National Institute on White Collar Crime, ABA Criminal Justice Section and ABA Center for Continuing Legal Education (25 February 2010) (https://www.justice.gov/atr/speech/evolution-criminal-antitrust-enforcement-over-last-two-decades).

friends. Our customers are the enemy." [3] Cartels — understood broadly as arrangements between competitors "designed to eliminate competition" — [4] are widely considered to be the "supreme evil of antitrust".[5] If successful, the total profits of cartel members ought to be higher than the sum of individual profits in a competitive market,[6] and yet there is neither an increase in efficiency, nor in the quality of the products. [7] The result of this is that collusive practices inflict "considerable damage on the economy".[8] The fight against cartels is hampered by how difficult they are to detect. Since they are both highly lucrative and systematically illegal in most jurisdictions, cartel members, eager to see their profits rise while avoiding the legal consequences of their actions, have been known to go to great lengths to hide their behaviour from the eye of the enforcer.[9] The secrecy of cartels means it is also rare for the parties affected by the conduct to be in possession of the proof needed to start proceedings in order to bring the infringement to an end, or to claim compensation. Final consumers, often indirect purchasers of the cartelists, are unlikely to even be aware that they have been harmed.[10] Unsurprisingly, the (few) studies that have been conducted on the detection rate of cartels paint a bleak picture when it comes to the chances of busting collusion.[11]

The low detection probability, coupled with the high profits that may be obtained through collusion, make it very difficult for competition law to deter companies from engaging in such conduct. Intuitively, it would appear that a solution which employs techniques that bring down cartels from inside, by breaking the trust among their members, should do the trick. The value of leniency resides precisely in that it helps to solve what Rey has described as an information acquisition problem

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[3] Scott D. Hammond, *Caught in the Act: Inside an International Cartel*, OECD Competition Committee, Working Party No. 3, Public Prosecutors Program (18 October 2005) (https://www.justice.gov/atr/speech/caught-act-inside-international-cartel).

[4] David L. Kaserman and John H. Mayo, *Government and Business: The Economics of Antitrust and Regulation*, Fort Worth, The Dryden Press (1995), p. 152.

[5] *Verizon Communications Inc. v. Law Offices of Curtis v. Trinko, LLP* , 540 U.S. 398 (2004), 407-408.

[6] See Sandra Marco Colino, *Competition Law of the EU and UK* (7th Edn), Oxford University Press (2011), ch. 8.2.2.

[7] Mario Monti, *Fighting Cartels — Why and How? Why Should We Be Concerned with Cartels and Collusive Behaviour?* (2000) (http://europa.eu/rapid/press-release_SPEECH-00-295_en.htm).

[8] European Commission, press release IP (98) 1060, 3 December 1998 [1999] 4 CMLR 13.

[9] According to former EU Competition Commissioner Neelie Kroes, in order to hide their behaviour, cartelists use "encrypted e-mail, attributing code names, using fake or misleading e-mail accounts, pre-paid mobile phones…". See Neelie Kroes, Tackling Cartels — A Never-Ending Task', *European Commission*, Speech 09/454 (8 October 2009) (http://europa.eu/rapid/press-release_SPEECH-09-454_en.htm?locale=en).

[10] Katalin J. Cseres and Joanna Mendes, 'Consumers' Access to EU Competition Law Procedures: Outer and Inner Limits' 51 *Common Market Law Review* (2014), 483-522, at 497.

[11] See Peter G. Bryant and Edwin Eckard, 'Price Fixing: The Probability of Getting Caught', *The* 73 *Review of Economics and Statistics* 3 (1991), pp. 531-536, and Emmanuel Combe, Constance Monnier, and Renaud Legal, 'Cartels: The Probability of Getting Caught in the European Union', *Bruges European Economic Research Papers,* No. 12 (2008) (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1015061).

faced by competition agencies: "firms know whether they collude; the agencies do not."[12] The proliferation of effective leniency regimes has been deemed the single most significant development in cartel enforcement.[13] However, in this assertion one important caveat stands out: not *any* leniency program will enhance cartel exposure, only an *effective* policy will achieve that result. A poorly designed leniency program might have adverse effects, as colluding firms could work out ways to use the system to their advantage.[14]

The abundant literature on leniency tends to focus on experienced antitrust jurisdictions, particularly the US and the EU. To date, little attention has been paid to the merits of amnesty programs in competition law regimes that are only just taking off, and yet around two thirds of competition laws around the world are under twenty-five years old.[15] The present paper attempts to fill in this notorious gap by focusing on the prospective effectiveness of leniency programs in young antitrust jurisdictions which have limited or no experience enforcing neither competition law nor amnesty policies. Newcomers treat leniency as part of the 'antitrust package'. While it took the US over a century and the EU more than four decades to adopt operational leniency programmes, younger jurisdictions tend to introduce leniency policies within 15 years of the implementation of their antitrust laws,[16] oftentimes much earlier.[17] The rush to embrace leniency is a testimony to their reliance on the efficacy of the established jurisdictions on which their antitrust legislation is largely modelled. However, 'on the shelf' competition law is not *prêt-à-porter*: it needs to be tailored to factor in the environment in which the law is to be applied. While there are striking similarities in the fundamental principles of modern competition law regimes, context is paramount both at the time of legislating and when it comes to enforcing the law.[18] Overlooking the peculiarities of the region in which the legislation is to be applied can easily

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[12] Patrick Rey, 'On the Use of Economic Analysis in Cartel Detection', in Claus-Dieter Ehlermann and Isabela (eds), *Competition Law Annual 2006: Enforcement of Prohibition of Cartels*, Hart (2007), Oxford and Portland, p. 81.

[13] Eleanor Fox and Daniel Crane, *Global Issues in Antitrust and Competition Law*, Thomson Reuters (2010), p. 75.

[14] Jeroen Hinloopen and Adriaan R. Soetevent, 'Laboratory Evidence on the Effectiveness of Corporate Leniency Programs' 39 *RAND Journal of Economics* (2008), pp. 607-616.

[15] Armando E. Rodríguez and Ashok Menon, *The Limits of Competition Policy: The Shortcomings of Antitrust in Developing and Reforming Economies* (2010) Wolters Kluwer.

[16] For example, Albanian competition law (Law No. 9121 on the Protection of Competition) entered into force in December 2003, and a leniency program was adopted in April 20116. The policy can be found at http://www.caa.gov.al/uploads/laws/Fine_Leniency_Programme.pdf.

[17] For example, Article 46 of China's Anti-Monopoly Law (AML), in force since 2008, refers to the possibility of exempting from or mitigating punishment in exchange for self-reporting. Since then, further leniency provisions were promulgated in various sets of rules, and a new comprehensive draft leniency policy was announced in early 2016.

[18] Eleanor Fox and Michal Gal, 'Drafting Competition Law for Developing Jurisdictions: Learning from Experience' (2014) *New York University Law and Economics Working Papers* 374, (http://lsr.nellco.org/nyu_lewp/374), p 9.

jeopardize the success and adequacy of any antitrust regulatory attempt, and this extends to the adoption of rigorous leniency programs.

The principal aim of this study, therefore, is to develop a framework for effective leniency policy design in jurisdictions with limited antitrust experience. Such a structure will be nurtured by the fundamental principles laid down in theoretical, empirical and experimental studies of leniency carried out by legal and economic scholars, as well as the experience of veteran leniency programs. At the same time, the paper will endeavour to adapt these principles to settings in which a competition culture is only just starting to bud. Any attempt to put forward normative and policy suggestions for the sound development of leniency in young jurisdictions is complicated by the sheer volume and diversity of new regimes. However, an observation of law and policy developments in these jurisdictions reveals common challenges that can equally be tackled with analogous solutions. Some issues ought to be addressed through the learning process given by the accumulation of experience, and require a methodological enforcement strategy and time. Others however might need the re-adjustment of either leniency programs or the antitrust systems they help to enforce. The paper focuses on leniency design, and identifies three specific challenges affecting the amnesty programs of young antitrust jurisdictions that deserve specific attention. Firstly, it is necessary to determine the magnitude of the reward that entices self-reporting in the context of jurisdictions that only contemplate relatively modest punishment for collusion. Secondly, achieving transparency and predictability without enforcement experience is particularly intricate, and requires careful policy-drafting on the part of antitrust agencies. Thirdly, the paper considers how to attain a sufficient degree of confidentiality that makes leniency enticing without hampering international cooperation efforts to break cartels.

The usefulness of each new leniency program resides not only in its fundamental role in enhancing regional prosperity through the protection of competition in local markets. Given the prominent absence of global antitrust rules, increasing "glocalized" efforts to tackle cartels can create an invaluable joint deterrent effect, paramount to combatting the biggest and most harmful collusive practices in the world. In order to address these issues, the paper relies principally on comparative theoretical and practical research, with some elements of interdisciplinary analysis, as it draws on the principal legal and economic studies of leniency. Accordingly, the paper is structured into five main parts. Part 1 provides the theoretical framework necessary to assess leniency programs, and lays down the parameters by which to evaluate policy design. Part 2 covers the practical experience of leniency by examining the evolution of amnesty programs in the US and the EU. Part 3 focuses on the implementation of leniency in young jurisdictions, and refers to the recent

adoption of leniency in Hong Kong to illustrate the principal issues that emerge when using amnesty without antitrust enforcement experience. In part 4, an assessment of the challenges of leniency in new jurisdictions, as evidenced through the analysis carried out in previous sections, is conducted, and suggestions as to how to tackle these issues are proposed. Finally, conclusions are drawn in part 5.

1. Theoretical framework: the role of leniency in the fight against cartels

1.1 The origins of and rationale of leniency policies

Leniency is defined in the New Oxford Dictionary as "[t]he fact or quality of being more merciful or tolerant than expected." Coherent with this definition, in the context of competition law, leniency is a policy by which cartel participants are offered some kind of reward — usually immunity, or a partial reduction in the penalty or penalties they would normally face for partaking in collusion —, in exchange for the voluntary disclosure of information that serves as evidence of the existence of the cartel.[19] It is a tool for detecting cartel activity[20] which involves "breaking down adversary coalitions by playing members against each other".[21] Such investigatory tactics have been described as the "most effective and least costly mechanism for detecting and prosecuting activity that is systematic, deliberate and covert",[22] and they are certainly not new nor exclusive to competition law.

It is possible to find multiple historical references to the possibility of escaping the most severe forms of punishment in exchange for some form of cooperative action. Gaarder's novel *Sophie's World* describes the time when, back in 399 B.C., Socrates was sentenced to death in Ancient Greece for the crimes of introducing new gods and corrupting the youth: "He could very likely have appealed for leniency. At least he could have saved his life by agreeing to leave Athens. But had he done this he would not have been Socrates."[23] In this case, however, the celebrated philosopher was not required to incriminate anyone else to escape capital punishment. Modern leniency systems usually involve affording a beneficial treatment to whistleblowers who, having breached the law, come forward and provide the necessary proof that

[19] In some cases, positive rewards are also granted. See *infra* part 1.3.1.
[20] Martin Duch, *The Impact of Leniency Program on Cartel Enforcement*, LL.M. Thesis, Tilburg University (2015), p. 6.
[21] Giancarlo Spagnolo, '*Divide et Impera:* Optimal Leniency Programs' (2005) *Stockholm School of Economics* (2005), at p. 2.
[22] Caron Beaton-Wells, 'Leniency Policies: Revolution or Religion?' in Caron Beaton-Wells and Christopher Tran (eds), *Anti-Cartel Enforcement in Contemporary Age: Leniency Religion*, Hart (2015), at p. 4.
[23] Jostein Gaarder, *Sophie's World* (20th anniversary edition), Weidenfeld & Nicolson (2015).

helps the authorities take action against other wrongdoers. This is precisely how the evidence that uncovered the infamous corruption scandal in the Fédération Internationale de Football Association (FIFA), the governing body of football, was obtained. The informant, Chuck Blazer, was a former FIFA executive committee member who had accepted bribes and been involved in money laundering and tax evasion. Blazer avoided a 75-year prison sentence by confessing, and by agreeing to "provide truthful, complete and accurate information" to US prosecutors, and to "participate in undercover activities pursuant to the specific instructions of law enforcement agents."[24]

Hypothetically, leniency helps destabilize cartels.[25] References abound in the literature to the prisoner's dilemma as an illustration of how leniency threatens cartel stability.[26] Collusion is a joint activity, but each cartel member will evaluate the strategy that is most profitable to them individually. As explained above,[27] colluding instead of competing can lead to a considerable increase in revenues, but the high return rate of cartels may be threatened by the conduct of other members: if they do not observe the arrangement and decide to cheat, the cheating firms will see a steeper surge in profits, at the expense of those in the cartel who are not cheating;[28] and if a cartelist blows the whistle and applies for leniency, furnishing the authorities with evidence of the collusion, the companies who have not come forward will likely face penalties for their unlawful conduct which, if sufficiently stiff, would at least remove any profits obtained through the cartel. Firms are thus "collectively better off not to self-report but each firm has a unilateral incentive to deviate."[29] As a consequence, they need to "make repeated [individual] judgments as to the profitability of staying

[24] The case was widely covered in the mainstream media. See, for instance, Rupert Neate, *Chuck Blazer agreed to go undercover to avoid potential 75-year sentence*, The Guardian (16th June 2015) (https://www.theguardian.com/football/2015/jun/15/chuck-blazer-fifa-ban-undercover-back-taxes-plea-deal).

[25] Gary R. Spratling and D. Jarrett Arp, 'The International Leniency Revolution – The Transformation of International Cartel Enforcement During The First Ten Years Of The United States' 1993 Corporate Amnesty/Immunity Policy', *American Bar Association Section of Antitrust Law Annual Meeting* (12 August 2003) (http://www.gibsondunn.com/fstore/documents/pubs/Spratling-Arp%20ABA2003_Paper.pdf).

[26] See, *inter alia*, Joe Chen and Joseph E. Harrington, Jr., 'The Impact of the Corporate Leniency Program on Cartel Formation and the Cartel Price Path', in 282 *The Political Economy of Antitrust* (2005) (http://dx.doi.org/10.1016/S0573-8555(06)82003-1), pp. 59-80; Constanza Nicolosi, 'No Good Whistle Goes Unpunished: Can We Protect European Antitrust Leniency Applications from Discovery?' 31 *Northwestern Journal of International Law and Business* (2011) pp. 225-260; Andreas Stephan and Ali Nikpay, 'Leniency Theories and Complex Realities' (2015) *CCP Working Paper* 14-8.

