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

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

*Sandra Marco Colino**

ABSTRACT

This Article develops a framework for effective leniency policy design in jurisdictions that have limited or no mileage enforcing antitrust laws. Through an extensive review of legal and economic studies of leniency and comparative analysis, the Article identifies hurdles common to young systems that may be tackled with analogous solutions. Some issues simply require a methodological enforcement strategy and time. Others, however, call for a readjustment of either the leniency programs or the antitrust systems they help to enforce. While the latter approach is preferable, it is more difficult to implement. This Article focuses on leniency and recommends three general strategies: rethinking

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the magnitude of the reward where penalties for collusion are modest, reducing discretion to enhance transparency and predictability in the pre-enforcement experience phase, and ensuring a balance between the adequate protection of confidentiality and the need to foster international cooperation efforts to dismantle cartels. These proposals aim to contribute to enhancing the efficiency of new systems and to fostering a “glocalized” deterrent effect that is paramount to combatting the biggest and most harmful collusive practices.

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I. INTRODUCTION

In 1978, the U.S. 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 an 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 that 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 program in the world. The current policy, the result 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 fifty jurisdictions, including the United States, Canada, and the European Union.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.³

In the secret recordings of the conversations inside ADM, the

1. See, e.g., ELEANOR FOX & DANIEL CRANE, GLOBAL ISSUES IN ANTITRUST AND COMPETITION LAW 30 (2010) (providing that ‘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 United States, and the latter in the European Union).

2. Scott D. Hammond, *The Evolution of Criminal Antitrust Enforcement over the Last Two Decades*, in ELEANOR FOX & DANIEL CRANE, GLOBAL ISSUES IN ANTITRUST AND COMPETITION LAW, *supra* note 1, at 75.

3. THE INFORMANT! (Warner Bros. Pictures 2009).

president is infamously heard talking about the company's motto: "Our competitors are our friends. Our customers are the enemy."⁴ Cartels—understood broadly as arrangements between competitors "designed to eliminate competition"⁵—are widely considered to be the "supreme evil of antitrust."⁶ If successful, the total profits of cartel members ought to be higher than the sum of individual profits in a competitive market,⁷ and yet there is neither an increase in efficiency nor an increase in the quality of the products.⁸ The result of this is that collusive practices inflict "considerable damage on the economy."⁹ 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 behavior from the eye of the enforcer.¹⁰ 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 too—often indirect purchasers of the cartelists—are unlikely to even be aware that they have been harmed.¹¹ 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.¹²

4. Scott D. Hammond, *Caught in the Act: Inside an International Cartel*, JUSTICE NEWS (Oct. 18, 2005), <https://www.justice.gov/atr/speech/caught-act-inside-international-cartel> [<https://perma.cc/RLR9-E8AK>] (archived Feb. 5, 2017).

5. DAVID L. KASERMAN & JOHN H. MAYO, GOVERNMENT AND BUSINESS: THE ECONOMICS OF ANTITRUST AND REGULATION 152 (1995).

6. *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407–08 (2004).

7. See COMPETITION LAW OF THE EU AND UK 145–49 (Sandra Marco Colino, ed., Oxford Univ. Press 7th ed. 2011).

8. Mario Monti, Member of the European Commission in charge of Competition, SPEECH/00/295: *Fighting Cartels: Why and How?*, Third Nordic Competition Policy Conference, (Sept. 11, 2000), http://europa.eu/rapid/press-release_SPEECH-00-295_en.htm [<https://perma.cc/6SNM-4C8D>] (archived Feb. 5, 2017).

9. Press Release, European Commission, Commission Strengthens the Fight Against the Cartels (Dec. 3, 1998), http://europa.eu/rapid/press-release_IP-98-1060_en.htm [<https://perma.cc/Z3PT-UFKN>] (archived Feb. 5, 2017).

10. See Press Release, European Commission, Tackling Cartels: A Never-Ending Task (Oct. 8, 2009), http://europa.eu/rapid/press-release_SPEECH-09-454_en.htm?locale=en [<https://perma.cc/5Y23-RLJ3>] (archived Feb. 5, 2017) (explaining that 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," according to former E.U. Competition Commissioner Neelie Kroes).

11. Katalin J. Cseres & Joanna Mendes, *Consumers' Access to EU Competition Law Procedures: Outer and Inner Limits*, 51 COMMON MKT. L. REV. 2, 497 (2013).

12. See generally Peter G. Bryant & E. Woodrow Eckard, *Price Fixing: The Probability of Getting Caught*, 73 REV. ECON. & STAT. 3, 535 (1991); Emmanuel Combe et al., *Cartels: The Probability of Getting Caught in the European Union* 22 (2008) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1015061 [<https://perma.cc/9L7M-564Z>] (archived Feb. 5, 2017).

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 that 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 Patrick Rey has described as an information acquisition problem faced by competition agencies: “firms know whether they collude; the agencies do not.”¹³ The proliferation of effective leniency regimes has been deemed the single most significant development in cartel enforcement.¹⁴ However, there is one important caveat: not *any* leniency program will enhance cartel exposure; only an *effective* policy will achieve that result. A poorly designed leniency program might even have adverse effects, as colluding firms could work out ways to use the system to their advantage.¹⁵

The abundant literature on leniency tends to focus on experienced antitrust jurisdictions, particularly the United States and the European Union. To date, little attention has been paid to the merits of amnesty programs in competition law regimes that are only just taking off, which is surprising given that about two-thirds of competition laws around the world are under twenty-five years old.¹⁶ The present Article attempts to fill this gap by focusing on the prospective effectiveness of leniency programs in young antitrust jurisdictions that have limited or no experience enforcing competition law or amnesty policies. Young jurisdictions treat leniency as part of the “antitrust package.” While it took the United States over a century and the European Union more than four decades to adopt operational leniency programs, younger jurisdictions tend to introduce leniency policies within fifteen years of the implementation of their antitrust laws,¹⁷ oftentimes much earlier.¹⁸ The rush to embrace leniency is a

13. Patrick Rey, *On the Use of Economic Analysis in Cartel Detection*, in EUROPEAN COMPETITION LAW ANNUAL 2006: ENFORCEMENT OF PROHIBITION OF CARTELS 81 (Claus-Dieter Ehlerman & Isabela Atanasu eds., 2007).

14. FOX & CRANE, *supra* note 1, at 75.

15. Jeroen Hinloopen & Adriaan R. Soetevent, *Laboratory Evidence on the Effectiveness of Corporate Leniency Programs*, 39 RAND J. OF ECON. 607, 608 (2008).

16. ARMANDO E. RODRÍGUEZ & ASHOK MENON, THE LIMITS OF COMPETITION POLICY: THE SHORTCOMINGS OF ANTITRUST IN DEVELOPING AND REFORMING ECONOMIES 21 (2010).

17. See, e.g., Albanian Competition Law on Competition Protection, Law No. 9121 (2003) (Alb.), http://www.caa.gov.al/uploads/laws/Fine_Leniency_Programme.pdf [<https://perma.cc/D8ZR-EK79>] (archived Feb. 7, 2017).

18. For example, Article 46 of China's Anti-Monopoly Law (AML), in force since 2007, 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. See, e.g., Zhonghua Renmin Gongheguo Fan Longduan Fa (中华人民共和国反垄断法) [Anti-Monopoly Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007), art. 46, <http://www.china.org.cn/government/>

testament to its efficacy in the established jurisdictions, on which 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 when legislating and when enforcing the law.¹⁹ Overlooking the peculiarities of the region in which the legislation is to be applied can easily 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 Article, therefore, is to develop a framework for effective leniency policy design in jurisdictions with limited antitrust experience. This framework is based on the fundamental principles laid down in theoretical, empirical, and experimental studies of leniency carried out by legal and economic scholars, as well as on the experience of established leniency programs. At the same time, the Article will endeavor to apply this framework to settings in which a competition culture is only just starting to bud. Any attempt to put forward normative and legislative suggestions for the sound development of leniency in young jurisdictions is complicated by the sheer volume and diversity of new regimes. However, an examination of the law and policy developments in these jurisdictions reveals common challenges that can be tackled with analogous solutions. Some issues ought to be addressed through the learning process and the accumulation of experience, and require a methodological enforcement strategy and time. Others, however, might need the readjustment of the leniency programs or the antitrust systems they help to enforce. The Article thus focuses on leniency design and identifies three specific challenges affecting the leniency programs of young antitrust jurisdictions that deserve particular attention: first, determining the magnitude of the reward that will entice self-reporting in jurisdictions that only contemplate relatively modest punishment for collusion; second, drafting policy on the part of antitrust agencies that will achieve transparency and predictability, which is particularly difficult where there is no enforcement experience; and third, attaining a sufficient degree of confidentiality to make leniency enticing without hampering international cooperation efforts to break cartels.

The usefulness of each new leniency program resides not just in its fundamental role in enhancing regional prosperity through the

laws/2009-02/10/content_17254169.htm [https://perma.cc/D8WF-F9WY] (archived Mar. 28, 2017)

19. Eleanor Fox & Michal Gal, *Drafting Competition Law for Developing Jurisdictions: Learning from Experience* 9, (New York Univ. Law & Econ. Working Papers, Paper No. 374, 2014), http://lsr.nellco.org/nyu_lewp/374 [https://perma.cc/C2AH-PJLA] (archived Feb. 5, 2017).

protection of competition in local markets; given the prominent absence of global antitrust rules, increasingly “glocalized” efforts to tackle cartels can also create an invaluable joint deterrent effect that is paramount to combatting the biggest and most harmful collusive practices in the world. In order to address these issues, the Article 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 Article is structured into five main parts: Part II provides the theoretical framework necessary to assess leniency programs and lays down the parameters by which to evaluate policy design. Part III covers the practical experience of leniency by examining the evolution of such programs in the United States and the European Union. Part IV focuses on the implementation of leniency programs in young jurisdictions and examines the recent adoption of leniency in Hong Kong to illustrate the principal issues that emerge when using leniency without antitrust enforcement experience. Part V assesses the challenges of leniency in new jurisdictions, as evidenced through the analysis carried out in previous Parts, and offers suggestions as to how to tackle these issues. Part VI concludes.

II. THEORETICAL FRAMEWORK: THE ROLE OF LENIENCY IN THE FIGHT AGAINST CARTELS

A. *The Origins 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.”²⁰ Consistent 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.²¹ It is a tool for detecting cartel activity²² that involves “breaking down adversary coalitions by playing members against each other.”²³ Such tactics have been described as the “most

20. *Leniency*, NEW OXFORD DICTIONARY, <https://en.oxforddictionaries.com/definition/leniency> (last visited Mar. 28, 2017) [<https://perma.cc/R5LV-JFAF>] (archived Mar. 28, 2017).

21. In some cases, positive rewards are also granted. See *infra* subsection II.C.2.

22. Martin Duch, *The Impact of Leniency Program on Cartel Enforcement* 6 (June 6, 2015) (unpublished L.L.M. Thesis, Tilburg School of Law), <http://www.nathanhmilller.org/miller-cartels-aer.pdf> [<https://perma.cc/GTY7-4HRK>] (archived Feb. 25, 2017).

23. Giancarlo Spagnolo, *Divide et Impera: Optimal Leniency Programs* 2 (Ctr. for Econ. & Policy Research, Working Paper No. 4840, 2005), <ftp://ftp.zew.de/pub/zew-docs/veranstaltungen/rnic/papers/GiancarloSpagnolo.pdf> [<https://perma.cc/6KQJ-PJUV>] (archived Feb. 25, 2017) [hereinafter Spagnolo, *Divide et Impera*].

effective and least costly mechanism for detecting and prosecuting activity that is systematic, deliberate and covert,”²⁴ and they are certainly not new or 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. Jostein Gaarder’s novel, *Sophie’s World*, describes the sentencing of Socrates to death in 399 B.C. 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.”²⁵ In this case, the celebrated philosopher was not required to incriminate anyone else to escape capital punishment, but modern leniency systems usually involve affording a beneficial treatment to whistleblowers who, having breached the law, come forward and provide proof that helps the authorities take action against other wrongdoers. This is precisely how the evidence that exposed 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 seventy-five-year prison sentence by confessing, and by agreeing to “provide truthful, complete and accurate information” to U.S. prosecutors and to “participate in undercover activities pursuant to the specific instructions of law enforcement agents.”²⁶

Hypothetically, leniency helps destabilize cartels.²⁷ References abound in the literature to the prisoner’s dilemma as an illustration of how leniency threatens cartel stability.²⁸ Collusion is a joint activity,

24. Caron Beaton-Wells, *Leniency Policies: Revolution or Religion?*, in ANTI-CARTEL ENFORCEMENT IN A CONTEMPORARY AGE: LENIENCY RELIGION 4 (Caron Beaton-Wells & Christopher Tran eds., 2015).

25. JOSTEIN GAARDER, *SOPHIE’S WORLD: A NOVEL ABOUT THE HISTORY OF PHILOSOPHY* 63 (Paulette Møller trans., Berkley Books 1994).

26. The case was widely covered in the mainstream media. See, e.g., Rupert Neate, *Chuck Blazer agreed to go undercover to avoid potential 75-year sentence*, GUARDIAN (June 16, 2015), <https://www.theguardian.com/football/2015/jun/15/chuck-blazer-fifa-ban-undercover-back-taxes-plea-deal> [<https://perma.cc/Q4YK-NVPU>] (archived Feb. 6, 2017). In the United States, the use of plea bargaining and leniency in criminal cases such as the FIFA scandal has been subject to strong criticism. See, e.g., Timothy Lynch, *The Case Against Plea Bargaining*, 26 REG. 3, 24 (2003).

27. Gary R. Spratling & 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*, Address at the American Bar Association Section of Antitrust Law’s Annual Meeting (Aug. 12, 2003), http://www.gibsondunn.com/fstore/documents/pubs/Spratling-Arp%20ABA2003_Paper.pdf [<https://perma.cc/K7ST-9QNL>] (archived Feb. 6, 2017).

28. See, e.g., Constanza Nicolosi, *No Good Whistle Goes Unpunished: Can We Protect European Antitrust Leniency Applications from Discovery?*, 31 NW. J. OF INT’L L. & BUS. 225, 4 (2011); Andreas Stephan & Ali Nikpay, *Leniency Theory and Complex Realities* 11 (Center for Competition Policy, Working Paper 14-8, 2015),

but each cartel member will evaluate the strategy that is most profitable to them individually. As explained above,²⁹ 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 members 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.³⁰ Moreover, 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 disgorge 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.”³¹ As a consequence, they need to “make repeated [individual] judgments as to the profitability of staying in a cartel agreement as against either cheating on the agreement or approaching the competition authority.”³²

Collusion, therefore, is only worthwhile provided that no member cheats or applies for leniency. But, whereas the risk of cheating can be minimized by establishing ways to monitor compliance within the cartel arrangement, ensuring that no one reports 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.³³ 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.³⁴ But risk-benefit analyses in this area are far from straightforward, and it

https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2537470 [<https://perma.cc/EW4X-EATF>] (archived Feb. 25, 2017); Joe Chen & Joseph E. Harrington, Jr., *The Impact of the Corporate Leniency Program on Cartel Formation and the Cartel Price Path* 15 (Ctr. for Int'l Research on the Japanese Econ., Working Paper F-358, 2005), <http://www.cirje.e.u-tokyo.ac.jp/research/dp/2005/2005cf358.pdf> [<https://perma.cc/2ZPB-KFCZ>] (archived Feb. 25, 2017).

29. See *supra* Part I.

30. Stigler's seminal work on the instability of cartels is still the point of reference in this field. See generally George J. Stigler, *A Theory of Oligopoly*, 72 J. OF POL. ECON. 44, 49–58 (1964) (providing results that 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).

31. Jay Pil Choi & Heiko Gerlach, *Global Cartels, Leniency Programs and International Antitrust Cooperation*, 30 INT'L J. INDUS. ORG. 528, 529 (2012).

32. Stephan & Nikpay, *supra* note 28, at 3.

33. See *id.*; see also Nicolosi *supra* note 28, at 230.

34. Gönenç Gürkaynak et al., *Granting Immunity and Revoking Immunity: A Global Overview of Leniency Programmes*, INT'L COMPANY & COM. L. R. 195 (2014).

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.³⁵ 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.”³⁶ Whether this carteldestabilizing premise holds true in practice will be explored in detail in the remainder of this Part.

B. *Measuring the Success of Leniency 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.”³⁷

Before delving into the analysis of the characteristics of specific leniency programs, it is necessary to define the parameters on which to assess whether the policy has truly become—borrowing from Joan-Ramón Borrell—a “weapon of mass dissuasion.”³⁸ As evidenced by the above analysis, the logic behind the introduction of leniency 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 that have been cracked or the millions of dollars that companies have been fined as the principal sign of success.³⁹ Scott Hammond, for instance, has

35. See generally Evgenia Motchenkova & Rob van der Laan, *Strictness of Leniency Programs and Asymmetric Punishment Effect*, 58 INT’L R. OF ECON. 401, 402 (2011) (explaining the issue of the asymmetric punishment of leniency).

36. Hans Vedder, *The Kone Case and the Lifts Cartel – An Upward Effect on Prices and Effectiveness?*, EUROPEAN LAW BLOG (June 19, 2014), <http://europeanlawblog.eu/2014/06/19/the-kone-case-and-the-lifts-cartel-an-upward-effect-on-prices-and-effectiveness/> [https://perma.cc/N5NG-3ZQE] (archived Feb. 6, 2017).

37. Joan-Ramón Borrell et al., *Evaluating Antitrust Leniency Programs*, 10 J. OF COMP. L. & ECON. 107, 111 (2013).

38. *Id.*

39. See, e.g., Sébastien Broos et al., *Analyse Statistique des Affaires d’Ententes dans l’UE (2004-2014)*, 67 REVUE ÉCONOMIQUE 79, 85 (2016); Ann O’Brien, *Leadership of Leniency*, in ANTI-CARTEL ENFORCEMENT IN A CONTEMPORARY AGE: LENIENCY RELIGION, *supra* note 24, at 18; Cécile Aubert et al., *The Impact of Leniency and Whistle-Blowing Programs On Cartels*, 24 INT’L J. INDUS. ORG. 1241, 1241–42 (2006); Hammond, *supra* note 2, at 83–84.

praised the U.S. Corporate Leniency Policy saying that it has served to break “more cartels than all other tools at our disposal combined,”⁴⁰ while Thomas Barnett deems the program “[the DOJ’s] greatest source of cartel evidence.”⁴¹ 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,⁴² 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.”⁴³

Estimating the deterrent effect of antitrust policies is more difficult than in other disciplines since, as Maria Bigoni notes, the population of cartels and changes in it are unobservable.⁴⁴ 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 deterrence. In 2003, the pivotal work of Massimo Motta and Michele Polo stressed the potential value of leniency for the dissuasion of collusive conduct.⁴⁵ 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.⁴⁶

40. Scott D. Hammond, *Cracking Cartels with Leniency Programs*, JUSTICE NEWS (Oct. 18, 2005), <https://www.justice.gov/atr/speech/cracking-cartels-leniency-programs> [<https://perma.cc/QGV4-M6A9>] (archived Feb. 6, 2017).

41. Thomas O. Barnett, *Global Antitrust Enforcement*, JUSTICE NEWS (Sept. 26, 2007), <https://www.justice.gov/atr/speech/global-antitrust-enforcement> [<https://perma.cc/NCA7-8D59>] (archived Feb. 6, 2017).

42. Choi & Gerlach, *supra* note 31, at 532–35.

43. William E. Kovacic, *A Case for Capping the Dosage: Leniency and Competition Authority Governance*, in ANTI-CARTEL ENFORCEMENT IN A CONTEMPORARY AGE: LENIENCY RELIGION, *supra* note 24, at 130 (warning 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); Maria Bigoni et al., *Fines, Leniency and Rewards in Antitrust*, 43 RAND J. ECON. 368, 369 (2011).