[27] See *supra* introduction.

[28] Stigler's seminal work on the instability of cartels is still the point of reference in this field. See George J. Stigler, *A Theory of Oligopoly* (1964) 72 Journal of Political Economy 44. Stigler's results show that the greater the number of firms in the cartel, the greater is the likelihood of cheating being able to go undetected. Nonetheless, if firms are able to pool their information the probability of detection of any cheating rises dramatically.

[29] Jay Pil Choi and Heiko Gerlach, *Global Cartels, Leniency Programs and International Antitrust Cooperation*, International Journal of Industrial Organization 30 (2012) 528-540, p. 529.

in a cartel agreement as against either cheating on the agreement or approaching the competition authority."[30]

Collusion, therefore, is only worthwhile provided that no other firm cheats or applies for leniency. Whereas the risk of cheating can be minimized by establishing ways to monitor compliance with the cartel arrangement, ensuring that no-one comes forward to the authorities is more difficult to control. Since full immunity will only typically be granted to the first to come forward, potential applicants will not inform other cartel members of their intention to blow the whistle, so as to ensure they get to the agency before anyone else. This race to be the first informant has a substantial impact on the trust between cartel members.[31] In principle, it seems logical that they would be tempted to seek leniency if the risk of the cartel being detected and punished is higher than the possibility of increasing profits by colluding.[32] But risk-benefit analyses in this area are far from straightforward, and it would be virtually impossible for a company to work out the most probable outcome with any degree of certainty. What is clear however is that leniency makes the profitability of cartels much less evident, as it creates an "asymmetry of costs" by granting immunity and reductions in the penalties to some cartelists, while stringently punishing others.[33] In this prisoner's dilemma, the risk of being discovered and punished is "unequally distributed", and the moment one firm blows the whistle the rest have almost "100% certainty of being detected and having to pay a hefty fine."[34] Whether this cartel-destabilizing premise holds true in practice will be explored in detail in the remainder of this section.

1.2 Measuring the success of amnesty policies: a review of the academic literature

"Leniency programs have become weapons of mass dissuasion in the hands of antitrust enforcers against the most damaging forms of explicit collusion among rival firms."[35]

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[30] Andreas Stephan and Ali Nikpay, *Leniency Theories and Complex Realities* (2015) *CCP Working Paper* 14-8, at p. 3.

[31] Andreas Stephan and Ali Nikpay, *Leniency Theories and Complex Realities* (2015) *CCP Working Paper* 14-8, at p. 3; see also Constanza Nicolosi, 'No Good Whistle Goes Unpunished: Can We Protect European Antitrust Leniency Applications from Discovery?' 31 *Northwestern Journal of International Law and Business* (2011) 225-260, p. 230.

[32] Gönenç Gürkaynak, Esq., K. Korhan Yildirim and Elif Açelya Setkaya, *Granting Immunity and Revoking Immunity: a Global overview of Leniency Programmes, International Company and Commercial Law Review* (2014) 25(6), 195-212.

[33] On the issue of the asymmetric punishment of leniency, see Evgenia Motchenkova and Rob van der Laan, 'Strictness of Leniency Programs and Asymmetric Punishment Effect', 58 *International Review of Economics* (2011), pp. 401-431.

[34] Hans Vedder, *The Kone Case and the Lifts Cartel – An Upward Effect on Prices and Effectiveness?*, European Law Blog (19 June 2014) (http://europeanlawblog.eu/?p=2397).

[35] Joan-Ramón Borrell, Juan Luis Jiménez and Carmen García, Evaluating Antitrust Leniency

Before delving into the analysis of the characteristics of specific leniency programs, it is indispensable to define the parameters on which to assess whether the policy has truly become, borrowing from Borrell *et al*., a "weapon of mass dissuasion". As evidenced by the above analysis, the logic behind the introduction of amnesty is premised on the hypothetical potential to break the trust between cartelists and to obfuscate calculations of the gains that might be attained through collusion. In practice however, quantifying the success of leniency is much more complex, not least because deciding how best to measure its effectiveness can be somewhat ambiguous. Enforcers and scholars often refer to the number of cartels cracked, or the millions companies have been fined thanks to evidence and information obtained through leniency applications, as the principal sign of success.[36] Hammond, for instance, has praised the US Corporate Leniency Policy saying that it has served to break "more cartels than all other tools at our disposal combined",[37] while Barnett deems the program "[the DOJ's] greatest source of cartel evidence".[38] Indeed, one can intuitively visualize a correlation between the number of collusive practices busted through leniency and the overall success of the policy as a tool for cartel detection. However, the true effectiveness of the policy rests on whether it serves to deter cartel formation,[39] and ultimately on its welfare-enhancing ability. From this perspective, "higher numbers of detected and convicted cartels alone are not necessarily good indicators of success. Since competition policy's main objective is increasing welfare [by deterring cartels], ideally a successful policy should reduce cartel formation and prices rather than increase convictions."[40]

Programs, 10(1) *Journal of Competition Law and Economics* (2004), pp. 107-136, p. 111.

[36] See, *inter alia*, Scott D. Hammond, *The Evolution of Criminal Antitrust Enforcement over the Last Two Decades*, 24th Annual National Institute on White Collar Crime, ABA Criminal Justice Section and ABA Center for Continuing Legal Education (25 February 2010) (https://www.justice.gov/atr/speech/evolution-criminal-antitrust-enforcement-over-last-two-decades), p. 3; Ann O'Brien, 'Leadership of Leniency', in Caron Beaton-Wells and Christopher Tran (eds), *Anti-Cartel Enforcement in Contemporary Age: Leniency Religion*, Hart (2015), p. 18; Cécile Aubert, Patrick Rey and William Kovacic, 'The Impact of Leniency Programs On Cartels', *International Journal of Industrial Organization*, 24(6) (2006), pp. 1241-1266; Sébastien Broos, Axel Gautier, Jorge Marcos Ramos and Nicolas Petit, *Analyse Statistique des Affaires d'Ententes dans l'UE (2004-2014)*, Revue économique (2016) 67, pp. 79 et seq., p. 85.

[37] Scott D. Hammond, 'Cracking Cartels with Leniency Programs', *OECD Competition Committee*, Paris (18 October 2005) (https://www.justice.gov/atr/speech/cracking-cartels-leniency-programs).

[38] Thomas O. Barnett, *Global Antitrust Enforcement*, Georgetown Law Global Antitrust Enforcement Symposium (26 September 2007).

[39] Jay Pil Choi and Heiko Gerlach, *Global Cartels, Leniency Programs and International Antitrust Cooperation*, International Journal of Industrial Organization 30 (2012) 528-540.

[40] Maria Bigoni, Sven-Olov Fridolfsson, Chloé Le Coq and Giancarlo Spagnolo, 'Fines, Leniency and Rewards in Antitrust', *Research Institute of Industrial Economics*, Stockholm (2 November 2011) (http://www.ifn.se/wfiles/wp/wp738.pdf), p. 2. Kovacic has also warned against calculating the success of leniency by numbers: "[t]he sheer volume of leniency-inspired cases and financial recoveries do not provide a confident basis" for determining whether leniency does in fact work. William E. Kovacic, 'A Case for Capping the Dosage: Leniency and Competition Authority Governance', in Caron Beaton-

Estimating the deterrent effect of antitrust policies is more difficult than in other disciplines since, as Bigoni *et al*. note, the population of cartels and changes in it are unobservable.[41] Since the early 2000s, a wide range of scholarly studies in the fields of law and economics have attempted to assess the impact of leniency on cartel avoidance. In 2003, the pivotal work of Motta and Polo stressed the potential value of leniency for the dissuasion of collusive conduct.[42] On this solid basis, further ground-breaking theoretical economic studies have subsequently come to the general conclusion that collusion is made difficult by leniency programs, albeit using different models and attaining varied outcomes.[43] The results of empirical works were initially mixed.[44] A study by Miller of the use of leniency in the US between 1985 and 2005 found that, since the 1993 revision of the Corporate Leniency Policy,[45] there was an initial increase in the number of cartel discoveries, and then a sharp drop. Such a trend would *a priori* be consistent with a policy that enhances deterrence.[46] In the EU, an initial investigation of the impact of the original EU leniency policy of 1996 did not produce any evidence that collusion had been made more difficult by the program.[47] The preliminary findings of the latest studies, which use more recent data and illustrate the impact of the revised 2003 program, are more encouraging.[48] Zhou's

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Wells and Christopher Tran (eds), *Anti-Cartel Enforcement in Contemporary Age: Leniency Religion*, Hart (2015), p. 130.

[41] Maria Bigoni, Sven-Olov Fridolfsson, Chloé Le Coq and Giancarlo Spagnolo, 'Fines, Leniency and Rewards in Antitrust', *Research Institute of Industrial Economics*, Stockholm (2 November 2011) (http://www.ifn.se/wfiles/wp/wp738.pdf), p. 2.

[42] Massimo Motta and Michele Polo, 'Leniency Programs and Cartel Prosecution' (2003) 21 *International Journal of Industrial Organization* 347.

[43] See, *inter alia*, Patrick Rey, 'Towards a Theory of Competition Policy' In M. Dewatripont, L.P. Hansen, and S.J. Turnovsky (eds), *Advances in Economics and Econometrics: Theory and Applications*, Cambridge University Press (2003); Cécile Aubert, Patrick Rey and William Kovacic, 'The Impact of Leniency Programs On Cartels', *International Journal of Industrial Organization*, 24(6) (2006), pp. 1241-1266; Joseph E. Harrington, Jr., 'Behavioral Screening and the Detection of Cartels', in Claus-Dieter Ehlermann and Isabela Atanasiu (eds) *European Competition Law Annual 2006: Enforcement of Prohibition of Cartels*, Hart (2007); Giancarlo Spagnolo, 'Leniency and Whistleblowers in Antitrust' In Paolo Buccirossi (ed), *Handbook of Antitrust Economics*, MIT Press (2008); Joseph E. Harrington and Myong-Hun Chang, 'Modelling the Birth and Death of Cartels with an Application to Evaluating Antitrust Policy', 7 *Journal of the European Economic Association* (2009), pp. 1400-1435; Jay Pil Choi and Heiko Gerlach, *Global Cartels, Leniency Programs and International Antitrust Cooperation*, International Journal of Industrial Organization 30 (2012) 528-540.

[44] Jun Zhou, 'New Evidence on the Efficacy of Leniency', *Working Paper* (2011) (The paper is no longer available on SSRN, but the abstract can be found at https://www.researchgate.net/publication/256027164_New_Evidence_on_the_Efficacy_of_Leniency).

[45] See *infra* part 2.1.

[46] Nathan H. Miller, 'Strategic Leniency and Cartel Enforcement' (2009) 99 *American Economic Review* 750-768.

[47] Steffen Brenner, 'An Empirical Study of the European Corporate Leniency Program' 27 *International Journal of Industrial Organization* (2009), pp. 639–645. See also *infra* part 2.2.

[48] Gordon Klein, 'Cartel Destabilization and Leniency Programs - Empirical Evidence' *ZEW Discussion Paper* No. 10-107 (2010) (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1854426), and Jun Zhou, 'Evaluating Leniency with Missing Information on Undetected Cartels: Exploring Time-Varying Policy Impacts on Cartel Duration' GESY Discussion Paper No. 353 (April 2011)

analysis of leniency in cartel investigations between 1985 and 2011 suggests a similar pattern to that detected by Miller in the US context.[49] These conclusions are further supported by a raft of experimental studies conducted in the past ten years, which generally report that leniency discourages cartel formation.[50] It leads to the formation of less cartels, and those that do emerge appear to be less stable.[51]

The results of these works, while generally pointing towards successful cartel deterrence, do not really shed much light on the impact on welfare and economic efficiency. They are limited in that "[t]hey can only estimate the effects of policies actually implemented, not those of the many available alternatives, and they focus on cartel formation rather than on welfare."[52] Similarly, Marvão and Spagnolo recently emphasized the shortcomings of the data currently available, stating that "it is unclear whether [leniency policies] are actually increasing welfare by generating a strong deterrent effect, or whether they are reducing welfare through the larger administration and prosecution costs they generate, without any compensating increase in deterrence."[53] Moreover, whereas the main findings of the experimental research points towards effectiveness, they have also shown that in some cases leniency leads to higher prices when a cartel does form.[54] Bigoni *et al*. establish that, while on average prices are lower, those for existing cartels tend to increase, and the cartel may become more stable through leniency. [55] Importantly, and linked to this idea of cartel stability, Harrington and Chang recently considered the effects of

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(http://www.sfbtr15.de/uploads/media/353_01.pdf).

[49] Jun Zhou, 'Evaluating Leniency with Missing Information on Undetected Cartels: Exploring Time-Varying Policy Impacts on Cartel Duration' GESY Discussion Paper No. 353 (April 2011) (http://www.sfbtr15.de/uploads/media/353_01.pdf).

[50] See José Apesteguia, Martin Dufwenberg, and Reinhard Selten, 'Blowing the Whistle', 31 Economic Theory (2007), pp. 143-166; Jeroen Hinloopen and Adriaan R. Soetevent, 'Laboratory Evidence on the Effectiveness of Corporate Leniency Programs' 39 *RAND Journal of Economics* (2008), pp. 607-616; Peter T. Dijkstra, Marco A. Haan and Lambert Schoonbeek, 'Leniency Programs and the Design of Antitrust: Experimental Evidence with Unrestricted Communication', University of Groningen (2012) (http://acle.uva.nl/binaries/content/assets/subsites/amsterdam-center-for-law--economics/cr-meetings/2012/paper-dijkstra.pdf?1346340026902).

[51] Jeroen Hinloopen and Adriaan R. Soetevent, 'Laboratory Evidence on the Effectiveness of Corporate Leniency Programs' 39 *RAND Journal of Economics* (2008), pp. 607-616.

[52] Maria Bigoni, Sven-Olov Fridolfsson, Chloé Le Coq and Giancarlo Spagnolo, 'Fines, Leniency and Rewards in Antitrust', *Research Institute of Industrial Economics*, Stockholm (2 November 2011) (http://www.ifn.se/wfiles/wp/wp738.pdf), p. 2.

[53] Catarina Marvão and Giancarlo Spagnolo, 'What Do We Know About the Effectiveness of Leniency Policies? A Survey of the Empirical and Experimental Evidence, in Caron Beaton-Wells and Christopher Tran (eds), *Anti-Cartel Enforcement in Contemporary Age: Leniency Religion*, Hart (2015).