44. Bigoni et al., *supra* note 43, at 369.

45. Massimo Motta & Michele Polo, *Leniency Programs and Cartel Prosecution*, 21 INT’L J. INDUS. ORG. 347, 372 (2003).

46. See Joseph E. Harrington & Myong-Hun Chang, *Modeling the Birth and Death of Cartels with an Application to Evaluating Competition Policy*, 7 J. EUR. ECON. ASS’N, 1400–01 (2009); Giancarlo Spagnolo, *Leniency and Whistleblowers in Antitrust*, in HANDBOOK OF ANTITRUST ECONOMICS 259 (Paolo Buccirossi ed., MIT Press, 2008); Joseph E. Harrington, Jr., *Behavioral Screening and the Detection of Cartels*, in EUROPEAN COMPETITION LAW ANNUAL 2006: ENFORCEMENT OF PROHIBITION OF CARTELS, *supra* note 13, at 51; Cécile Aubert, Patrick Rey & William Kovacic, *The Impact of Leniency Programs On Cartels*, 24 INT’L J. INDUS. ORG. 1241, 1242 (2006); Patrick Rey, *Towards a Theory of Competition Policy*, in ADVANCES IN ECONOMICS AND

The outcome of the initial empirical works was somewhat unclear.⁴⁷ A study by Nathan Miller of the use of leniency in the United States between 1985 and 2005 found that, since the 1993 revision of the Corporate Leniency Policy,⁴⁸ there was an initial increase in the number of cartel discoveries and then a sharp drop. Such a trend would be consistent with a policy that enhances deterrence.⁴⁹ In the European Union, an investigation conducted in 2009 of the impact of the original E.U. leniency policy of 1996 did not produce any evidence that collusion had been made more difficult by the program.⁵⁰ The preliminary findings of the latest studies, however, which use more recent data and illustrate the impact of the revised 2003 program, are more encouraging.⁵¹ For example, Jun Zhou's analysis of E.U. leniency in cartel investigations between 1985 and 2011 suggests a similar pattern to that detected by Miller in the U.S. context.⁵² 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.⁵³ Thus, leniency leads to the formation of fewer cartels and makes those that do emerge appear less stable.⁵⁴

The results of these works, while generally pointing towards successful cartel deterrence, do not really shed much light on a leniency policy's impact on welfare and economic efficiency. They are limited in that "[t]hey can only estimate the effects of policies actually

ECONOMETRICS: THEORY AND APPLICATIONS 82, 85–90 (M. Dewatripont, L.P. Hansen & S.J. Turnovsky eds., 2003); Choi & Gerlach, *supra* note 31, at 529.

47. Jun Zhou, *New Evidence on the Efficacy of Leniency* abstract (Working Paper, 2011), https://www.researchgate.net/publication/256027164_New_Evidence_on_the_Efficacy_of_Leniency (last visited Feb. 7, 2017) [<https://perma.cc/DKW5-UC8T>] (archived Feb. 7, 2017).

48. See *infra* subsection II.C.1.

49. Nathan H. Miller, *Strategic Leniency and Cartel Enforcement*, 99 AM. ECON. REV. 750, 755 (2009).

50. Steffen Brenner, *An Empirical Study of the European Corporate Leniency Program*, 27 INT'L J. INDUS. ORG. 639, 641 (2009). See also *infra* subsection II.C.2.

51. Jun Zhou, *Evaluating Leniency with Missing Information on Undetected Cartels: Exploring Time-Varying Policy Impacts on Cartel Duration 2* (GESY, Discussion Paper No. 353, 2011), http://www.sfbtr15.de/uploads/media/353_01.pdf [<https://perma.cc/N93B-3A2P>] (archived Feb. 8, 2017) [hereinafter Zhou, *Evaluating Leniency*]; Gordon Klein, *Cartel Destabilization and Leniency Programs - Empirical Evidence 4–5* (ZEW, Discussion Paper No. 10-107, 2010), <http://ftp.zew.de/pub/zew-docs/dp/dp10107.pdf> (last visited Feb. 7, 2017) [<https://perma.cc/6KLV-JE7R>] (archived Feb. 7, 2017).

52. Zhou, *Evaluating Leniency*, *supra* note 51, at 1–2.

53. See generally José Apesteguía, Martin Dufwenberg & Reinhard Selten, *Blowing the Whistle*, 31 ECON. THEORY 143, 143–66 (2007) (discussing leniency laws and their impact on collusive cartel behavior as seen in experimental studies); Peter T. Dijkstra, Marco A. Haan & Lambert Schoonbeek, *Leniency Programs and the Design of Antitrust: Experimental Evidence with Unrestricted Communication* 18 (2012), https://www.researchgate.net/publication/228842423_Leniency_Programs_and_the_Design_of_Antitrust_Experimental_Evidence_with_Unrestricted_Communication [<https://perma.cc/SF9H-97SN>] (archived Feb. 4, 2017); Hinloopen & Soetevent, *supra* note 15, at 607, 611.

54. Hinloopen & Soetevent, *supra* note 15, at 611.

implemented, not those of the many available alternatives, and they focus on cartel formation rather than on welfare.”⁵⁵ Catarina Marvão and Giancarlo 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.”⁵⁶ Moreover, whereas the main findings of the experimental research point towards effectiveness, they have also shown that, in some cases, leniency leads to higher prices when a cartel does form.⁵⁷ For example, Bigoni establishes that, while on average prices are lower, those for existing cartels tend to increase, and the cartel may become more stable through leniency.⁵⁸

Importantly, and linked to this idea of cartel stability, Joseph Harrington and Myong Hun Chang recently considered the effects of leniency on non-leniency enforcement—that is, the number of cartels that are cracked by means other than leniency applications.⁵⁹ Since antitrust authorities have limited resources, handling leniency cases, they say, unavoidably means that fewer resources will be available for non-leniency investigations. This may have a negative impact on the race to report that leniency programs are presumed to trigger: if the likelihood of conviction in the absence of leniency requests is low, it could reduce the fear of getting caught and jeopardize the effects of the prisoner’s dilemma created by leniency.⁶⁰ Interestingly, their study finds that, in industries where collusion is reasonably stable, leniency can increase the duration of collusion because “stable cartels are more concerned with detection and prosecution through non-leniency means.”⁶¹

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 conclude that leniency

55. Bigoni et al., *supra* note 43, at 369.

56. Catarina Marvão & Giancarlo Spagnolo, *What Do We Know About the Effectiveness of Leniency Policies? A Survey of the Empirical and Experimental Evidence*, in *ANTI-CARTEL ENFORCEMENT IN A CONTEMPORARY AGE: LENIENCY RELIGION*, *supra* note 24, at 21.

57. Joseph E. Harrington & Myong-Hun Chang, *Endogenous Antitrust Enforcement in the Presence of a Corporate Leniency Program 2* (Working Paper, 2013) [hereinafter Harrington & Chang, *Endogenous*] <https://bepp.wharton.upenn.edu/files/?whdmsaction=public:main.file&fileID=5147> [<https://perma.cc/A4P5-AYJY>] (archived Feb. 7, 2017).

58. Bigoni et al., *supra* note 43, at 370.

59. Harrington & Chang, *Endogenous*, *supra* note 57, at 1.

60. See generally *id.* (explaining the game theory rationale for this possible phenomenon); see also *supra* Section II.A.

61. Harrington & Chang, *Endogenous*, *supra* note 57, at 4–5.

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 collusion⁶² (without leniency, firms would never benefit from reporting),⁶³ a reduction in the cost of cartel investigations,⁶⁴ a faster investigation and prosecution process,⁶⁵ and a positive impact on the perception of a country's antitrust policy among the business community.⁶⁶ But these benefits are not automatically present in every leniency program; adequate policy design is paramount in order to create the desired race to report that destroys collusion.⁶⁷ This need poses a new, equally complex dilemma: how to devise a sound leniency program.

C. Adequate Leniency Policy Design: The Theory

Any attempt to delineate a general theoretical framework for the assessment of leniency programs is hampered by the importance of context. What might work very well in one jurisdiction might not be as effective in another displaying dissimilar characteristics.⁶⁸ This is particularly true in antitrust, as the economic environment is paramount both at the time of legislating and at the time of enforcing the law. The literature that has, to date, discussed the features of robust leniency programs has focused mainly on the corporate leniency policies of the United States and the European Union.⁶⁹ Prior to assessing the lessons that can be drawn from the practical experience of these studies,⁷⁰ this Section discusses 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 search for general parameters through which to assess specific leniency policies, certain features emerge as fundamental in the construction of any system that rewards informants who come forward and help bring down the unlawful activity of which they have been part. As an initial matter,

62. Brenner, *supra* note 50, at 639–40.

63. Zhijun Chen & Patrick Rey, *On the Design of Leniency Programs*, 56 J. L. & ECON. 917, 925 (2013).

64. Motta & Polo, *supra* note 45, at 349.

65. Brenner, *supra* note 50, at 644.

66. Borrell et al., *supra* note 37, at 136.

67. FOX & CRANE, *supra* note 1, at 77.

68. See Fox & Gal, *supra* note 19, at 5–6 (noting the importance of context in antitrust).

69. For a general overview of specific leniency policies, see SAMANTHA MOBLEY & ROSS DENTON, *GLOBAL CARTELS HANDBOOK: LENIENCY: POLICY AND PROCEDURE* (Oxford University Press, 2011). The very useful book is directed at practitioners, and does not enter into a discussion of the merits of the various programs.

70. See *infra* Part II.

leniency 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 presence of such fear and mistrust.⁷¹ 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.⁷² In addition to, *inter alia*, facilitating multi-jurisdictional leniency applications,⁷³ convergence enables comparisons on the basis of which a general structure for the evaluation of the merits of specific programs can be built.

Leniency 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 line of the strategy against cartelization is the carrot-and-stick approach frequently described by scholars⁷⁴ and indirectly fleshed out by former Deputy Assistant Attorney General Hammond.⁷⁵ The “stick” would principally be the severe sanctions and a high risk of detection, and the “carrot” would be the reward of leniency offered to informants.⁷⁶ Based on this, there are two principal strands of factors that determine whether a leniency program is suitably designed: the efficacy of the risk and the sanctions that form part of the stick, and the quality of the reward that is the carrot. Each of these will be assessed in turn.

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.⁷⁷ 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. Thus there are two essential factors

71. For instance, according to Wils, 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*, 39 *WORLD COMPETITION* 327, 343–46 (2016) [hereinafter Wils, *The Use of Leniency*].

72. Said convergence is frequently highlighted in the literature. See O'Brien, *supra* note 39, at 17, 19; FOX & CRANE, *supra* note 1, at 77.

73. ANNUAL PROCEEDINGS OF THE FORDHAM CORPORATE LAW INSTITUTE: INTERNATIONAL ANTITRUST LAW & POLICY 38 (Barry E. Hawk ed., 2004) [hereinafter HAWK]; See *infra* Section III.C.

74. FOX & CRANE, *supra* note 1, at 75–92.

75. Scott D. Hammond, Director of Criminal Enforcement, Antitrust Division U.S. Department of Justice, Cornerstones of an Effective Leniency Program Address at the ICN Workshop on Leniency Programs (Nov. 22–23, 2004), <http://www.justice.gov/atr/public/speeches/206611.htm> [<https://perma.cc/V7M2-ECP9>] (archived Feb. 6, 2017).

76. *Id.* See also FOX & CRANE, *supra* note 1 (discussing this policy); O'Brien, *supra* note 39, at 20.

77. FOX & CRANE, *supra* note 1, at 78.

in leniency policy design. First, 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.⁷⁸ But 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, 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 antitrust laws in multiple parts of the world. And international collusion abounds: there were 516 investigations of suspected international cartels between 1990 and 2008.⁷⁹ Supposing a firm decides to self-report in one of the jurisdictions, the company may qualify for leniency under the relevant leniency program. However, if the information obtained through leniency can be requested by antitrust enforcers in other 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. Diminishing this disincentive can be accomplished by imposing very high information-sharing requirements, as well as through the facilitation of simultaneous leniency applications in various jurisdictions.

Second, with regard to the reward of the policy, it is important to note that leniency comes in two forms: it could be a grant of immunity or reduction in the penalties that would otherwise be applicable, or it could be a grant of *positive* financial rewards. Giving the informant a financial recompense or a “bounty,” such as a portion of the fines collected from those whose illegal conduct was prosecuted thanks to the report, is uncommon, but not unheard of.⁸⁰ There have been

78. See generally *id.*; UNCTAD MENA PROGRAMME, COMPETITION GUIDELINES: LENIENCY PROGRAMMES, ¶1.2(c) (June 22, 2016), http://unctad.org/en/PublicationsLibrary/ditcclp2016d3_en.pdf [<https://perma.cc/YLZ3-ZEZE>] (archived Feb. 7, 2017).

79. John M. Connor, *Cartels and Antitrust Portrayed: Private International Cartels from 1990 to 2008* 4 (Am. Antitrust Inst., Working Paper No. 09-06, 2009), https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=1467310 [<https://perma.cc/CEQ7-CE22>] (archived Feb. 25, 2017).

80. 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 *CARTELS IN ASIA: LAW AND PRACTICE* 109, 110 (Thomas Cheng, Sandra Marco Colino & Burton Ong eds., 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. Aubert, Rey & Kovacic, *supra* note 46, at 1243. On the advantages of offering rewards to leniency applicants, see also Bigoni et al., *supra* note 43, at 370.

arguments made that such bounties would be “stronger tools than leniency programs to deter cartel formation,”⁸¹ provided that the recompense was “large enough to outweigh the cost of returning to the competition outcome in all the future periods.”⁸² 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.⁸³ Spagnolo acknowledges, however, that positive rewards might not be feasible, so reduced fines can also be helpful, as they would decrease the cost of deviating from the cartel agreement.⁸⁴

If the rewards offered to leniency applicants are too generous, there is also a risk of strategic exploitation of the policy.⁸⁵ The possibility that companies will abuse leniency programs has not escaped the notice of economists such as Motta and Polo⁸⁶ or Julien Sauvagnat.⁸⁷ Motta and Polo raise the issue that reduced penalties could have “ex-ante a pro-collusive effect.”⁸⁸ From a legal perspective, Wouter Wils, who has written extensively on the European Union’s leniency policy,⁸⁹ recently revisited the prospect of using leniency as a platform to facilitate the creation and maintenance of cartels in systems that 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.”⁹⁰ Such tactics are commonly referred to as *collude-and-report strategies*.⁹¹ Upon examining the E.U. experience, however, he finds no “convincing example” of this taking place in practice.⁹² However, the potential to abuse the system has to be accounted for, and the incentivizing benefit of transparency and predictability needs to be balanced against the risk of implementing such a foreseeable strategy that firms can learn to use to their best advantage.

81. Aubert, Rey & Kovacic, *supra* note 46, at 1264–65.

82. *Id.* at 1248.

83. Spagnolo, *Divide et Impera*, *supra* note 23, at 19–20.

84. *Id.* at 20–23.

85. Chen & Rey, *supra* note 63, at 918.

86. Motta & Polo, *supra* note 45, at 349.

87. Julien Sauvagnat, *Are Leniency Programs Too Generous?*, 123 ECON. LETTERS 323, 326 (2014).

88. Motta & Polo, *supra* note 45, at 349.

89. See Wouter P. J. Wils, *Leniency in Antitrust Enforcement: Theory and Practice*, 30 WORLD COMPETITION 25 (2007); see also Wils, *The Use of Leniency*, *supra* note 71, at 327.

90. Wils, *supra* note 89, at 25.

91. See, e.g., Chen & Rey, *supra* note 63, at 919.

92. See Wils, *The Use of Leniency*, *supra* note 71, at 342. *But see* Hinloopen & Soetevent, *supra* note 15, at 613–15 (showing potential collude-and-report tactics).

Another issue related to the reward of the policy is the moral implication of pardoning a lawbreaker. Wils touches on this problem and finds a potential solution in the adoption of programs that are proportionate to the aims they pursue, to ensure that the leniency granted is no more “than [is] strictly necessary to obtain the positive enforcement effects, and to stress the condition for any beneficiary . . . to provide genuine and full cooperation to the enforcement authorities.”⁹³ Two principal strategies are typically used to palliate both the potential abuses of leniency and the diminishment of retributive justice. First, the predominant position in the literature is that leniency should only be offered to the first company to come forward,⁹⁴ and it should consist of full (as opposed to partial) immunity, without positive rewards.⁹⁵ Second, leniency should not extend to civil damage claims, meaning that the informant will not be able to avoid having to compensate the victims of its harmful illegal behavior. Whereas some retribution is unavoidably sacrificed by pardoning the administrative and/or criminal actions 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.)⁹⁶

2. External Factors Affecting the Success of Leniency: The Stick

The effectiveness of leniency is highly dependent on the characteristics of the specific antitrust regulation and the general legal system it forms a part of and helps to enforce. As seen above, most regimes do not offer positive rewards, meaning that one factor is the attractiveness of leniency, which resides in the stiffness of the penalties it helps self-reporters avoid. Provided that there is a risk of detection looming over companies behaving illegally, the harsher the punishment envisaged, the more attractive leniency applications will appear. Thus, determining the most appropriate means to penalize anticompetitive behavior in general and collusion in particular is a rather intricate task and is one that has inspired fascinating academic discussions.⁹⁷ An exhaustive evaluation of cartel punishment exceeds the scope of this Article, but, for present purposes, leniency should be more efficient in antitrust regimes that allow for the imposition of high

93. Wils, *The Use of Leniency*, *supra* note 71, at 343.

94. See Sauvagnat, *supra* note 87, at 325.

95. On the limitations and perverse effects of partial immunity, see Chen & Harrington, *supra* note 28, at 59–80.

96. See *infra* subsection II.C.2.

97. See, e.g., KG ELZINGA, & W BREIT, *THE ANTITRUST PENALTIES: A STUDY IN LAW AND ECONOMICS* 131 (1976); John M. Connor & Robert H. Lande, *Optimal Cartel Deterrence: An Empirical Comparison of Sanctions to Overcharge*, U. OF BALT. (2011); Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

finances 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.⁹⁸ The temptation to apply for leniency will be greatest in those regimes that also incorporate jail terms (yet only a few jurisdictions contemplate individual criminal sanctions).⁹⁹

Another external factor relates to the protection of confidentiality that leniency programs ought to guarantee, as discussed above.¹⁰⁰ In addition to the privacy assurances within leniency policies, confidentiality will be largely reliant on how competition agencies engage in information sharing. In this respect, Jay Choi and Heiko Gerlach have attempted to establish the amount and kind of information that should be pooled in a fight against international cartels.¹⁰¹ They consider three scenarios in which a cartel could potentially be discovered in two jurisdictions. First, if there is no coordination and no information sharing, the incentive to self-report is virtually nonexistent. International cartels are 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. Second, if antitrust authorities share case information but not leniency applications, there ought to be a higher cartel detection probability coupled with an increased chance of successful conviction in each jurisdiction. Third, 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 is another factor that affects the effectiveness of leniency programs. Since damages are not condoned 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 Paolo Buccirossi, is that leniency applications actually boost the chances of successful damages claims by victims of collusion,¹⁰² both in the

98. See, e.g., Gregory J. Werden, *Sanctioning Cartel Activity: Let the Punishment Fit the Crime*, 5 EUR. COMPETITION J. 19, 23 (2009) (insisting that cartels “should be prohibited rather than merely taxed”).

99. The United States and the United Kingdom are among these. See Gilbert Geis, *Detering Corporate Crime*, in CORPORATE GOVERNANCE AND GOVERNMENTAL DEVIANCE: PROBLEMS OF ORGANIZATIONAL BEHAVIOR IN CONTEMPORARY SOCIETY 278 (M. David Ermann & Richard J. Lundmann eds., 1978) (discussing the deterrent effect of imprisonment).

100. See *supra* subsection II.C.1.

101. Choi & Gerlach, *supra* note 31, at 529–30.

102. Paolo Buccirossi, Catarina Marvão & Giancarlo Spagnolo, *Leniency and Damages 2* (Stockholm Inst. of Transition Econ. Working Paper No. 32, 2015).

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,¹⁰³ Buccirossi goes further and raises the possibility of eliminating this liability altogether, if the other cartelists are able to account for the damages caused by the leniency applicant.¹⁰⁴ Positive rewards could also be used to compensate the effect of damage claims on leniency applicants, as proposed by Frederik Silbye.¹⁰⁵

Summing up the arguments put forward in this Section, for leniency policies to achieve their maximum deterrent effect, they ought to guarantee at least full immunity, if not positive rewards. Positive rewards might be the most efficient in economic terms and can neutralize the cost of compensation for victims, but a moral argument may be raised against rewarding wrongdoers. Moreover, an excessively generous, transparent, and predictable policy might lead to undesirable strategic misuses of the policy.

For leniency policies to achieve their maximum incentivizing effect, granting confidentiality in 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 issues other than leniency 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.