[54] Joseph E. Harrington and Myong-Hun Chang, 'Endogenous Antitrust Enforcement in the Presence of a Corporate Leniency Program' (30 November 2013) (https://bepp.wharton.upenn.edu/files/?whdmsaction=public:main.file&fileID=5147) , p. 2.

[55] Maria Bigoni, Sven-Olov Fridolfsson, Chloé Le Coq and Giancarlo Spagnolo, 'Fines, Leniency and Rewards in Antitrust', *Research Institute of Industrial Economics*, Stockholm (2 November 2011) (http://www.ifn.se/wfiles/wp/wp738.pdf), p. 3.

leniency on non-leniency enforcement — that is, the number of cartels that are cracked by means other than amnesty applications.[56] Since antitrust authorities have limited resources, handling leniency cases, they say, unavoidably means that less resources will be available for non-leniency investigations. This may have a negative impact on the race to inform that leniency programs are presumed to trigger: if the likelihood of conviction in the absence of amnesty requests is low, it could reduce the fear of getting caught and jeopardize the effects of the prisoner's dilemma created by leniency.[57] Interestingly, their study finds that, in industries where collusion is reasonably stable, leniency can increase the duration of collusion, since "stable cartels are more concerned with detection and prosecution through non-leniency means."[58]

Further theoretical and empirical studies using data available in a wider number of jurisdictions, and over a more prolonged period of time, are needed in order to attain greater certainty about the effects of leniency on cartel deterrence and welfare. However, on the basis of the data readily available, it is possible to acknowledge that amnesty programs appear to have generally performed satisfactorily, particularly in relation to cartel detection and prevention. The literature has also underlined other important practical advantages of leniency, including: the creation of incentives to denounce collusion[59] (without leniency firms would never benefit from reporting);[60] a reduction in the cost of cartel investigations;[61] a faster investigation and prosecution process;[62] and a positive impact on the perception of a country's antitrust policy among the business community.[63] But these benefits are not automatically present in every leniency program. Adequate policy design is paramount in order to create the desired race to self-report that destroys collusion.[64] This assertion poses a new, equally complex dilemma: how to devise a sound leniency program?

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[56] Joseph E. Harrington and Myong-Hun Chang, 'Endogenous Antitrust Enforcement in the Presence of a Corporate Leniency Program' (30 November 2013) (https://bepp.wharton.upenn.edu/files/?whdmsaction=public:main.file&fileID=5147).
[57] See *supra* part 1.1.
[58] Joseph E. Harrington and Myong-Hun Chang, 'Endogenous Antitrust Enforcement in the Presence of a Corporate Leniency Program' (30 November 2013) (https://bepp.wharton.upenn.edu/files/?whdmsaction=public:main.file&fileID=5147) , pp. 4-5.
[59] Steffen Brenner, 'An Empirical Study of the European Corporate Leniency Program' 27 *International Journal of Industrial Organization* (2009), pp. 639–645.
[60] Zhijun Chen and Patrick Rey, 'On the Design of Leniency Programs', (2013) 56 *Journal of Law and Economics*, 917-957, p. 925.
[61] Massimo Motta and Michele Polo, 'Leniency Programs and Cartel Prosecution' (2003) 21 *International Journal of Industrial Organization* 347.
[62] Steffen Brenner, 'An Empirical Study of the European Corporate Leniency Program' 27 *International Journal of Industrial Organization* (2009), pp. 639–645.
[63] Joan-Ramón Borrell, Juan Luis Jiménez and Carmen García, Evaluating Antitrust Leniency Programs, 10(1) *Journal of Competition Law and Economics* (2004), pp. 107-136, p. 136.
[64] Eleanor Fox and Daniel Crane, *Global Issues in Antitrust and Competition Law*, Thomson Reuters (2010), p. 77.

1.3 Adequate leniency policy design: the theory

Any attempt to delineate a general theoretical framework for the assessment of amnesty programs is hampered by the importance of context. What might work very well in one jurisdiction might not be as effective in another that displays dissimilar characteristics.[65] This contention is particularly accurate in antitrust, as environment is paramount both at the time of legislating and when it comes to enforcing the law. The literature that has, to date, discussed the features of robust immunity programs by focusing mainly on the corporate leniency policies of the US and the EU.[66] Prior to assessing the lessons that can be drawn from the practical experience of these,[67] this part of the paper considers the issues that must be taken into consideration when designing leniency programs so as to ensure that they serve the purpose for which they were implemented in the first place.

Despite the practical limitations affecting the quest for general parameters through which to assess specific leniency policies, certain features present themselves as fundamental in the construction of any system that rewards informants who come forward and help bring down the unlawful activity they have been part of. Amnesty programs play on universal emotions, such as the fear of getting caught and the mistrust towards partners in illegal activity. In practice, the behavior of informants is less based on precise cost-benefit analyses than on the evocation of such feelings.[68] And the latter is less dependent on context than cost-benefit assessments. Therefore, it is not entirely surprising that, as regimes become more experienced, a noticeable degree of convergence can be observed in leniency policies around the world.[69] In addition to, *inter alia*, facilitating multi-jurisdictional amnesty applications, [70]

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[65] On the importance of context in antitrust, see Eleanor Fox and Michal Gal, 'Drafting Competition Law for Developing Jurisdictions: Learning from Experience' (2014) *New York University Law and Economics Working Papers* 374, (http://lsr.nellco.org/nyu_lewp/374).

[66] For a general overview of specific leniency policies, see Samantha Mobley and Ross Denton, *Global Cartels Handbook: Leniency: Policy and Procedure* (2011) Oxford University Press. The very useful book is directed at practitioners, and does not enter into a discussion of the merits of the various programs.

[67] See *infra* section 2.

[68] For instance, according to Wils, companies can be expected to base their decisions on the risks they perceive, rather than on thorough cost-benefit analyses. Wouter P. J. Wils, *The Use of Leniency in EU Cartel Enforcement: An Assessment After Twenty Years*, World Competition (September 2016) 39(3) (forthcoming).

[69] Said convergence is frequently highlighted in the literature. See, *inter alia*, Ann O'Brien, 'Leadership of Leniency', in Caron Beaton-Wells and Christopher Tran (eds), *Anti-Cartel Enforcement in Contemporary Age: Leniency Religion*, Hart (2015); Eleanor Fox and Daniel Crane, *Global Issues in Antitrust and Competition Law*, Thomson Reuters (2010), p. 77.

[70] Barry E. Hawk (ed), A*nnual Proceedings of the Fordham Corporate Law Institute: International Antitrust Law & Policy*, Juris Publishing Inc. (2004), p. 38. See *infra* section 2.3.

convergence enables comparisons on the basis of which a general structure for the evaluation of the merits of specific programs can be built.

Amnesty programs are part of a wider antitrust strategy to combat cartels. They are thus inextricably related to the fight against the secret, harmful activity that is collusion. The general lines of the strategy against cartelization respond to a carrot and stick approach frequently described by scholars,[71] and indirectly fleshed out by former Deputy Assistant Attorney General Hammond.[72] The stick would principally be the severe sanctions and a high risk of detection, and the carrot the rewards offered to informants through leniency.[73] Based on this, two principal strands of factors that determine whether a leniency program is suitably designed are observed: internal factors relating to intrinsic features of the policy — the quality of the reward carrot —, and external factors which, though not part of the leniency program itself, act as buttresses that provide vital support to the leniency edifice. The latter would include the risk and the sanctions that form part of the stick. Each of these will be assessed in turn.

1.3.1 Internal policy design: the carrot

The internal effectiveness of a leniency program can be measured by the incentive to self-report that it generates.[74] Self-reporting will happen only if firms, fearing that their illegal activity might be detected by the enforcer, sense that they are both duly protected and adequately rewarded by the policy. Firstly, leniency policies need to offer adequate protection to whistleblowers, so as to avoid situations in which reporting will put them at greater risk than any reward they may obtain through the program. To this end, transparency and predictability are frequently highlighted as crucial in leniency.[75] The principal challenge when it comes to protecting informants is ensuring confidentiality. Without this assurance, it might prove very complicated to convince firms to self-report, as they may face retaliation from other cartelists and,

[71] Eleanor Fox and Daniel Crane, *Global Issues in Antitrust and Competition Law*, Thomson Reuters (2010), pp. 75 et seq.
[72] Scott D. Hammond, *Cornerstones of an Effective Leniency Program*, Presented at the ICN Workshop on Leniency Programs, Sydney Australia, (22–23 November 2004) (http://www.justice.gov/atr/public/speeches/206611.htm).
[73] *Ibid*. The policy is discussed, *inter alia*, in Eleanor Fox and Daniel Crane, *Global Issues in Antitrust and Competition Law*, Thomson Reuters (2010); Ann O'Brien, 'Leadership of Leniency', in Caron Beaton-Wells and Christopher Tran (eds), *Anti-Cartel Enforcement in Contemporary Age: Leniency Religion*, Hart (2015), p. 20.
[74] Eleanor Fox and Daniel Crane, *Global Issues in Antitrust and Competition Law*, Thomson Reuters (2010), p. 78.
[75] See, *inter alia*, Eleanor Fox and Daniel Crane, *Global Issues in Antitrust and Competition Law*, Thomson Reuters (2010); United Nations, Competition Guidelines: Leniency Programmes, UNCTAD MENA Programme (22 June 2016) (http://unctad.org/en/PublicationsLibrary/ditcclp2016d3_en.pdf), section 1.2(c).

above all, the risk of being severely punished in other jurisdictions. This last threat is particularly acute in the case of international cartels, which might be contrary to the antitrust laws in multiple parts of the world. International collusion abounds, with 516 investigations of suspected international cartels between 1990 and 2008.[76] Supposing a firm decides to self-report in one of the jurisdictions, the company may qualify for leniency under the relevant amnesty program. However, if the information obtained through leniency can be requested by antitrust enforcers in regimes where the penalties imposed may be higher, or where the leniency applicant may be subject to damage claims, then leniency would actually put this company in a worse position vis-à-vis other cartelists. Remedying such a menace to the proper functioning of leniency can be done by imposing very high information-sharing requirements, as well as through the facilitation of simultaneous leniency applications in various jurisdictions.

Secondly, with regard to the reward of the policy, it is important to note that leniency may be limited to granting immunity or a reduction in the penalties that would otherwise be applicable, or it can grant *positive* rewards. Giving the informant a financial recompense or 'bounty', such as a cut in the fines imposed on those whose illegal conduct was busted thanks to the tipoff, is uncommon, but not unheard of.[77] There have been voices arguing that such bounties would be "stronger tools than leniency programs to deter cartel formation",[78] provided that the recompense was "large enough to outweigh the cost of returning to the competition outcome in all the future periods."[79] Spagnolo also argues that the first informant should be offered a recompense equal to the sum of the fines paid by the convicted firms. If the fine is sufficiently high, full deterrence would theoretically be achieved at zero cost.[80] However, Spagnolo acknowledges that positive rewards might not be feasible, so

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[76] John M. Connor, *Cartel and Antitrust Portrayed: Private International Cartels from 1990 to 2008*, American Antitrust Institute Working Paper 09-06 (2009) (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1467310) .

[77] For example, the UK and Korea leniency programs offer positive rewards. On the latter, see Andreas Stephan, 'Is the Korean Innovation of Individual Informant Rewards a Viable Cartel Detection Tool?' in Thomas Cheng, Sandra Marco Colino and Burton Ong, *Cartels in Asia: Law and Practice*, Wolters Kluwer (2015). Beyond the realms of antitrust, one such example can be found in the U.S. Civil False Claims Act, by which individuals who act as informants of fraud in procurement contracts may be entitled to a share of the fines imposed. Cécile Aubert, Patrick Rey and William Kovacic, 'The Impact of Leniency Programs On Cartels', 24 *International Journal of Industrial Organization* 6 (2006), pp. 1241-1266. On the advantages of offering rewards to leniency applicants, see also Maria Bigoni, Sven-Olov Fridolfsson, Chloé Le Coq and Giancarlo Spagnolo, 'Fines, Leniency and Rewards in Antitrust', *Research Institute of Industrial Economics*, Stockholm (2 November 2011) (http://www.ifn.se/wfiles/wp/wp738.pdf), p. 3.

[78] Cécile Aubert, Patrick Rey and William Kovacic, 'The Impact of Leniency Programs On Cartels, 24 *International Journal of Industrial Organization* (6) (2006), pp. 1241-1266.

[79] *Ibid*.

[80] Giancarlo Spagnolo, *Divide et Impera: Optimal Leniency Programs*, Stockholm School of Economics (2005).

reduced fines can also be helpful as they would decrease the cost deviating from the cartel agreement.[81]

If the rewards offered to leniency applicants are too generous, there may be a risk of strategic exploitation of the policy.[82] The possibility of abusing leniency programs has not escaped the notice of economists such as Motta and Polo[83] or Sauvagnat.[84] Motta and Polo raise the issue that reduced penalties could have an "ex ante pro collusive effect".[85] From a legal perspective, Wils, who has written extensively on the EU's leniency policy,[86] recently revisited the prospect of using leniency as a platform to facilitate the creation and maintenance of cartels in systems which do not include incarceration as a potential penalty for collusion. He points out that, "[i]n situations where the same companies participate in a number of cartels in different markets, or repeatedly form cartels over time, one could imagine a system in which cartel participants take turns to apply for leniency, every time one of the cartels is (about to be) detected by the competition authority." Such tactics are commonly referred to as collude-and-report strategies.[87] Upon examining the EU experience however, he finds no "convincing example" of this taking place in practice.[88] However, the potential to abuse the system has to be accounted for, and the required transparency and predictability need to be balanced against the risk of implementing such a foreseeable strategy that firms can learn to use it to their best advantage.