III. THE PRACTICE OF POLICY DESIGN: THE EVOLUTION OF LENIENCY IN ESTABLISHED ANTITRUST REGIMES

The leniency programs of the United States, Canada, and the European Union are frequently referred to as the “Big Three” corporate leniency policies.¹⁰⁶ At this point in the Article, having already sketched the theoretical framework for assessing the quality of leniency programs, it seems appropriate to examine the practice of the policies that already have some mileage and that have proven their ability to bring down cartels. Rather than providing a comprehensive, overwhelmingly descriptive account of each regime, the focus here is on the evolution of the U.S. and E.U. programs, the features that make them successful, and any outstanding issues that remain to be addressed.

103. Spagnolo, *Divide et Impera*, *supra* note 23, at 15–17.

104. Buccirossi, Marvão & Spagnolo, *supra* note 102, at 5.

105. Frederik Silbye, *A Note on Antitrust Damages and Leniency Programs*, 33 *EUR. J. L. & ECON.* 691, 699 (2012).

106. See O'Brien, *supra* note 39, at 19.

A. *The United States*

The idea of using leniency to fight cartels is attributed to the prosecutors at the Antitrust Division of the DOJ.¹⁰⁷ It is unsurprising that it was in the United States where such a policy was first introduced. The U.S. 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.¹⁰⁸ The first Corporate Leniency Policy in the United States dates back to 1978, but this version was largely unsuccessful. Under that policy, leniency was only available provided that no investigation had yet been initiated by the DOJ, and even then it was discretionary.

Furthermore, in exercising this discretion, seven requirements had to be fulfilled in order to decide whether to grant leniency: (1) the firm had to be the first to blow the whistle; (2) the confession should be a “truly corporate act,” as opposed to isolated individual confessions; (3) the DOJ should not reasonably expect to become aware of the undercover cartel without the report of the leniency applicant; (4) the company was required to promptly terminate its involvement in the cartel; (5) consideration was given to the “candor and completeness” with which the firm reported the violation and assisted the DOJ in the investigation; (6) the nature of the wrongdoing and the whistleblower’s involvement also had to be examined; and finally, (7) the leniency applicant had to have made or had to intend to make restitution to those injured by the illegal activity.¹⁰⁹ Given the high threshold for qualifying for leniency under this policy, in its fifteen years of application only seventeen companies filed for leniency, of which just ten were granted full immunity.¹¹⁰ Unsurprisingly, the 1978 policy has been deemed “perhaps the least well understood and most infrequently

107. *Id.* at 17.

108. *But see* Lloyd Duhaime, *1889 Canada Wheels Out World’s First Competition Statute*, DUHAIME’S ENCYCLOPEDIA OF LAW (May 31, 2012), <http://www.duhaime.org/LawMuseum/CanadianLegalHistory/LawArticle-1420/1889-Canada-Wheels-Out-Worlds-First-Competition-Statute.aspx> [https://perma.cc/6224-DV7Q] (archived Feb. 5, 2017) (explaining that 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).

109. Gary R. Spratling & 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*, A.B.A. SECTION OF ANTITRUST L. ANNUAL MEETING 2 (2003), http://www.gibsondunn.com/fstore/documents/pubs/Spratling-Arp%20ABA2003_Paper.pdf [https://perma.cc/W8ZE-UPUK] (archived Feb. 5, 2017).

110. Gary R. Spratling, *The Experience and Views of the Antitrust Division*, Address at the U.S. Sentencing Comm’n Symposium: Corporate Crime in America: Strengthening the “Good Citizen” Corporation (Sept. 8, 1995), in KY P. EWING, *COMPETITION RULES FOR THE 21ST CENTURY: PRINCIPLES FROM AMERICA’S EXPERIENCE* 623 (2d ed. 2006).

invoked criminal law policy of the Antitrust Division,”¹¹¹

In order to tackle these shortcomings and invigorate the strategy, the DOJ revised its corporate leniency policy in 1993 and 1994,¹¹² introducing an individual leniency program.¹¹³ The changes, attributed principally to the then Assistant Attorney General Anne Bingaman,¹¹⁴ modified the regime along three main lines: the confirmation of the “first-informant rule,”¹¹⁵ 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 “postinvestigation amnesty” rule,¹¹⁶ allowing that the first informant might be granted amnesty in exchange for cooperation even when an investigation is already underway; and, perhaps most importantly, the extension of leniency to individuals (e.g., directors, officials, and employees) who provide information such that they too could be granted immunity from criminal prosecution.¹¹⁷

The reform was successful in terms of the number of requests and the amounts of the fines imposed.¹¹⁸ By 2010, there were twenty times more applications than there were under the original policy,¹¹⁹ and 90 percent of the \$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 amount of the fines imposed was higher than the sum of all the penalties levied during the entire prior 109-year history of U.S. antitrust enforcement.¹²⁰ Although this rise in the cost of antitrust violations is also a consequence of the steep increase in the financial penalties that could be imposed, the role of leniency was undeniably vital to uncovering and prosecuting these collusive practices.¹²¹

111. Robert E. Bloch, *Past Practice and Future Promise: The Antitrust Division's Corporate Amnesty Program*, 8 ANTITRUST 28, 28 (2003).

112. See DEPARTMENT OF JUSTICE, CORPORATE LENIENCY POLICY (Aug. 10, 1993), <https://www.justice.gov/sites/default/files/atr/legacy/2007/08/14/0091.pdf> [<https://perma.cc/3W5V-342V>] (archived Feb. 5, 2017) [hereinafter US 1993 Leniency Policy].

113. See DEPARTMENT OF JUSTICE, LENIENCY POLICY FOR INDIVIDUALS (Aug. 10, 1994), <https://www.justice.gov/atr/individual-leniency-policy> [<https://perma.cc/KAA8-X9TL>] (archived Feb. 5, 2017).

114. William E. Kovacic, *A Case for Capping the Dosage: Leniency and Competition Authority Governance*, in ANTI-CARTEL ENFORCEMENT IN A CONTEMPORARY AGE: LENIENCY RELIGION, *supra* note 24, at 125.

115. Chen & Rey, *supra* note 63, at 917.

116. *Id.*

117. O'Brien, *supra* note 39, at 18.

118. *Id.*

119. Scott D. Hammond, Deputy Assistant Attorney Gen., Dep't of Justice, *The Evolution of Criminal Antitrust Enforcement over the Last Two Decades*, presented at the National Institute on White Collar Crime 2–3 (Feb. 25, 2010), <https://www.justice.gov/atr/file/518241/download> [<https://perma.cc/53AY-JCSH>] (archived Feb. 5, 2017).

120. Aubert, Rey & Kovacic, *supra* note 46, at 1242.

121. *Id.* at 1242–43.

Perhaps the best known case to date in which leniency has been used remains the investigation of the lysine cartel in the food additives industry in the mid-1990s.¹²² In 1996, Archer Daniels-Midland (ADM) was fined \$100 million for its participation in the collusive practice, 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.¹²³ 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.¹²⁴

After the 1993–1994 revision, it took years for applications under the improved policy to start flowing in, in all likelihood because no company wanted to be the one to test the waters.¹²⁵ Finally, in May 1999, Rhône-Poulenc’s cooperated with the DOJ under the new corporate leniency policy to break up a vitamins cartel. This cooperation resulted in a criminal fine of \$500 million being imposed on cartel instigator Hoffman-La Roche, and a further fine of \$225 million being levied against BASF. This case was the first in which a foreign executive got a jail sentence in the United States for participating in collusion.

The revised policy also notoriously came into play in the mid-1990s price-fixing scandal involving the competing auction houses Sotheby’s and Christie’s. 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 leniency in exchange for their cooperation and provision of evidence of the conspiracy in violation of Section 1 of the Sherman Act.¹²⁶ The case culminated in the conviction of Sotheby’s and its chief executive Alfred Taubman. Fines were also imposed on the art houses’ collusive practices under Canadian and E.U. competition law, with Davidge also filing for leniency under the latter.¹²⁷

Interestingly, in 2003, the company Stolt-Nielsen became the first

122. See, e.g., KURT EICHENWALD, *THE INFORMANT: A TRUE STORY* (2000) (telling the story of Mark Whitacre, the FBI’s confidential informant who recorded conversations that evidenced collusion at ADM).

123. See O’Brien, *supra* note 39, at 22–24.

124. JOHN M. CONNOR, *GLOBAL PRICE FIXING: OUR CUSTOMERS ARE OUR ENEMY* 411 (2001).

125. William E. Kovacic, Robert C. Marshall, Leslie M. Marx & Matthew E. Raiff, *Lessons for Competition Policy from the Vitamins Cartel* 23–25 (2005), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=818744 [<https://perma.cc/9W9K-CR23>] (archived Feb. 5, 2017).

126. See generally Orley Ashenfelter & Kathryn Graddy, *Anatomy of the Rise and Fall of a Price-Fixing Conspiracy: Auctions and Sotheby’s and Christie’s*, 1 J. COMPETITION L. & ECON. 3, 7–10 (2005).

127. CHRISTOPHER HARDING AND JENNIFER EDWARDS, *CARTEL CRIMINALITY: THE MYTHOLOGY AND PATHOLOGY OF BUSINESS COLLUSION* 167–76 (2015).

to have its leniency 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.¹²⁸ 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.

B. *The European Union*

Following the leniency trend set by the United States, most Organization for Economic Cooperation and Development (OECD) countries,¹²⁹ and more than fifty antitrust jurisdictions around the world, have implemented similar policies to help combat collusion.¹³⁰ The European Union adopted its first immunity policy in 1996, when the European Commission published its original Leniency Notice.¹³¹ Under this policy there was no guarantee of full immunity for the informant. Rather, only 75 percent 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.¹³² Such a limitation on leniency 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.¹³³

This shortcoming was addressed in the first revision of the policy in 2002.¹³⁴ The 2002 Leniency Notice allowed fines to be completely waived provided the following conditions are met at the time of the leniency request: the applicant (1) must provide all evidence in its possession immediately, (2) must ensure full cooperation throughout the investigation, (3) must cease its involvement in the cartel, (4) must not be a cartel instigator by having encouraged the participation of other undertakings in the collusive practice, and, (5) must be the first to provide evidence that 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).¹³⁵

The current version of the E.U. leniency policy can be found in the

128. Jim Walden and Kristopher Dawes, *The Curious Case of Stolt-Nielsen S.A. v United States*, ANTITRUST SOURCE 1 (Mar. 2005).

129. Bigoni et al., *supra* note 43, at 2.

130. FOX & CRANE, *supra* note 1, at 77–78.

131. See European Commission Notice on the Non-Imposition or Reduction of Fines in Cartel Cases 1996 OJ (C207/4) (the 1996 Leniency Notice).