Another issue related to the benevolence of the recompense is the moral adequacy of condoning a lawbreaker. Wils touches upon this problem, and finds a potential solution in the adoption of programs that are proportionate to the aims they pursue, which ensure that leniency granted is no more "than strictly necessary to obtain the positive enforcement effects, and to stress the condition for any beneficiary

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[81] *Ibid*.
[82] Zhijun Chen and Patrick Rey, 'On the Design of Leniency Programs', (2013) 56 *Journal of Law and Economics*, 917-957;
[83] Massimo Motta and Michele Polo, 'Leniency Programs and Cartel Prosecution' (2003) 21 *International Journal of Industrial Organization* 347.
[84] Julien Sauvagnat, 'Are Leniency Programs Too Generous?' *Economic Letters* 123 (2014), pp. 323-326.
[85] Massimo Motta and Michele Polo, 'Leniency Programs and Cartel Prosecution' (2003) 21 *International Journal of Industrial Organization* 347.
[86] See, *inter alia*, Wouter P. J. Wils, 'Leniency in Antitrust Enforcement: Theory and Practice', (2007) 30 *World Competition* (2007), pp. 25-64, and see Wouter P. J. Wils, 'The Use of Leniency in EU Cartel Enforcement: An Assessment After Twenty Years', *World Competition* (September 2016) 39(3) (forthcoming).
[87] Zhijun Chen and Patrick Rey, 'On the Design of Leniency Programs', (2013) 56 *Journal of Law and Economics*, 917-957.
[88] Wouter P. J. Wils, 'The Use of Leniency in EU Cartel Enforcement: An Assessment After Twenty Years', *World Competition* (September 2016) 39(3) (forthcoming). But see the results of the experimental study Jeroen Hinloopen and Adriaan R. Soetevent, 'Laboratory Evidence on the Effectiveness of Corporate Leniency Programs' 39 *RAND Journal of Economics* (2008), pp. 607-616, which show potential collude-and-report tactics.

[…] to provide genuine and full cooperation to the enforcement authorities."[89] Two principal strategies are typically used to palliate both the potential abuses of leniency and the diminishment of retributive justice. First of all, the predominant position in the literature is that leniency should only be offered to the first company to come forward,[90] and it should consist of full (as opposed to partial) immunity, without positive rewards.[91] Secondly, leniency does not extend to civil damage claims, meaning that the informant will not eschew having to compensate the victims of its harmful illegal behavior. Whereas some retribution is unavoidably sacrificed by condoning the administrative and/or criminal sanctions of the whistleblower, part of the retributory "payback effect" is safeguarded with the preservation of reparatory justice through civil litigation. The effect of damages on leniency will be explored further below.[92]

1.3.2 External factors affecting the success leniency: the stick

The effectiveness of leniency is highly dependent on the characteristics of the antitrust regulation, and ultimately the legal system, it forms part of and helps to enforce. As seen above, most regimes do not offer positive rewards, meaning that the attractiveness of leniency resides in the stiffness of the penalties it helps to forego. Provided that there is a risk of detection looming over companies behaving illegally, the harsher the punishment envisaged, the more succulent leniency applications will appear. Determining the most appropriate means to penalize anticompetitive behavior in general and collusion in particular is a rather intricate task which has inspired fascinating academic discussions.[93] An exhaustive evaluation of cartel punishment sadly exceeds the scope of this paper. For our purposes, leniency ought to be more efficient in antitrust regimes which allow for the imposition of high fines through administrative or criminal enforcement. By contrast, if the sanctions imposed are a mere tax on what is a very lucrative activity, there will be little incentive to break the trust of the cartel.[94] The temptation to apply for leniency will be greatest in those

[89] Wouter P. J. Wils, 'The Use of Leniency in EU Cartel Enforcement: An Assessment After Twenty Years', *World Competition* (September 2016) 39(3) (forthcoming).
[90] Julien Sauvagnat, 'Are Leniency Programs Too Generous?' *Economic Letters* 123 (2014), pp. 323-326.
[91] On the limitations and perverse effects of partial immunity, see Joe Chen and Joseph E. Harrington, Jr., 'The Impact of the Corporate Leniency Program on Cartel Formation and the Cartel Price Path', in 282 *The Political Economy of Antitrust* (2005) (http://dx.doi.org/10.1016/S0573-8555(06)82003-1), pp. 59-80.
[92] See *infra* part 1.3.2.
[93] See E.g. Gary S. Becker, 'Crime and Punishment: An Economic Approach', 76 *Journal of Political Economy* 2 (1968), pp. 169–217; KG Elzinga, and W Breit, *The Antitrust Penalties: A study in law and economics*, (1976) Yale University Press, 131; JM Connor and RH Lande, 'Optimal Cartel Deterrence: An Empirical Comparison of Sanctions to Overcharges' (2011) *AAI Working Paper* 11-08.
[94] Werden, for instance, has insisted that cartels "should be prohibited rather than merely taxed."

regimes that also incorporate jail terms, yet only a few jurisdictions contemplate individual criminal sanctions.[95]

A further external issue arises in relation to the protection of confidentiality that leniency programs ought to guarantee, as discussed above.[96] In addition to the privacy assurances within amnesty policies, confidentiality will be largely reliant upon how competition agencies engage in information-sharing. In this respect, Choi and Gerlach have attempted to establish the amount and kind of information that should be pooled in their fight against international cartels.[97] They consider three scenarios in which a cartel could potentially be cracked in two jurisdictions. Firstly, if there is no coordination and no information-sharing, the incentive to self-report is virtually inexistent. International cartels highly lucrative, and if caught their members would likely offset the costs of the penalties imposed in one jurisdiction with the benefits they are obtaining in other markets. Secondly, if antitrust authorities share case information but not leniency applications, there ought to be a higher cartel detection probability coupled and an increased chance of successful conviction in each jurisdiction. Thirdly, if confidentiality is not granted to leniency applicants, the results would be ambiguous: firms will either self-report in both jurisdictions, or in neither. In this sense, enabling informants to simultaneously seek leniency in all the jurisdictions where the cartel may be investigated would be desirable.

Finally, and related to the above concerns, the availability of damages through antitrust civil litigation also affects the effectiveness of amnesty programs. Since damages are not condoned even when immunity is granted, in theory the easier it is for injured parties to go to court to claim compensation, and the higher the reparation they may be entitled to, the more difficult it would be to convince cartelists to self-report. The problem, as explained by Buccirossi *et al*., is that leniency applications actually boost the chances of successful damage claims by victims of collusion,[98] both in the jurisdiction where leniency is sought and in others where confidentiality is not guaranteed. In this respect, while Spagnolo emphasizes the importance of limiting the accountability of the leniency applicant,[99] Buccirossi *et al*. go further and raise the possibility of eliminating this liability altogether, if the other cartelists are able to

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Gregory J. Werden, 'Sanctioning Cartel Activity: Let the Punishment fit the Crime', (2009) *European Competition Journal* 19 at 23.

[95] The US and the UK are among these. On the deterrent effect of imprisonment, see Gilbert Geis, 'Deterring Corporate Crime', in MD Ermann, and RJ Lundmann (eds), *Corporate and Governmental Deviance* (Oxford, OUP 1978) 278.

[96] See *supra* part 1.3.1.

[97] Jay Pil Choi and Heiko Gerlach, *Global Cartels, Leniency Programs and International Antitrust Cooperation*, International Journal of Industrial Organization 30 (2012) 528-540, p. 529.

[98] Paolo Buccirossi, Catarina Marvão and Giancarlo Spagnolo, 'Leniency and Damages', *CEPR Discussion Paper* No. 10682 (June 2015), p. 2.

[99] Giancarlo Spagnolo, *Divide et Impera: Optimal Leniency Programs*, Stockholm School of Economics (2005).

account for the damages caused by the leniency applicant.[100] Positive rewards could also be used to compensate the effect of damage claims on leniency applicants, as proposed by Silbye.[101]

Summing up the arguments put forward in this part of the paper, for leniency policies to achieve their maximum deterrent effect, they ought to guarantee at least full immunity, if not positive rewards. The latter option might be the most efficient in economic terms, and can neutralize the cost of compensation for victims. However, a moral argument may be raised against rewarding wrongdoers. Moreover, an excessively generous, transparent and predictable policy might lead to undesired strategical misuses of the policy. In any case, granting confidentiality of leniency applications appears to be vital. Cross-border agency cooperation is paramount in order to bring down international cartels, but there is a strong argument for limiting it to sharing information about anything other than amnesty applications, unless multi-jurisdictional leniency applications are facilitated through cross-border convergence. How these features and recommendations play out in specific leniency programs is the object of the next part of this paper.

2. The practice of policy design: evolution of leniency in established antitrust regimes

The amnesty programs of the US, Canada and the EU are frequently referred to as the 'Big Three' corporate leniency policies.[102] At this point of the study, having already sketched the theoretical framework for assessing the quality of amnesty programs, it seems appropriate to examine the practice of those policies that already have some mileage, and that have proved their ability to bring down cartels. Rather than providing a comprehensive, overwhelmingly descriptive account of each regime, the focus is on the evolution of the US and EU programs, the features that make them successful, and any outstanding issues that remain to be addressed.

2.1 The United States

The idea of using leniency to fight cartels is attributed to the prosecutors at the Antitrust Division of the United States Department of Justice (DOJ).[103] It is

[100] Paolo Buccirossi, Catarina Marvão and Giancarlo Spagnolo, Leniency and Damages, *CEPR Discussion Paper* No. 10682 (June 2015).
[101] Frederik Silbye, 'A Note on Antitrust Damages and Leniency Programs', 33 *European Journal of Law and Economics* (2012), pp. 691-699.
[102] Ann O'Brien, 'Leadership of Leniency', in Caron Beaton-Wells and Christopher Tran (eds), *Anti-Cartel Enforcement in Contemporary Age: Leniency Religion*, Hart (2015), p. 19.
[103] Ann O'Brien, 'Leadership of Leniency', in Caron Beaton-Wells and Christopher Tran (eds), *Anti-*

unsurprising that it was in the US where such a policy was first introduced. The US Sherman Act, enacted in 1890, is the oldest competition law statute still applicable today, and has served as inspiration for modern antitrust regimes around the world.[104] The first Corporate Leniency Policy in this jurisdiction dates back to 1978, but was largely unsuccessful. Leniency was only available provided that no investigation had yet been initiated by the DOJ, and even then it was discretional. Seven factors had to be considered in order to decide whether to grant leniency, namely: the firm had to be the first to blow the whistle; the confession should be a "truly corporate act", as opposed to isolated individual confessions; the DOJ should not reasonably expect to become aware of the undercover cartel without the report of the leniency applicant; the company was required to promptly terminate its involvement in the cartel; consideration was given to the "candor and completeness" with which the firm reported the violation and assisted the DOJ in the investigation; the nature of the wrongdoing and the whistleblower's involvement also had to be examined; and finally, the leniency applicant had to have made or intend to make restitution to those injured by the illegal activity.[105] Given the high threshold for qualifying for amnesty under this policy, in its 15 years of application only 17 companies filed for leniency, of which just ten were granted full immunity.[106] Unsurprisingly, the 1978 policy has been deemed "perhaps the least well understood and most infrequently invoked criminal law policy of the Antitrust Division."[107]

In order to tackle these shortcomings and invigorate the strategy, in 1993 and 1994 the DOJ respectively revised its corporate leniency policy[108] and introduced an individual amnesty program.[109] The changes, attributed principally to the then Assistant Attorney General Anne Bingaman,[110] modified the regime along three main

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Cartel Enforcement in Contemporary Age: Leniency Religion, Hart (2015), p. 17.

[104] However, Canada enacted its original Competition Act in 1889, one year before the Sherman Act was passed, making the former the first modern antitrust statute in the world.

[105] Gary R. Spratling and D. Jarrett Arp, *The International Leniency Revolution – The Transformation of International Cartel Enforcement During The First Ten Years Of The United States' 1993 Corporate Amnesty/Immunity Policy*, American Bar Association Section of Antitrust Law Annual Meeting (12 August 2003) (http://www.gibsondunn.com/fstore/documents/pubs/Spratling-Arp%20ABA2003_Paper.pdf), p. 2.

[106] Gary R. Spratling, *The Experience and Views of the Antitrust Division*, address before the United States Sentencing Commission Symposium 'Corporate Crime in America: Strengthening the "Good Citizen" Corporation' (8 September 1995), cited in Ky P. Ewing, *Competition Rules for the 21st Century: Principles from America's Experience*, Kluwer Law International (2nd Edn) (2006), p. 623.

[107] Robert E. Bloch, *Past Practice and Future Promise: The Antitrust Division's Corporate Amnesty Program*, Antitrust 28 (Fall 2003).

[108] Department of Justice, *Corporate Leniency Policy* (10 August 1993) (https://www.justice.gov/sites/default/files/atr/legacy/2007/08/14/0091.pdf).

[109] Department of Justice, *Leniency Policy for Individuals* (10 August 1994) (https://www.justice.gov/atr/individual-leniency-policy).

[110] William E. Kovacic, A Case for Capping the Dosage: Leniency and Competition Authority Governance, in Caron Beaton-Wells and Christopher Tran (eds), *Anti-Cartel Enforcement in Contemporary Age: Leniency Religion*, Hart (2015), p. 125.

lines: the confirmation of the "first informant rule",[111] by virtue of which leniency would now be automatically guaranteed to the first company to come forward with information on a cartel not already under investigation; the inclusion of a "post-investigation amnesty" rule,[112] allowing the first informant might be granted amnesty in exchange for cooperation even when an investigation is underway; and, perhaps most importantly, the extension of amnesty to individuals ("directors, officials and employees") who provide information, and who may be granted immunity from criminal prosecution.[113] The reform was successful in terms of the number of requests and the amounts of the fines imposed.[114] By 2010, applications were 20 times higher than they were under the original policy,[115] and 90 percent of the USD 5 billion paid in penalties for antitrust violations between 1996 and 2010 was obtained in the context of investigations that involved leniency requests. In fact, in 1999 alone, the total of the fines imposed was higher than the sum of all penalties levied during the entire prior 109-year history of US antitrust.[116] Although this rise in the cost of antitrust violations is also a consequence of the steep increase in the financial penalties that may be imposed, the role of amnesty was undeniably vital to crack these collusive practices.[117]

Perhaps the best known case in which leniency has been used to date remains the investigation of the lysine cartel in the food additives industry in the mid 1990s.[118] ADM was fined USD 100 million, and the secret recordings of the meetings were widely shared with the business community and the general public in what has been described as a "wise marketing move" on the part of the DOJ.[119] Interestingly, the immunity granted to informant Mark Whitacre was eventually revoked, as he was found guilty of embezzlement and sentenced to nine years in jail.[120] After the 1993-1994 revision, it took years for applications under the improved policy to start flowing

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[111] Zhijun Chen and Patrick Rey, 'On the Design of Leniency Programs', (2013) 56 *Journal of Law and Economics*, 917-957, p. 917.
[112] *Ibid*.
[113] Ann O'Brien, 'Leadership of Leniency', in Caron Beaton-Wells and Christopher Tran (eds), *Anti-Cartel Enforcement in Contemporary Age: Leniency Religion*, Hart (2015), p. 18.
[114] Ann O'Brien, 'Leadership of Leniency', in Caron Beaton-Wells and Christopher Tran (eds), *Anti-Cartel Enforcement in Contemporary Age: Leniency Religion*, Hart (2015), p. 18.
[115] Scott D. Hammond, *The Evolution of Criminal Antitrust Enforcement over the Last Two Decades*, 24th Annual National Institute on White Collar Crime, ABA Criminal Justice Section and ABA Center for Continuing Legal Education (25 February 2010) (https://www.justice.gov/atr/speech/evolution-criminal-antitrust-enforcement-over-last-two-decades), p. 3.
[116] Cécile Aubert, Patrick Rey and William Kovacic, 'The Impact of Leniency Programs On Cartels', *International Journal of Industrial Organization*, 24(6) (2006), pp. 1241-1266.
[117] *Ibid*.
[118] The story of Mark Whitacre is told in the novel *The Informant: A True Story*, by Kurt Eichenwald, published by Broadway Books (2000).
[119] Ann O'Brien, 'Leadership of Leniency', in Caron Beaton-Wells and Christopher Tran (eds), *Anti-Cartel Enforcement in Contemporary Age: Leniency Religion*, Hart (2015), p. 20.
[120] John M. Connor, *Global Price Fixing: Our Customers Are Our Enemy* (2001) Kluwer Academic Publishers, p. 411.

in, in all likelihood because no company wanted to be the one to test the waters.[121] Finally, in May 1999, following Rhône-Poulenc's cooperation in the context of the new corporate leniency policy, a criminal fine of USD 500 million was imposed on cartel instigator Hoffman-La Roche, and a further fine of USD 225 million was levied on BASF, for participating in the vitamins cartel. The case was the first in which a foreign executive got a jail sentence in the US for participating in collusion. The revised policy was also notoriously used in the Sotheby's-Christie's price-fixing scandal that started in the mid-1990s. Christopher Davidge, Christie's chief executive at the time, filed for leniency in the context of an ongoing DOJ investigation against the auction houses. Davidge and Christie's were respectively granted individual and corporate amnesty in exchange for cooperation, and for the provision of evidence of the conspiracy contrary to Section 1 of the Sherman Act.[122] The case culminated with the conviction of Sotheby's and its chief executive Alfred Taubman. Fines were also imposed on the art houses' collusive practices under Canadian and EU competition law, with Davidge also filing for leniency under the latter.[123] Interestingly, in 2003 the company Stolt-Nielsen became the first to have its immunity rescinded, on the grounds that it did not take "prompt and effective action" to end conspiratorial activities, and did not offer its full and complete cooperation.[124] These highly publicized cases left no doubt that the policy was fully operational, and that cartelists choosing not to use it could face serious legal consequences.

2.2 The European Union

Following the leniency trend set by the US, most OECD countries[125] and a total of more than 50 antitrust jurisdictions around the world have implemented similar policies to combat collusion.[126] The EU adopted its first immunity policy in 1996, when the European Commission published its original Leniency Notice.[127] Under this

[121] William E. Kovacic, Robert C. Marshall, Leslie M. Marx and Matthew E. Raiff, 'Lessons for Competition Policy from the Vitamins Cartel' (2005) (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=818744).
[122] See generally Orley Ashenfelter and Kathryn Graddy, *Anatomy of the Rise and Fall of a Price-Fixing Conspiracy: Auctions and Sotheby's and Christie's* (2005) Journal of Competition Law and Economics 1(1), pp. 3-20.
[123] Christopher Harding and Jennifer Edwards, *Cartel Criminality: The Mythology and Pathology of Business Collusion*, Ashgate (2015) pp. 167 et seq.
[124] Jim Walden and Kristopher Dawes, 'The Curious Case of *Stolt-Nielsen S.A. v United States*', *The Antitrust Source* (March 2005)
[125] Maria Bigoni, Sven-Olov Fridolfsson, Chloé Le Coq and Giancarlo Spagnolo, 'Fines, Leniency and Rewards in Antitrust', *Research Institute of Industrial Economics*, Stockholm (2 November 2011) (http://www.ifn.se/wfiles/wp/wp738.pdf).
[126] Eleanor Fox and Daniel Crane, *Global Issues in Antitrust and Competition Law*, Thomson Reuters (2010), pp. 77-78.
[127] European Commission, *Commission Notice on the Non-Imposition or Reduction of Fines in Cartel Cases* [1996] OJ C207/4 (the 1996 Leniency Notice).

policy there was no guarantee of full immunity for the informant. In theory, just 75 per cent of the fine was guaranteed to be waived on the first company to come forward, and in practice full immunity was only ever granted to three companies.[128] Such a limitation had an undesired effect on transparency and predictability, and as predicted by Harrington and Chen in their assessment of partial immunity, it jeopardized the effectiveness of the policy.[129] The shortcoming was addressed already in the first revision of the policy in 2002.[130] Since the 2002 Leniency Notice, fines can be completely waived provided the following conditions are met: the applicant must provide all evidence in its possession immediately, at the time of the leniency request; it must ensure full co-operation throughout the investigation; it must cease its involvement in the cartel; it must not be a cartel instigator, by having encouraged the participation of other undertakings in the collusive practice; and it must be the first to provide evidence which would allow the European Commission to conduct a dawn raid or to find an infringement of Article 101(1) of the Treaty on the Functioning of the European Union (TFEU).[131]

The current version of the EU leniency policy can be found in the 2006 Leniency Notice,[132] which revised the program for a second time to ensure greater legal certainty and clarity, and brought the system more in line with US policy.[133] In this reform, three aspects were prioritized. First of all, a 'marker' system was introduced, by virtue of which companies can be secured a place in the queue of leniency applicants the moment they submit an application.[134] They are subsequently afforded some time to gather the supporting documents that prove the existence of collusion, and they are informed as to whether they are the first to seek leniency. Unfortunately, the marker is discretionary, and it is up to the European Commission to grant it on a case-by-case basis.[135] Secondly, the new policy provides some additional details as to the evidential threshold for immunity. In its corporate leniency statement, the company must provide a "detailed description of the alleged cartel arrangement, including for instance its aims, activities and functioning; the product or

[128] Jatinder S. Sandhu, *The European Commission's Leniency Policy: A Success?* European Competition Law Review (2007) 28(3), pp. 148-157, at p. 149.
[129] Joe Chen and Joseph E. Harrington, Jr., 'The Impact of the Corporate Leniency Program on Cartel Formation and the Cartel Price Path', in 282 *The Political Economy of Antitrust* (2005) (http://dx.doi.org/10.1016/S0573-8555(06)82003-1), pp. 59-80.
[130] European Commission, *Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases*, [2002] OJ C45/3 (EU 2002 Leniency Notice).
[131] EU 2002 Leniency Notice, paras 8-11.
[132] European Commission, *Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases*, [2006] OJ C298/17 (EU 1996 Leniency Notice).
[133] For a detailed and up-to-date analysis of the EU leniency policy, see Wouter P. J. Wils, *The Use of Leniency in EU Cartel Enforcement: An Assessment After Twenty Years*, World Competition (September 2016) 39(3) (forthcoming).
[134] EU 2006 Leniency Notice, para. 14.
[135] EU 2006 Leniency Notice, para. 15.

service concerned, the geographic scope, the duration of and the estimated market volumes affected by the alleged cartel; the specific dates, locations, content of and participants in alleged cartel contacts, and all relevant explanations in connection with the pieces of evidence provided in support of the application."[136] The cooperation requirements are therefore considerably high. Thirdly, the 2006 Notice makes clear that oral corporate statements may now be used by the European Commission as evidence,[137] and there is a procedure by which they may "constitute binding statements not subject to challenge by the cooperating undertaking".[138] The reason for the weight given to oral statements is that, if written statements were required, litigants claiming damages in other jurisdictions (particularly the US) might be tempted to seek discovery of such documents to substantiate their claims.[139]

Like in the US, the revised EU leniency program, combined with the rise of the amount of the fines imposed on anticompetitive conduct, have proven fruitful. Between 2012 and 2016, the total amount of financial penalties imposed on cartels was close to EUR 9 billion, even after taking into account the adjustments made by the EU courts to the Commission fining decisions.[140] A statistical study of cartel decisions between 2004 and 2014 estimates that at least one undertaking sought leniency in 94 per cent cases assessed.[141] Importantly, in 2016 record fines totaling nearly EUR 3 billion were imposed on the members of a single cartel, truck producers MAN, Volvo/Renault, Daimler, Iveco, and DAF for engaging in price fixing over 14 years.[142] The case provides a clear illustration of the 'race' to blow the whistle instigated by the leniency: MAN, the first to come forward, was granted full immunity. Since Volvo/Renault, Daimler and Iveco also filed for amnesty, albeit at a later stage, they were respectively given a 40, 30 and 10 per cent reduction in their fines.[143] In the end, all but one of the cartelists applied for leniency. All participants got a further 10 per cent reduction under the 2008 Settlement Notice,[144] by which the companies acknowledge their participation in the collusion, as well as their liability,

[136] EU 2006 Leniency Notice, para. 9.
[137] EU 2006 Leniency Notice, para. 31.
[138] Jatinder S. Sandhu, *The European Commission's Leniency Policy: A Success?* European Competition Law Review (2007) 28(3), pp. 148-157, p. 156.
[139] Jatinder S. Sandhu, *The European Commission's Leniency Policy: A Success?* European Competition Law Review (2007) 28(3), pp. 148-157, p. 155.
[140] European Commission, *Cartel Statistics* (2016) (http://ec.europa.eu/competition/cartels/statistics/statistics.pdf).
[141] Sébastien Broos, Axel Gautier, Jorge Marcos Ramos and Nicolas Petit, *Analyse Statistique des Affaires d'Ententes dans l'UE (2004-2014)*, Revue économique (2016) 67, pp. 79 et seq., p. 85.
[142] European Commission, *Antitrust: Commission Fines Truck Producers € 2.93 Billion for Participating in a Cartel*, Press Release (19 July 2016) (http://europa.eu/rapid/press-release_IP-16-2582_en.htm). At the time of writing, the full text of the decision had not yet been made available.
[143] *Ibid*.
[144] Commission Notice on the Conduct of Settlement Procedures in View of the Adoption of Decisions Pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, [2008] OJ C167/1, amended Communication from the Commission [2015] OJ C256/2.

in exchange for a faster resolution and a smaller penalty.

2.3 Convergence and divergence in the US and the EU

The adoption of leniency in the US and the EU has been somewhat of a steep learning curve. The modifications that have had to be introduced in both jurisdictions in order to make the policies work in practice have led certain convergence between the two regimes. The approximation of regimes around the world is desirable, as it makes it "much easier and far more attractive for companies to simultaneously seek and obtain leniency in [all] jurisdictions where the applicants have exposure".[145] Nonetheless, important differences persist. In part, these disparities can be explained by the need to adapt to the specific context of each jurisdiction, and in part by the different degree of experience they possess.

One of the most notorious differences between US and EU leniency programs relates to the reward given to those who are not the first to come forward. In the US, only the first informant qualifies for amnesty.[146] In the EU however, although only the first informant may qualify for full immunity, reductions in the fines of subsequent applicants may be granted, provided that the information they supply is of "significant added value".[147] Such is the case when the information "strengthens, by its very nature and/ or its level of detail, the Commission's ability to prove the alleged cartel," with greater value placed on "compelling evidence".[148] According to Wils, granting the reduction will depend on the potential of the evidence provided to strengthen the "ability to prove the infringement".[149] It is only in the final decision that applicants will find out whether they have indeed qualified for the reduction, and within which band.[150] However, to increase legal certainty, the European Commission will inform the relevant parties of its preliminary conclusions.[151] In practice, the divergence between the two regimes is palliated by the possibility, under US law, of entering into plea agreements with the DOJ, by which those who decide to cooperate with the investigation may get punished less harshly.[152]

Another important EU-US divergence is linked to the different nature of the enforcement system in both jurisdictions. In the US, there is not only corporate but

[145] Barry E. Hawk (ed), A*nnual Proceedings of the Fordham Corporate Law Institute: International Antitrust Law & Policy*, Juris Publishing Inc. (2004), p. 38.
[146] US 1993 Leniency Policy, section B(1).
[147] EU 2006 Leniency Notice, para. 24.
[148] *Ibid*, para. 25.
[149] Wouter P. J. Wils, *The Use of Leniency in EU Cartel Enforcement: An Assessment After Twenty Years*, World Competition (September 2016) 39(3) (forthcoming).
[150] EU 2006 Leniency Notice, para. 26.
[151] *Ibid*, para. 29.
[152] Ann O'Brien, 'Leadership of Leniency', in Caron Beaton-Wells and Christopher Tran (eds), *Anti-Cartel Enforcement in Contemporary Age: Leniency Religion*, Hart (2015), p. 18.

also individual leniency. Under criminal enforcement, individuals may be punished with fines and even jail terms. This seems particularly adequate considering that, as Stephan and Nikpay explain, "cartels are not typically organized at an institutional level within the firm. Many infringements are perpetrated by a small number of rogue employees or within a subsidiary with objectives that may not necessarily align with those of its parent."[153] Leniency in the US grants protection from a potential criminal conviction, criminal fines and imprisonment for executives who cooperate. In the EU, the 2006 Leniency Notice only refers to "undertakings" filing for leniency, since only administrative and civil enforcement is possible, and the penalties are imposed on the corporate entity and not on individuals. Under neither the EU nor the US regime does the immunity granted extend to other jurisdictions, or to damage claims. However, in the US, where treble damages may be recovered, in addition to attorney's fees, leniency applicants will only be obliged to pay their "pro rata share of the damages". [154] This is a considerable limitation which ought to make leniency applications much more attractive, but such a reward is difficult to offer in jurisdictions that are not as generous when it comes to compensating injured parties.