132. Jatinder S. Sandhu, *The European Commission's Leniency Policy: A Success?*, 28 EUROPEAN COMPETITION L. REV. 148, 149 (2007).

133. See Chen & Harrington, *supra* note 28, at 17–18.

134. European Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, 2002 OJ [C45/3] (EU 2002 Leniency Notice).

135. *Id.* ¶¶ 8–11.

2006 Leniency Notice,¹³⁶ which revised the program for a second time to ensure greater legal certainty and clarity and to bring the system more in line with U.S. policy.¹³⁷ In this reform, three aspects were prioritized. First, 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.¹³⁸ 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.¹³⁹ Second, the new policy provides some additional details as to the evidentiary 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 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.¹⁴⁰

The cooperation requirements are therefore considerably high. Third, oral corporate statements may now be used by the European Commission as evidence,¹⁴¹ and there is a procedure by which they may “constitute binding statements not subject to challenge by the cooperating undertaking.”¹⁴² The reason for the weight given to oral statements is that, if written statements were required, litigants claiming damages in other jurisdictions (particularly the United States) might be tempted to seek discovery of such documents to substantiate their claims.¹⁴³

As in the United States, the revised E.U. leniency program, combined with the rise of the amount of the fines imposed on anticompetitive conduct, has proven fruitful. Between 2012 and 2016, the total amount of the financial penalties imposed on cartels was close to €9 billion, even after taking into account the adjustments made by the E.U. courts to the Commission’s fining decisions.¹⁴⁴ A statistical study of cartel decisions between 2004 and 2014 estimates that at least

136. Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases (EC) 2006 O.J. (C298/17) 1 [hereinafter EU 2006 Leniency Notice].

137. For a detailed and up-to-date analysis of the European Union’s leniency policy, see Wils, *The Use of Leniency*, *supra* note 71.

138. EU 2006 Leniency Notice, *supra* note 136, ¶¶ 14–15.

139. *Id.* ¶ 15.

140. *Id.* ¶ 9(a).

141. *Id.* ¶ 31.

142. Sandhu, *supra* note 132, at 156.

143. *Id.*

144. Commission Cartel Statistics (EC) (2016), <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf> [<https://perma.cc/6JHF-MHNV>] (archived Feb. 13, 2017).

one undertaking sought leniency in 94 percent of cases assessed.¹⁴⁵ Importantly, in 2016, record fines—totaling nearly €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 for over fourteen years.¹⁴⁶

This case provides a clear illustration of the race to report incentivized by the leniency program: MAN, the first to come forward, was granted full immunity. Volvo/Renault, Daimler, and Iveco also filed for amnesty, albeit at a later stage, and they were given a 40, 30, and 10 percent reduction in their fines, respectively.¹⁴⁷ In the end, all but one of the cartelists applied for leniency. All participants got a further 10 percent reduction under the 2008 Settlement Notice,¹⁴⁸ by which the companies acknowledge their participation in the collusion, as well as their liability, in exchange for a faster resolution and a smaller penalty.

C. *Convergence and Divergence in the United States and the European Union*

The adoption of leniency in the United States and the European Union has been subject to 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 to certain convergences between the two regimes. The similarity 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.”¹⁴⁹ Nonetheless, important differences persist. These divergences can be explained in part 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 United States and European Union leniency programs relates to the reward given to those who are not the first to come forward. In the United States, only the first informant qualifies for leniency.¹⁵⁰ In the European Union, however, although only the first informant may qualify for full leniency, reductions in the fines of subsequent applicants may be

145. Broos et al., *supra* note 39, at 85.

146. Press Release IP/16/2582, European Commission, Antitrust: Commission Fines Truck Producers € 2.93 Billion for Participating in a Cartel (July 19, 2016) (at the time of writing, the full text of the decision had not yet been made available).

147. *Id.*

148. 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 O.J. (C167/01) 1, 5, amended Communication from the Commission 2015 O.J. (C256/2).

149. HAWK, *supra* note 73, at 38.

150. US 1993 Leniency Policy, *supra* note 112, § B(1).

granted, provided that the information they supply is of “significant added value.”¹⁵¹ 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.”¹⁵² According to Wils, granting the reduction will depend on the potential of the evidence provided to strengthen the “ability to prove the infringement.”¹⁵³ It is only in the final decision that applicants will find out whether they have indeed qualified for the reduction, and within which band.¹⁵⁴ However, to increase legal certainty, the European Commission will inform the relevant parties of its preliminary conclusions.¹⁵⁵ In practice, the divergence between the two regimes is palliated by the possibility, under U.S. law, of entering into plea agreements with the DOJ, by which subsequent firms who decide to cooperate with the investigation may be punished less harshly.¹⁵⁶ Such a policy is usually referred to as Leniency Plus or Amnesty Plus.¹⁵⁷

Another important E.U.–U.S. divergence is linked to the nature of their enforcement systems. In the United States, there is not only corporate leniency but also individual leniency. Under criminal enforcement, individuals may be punished with fines and even jail terms. This seems particularly adequate considering that, as Andreas Stephan and Ali Nikpay explain, “cartels are not typically organised 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.”¹⁵⁸ Leniency in the United States grants individual protection from a potential criminal conviction, criminal fines, and imprisonment for executives who cooperate. In the European Union, only administrative and civil enforcement is possible, and the penalties are imposed on the corporate entity and not on individuals, thus the 2006 Leniency Notice only refers to “undertakings” filing for leniency. Under neither the European Union nor the United States regime does the leniency granted extend to other jurisdictions or to damage claims. However, in the United States, where treble damages and attorney’s fees may be recovered, leniency applicants will only be obliged to pay their “pro rata share of the damages.”¹⁵⁹ This is a considerable

151. EU 2006 Leniency Notice, *supra* note 136, ¶ 24.

152. *Id.* ¶ 25.

153. Wils, *The Use of Leniency*, *supra* note 71, at 6.

154. EU 2006 Leniency Notice, *supra* note 136, ¶ 26.

155. *Id.* ¶ 29.

156. Beaton-Wells, *supra* note 24, at 18.

157. See Marek Martyniszyn, *Leniency (Amnesty) Plus: A Building Block or a Trojan Horse?*, 3 J. ANTITRUST ENFT 391 (providing a critical view on Amnesty Plus systems).

158. Stephan & Nikpay, *supra* note 28, at 3.

159. GREGOR ERBACH, EUROPEAN PARLIAMENTARY RES. SERV., EU AND US COMPETITION POLICIES: SIMILAR OBJECTIVES, DIFFERENT APPROACHES 4 (2014),

limitation that 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.

One important similarity between the jurisdictions is that the successive revisions of the leniency policies in the United States and the European Union have attempted to increase transparency, for instance, via the marker system or by clarifying the kind of information required for qualifying for immunity. An aspect on which applicants require the utmost transparency and predictability is the difficult issue of the confidentiality of leniency applications. The DOJ guarantees an entirely paperless procedure¹⁶⁰ and vows to not disclose the identity of the informant without a court order.¹⁶¹ 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.”¹⁶² In the European Union, accepting oral statements as sufficient proof of collusion is also designed to prevent claimants in other jurisdictions from having access to the evidence, but it is unclear whether there are any circumstances under which a written transcript of the oral statement could be obtained.¹⁶³

In the light of the calls to address this important issue¹⁶⁴ and the growing concerns about a possible decrease in the number of leniency applications for fear of civil liability,¹⁶⁵ in March 2017 the E.U. Commission announced the launch of a new tool enabling anonymous whistleblowing.¹⁶⁶ The new system, called the Anonymous Whistleblower Tool, complements the existing E.U. leniency policy: it has a wider scope of application, as it is not limited to cartels nor cartel participants, and it can be used by any individuals “who have knowledge of the existence or functioning of a cartel or other types of

[http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2014/140779/LDM_BRI\(2014\)140779_REV1_EN.pdf](http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2014/140779/LDM_BRI(2014)140779_REV1_EN.pdf) [<https://perma.cc/K68J-7G2R>] (archived Mar. 28, 2017) (emphasis omitted).

160. Nicolosi, *supra* note 28, at 235.

161. SCOTT D. HAMMOND & BELINDA A. BARNETT, U.S. DEP'T OF JUST., FREQUENTLY ASKED QUESTIONS REGARDING THE ANTITRUST DIVISION'S LENIENCY PROGRAM AND MODEL LENIENCY LETTERS 27 (2008).

162. SCOTT D. HAMMOND, BEATING CARTELS AT THEIR OWN GAME—SHARING INFORMATION IN THE FIGHT AGAINST CARTELS 10 (2003).

163. Sandhu, *supra* note 132, at 155.

164. See Nicolosi, *supra* note 28 (proposing very interesting ways in which to protect leniency applicants in the European Union from U.S. antitrust claims which are substantiated by the leniency materials generated in the European Union).

165. Sonya Lalli, *DG Comp Encourages Anonymous Tip-Offs*, GLOBAL COMP. REVIEW (Mar. 16, 2017), http://globalcompetitionreview.com/article/1138230/dg-comp-encourages-anonymous-tip-offs?utm_source=Law%20Business%20Research&utm_medium=email&utm_campaign=8108957_GCR%20Headlines%2016%2F03%2F2017&dm_i=1KSF,4TSWT,9GQ8I3,I7SPL,1 [<https://perma.cc/3D36-5R72>] (archived Mar. 28, 2017).

166. *Anonymous Whistleblower Tool*, EUROPEAN COMM'N, <http://ec.europa.eu/competition/cartels/whistleblower/index.html> (last visited Mar. 28, 2017) [<https://perma.cc/P6VW-JXTR>] (archived Mar. 28, 2017).

antitrust violations to help end such practices.”¹⁶⁷ Anonymity is granted

through a specifically-designed encrypted messaging system that allows two way communications. The service is run by a specialised external service provider that acts as an intermediary, and which relays only the content of received messages without forwarding any metadata that could be used to identify the individual providing the information.¹⁶⁸

By extending the ability to blow the whistle to anyone with knowledge of an anticompetitive activity of any kind, this new system has the potential to increase the risk of detection. However, if a cartel participant wishes to report anonymously, it will not be able benefit from immunity or a reduction in fines. Therefore, its potential to fix the transparency and predictability problems of traditional leniency remains limited.