The successive revisions of the leniency policies in the US and the EU have attempted to increase transparency via, for instance, the marker system, or by clarifying the kind of information required for qualifying for immunity. One aspect on which applicants require utmost transparency and predictability is the difficult issue of confidentiality of leniency applications. The DOJ guarantees an entirely paperless procedure,[155] and vows not disclose the identity of the informant without a court order.[156] Hammond, while acknowledging that such a high degree of confidentiality might be deemed problematic, claims that it is "a necessary inducement to encourage leniency applications."[157] In the EU, accepting oral statements as sufficient proof of collusion is also destined to prevent claimants in other jurisdictions from having access to the evidence, but it is unclear whether there are any circumstances under

[153] Andreas Stephan and Ali Nikpay, *Leniency Theories and Complex Realities* (2015) *CCP Working Paper* 14-8, p. 3.
[154] European Parliamentary Research Service, *EU and US Competition Policies: Similar Objectives, Different Approaches*, Briefing (27 March 2014) (http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2014/140779/LDM_BRI(2014)140779_REV1_EN.pdf), p. 4.
[155] Constanza Nicolosi, 'No Good Whistle Goes Unpunished: Can We Protect European Antitrust Leniency Applications from Discovery?' 31 *Northwestern Journal of International Law and Business* (2011) 225-260, p. 235.
[156] Scott D. Hammond and Belinda A. Barnett, *Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters*, Department of Justice (19 November 2008) (https://www.justice.gov/sites/default/files/atr/legacy/2014/09/18/239583.pdf).
[157] Scott D. Hammond, Beating Cartels at their Own Game—Sharing Information in the Fight Against Cartels, Inaugural Symposium on Competition Policy, Fair Trade Commission of Japan, Tokyo (20 November 2003) (www.justice.gov/atr/public/speeches/201614.pdf).

which a written transcript of the oral statement could be obtained.[158] Such issues will have to be clarified in a not too distant future in the journey towards transparency.[159]

3. Leniency policy design in young antitrust regimes

If the US and EU experience is anything to go by, chiseling effective leniency programs is a complex exercise that involves a great deal of learning-by-doing. The policy molding process is even more intricate in the context of younger antitrust jurisdictions, where pre-lenience cartel busting experience is at best scarce and at worst inexistent. This part of the paper explores just how leniency policy design takes place in newer competition law regimes, and how attempts to replicate the programs of experienced jurisdictions have to be measured out against the need to adapt to circumstantial demands. The comprehensive amnesty policy recently adopted in Hong Kong is used as an illustrative example of how this pans out in practice.

3.1 The proliferation of antitrust and the problem of copy-and-paste regulation

Since the Second World War, a global 'antitrust trend' has led to the adoption of laws protective of competition in over 130 jurisdictions. Most regimes are still in their infancy: by 1995, there were a mere 35 antitrust systems in place.[160] Determining the best approach to competition regulation in this myriad of young regimes is no easy task. Newcomers to the antitrust arena can either follow the footsteps of established jurisdictions, or they can create their own antitrust model. The results are usually a combination of both imitation and originality. Since they lack enforcement experience, they unavoidably take into consideration the practice of established, effective antitrust systems for inspiration. The laws of the US and EU are widely used as models for these new regimes, and they also draw on standards developed by international organizations, such as the UNCTAD Model Law.[161]

Scholars have often considered the merits of modeling new competition laws on the experience in other jurisdictions, paying particular attention to developing

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[158] Jatinder S. Sandhu, *The European Commission's Leniency Policy: A Success?* European Competition Law Review (2007) 28(3), pp. 148-157, p. 156.

[159] See Constanza Nicolosi, 'No Good Whistle Goes Unpunished: Can We Protect European Antitrust Leniency Applications from Discovery?' 31 *Northwestern Journal of International Law and Business* (2011) 225-260, in which Nicolosi proposes very interesting ways in which to protect leniency applicants in the EU from US antitrust claims substantiated by the leniency materials generated in the EU.

[160] Gantz, David A. *Liberalizing International Trade after Doha: Multilateral, Plurilateral, Regional, and Unilateral Initiatives* (2013) Cambridge University Press, pp. 112-3.

[161] Eleanor Fox and Michal Gal, 'Drafting Competition Law for Developing Jurisdictions: Learning from Experience' (2014) *New York University Law and Economics Working Papers* 374 (http://lsr.nellco.org/nyu_lewp/374).

countries.[162] Certain practical problems have been identified, and yet according to Waked there is little evidence of efficacy purported by copied antitrust laws.[163] The main issue is that, when "copy-and-paste laws are not tailored to meet local needs, their enforcement is often quite ineffective".[164] Indeed, Fox and Gal have highlighted the limitations of antitrust legal transplants, and warn that they may even be harmful if the special characteristics of each jurisdiction are not considered.[165] These cautioning remarks however do not rule out the value of using the experience of other jurisdictions in the development of new antitrust regimes. On the contrary, the adoption of laws that safeguard competition is even more fundamental in societies "that have persistently supported monopolistic structures and blocked the economic opportunities of the mass of people without power or connections."[166] Legislation that protects the operation of markets in such jurisdictions should contribute towards enhancing efficiency and overall societal welfare.[167]

The overwhelming majority of the problems that arise when replicating experienced antitrust rules and policies are related to contextual oversights. As a consequence, they can be resolved by adopting a "think global, act local" approach to the enactment and implementation of antitrust laws, which would involve using the principles and experience developed in other jurisdictions as a starting point, and subsequently adapting the interpretation and implementation of the law to each particular setting. The marked variations that exist between substantive, procedural and institutional aspects across jurisdictions, and even with regard to the goals pursued by the law, are perhaps indicators that the "think global, act local" approach is indeed followed, and that context is carefully considered when adjusting competition law principles developed in other parts of the world to new jurisdictions.

There is thus significant value in the experience in the US and EU in the development of the laws and policies of young antitrust systems, if and when this experience is tailored to fit the needs of each specific environment. The adoption of leniency policies is, in this regard, no more than the inclusion in the arsenal of the enforcer of a type of tool that has proven to be effective at tackling collusion within

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[162] The new competition laws of developing countries have been excellently explored in Michal Gal et al. (eds), *Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law*, Edward Elgar (2015), and D. Daniel Sokol, Thomas K. Cheng and Ioannis Lianos, Competition Law and Development, Stanford University Press (2013).

[163] Dina I. Waked, 'Antitrust Enforcement in Developing Countries: Reasons for Enforcement and Non-Enforcement Using Resource-Based Evidence', 5th Annual Conference on Empirical Legal Studies Paper (12 July 2010) (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1638874).

[164] Joan-Ramón Borrell, Juan Luis Jiménez and Carmen García, Evaluating Antitrust Leniency Programs, 10(1) *Journal of Competition Law and Economics* (2004), pp. 107-136, p. 109.

[165] Eleanor Fox and Michal Gal, 'Drafting Competition Law for Developing Jurisdictions: Learning from Experience' (2014) *New York University Law and Economics Working Papers* 374 (http://lsr.nellco.org/nyu_lewp/374).

[166] *Ibid*.

[167] *Ibid*.

the most veteran antitrust agencies. Whether or not it is as successful in new regimes will depend, as seen in Part 1 of this paper, on the specificities of the instrument that has been devised, the skills of the hands that employ it, and the availability of supplementary tools that can be used in conjunction with it.[168]

3.2 The adoption of leniency in a new jurisdiction: the case of Hong Kong

In order to assess the appropriateness of leniency programs in new antitrust regimes, it is necessary to specifically explore the kind of policies introduced and how they are being implemented. Hong Kong, one of the latest jurisdictions to succumb to the global antitrust trend, provides a remarkable example in this regard. The Hong Kong Competition Ordinance (CO),[169] the region's first cross-sector competition law, became fully enforceable on 14th December 2015. The CO was passed in 2012 by the Legislative Council (LegCo), following a two-decade heated adoption process. It has taken three and a half years for the law to be wholly operational. During the lengthy implementation process, the institutional framework for the application of the law was established with the creation of the Hong Kong Competition Commission (HKCC) and the Hong Kong Competition Tribunal (HKCT). By July 2015, the HKCC had already adopted six guidelines on substantive and procedural aspects of the law. Importantly, in November 2015, with less than a month to go for the full implementation of the law, the Commission published two policy documents, one of which was its detailed *Leniency Policy for Undertakings Involved in Cartel Conduct* (HK Leniency Policy).[170]

The reasons why Hong Kong provides such an interesting case study in the context of leniency are fourfold. First of all, Hong Kong's belated competition legislation is unmistakably modeled on experienced antitrust laws, and most prominently the EU. Its study therefore facilitates the assessment of the adaptation of general competition law principles to fresh contexts. Secondly, although there was some sectoral competition legislation in the telecommunications and broadcasting sectors before the introduction of the CO, the antitrust provisions of these sector-specific ordinances were rarely ever applied, and there is a manifest absence of a cartel-cracking tradition. Thirdly, its strategic location in Asia is paramount. Asia has been described as a "cartel tiger" in the making,[171] with visible progression in anti-

[168] See *supra* part 1.3.
[169] Hong Kong S.A.R., Competition Ordinance, Ordinance No. 14 of 2012 A1347.
[170] HKCC, *Leniency Policy for Undertakings Engaged in Cartel Conduct* (November 2015) (https://www.compcomm.hk/en/legislation_guidance/policy_doc/files/Leniency_Policy_Eng.pdf)
[171] Korea is the principal example of this trend. See John M. Connor, *Cartel and Antitrust Portrayed: Private International Cartels from 1990 to 2008*, American Antitrust Institute Working Paper 09-06 (2009) (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1467310), p. 17.

cartel enforcement in the last decade.[172] Finally, the HKCC was exceptionally quick to implement a full amnesty policy, and it adopted an overwhelmingly orthodox program built clearly on international leniency experience.[173]

3.2.1 Leniency in the Hong Kong Competition Ordinance

Sections 80 and 81 CO respectively allow the Competition Commission to offer and to terminate leniency agreements. The law appears to cast a wide net on the subjects of such arrangements, and the term "person" could include natural persons, corporations, or partners in a partnership.[174] However, as explained below, the Leniency Policy enacted by the HKCC appears to restrict the application of leniency to any entity other than an undertaking.[175] If leniency is agreed, then the HKCC undertakes not to bring or continue to bring "proceedings under Part 6 [before the Competition Tribunal] for a pecuniary penalty in respect of an alleged contravention of a conduct rule" for as long as the arrangement is in place.[176] The Commission may terminate the agreement via a written notice if any of the circumstances listed in section 81 occur. These include, *inter alia*, suspecting that the information provided is "incomplete, false or misleading", or discovering that the informant has "failed to comply" with the terms of the leniency agreement.[177]

On the basis of Sections 80 and 81 CO, the HKCC prepared its detailed Leniency Policy. Compared to the US and the EU, who adopted their first policies towards whistleblowers decades after the entry into force of their antitrust laws, in Hong Kong the HKCC has acted laudably quickly to ensure that leniency was in place the moment the CO became fully effective.

3.2.2 The context: is Hong Kong prone to cartels?

A discussion of the competition problems of Hong Kong is complicated by the fact that, to date, there have been no conclusive investigations of potential cartelization practices. There were no important developments on this front under the sector-

[172] John M. Connor, *Cartel and Antitrust Portrayed: Private International Cartels from 1990 to 2008*, American Antitrust Institute Working Paper 09-06 (2009) (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1467310), p. 23.
[173] This is in stark contrast with China, for instance. Although leniency was already envisaged in the AML, its original conception was not conventional, with features such as leniency for non-cartel agreements. Detailed draft guidelines were published in early 2016, which look set to bring the policy in line with more conventional programs.
[174] CO, Section 80.
[175] See *infra* part 3.2.3.
[176] *Ibid*.
[177] CO, Section 81.

specific competition provisions of the Telecommunications Ordinance[178] and the Broadcasting Ordinance,[179] the only antitrust regulation that existed before the CO.

One of the most prominent features of Hong Kong's economy is the presence of tycoons.[180] A handful of families rule entire industries, and expand their power by penetrating multiple markets. A glaring example is the real estate market, reigned by CK Hutchinson Holdings, famously owned by Li Ka-Shing, Hong Kong's richest individual,[181] and Henderson Land Development, owned by Lee Shau-Kee, the second richest.[182] Their holdings also comprise the principal telecommunications companies, energy, and retail, including supermarkets and pharmacies.[183] As a consequence, several concentrated, duopolistic market structures exist, and complaints point towards occurrences of potentially abusive conduct. Enquiries suggest that the public expects the HKCC to focus on targeting the behavior of these local tycoons.[184] However, thus far the Commission appears to be devoting more time and energy to fighting collusion, in part because "[c]artel conduct presents an attractive target for initial enforcement by the newly formed Competition Commission as the law is relatively clear […] and successful prosecution does not require complex economic analysis and invocation of sophisticated economic theories."[185] And while cartels may not be the public's main concern, there are indications that collusion is affecting multiple local markets. Trade associations, for instance, have oftentimes publicly called for their members to raise prices through public announcement in the press and social media. At the same time, local courts have not been particularly damning of collusion.[186]

Markets prone to cartels display special characteristics which are not infrequent in Hong Kong.[187] In the absence of competition law, colluding rather than competing would seem like an attractive business prospect. To date the HKCC's action against cartels has comprised: a preliminary investigation into the residential

[178] Telecommunications Ordinance (Cap 106), ss 7K and 7L.
[179] Broadcasting Ordinance (Cap 562), ss 13 and 14.
[180] Mark Williams, 'Seeds of its Own Destruction: Hong Kong's Dysfunctional Competition Policy' (2006) *Journal of Business Law*, 52-73.
[181] See Mr. Li's profile on Forbes, at http://www.forbes.com/profile/li-ka-shing/.
[182] See Mr. Lee's profile on Forbes, at http://www.forbes.com/profile/lee-shau-kee/.
[183] Jennifer Hughes, *Hong Kong's Tycoons Look to Shake Off a Tough Year*, Financial Times (4 January 2015) (http://www.ft.com/cms/s/0/7f6d20e0-8989-11e4-ad5b-00144feabdc0.html#axzz4GAFR0eoa).
[184] Thomas Cheng, *Trade Associations and Cartel Conduct under the New Hong Kong Competition Law Regime — An Enforcement Priority for the Competition Commission?*, in Thomas Cheng, Sandra Marco Colino and Burton Ong, *Cartels in Asia: Law and Practice*, Wolters Kluwer (2015).
[185] *Ibid*.
[186] See the case *HKSAR v Chan Wai Yip and others* [FACC No. 4 of 2010], in which the Court of Appeal effectively ruled that bid-rigging was lawful.
[187] On the characteristics of markets prone to collusion, See Marc Ivaldi, Bruno Jullien, Patrick Rey, Paul Seabright and Jean Tirole, *The Economics of Tacit Collusion*, Final Report for DG Competition, European Commission, IDEI, Toulousse (March 2003) (http://ec.europa.eu/competition/mergers/studies_reports/the_economics_of_tacit_collusion_en.pdf).

building and renovation maintenance market, which concluded with a report suggesting that bid-rigging practices were likely to be in place;[188] a request to the Hong Kong Newspaper Hawker Association to withdraw a letter sent to its members and a public post on Facebook suggesting a retail price for cigarettes of certain brands;[189] and an ongoing study of the auto fuels market, expected to be released in late 2016.[190] Whether any leniency applications have been filed in these or other markets will only be known with the first formal decisions. What is apparent however is that the HKCC is attempting to hit cartels in a relatively unusual way, by monitoring markets to detect potential infringements, rather than relying on leniency applications or complaints. Finding conclusive evidence of the existence of collusion is not easy via this method.[191] Rather than a principal line of action, the likely intention behind this tactic may be to create a strong fear of detection on potential cartelists in these industries, thus pressuring them to be the first to blow the whistle.

3.2.3 Scope of the Hong Kong Leniency Policy

As is traditional in competition regimes, leniency applies only in the presence of cartel conduct that contravenes the CO's First Conduct Rule (FCR),[192] which contains a prohibition of anti-competitive joint conduct which clearly echoes that of Article 101(1) TFEU. Leniency might also be used on "other anti-competitive practices that may contravene the First Conduct Rule [which are] are used to give effect to the cartel conduct".[193] Moreover, the HKCC leaves the door open for extending the policy to non-cartel conduct contrary to the CO, as the Leniency Policy explicitly states that the possibility of entering into a leniency agreement with respect to a contravention outside its scope is not precluded.[194] Although leniency outside cartel investigations is not at all common, it is available — although rarely used — in some jurisdictions, such as China.[195]

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[188] HKCC, *Report on Study into Aspects of the Market for Residential Building Renovation and Maintenance* (May 2016) (https://www.compcomm.hk/en/media/press/files/Report_on_market_study.pdf).
[189] HKCC, *Competition Commission Welcomes Quick Rectification by the Hong Kong Newspaper Hawker Association on Retail Price of Branded Cigarettes*, Press Release (31 May 2016) (https://www.compcomm.hk/en/about/public_notices/files/HKNHA_20160531_e.pdf).
[190] There is reference to this ongoing investigation in the HKCC's press release *Competition Commission Announces Results of Its Study into Aspects of the Residential Building Renovation and Maintenance Market* (31 May 2016) (https://www.compcomm.hk/en/media/press/files/Press_release_Report_on_market_study_20160524.pdf).
[191] Wouter P. J. Wils, *The Use of Leniency in EU Cartel Enforcement: An Assessment After Twenty Years*, World Competition (September 2016) 39(3) (forthcoming).
[192] HK Leniency Policy, para. 2.3.
[193] HK Leniency Policy, para. 2.5.
[194] HK Leniency Policy, p. 1.
[195] However, the new draft guidelines published in April 2016 suggest that leniency might be limited to

Cartels are defined by the HKCC as "agreements between competitors to fix prices, to share markets, to restrict output or to rig bids".[196] Interestingly, when defining cartels, section 2.4 of the Leniency Policy expressly refers to both agreements and concerted practices, but not to decisions by associations of undertakings. It is unclear why these are not mentioned. Such practices are deemed "serious anti-competitive conduct" under the CO,[197] and are contrary to the First Conduct Rule (FCR). According to the *Guidelines on the FRC*, they are anticompetitive by object,[198] and therefore there will be no need to demonstrate the existence of anti-competitive effects.[199] Efficiency considerations under Schedule 1 CO are described as "unlikely",[200] and the exclusion for agreements of lesser significance (somewhat similar to the EU's *De Minimis* approach) is expressly ruled out in the case of serious anti-competitive conduct.[201]

The very title of the policy document enacted by the HKCC suggests that only undertakings may benefit from leniency in the conditions fleshed out in the Leniency Policy. This does not mean that natural or legal persons other than undertakings cannot resort to leniency under any circumstances. In the introduction, it is made clear that the conditions of the Leniency Policy "[do] not apply to leniency agreements between the Commission and persons who are not undertakings." Yet the HKCC may "exercise its enforcement discretion towards such persons". In addition, the benefit of leniency extends to current (and, under certain circumstances, even former) employees and officers of undertakings that are granted leniency, as long as they "provide complete, truthful and continuous cooperation with the Commission throughout its investigation and any ensuing proceedings".[202] This is important given that the CO contains not only corporate but also individual sanctions, including director's disqualification. Avoiding these penalties is likely to act as a crucial incentive for full cooperation.

3.2.4 Extent and conditions of leniency

When leniency is granted, the HKCC agrees "not to commence proceedings for a pecuniary penalty against the cartel member who enters into a leniency agreement

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cartel cases in a not too distant future.

[196] HKCC, *Guideline: First Conduct Rule* (27 July 2015) (https://www.compcomm.hk/en/legislation_guidance/guidance/first_conduct_rule/files/Guideline_The_First_Conduct_Rule_Eng.pdf) (Guideline FCR) para. 3.7.

[197] CO, Section 2.

[198] Guideline FCR, para. 3.7.

[199] Guideline FCR, para. 3.5.

[200] Guideline FCR, para. 4.4.

[201] Guideline FCR, para. 5.2.

[202] HK Leniency Policy, p. 1.

with the Commission. In addition, the Commission will agree not to bring any other proceedings before the Tribunal or other courts other than proceedings for an order under section 94 of the Ordinance declaring that the cartel member has contravened the First Conduct Rule."[203] The cartelist benefitting from leniency will thus be spared a fine of up to 10 per cent of the company's Hong Kong turnover for each year of infringement, up to a maximum of three years.[204] Compared to the corporate financial penalties that may be imposed in other jurisdictions, those provided for in the CO seem rather modest. In the EU, for instance, fines can be of up to 10 per cent global turnover, and there is no limit on the years of infringement. Importantly however, leniency also affects directors' disqualification orders, as the HKCC vows not to seek the same when leniency has been granted.[205]

Going back to the carrot and stick approach described in part 1 of this paper,[206] the reduced financial penalties available to punish cartels question whether, under Hong Kong competition law, the stick is strong enough for the carrot to seem sufficiently enticing. Moreover, like in the US and the EU, leniency does not extend to civil damages claims stemming from follow-on actions before the Tribunal.[207] Legal practitioners have noted that "[a] successful leniency application may, in fact, expose the applicant to follow-on actions",[208] further blurring the advantages of blowing the whistle under Hong Kong law. Moreover, the policy gives the HKCC considerable discretion to terminate the leniency agreement.[209] While the threat of termination (and therefore of losing immunity) may have a positive impact on compliance with the leniency agreement, this approach also causes a considerable degree of legal uncertainty for applicants, which could translate into fear of self-reporting.

As per the US system, in Hong Kong only the first applicant will be granted leniency, and it will come in the shape of full immunity from fines.[210] There are no reductions in the penalties for cartelists who come second in the race to apply for leniency. Still, some benefits are afforded to those who do not qualify for full immunity but who are nonetheless willing to cooperate with the investigation.[211] Such cooperation will be at the undertakings' "own cost",[212] and its value will be assessed

[203] HK Leniency Policy, section 1.3.
[204] CO, section 93.
[205] HK Leniency Policy, fn 11.
[206] See *supra* part 1.3.
[207] HK Leniency Policy, para 1.7.
[208] Neil Carabine et al., *Hong Kong Competition Commission's Enforcement and Leniency Policies*, King & Wood Mallesons (18 December 2015) (http://www.kwm.com/en/hk/knowledge/insights/hk-compcomm-enforcement-and-leniency-policies-20151218).
[209] HK Leniency Policy, section 3.
[210] HK Leniency Policy, para. 2.1(c).
[211] HK Leniency Policy, section 4.
[212] HK Leniency Policy, section 4.1.

according to the parameters laid down in Section 4.4 of the Policy. These include "approach[ing] the Commission in a timely manner seeking to cooperate" and providing "significant evidence regarding the cartel conduct". The favorable treatment may consist of "a lower level of enforcement action, including recommending to the Tribunal a reduced pecuniary penalty", and making joint submissions to the Tribunal on the penalties to be imposed or the orders to be made.[213] The Tribunal can disregard the Commission's recommendations, and even when it does take them into account, there is no clear guidance as to how it will impact the sanctions imposed.[214]

With regard to confidentiality, section 5 of the Policy focuses on the duties of the informant seeking leniency, and on the obligations of the HKCC vis-à-vis the whistleblower. It develops the general confidentiality requirements of Section 125 CO. According to the HKCC, the applicant is obliged to "keep confidential the fact of the investigation, its application for leniency […] and the terms of any leniency agreement entered into with the Commission."[215] Importantly, although the policy refers to the Commission's own obligation "to preserve the confidentiality of any confidential information",[216] the possibility of releasing the whistleblowers' self-incriminating leniency materials to other antitrust authorities and injured parties is not only not ruled out, but presented as a possibility. In line with Section 126 CO, the Leniency Policy states that the HKCC "may disclose confidential information with lawful authority",[217] even if it pledges to use its "best endeavours" to protect confidential information and the leniency agreement.[218] No details are given as to the circumstances under which the information may be revealed. The reader is instead referred to the specifications made in the HKCC's *Guideline on Investigations.*[219] Yet Section 6 of this Guideline does not provide much clarity. It simply says that disclosure may happen "without the consent of relevant parties", and under circumstances not limited to those expressly listed in the Ordinance,[220] and goes on to list the circumstances under which the information may be disclosed. These include: the performance of the Commission's functions; under court order; and cooperation with other competition authorities.[221] The last scenario might seriously jeopardize the cartelists' willingness to come forward, as it could facilitate the imposition of tough

[213] HK Leniency Policy, section 4.2.
[214] HK Leniency Policy, section 4.5.
[215] HK Leniency Policy, section 5.1.
[216] HK Leniency Policy, section 5.5.
[217] *Ibid*.
[218] HK Leniency Policy, section 5.6.
[219] HKCC, *Guideline: Investigations* (27 July 2015) (https://www.compcomm.hk/en/legislation_guidance/guidance/investigations/files/Guideline_Investigations_Eng.pdf), cited in HK Leniency Policy, section 5.5.
[220] Guideline Investigations, para. 6.4.
[221] Guideline Investigations, sections 6.9-16.

penalties and the pursuit of injury claims in other jurisdictions.

3.2.5 Application process

There are various stages in the application process for leniency. To begin with, the HK Leniency Policy establishes a marker system. The applicant or its legal representatives can enquire, without revealing their identity, if there is a marker available for a particular cartel. However, applications cannot be made anonymously.[222] To be granted a marker, the information provided must be at least "sufficient to identify the conduct", and should include "the identity of the undertaking applying for the marker, information on the nature of the cartel […], the main participants […] and the caller's contact details".[223] This part of the application takes place over the phone.[224] Once a marker has been granted, the Commission will decide whether leniency is available. Even if an investigation is underway, and the HKCC has already exercised its investigatory powers, leniency is not excluded. If the Commission decides that leniency is pertinent, the undertaking with the highest-ranking marker will then be invited to submit a full application.[225] Other applicants will also be notified that they were not the first to come forward, and are invited to consider cooperating in order to opt for a more benevolent treatment if sanctions are finally imposed.[226]

Once an undertaking has been invited to apply for leniency, it must make its application though a proffer, providing a "detailed description of the cartel, the entities involved, the role of the applicant, a timeline of the conduct and the evidence the leniency applicant can provide in respect of the cartel conduct."[227] The proffer may be made orally or in writing.[228] When the HKCC has considered the information provided in the proffer, and any other additional information, if it is assured of "full and truthful cooperation" it will decide "whether to make an offer to enter into a leniency agreement."[229] The leniency agreement is drafted according to the template included in Annex A of the Leniency Policy. Applicants are effectively required to sign a written confession admitting their involvement in cartel conduct.[230] This formality, which might be of concern to potential informants — particularly in light of the ambiguous confidentiality guarantees described above —,[231] is in part a

[222] HK Leniency Policy, para. 2.7.
[223] HK Leniency Policy, para. 2.8.
[224] HK Leniency Policy, para. 2.11.
[225] HK Leniency Policy, para. 2.12.
[226] HK Leniency Policy, para. 2.17.
[227] HK Leniency Policy, para. 2.18.
[228] HK Leniency Policy, para. 2.22.
[229] HK Leniency Policy, para. 2.21.
[230] HK Leniency Policy, para 2.1 (e).
[231] See *supra* part 2.3.

consequence of the semi-judicial enforcement system of this jurisdiction. Whereas the European Commission is simultaneously the authority that handles leniency applications and the body which imposes fines for anti-competitive conduct, in Hong Kong it is the Competition Tribunal that decides on the application of penalties. Therefore, the HKCC requires a signed confession on the basis of which it endeavors to request the Tribunal not to punish the informant. Once the agreement is finalized, the grantee is obliged to "provide the Commission with all non-privileged information and evidence in respect of the cartel conduct without delay."[232] Any breach of the agreement could lead to the termination of the agreement on the part of the HKCC Commission to revoke the leniency, in application of Section 81 CO.[233]

4. Leniency programs in new antitrust jurisdictions: an assessment

This paper has, by now, carefully explored international principles of leniency in antitrust, the experience of the US and the EU, as well as the specifications of Hong Kong, one of the newest amnesty policies in the world. At this stage, it is finally possible to conduct an assessment of how the traditional challenges of leniency materialize in young antitrust regimes, and the ways in which such obstacles may be tackled. In the first part of the article it was established, with the support of extensive literature review, that leniency may effectively deter cartel activity. However, our research also revealed that its eventual success would be dependent on internal policy design and the availability of support from external (antitrust and non-antitrust) law and policy instruments.[234] The principal external and internal hurdles affecting new leniency programs are explored below.

4.1 Are the rewards offered to informants sufficiently high?

The recompense offered to cartel informants in Hong Kong is limited by a feature present in most leniency programs, new and old: the absence of positive rewards. The availability of full immunity, covering both fines and other penalties, is laudable. However, as the US experience reveals, the first leniency applications may still be quite some time away, as cartelists will want to wait and see how others are treated to ensure that the HKCC will honor its amnesty promise.[235] Whereas positive rewards are also lacking in the EU and US regimes, in new jurisdictions this absence might be trickier. As seen is Part 1, the recompense of leniency is unavoidably modulated by

[232] HK Leniency Policy para.2.27.
[233] HK Leniency Policy, para. 2.30.
[234] See *supra* parts 1.2-3.
[235] See *supra* part 2.1.

the punishment that may be escaped by resorting to it.[236] Regimes that only contemplate limited financial penalties, such as the ones available under the CO, put into question the attractiveness of the carrot policy. The low fines, coupled with the fact that in young regimes cartels tend to be entrenched in local culture,[237] and the fear of potential reprisals against those who report,[238] it is evident that it may well take time and effort for amnesty programs to bear the desired fruits without the supplementary incentive of positive rewards.