IV. LENIENCY POLICY DESIGN IN YOUNG ANTITRUST REGIMES

If the U.S. and E.U. experiences are anything to go by, sculpting 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-leniency cartel-busting experience is at best scarce and at worst nonexistent. This Part of the Article 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 against the need to adapt to circumstantial demands. The comprehensive leniency policy recently adopted in Hong Kong is used as an illustrative example of how this applies in practice.

A. The Proliferation of Antitrust and the Problem of Copy-and-Paste Regulation

Since World War II, 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: in 1995, there were only thirty-five antitrust regimes in place.¹⁶⁹ 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.

167. Press Release, European Commission, Commission Introduces New Anonymous Whistleblower Tool (Mar. 16, 2017), http://europa.eu/rapid/press-release_IP-17-591_en.htm [<https://perma.cc/N32V-LYA6>] (archived Mar. 28, 2017).

168. *Id.*

169. DAVID A. GANTZ, LIBERALIZING INTERNATIONAL TRADE AFTER DOHA: MULTILATERAL, PLURILATERAL, REGIONAL, AND UNILATERAL INITIATIVES 112–13 (2013).

The results are usually a combination of both imitation and originality. Since they lack enforcement experience, they inevitably take into consideration the practice of established, effective antitrust systems for inspiration. New regimes thus widely use the laws of the United States and European Union as models and also draw on standards developed by international organizations, such as the United Nations Conference on Trade and Development (UNCTAD) Model Law.¹⁷⁰

Scholars have considered the merits of modeling new competition laws on the experience in other jurisdictions, paying particular attention to developing countries.¹⁷¹ Certain practical problems have been identified, and, according to Dina Waked, there is little general evidence of the efficacy of copying established antitrust laws.¹⁷² The main issue is that, when “copy-and-paste laws are not tailored to meet local needs, their enforcement is often quite ineffective.”¹⁷³ Indeed, Eleanor Fox and Michal Gal have highlighted the limitations of antitrust-law transplants and warned that such transplants may even be harmful if the special characteristics of each jurisdiction are not considered.¹⁷⁴

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 jurisdictions “that have persistently supported monopolistic structures and blocked the economic opportunities of the¹ mass of people without power or connections.”¹⁷⁵ Legislation that protects the operation of markets in such jurisdictions should contribute to enhancing efficiency and overall social welfare.¹⁷⁶

The overwhelming majority of the problems that arise when replicating experienced antitrust rules and policies are, however, 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. This approach would involve using the principles and experience developed in other jurisdictions as a starting point but adapting the interpretation and implementation of the law to each particular setting. The marked

170. Fox & Gal, *supra* note 19, at 9.

171. The new competition laws of developing countries have been excellently explored in *ECONOMIC CHARACTERISTICS OF DEVELOPING JURISDICTIONS: THEIR IMPLICATIONS FOR COMPETITION LAW* (Michal S. Gal et al. eds., 2015); *COMPETITION LAW AND DEVELOPMENT* (D. Daniel Sokol et al. eds., 2013).

172. Dina I. Waked, *Antitrust Enforcement in Developing Countries: Reasons for Enforcement & Non-Enforcement Using Resource-Based Evidence* 3 (5th Ann. Conf. on Empirical Legal Stud., Working Paper, 2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=16388740 [<https://perma.cc/HZ8G-699K>] (archived Feb. 13, 2017).

173. Borrell et al., *supra* note 37, at 109.

174. Fox & Gal, *supra* note 19, at 9.

175. *Id.* at 3.

176. *Id.*

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 of the United States and European Union in the development of the laws and policies of young antitrust systems, if 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 the most veteran antitrust agencies. Whether or not it is as successful in new regimes will depend, as demonstrated in Part II of this Article, on the specifics 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.¹⁷⁷

B. *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 (HKCO),¹⁷⁸ the region's first cross-sector competition law, came into force on December 14, 2015. The HKCO was passed in 2012 by the Legislative Council (LegCo) after two decades of heated adoption discussions. It has taken 3.5 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 before the full implementation of the law, the HKCC published two policy documents, one of which was its detailed *Leniency Policy for Undertakings Involved in Cartel Conduct* (HK Leniency Policy).¹⁷⁹

The reason why Hong Kong provides such an interesting case

177. See *supra* Part II.

178. Competition Ordinance, (2015) Cap. 619, 7, § 12 (L.H.K.) [hereinafter HKCO].

179. H.K. COMPETITION COMM'N, LENIENCY POLICY FOR UNDERTAKINGS ENGAGED IN CARTEL CONDUCT (2015) [hereinafter HK Leniency Policy].

study in the context of leniency is fourfold. First, Hong Kong's belated competition legislation is unmistakably modeled on experienced antitrust regimes, most prominently the European Union. Its study therefore facilitates the assessment of the adaptation of general competition law principles to new contexts. Second, although there was some sectoral competition legislation in the telecommunications and broadcasting sectors before the introduction of the HKCO, the antitrust provisions of these sector-specific ordinances were rarely applied and there was a manifest absence of a cartel-breaking tradition. Third, its strategic location in Asia is paramount. Asia has been described as a "cartel tiger" in the making,¹⁸⁰ with visible progress in anti-cartel enforcement over the last decade.¹⁸¹ Finally, the HKCC was exceptionally quick to implement a full leniency policy, and it adopted an overwhelmingly orthodox program built quite obviously on international leniency experience.¹⁸²

1. Leniency in the Hong Kong Competition Ordinance

Sections 80 and 81 of the HKCO respectively allow the HKCC 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.¹⁸³ However, as explained below, the Leniency Policy enacted by the HKCC appears to restrict the application of leniency to entities other than an undertaking.¹⁸⁴ If leniency is agreed on, then the HKCC ceases attempts 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.¹⁸⁵ The HKCC 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.¹⁸⁶

On the basis of Sections 80 and 81 of the HKCO, the HKCC prepared its detailed Leniency Policy. Compared to the United States and the European Union, who adopted their first policies towards self-

180. See Connor, *supra* note 79, at 17 (noting Korea is the principal example of this trend, stating that "Asia (mostly Korea) is becoming a cartel tiger").

181. See *id.* at 23 (depicting growth in anti-cartel enforcement through a graph).

182. 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.

183. HKCO, *supra* note 178, § 80.

184. See *infra* subsection IV.B.3.

185. HKCO, *supra* note 178, § 80.

186. *Id.* § 81.

reporters decades after the entry into force of their antitrust laws, in Hong Kong the HKCC acted quickly to ensure that leniency was in place the moment the HKCO became fully effective.

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-specific competition provisions of the Telecommunications Ordinance¹⁸⁷ or the Broadcasting Ordinance¹⁸⁸—the only antitrust regulations that existed before the HKCO.

One of the most prominent features of Hong Kong's economy is the presence of tycoons.¹⁸⁹ A handful of families rule entire industries and expand their power by penetrating multiple markets. A glaring example of this is the real estate market, controlled by CK Hutchinson Holdings, which is owned by Li Ka-Shing (Hong Kong's richest individual),¹⁹⁰ and Henderson Land Development, which is owned by Lee Shau-Kei (Hong Kong's second richest individual).¹⁹¹ Their holdings also control the principal companies in telecommunications, energy, and retail, including supermarkets and pharmacies.¹⁹² As a consequence, several concentrated, duopolistic market structures exist and complaints evidence occurrences of potentially abusive conduct.

Enquiries suggest that the public expects the HKCC to focus on targeting the behavior of these local tycoons.¹⁹³ 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

187. Telecommunications Ordinance, (2000) Cap. 106, §§ 7K, 7L (H.K.).

188. Broadcasting Ordinance, (2012) Cap. 562, §§ 13–14 (H.K.).

189. Mark Williams, *Seeds of its Own Destruction: Hong Kong's Dysfunctional Competition Policy*, 2006 J. BUS. L. 52–73.

190. See *Hong Kong's 50 Richest People: #1 Li Ka-Shing*, FORBES, <http://www.forbes.com/profile/li-ka-shing/> (last visited Feb. 12, 2017) [<https://perma.cc/8NPK-DERJ>] (archived Feb. 14, 2017).

191. See *Hong Kong's 50 Richest People: #2 Lee Shau Kee*, FORBES, <http://www.forbes.com/profile/lee-shau-kei/> (last visited Feb. 12, 2017) [<https://perma.cc/N3ET-6W2F>] (archived Feb. 14, 2017).

192. Jennifer Hughes, *Hong Kong's Tycoons Look to Shake Off a Tough Year*, FIN. TIMES (Jan. 4, 2015), <http://www.ft.com/cms/s/0/7f6d20e0-8989-11e4-ad5b-00144feabdc0.html#axzz4GAFR0eoa> (subscription required) [<https://perma.cc/2Y6N-9S2A>] (archived Mar. 28, 2017).

193. Thomas Cheng, *Trade Associations and Cartel Conduct under the New Hong Kong Competition Law Regime—An Enforcement Priority for the Competition Commission?*, in *CARTELS IN ASIA: LAW AND PRACTICE*, *supra* note 80, at 295.

of sophisticated economic theories.”¹⁹⁴ 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.¹⁹⁵ At the same time, local courts have not been particularly damning of collusion.¹⁹⁶

Markets prone to cartels display special characteristics which are not infrequent in Hong Kong.¹⁹⁷ In the absence of competition law, colluding rather than competing would seem like an attractive business prospect. To date, the HKCC’s actions against cartels have included the following: a preliminary investigation into the residential building and renovation maintenance market, which concluded with a report suggesting that bid-rigging practices were likely in place;¹⁹⁸ 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;¹⁹⁹ a call to rectify the codes of conduct of the Hong Kong Institute of Architects and the Hong Kong Institute of Planners to remove all restrictions on the freedom of the associations’ members to set their own fees and take on clients;²⁰⁰ and an investigation into the alleged bid-rigging practices of five information society companies, which has culminated with the first ever proceedings brought by the HKCC before the HKCT.²⁰¹ Whether any leniency applications have been filed in these or other

194. *Id.*

195. See Press Release, H.K. Competition Comm’n: Competition Commission Welcomes Quick Rectification by the Hong Kong Newspaper Hawker Association on Retail Price of Branded Cigarettes (May 31, 2016) [hereinafter HKCC: Competition Commission], https://www.compcomm.hk/en/about/public_notices/files/HKNHA_20160531_e.pdf [<https://perma.cc/C3SG-LGST>] (archived Feb. 14, 2017).