4.2 Prize for second best

Leniency in new regimes tends to be limited to the first to come forward. As previously discussed, the decision to restrict leniency to the first applicant is backed by the findings numerous scholars on both efficiency and retributive justice grounds. Yet the uncertainty of not being first could make the cost-benefit analysis intrinsic to the decision to apply for leniency less appealing. In Hong Kong, this is tackled by opening up the possibility of affording a more beneficial treatment to companies who do not qualify for amnesty but do offer their cooperation, on an ad hoc basis (similar to the plea agreements that the DOJ might enter into).[239] This approach constitutes an obstacle to predictability, but this is expected and almost unavoidable in regimes with little or no enforcement practice. With time, the case-by-case application of the policy will reveal just how that discretion is exercised.

4.3 Low financial penalties and damages: too severe a stick?

One further fundamental question relating to the leniency recompense relates to whether, given the lack of protection from damage claims, leniency is even attractive to the first candidate under a new antitrust regime. Where fines are not particularly high, the biggest risk of getting caught might be private actions. In the Sotheby's Christie's cartel discussed earlier,[240] while the fine imposed on Sotheby's was USD 45 million, damages amounted to USD 256 million, which would have left the company bankrupt had it not been for its former CEO paying part of this sum out of

[236] Giancarlo Spagnolo, *Divide et Impera: Optimal Leniency Programs*, Stockholm School of Economics (2005).
[237] Bryane Michael, *Hong Kong Needs a Whistle-blower Law for Better Governance and Business Practices, Researcher Says*, South China Morning Post (11 August 2015) (http://www.scmp.com/news/hong-kong/law-crime/article/1848274/hong-kong-needs-whistle-blower-law-better-governance-and).
[238] Johan Nylander, *Why Hong Kong Needs a Whistleblowing Policy*, Forbes Asia (14 August 2015) (http://www.forbes.com/sites/jnylander/2015/08/14/why-hong-kong-needs-a-whistleblowing-policy/#218c460f71f5).
[239] See *supra* part 2.1.
[240] See *supra* part 1.2.

his own pocket. And in the EU context, in 2014 leniency beneficiary Lufthansa was sued for EUR 1.76 billion by Deutsche Bahn for the damages suffered as a consequence of the former's participation in an air freight cartel.[241] To make matters worse, the duty to cooperate in the investigation bears elevated legal and administrative fees, which are also not condoned by immunity.

In principle, low penalties and high damages are not an advisable combination for the proper-functioning of leniency. However, the practical impact of these features will be determined by the specific characteristics of cartels, and cartelists, in each jurisdiction. In Hong Kong for instance, one mitigating factor for the problems associated with the relatively modest fines vis-à-vis the substantial costs of blowing the whistle is that over 98 per cent of businesses in Hong Kong are small and medium-sized enterprises (SMEs).[242] If they are engaged in cartels, fines on local turnover would have a much more significant impact on them than they would on multinationals and larger corporations who operate in other areas of the world. This leads to an important inference regarding the purpose and utility of new leniency programs: while their role in the crackdown of international cartels might be secondary and complementary to that of experienced amnesty policies, they may still very efficient at tackling local collusion, which is just as detrimental to the proper functioning of their home markets. And these regimes' peripheral responsibility in bringing down international cartels should not be underestimated. The existence of effective cartel detection tools in multiple jurisdictions increases the overall possibility of getting caught, as well as the cost of collusion once a cartel is busted. This ought to create a powerful joint deterrent effect, as it will be more difficult for international cartelists to offset the costs of the penalties they may face in one jurisdiction with the profits made through in other parts of the world that do not have as efficient cartel-busting mechanisms in place. As a result, these separate, jurisdiction-specific efforts could end up providing a "glocalized" solution to international collusion, arguably the most harmful kind of anticompetitive behavior.

With regard to injured parties, it is also important to emphasize that the extent to which restitution may be achieved will largely depend on how damages are awarded in each jurisdiction. This, once again, can only be determined through experience.

4.4. Enhancing cartel detection risk through non-leniency tools

[241] The case was eventually settled out of court.
[242] *Small and Medium Sized Enterprises*, Support and Consultation Centre for SMEs, Trade and Industry Department, (2016) (https://www.success.tid.gov.hk/english/aboutus/sme/service_detail_6863.html).

In jurisdictions where there have been few or no finalized cartel investigations, there is no information currently available that could help calculate the detection rate of collusion. Unavoidably, the risk of detection that might convince a company to apply for leniency is very difficult to measure. Like in other young antitrust regimes, in Hong Kong, until the recent introduction of the CO, the chances of getting away with collusion were 100 per cent, as the conduct was not illegal. This makes it even more difficult to push companies to come forward simply by introducing the possibility of obtaining immunity from penalties that, for the time being, are no more than a threat on paper. The initiative of the HKCC to monitor markets and conduct studies into sectors where collusion is likely to occur is commendable in this regard.[243] The authority's efforts reflect an attempt to raise awareness among the business community that the activity is now illegal, that investigations are underway and that the risk of detection exists. Obfuscating cost-benefit analyses regarding the profitability of reporting as opposed to staying in the cartel, while creating a perception of risk, is paramount for the invigoration of the policy.[244] Such techniques are advisable, wherever possible, in young antitrust jurisdictions.

4.5 The boundaries of agency discretion

Our analysis of the HK Leniency Policy illustrated the degree to which enforcement discretion might jeopardize the attainment of transparency and predictability in new leniency programs. Enforcers are afforded discretion both in the conclusion and the termination of leniency agreements. In the negotiation stage, for instance, a marker can only be granted if the Commission considers that the information provided is "sufficient".[245] It is unclear what will constitute, in the eyes of the HKCC, sufficient information. Moreover, participants who "coerced" others to join the cartel will not qualify for leniency,[246] but the actions that are considered coercion are not detailed. The Hong Kong Competition Association criticized this ambiguity in its submissions to the draft leniency policy, and asked for the HKCC to come up with a precise set of criteria similar to that available in the United Kingdom.[247] As for termination, there is scarce clarity as to the circumstances under which the HKCC might decide to end an

[243] See *infra* part 3.2.2.
[244] Companies can be expected to base their decisions on the basis on the risks they perceive, rather than on thorough cost-benefit analyses. Wouter P. J. Wils, *The Use of Leniency in EU Cartel Enforcement: An Assessment After Twenty Years*, World Competition (September 2016) 39(3) (forthcoming).
[245] HK Leniency Policy, para. 2.8.
[246] HK Leniency Policy, para. 2.26 (b).
[247] Hong Kong Competition Association, *Comments on the Draft Leniency Policy* (2015) (https://www.compcomm.hk/en/enforcement/consultations/past_consultations/files/S16_Hong_Kong_Competition_Association.pdf).

existing leniency agreement after it has been entered into. For instance, it may be revoked if there are "reasonable grounds to suspect that the information on which it based its decision to make the agreement was incomplete, false or misleading".[248] The term "reasonable grounds" in this context grants the HKCC very broad powers, at the expense of certainty and transparency. While unnecessary discretion and uncertainty should be avoided, such vagueness is not uncommon at this introductory stage. Practice should progressively contribute towards providing greater clarity.

4.6 The protection of confidentiality: the boundaries of transparency and predictability

Requiring a written confession, coupled with the broadly construed scenarios under which disclosure of confidential information may take place, will be of concern for leniency applicants. As of this moment, it is unclear just how likely disclosure will be in practice. Uncertainty on this controversial issue is not uncommon, even in experienced regimes. In the EU, the Court of Justice in *Pfleiderer* avoided providing clarification on the issue, and left it up to the national courts to conduct a "weighting exercise" of the interests in favor of disclosure versus the protection of confidentiality on a case-by-case basis.[249] Subsequently, the *Donau-Chemie* case reiterated the inadequacy of rigid rules.[250] With regard to leniency documents, the Court established that while a refusal to grant access to the same could well be justified, such access ought not to be "systematically refused". Requests should be 'assessed on a case-by-case basis, taking into account all the relevant factors in the case'.[251] With regard to disclosure requests from other jurisdictions, it is understandable that the HKCC leaves the door open for honoring these, so as to honor bilateral cooperation agreements with other jurisdictions. However, the stick faced by leniency applicants would be so severe if they can be sued in other jurisdictions on the basis of the leniency agreements entered into in Hong Kong that it could well remove the entire appeal of the immunity carrot.

Despite these criticisms, the existing uncertainty can be defended along at least three lines. First of all, at a time when the law has just been fully implemented and no cases have seen the light, ambiguity is to be expected. The HKCC could not, and ought not, close leave no room for interpretation in the policy document, as it would imply an extra-limitation of its policy-drafting powers. The role of the Competition Tribunal in the clarification of some of the pending issues will be crucial,

[248] HK Leniency Policy, para. 3.1.
[249] Case C-360/09 *Pfleiderer AG v Bundeskartellamt* [2011] ECR I-5161.
[250] Case C-536/11 *Bundeswettbewerbsbehörde v Donau Chemie AG and others* [2013] 5 CMLR 19.
[251] *Ibid*, para. 43.

and the court should have room to ultimately decide whether leniency should be granted. Second, since most of the undertakings in Hong Kong are SMEs, if they do not operate internationally there is less reason to fear disclosure that could lead to massive injury claims in other jurisdictions. Thirdly, uncertainty might be a goal in itself. One should not forget that leniency applicants are outlaws, engaged in an activity that is highly detrimental for competition and economic efficiency. Antitrust fining policies, for instance, oftentimes expressly aim to make it difficult for firms to calculate the amount they might be fined, so as to avoid risk-benefit analyses. As the Court of Justice once said, "[i]f the amount of the fine were the result of a calculation which followed a simple arithmetical formula, undertakings would be able to predict the possible penalty and to compare it with the profit that they would derive from the infringement of the competition rules."[252] Therefore, while transparency may be desirable, predictability is best avoided in situations with such a low detection probability and such high profits for breaking the law.[253]

Conclusion

While antitrust trendsetters principally molded their legislation into shape through a history of trial-and-error, antitrust trend followers are able profit from the catalogue of good (and bad) antitrust practice that they have at their disposal in the shape of the experience of established jurisdictions. Leniency policies constitute a vital part of that catalogue. They can act as successful weapons of mass cartel dissuasion, with proven effects on both detection and deterrence of a conduct that would otherwise be very difficult to uncover. At the same time, insofar as they may lead to the imposition of heavy financial penalties, they cause an increase in financial resources of antitrust authorities that is very enticing for newly established competition agencies. It comes as no surprise that leniency is a tool that young regimes crave, and are implementing at a surprising pace.

The prompt adoption of amnesty programs is commendable and generally beneficial for the protection of competition. While cartels may become unstable and die on their own, the principal cause of death remains vigorous antitrust enforcement,[254] of which leniency is a vital force. If efficient policy design is a challenge in every situation, efficient policy design in jurisdictions with limited competition culture is particularly demanding. Borrowing from international

[252] Case T-53/03, *BPB plc* v *Commission* [2008] ECR II-1333, para 336.
[253] Andreas Stephan and Ali Nikpay, *Leniency Theories and Complex Realities* (2015) *CCP Working Paper* 14-8, p. 8.
[254] Margeret C. Levenstein and Valerie Y. Suslow, *Breaking Up is Hard to Do: Determinants of Cartel Duration*, Working Paper 1150, Michgan Ross School of Law (2010), p. 31.

experience helps to cut corners and to achieve admirable results at a faster pace, but young antitrust regimes exhibit specific problems that must be taken into account in the design and application of each individual leniency program. In particular, this study prompts three principal considerations: first of all, there is a strong argument to be made for the introduction of positive rewards for leniency applicants. They could increase the incentive to cooperate, offset the effect of substantial damage claims, and enhance the attractiveness of amnesty in regimes that do not envisage particularly stiff penalties against collusion. Secondly, while transparency and predictability remain essential, some uncertainty is unavoidable at this early enforcement stage, and possibly even desirable. The principal value of leniency resides in its creation of a general (unmeasurable) perception of risk; the effects of full predictability on that perception would be at best mixed, particularly in jurisdictions where cartel detection probability has been virtually zero. Thirdly, guaranteeing the confidentiality of leniency applications is a must, albeit within the inescapable practical limitations of such an endeavor. Agencies are encouraged to avoid the kind of ambiguity that could frighten potential leniency applicants, yet some of the remaining loose ends are best tied through experience. As O'Brien notes, transparency is "a journey, not a destination", something to strive towards in daily decision-making which requires the unavoidable passage of time.[255]

These proposals are by no means a panacea of all ills. Leniency should be viewed as an investigatory instrument in the hands of the enforcer that is part of a greater strategy to bring down cartels. To ensure its maximum potential, it requires the support of the toolbox it resides in, the general antitrust apparatus it helps to enforce. This support comes in the form of non-leniency investigative tools, such as market studies similar to those conducted by the HKCC. But, most importantly, shortcomings within the design of antitrust systems, such as weak penalties, pose a real threat to cartel detection in general and the effectiveness of leniency in particular. While the proposals fleshed out above ought to diminish the negative impact of those limitations, the most advisable solution is to introduce the necessary changes to the basic substantive and procedural laws that enhance the potential of antitrust systems.

Striving towards healthy leniency policy design, as demonstrated in the paper, has fundamental local and global implications. From a local perspective, protecting markets from collusion is paramount to the promotion of economic development and prosperity. From a global point of view, when jointly considered, the multiple local pointillist efforts to combat cartels paint a very promising picture of the future potential to tackle international collusion. As convergence increases, cartelists

[255] Ann O'Brien, 'Leadership of Leniency', in Caron Beaton-Wells and Christopher Tran (eds), *Anti-Cartel Enforcement in Contemporary Age: Leniency Religion*, Hart (2015), p. 18.

operating across jurisdictions cannot expect to continue to take advantage of disparate antitrust standards across jurisdictions to ensure the profitability of their harmful behavior. Individually considered, these budding leniency programs are undoubtedly important, but the joint deterrent effect achieved by the propagation of anti-cartel tools is invaluable.