196. See *HKSAR v. Chan Wai Yip and Others*, [2008] H.K.C. 449, <https://www.hongkongcaselaw.com/tag/magistracy-appeal-no-449-of-2008/page/2/> [<https://perma.cc/Y3X3-Z53F>] (archived Feb. 14, 2017) (effectively ruling that bid-rigging was lawful).

197. See Marc Ivaldi et al., *The Economics of Tacit Collusion* (IDEI, Toulouse, Working Paper No. 186, 2003), http://idei.fr/sites/default/files/medias/doc/wp/2003/tacit_collusion.pdf [<https://perma.cc/6TXH-XUBL>] (archived Feb. 14, 2017) (describing the characteristics of markets prone to collusion).

198. H.K. COMPETITION COMM’N, REPORT ON STUDY INTO ASPECTS OF THE MARKET FOR RESIDENTIAL BUILDING RENOVATION AND MAINTENANCE (2016), https://www.compcomm.hk/en/media/press/files/Report_on_market_study.pdf [<https://perma.cc/F9TT-DAYH>] (archived Feb. 25, 2017).

199. HKCC: Competition Commission, *supra* note 195.

200. See Press Release, H.K. Competition Comm’n: Competition Commission Calls Upon Two Professional Associations to Rectify Practices Which Raise Competition Concerns (Nov. 28, 2016), https://www.compcomm.hk/en/media/press/files/20161128_Competition_Commission_calls_upon_two_professional_associations_EN.pdf [<https://perma.cc/X3BN-RY5K>] (archived Apr. 1, 2017).

201. See Press Release, H.K. Competition Comm’n: Competition Takes Bid-Rigging Case to Competition Tribunal (Mar. 23, 2017), https://www.compcomm.hk/en/media/press/files/20170323_Competition_Commission_takes_bid_rigging_case_to_Competition_Tribunal_e.pdf [<https://perma.cc/GK8B-7A2S>] (archived Apr. 1, 2017).

investigations is not known at the time of writing. 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.²⁰² The likely intention behind this tactic may be to create a strong fear of detection on potential cartelists in these industries, thus creating the natural incentive for firms to blow the whistle.

3. The 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 HKCO's First Conduct Rule (FCR),²⁰³ which is a prohibition of anticompetitive joint conduct that clearly echoes that of Article 101(1) of the TFEU. Leniency might also be used on "other anti-competitive practices that may contravene the First Conduct Rule [that are] used to give effect to the cartel conduct."²⁰⁴ Moreover, the HKCC leaves the door open for extending the policy to non-cartel conduct contrary to the HKCO, 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.²⁰⁵ Although leniency outside cartel investigations is not at all common, it is available—if rarely used—in some jurisdictions, such as China.²⁰⁶

Cartels are defined by the HKCC as "agreements between competitors to fix prices, to share markets, to restrict output or to rig bids."²⁰⁷ 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 HKCO²⁰⁸ and are contrary to the FCR. According to the *Guidelines on the FRC*, they are anticompetitive by object²⁰⁹ and, therefore, there will be no need to demonstrate the existence of anti-competitive effects.²¹⁰ Efficiency considerations under Schedule 1 of the HKCO are described as

202. Wils, *The Use of Leniency*, *supra* note 71.

203. HK Leniency Policy, *supra* note 179, ¶ 2.3.

204. *Id.* ¶ 2.5.

205. *Id.* at 1.

206. However, the new draft guidelines published in April 2016 suggest that leniency might be limited to cartel cases in a not too distant future.

207. H.K. COMPETITION COMM'N, GUIDELINE: FIRST CONDUCT RULE 15, ¶ 3.7 (July 27, 2015) [hereinafter *Guideline FCR*], https://www.compcomm.hk/en/legislation_guidance/guidance/first_conduct_rule/files/Guideline_The_First_Conduct_Rule_Eng.pdf [<https://perma.cc/B8WX-AML8>] (archived Feb. 14, 2017).

208. HKCO, *supra* note 178, § 2.

209. *Guideline FCR*, *supra* note 207, ¶ 3.7.

210. *Id.* ¶ 3.5.

“unlikely,”²¹¹ and the exclusion of agreements of lesser significance (somewhat similar to the European Union’s *De Minimis* approach) is expressly ruled out in the case of serious anticompetitive conduct.²¹²

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, however, 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.”²¹³ This is important given that the HKCO contains not only corporate but also individual sanctions, including director disqualification. Avoiding these penalties is likely to act as a crucial incentive for full cooperation.

4. The 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 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.²¹⁴

The cartel member benefitting from leniency will thus be spared a fine of up to 10 percent of the company’s Hong Kong turnover for each year of infringement, up to a maximum of three years.²¹⁵ Compared to the corporate financial penalties that may be imposed in other jurisdictions, those provided for in the HKCO seem rather modest. In the European Union, for instance, fines can be up to 10 percent of global turnover, and there is no limit on the number of years to which that is applied. Importantly however, leniency also affects director disqualification orders, as the HKCC vows not to seek the same when leniency has been granted.²¹⁶

211. *Id.* ¶ 4.4.

212. *Id.* ¶ 5.2.

213. HK Leniency Policy, *supra* note 179, at 1.

214. *Id.* § 1.3.

215. HKCO, *supra* note 178, § 93.

216. HK Leniency Policy, *supra* note 179, at 9 n.11.

Going back to the carrot-and-stick approach described in Part II,²¹⁷ the availability of reduced financial penalties creates a question of whether, under Hong Kong competition law, the stick is strong enough for the carrot to seem sufficiently enticing. Moreover, as in the United States and the European Union, leniency does not extend to civil damages claims stemming from follow-on actions before the Tribunal.²¹⁸ Legal practitioners have noted that “[a] successful leniency application may, in fact, expose the applicant to follow-on actions,”²¹⁹ further obscuring the advantages of self-reporting under Hong Kong law. Furthermore, the policy gives the HKCC considerable discretion to terminate the leniency agreement.²²⁰ 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 a fear of self-reporting.

Similar to the U.S. system, the Hong Kong system grants only the first applicant leniency, in the form of full immunity from fines.²²¹ There are no reductions in the penalties for cartelists who come in second in the race to report. Still, some benefits are afforded to those who do not qualify for full immunity but who are nonetheless willing to cooperate with the investigation.²²² Such cooperation will be at the undertaking’s “own cost,”²²³ and its value will be assessed according to the parameters laid down in section 4.4 of the HK Leniency Policy. The parameters include “approach[ing] the Commission in a timely manner seeking to cooperate” and providing “significant evidence regarding the cartel conduct.”²²⁴ 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.²²⁵ 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.²²⁶

With regard to confidentiality, section 5 of the HK Leniency 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

217. See *supra* Section II.C.

218. HK Leniency Policy, *supra* note 179, ¶1.7.

219. Neil Carabine et al., *Hong Kong Competition Commission’s Enforcement and Leniency Policies*, KING & WOOD MALLESONS (Dec. 18, 2015), <http://www.kwm.com/en/hk/knowledge/insights/hk-compcomm-enforcement-and-leniency-policies-20151218> [<https://perma.cc/6VBL-VUZM>] (archived Feb. 14, 2017).

220. HK Leniency Policy, *supra* note 179, § 3.

221. *Id.* ¶ 2.1(c).

222. *Id.* at 4.

223. *Id.* § 4.1.

224. *Id.*

225. *Id.* § 4.2.

226. *Id.* § 4.5.

general confidentiality requirements of section 125 of the HKCO. 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.”²²⁷ Importantly, although the policy refers to the Commission’s own obligation “to preserve the confidentiality of any confidential information,”²²⁸ the possibility of releasing the whistleblowers’ self-incriminating leniency materials to other antitrust authorities and injured parties is not only not ruled out, but is actually presented as a possibility. In line with section 126 of the HKCO, the Leniency Policy states that the HKCC “may disclose confidential information with lawful authority,”²²⁹ even if it pledges to use its “best endeavors” to protect confidential information and the leniency agreement.²³⁰

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*.²³¹ 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.²³² It goes on to list several circumstances under which the information may be disclosed, including the following: where necessary for the performance of the Commission’s functions, under court order, and in cooperation with other competition authorities.²³³ The last scenario might seriously jeopardize the cartelist’s willingness to come forward, as it could facilitate the imposition of tough penalties and the pursuit of injury claims in other jurisdictions.

5. The 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 representative can inquire, without revealing its identity, whether there is a marker available for a particular cartel. However, applications themselves cannot be made anonymously.²³⁴ To be granted a marker, the information provided must be at least “sufficient . . . to identify the conduct” and should include “the identity

227. *Id.* § 5.1.

228. *Id.* § 5.5.

229. *Id.*

230. HK Leniency Policy, *supra* note 179, ¶ 5.6.

231. *Id.* ¶ 5.5 (citing H.K. COMPETITION COMM’N, GUIDELINE ON INVESTIGATIONS (July 27, 2015), https://www.compcomm.hk/en/legislation_guidance/guidance/investigations/files/Guideline_Investigations_Eng.pdf [<https://perma.cc/82SG-3ETS>] (archived Feb. 4, 2017) [hereinafter *Guideline on Investigations*]).

232. *Guideline on Investigations*, *supra* note 231, ¶ 6.4.

233. *Id.* ¶¶ 6.9–.16.

234. HK Leniency Policy, *supra* note 179, ¶ 2.7.

of the undertaking applying for the marker, information on the nature of the cartel . . . the main participants . . . and the caller's contact details." 235 This part of the application takes place over the telephone.²³⁶ 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 precluded. If the Commission decides that leniency is allowable, the undertaking with the highest-ranking marker will then be invited to submit a full application.²³⁷ Other applicants will also be notified that they were not the first to come forward and will be invited to consider cooperating in hopes of more benevolent treatment if sanctions are finally imposed.²³⁸

Once an undertaking has been invited to apply for leniency, it must make its application through 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."²³⁹ The proffer may be made orally or in writing.²⁴⁰ 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."²⁴¹

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.²⁴² This formality, which might be of concern to potential informants—particularly in light of the ambiguous confidentiality guarantees described above²⁴³—is in part a 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 that imposes fines for anticompetitive 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 that the Tribunal not punish the informant. Once the agreement is finalized, the grantee is obliged to "provide the Commission with all non-privileged information and evidence in

235. *Id.* ¶ 2.8.

236. *Id.* ¶ 2.11.

237. *Id.* ¶ 2.12, 2.14.

238. *Id.* ¶ 2.17, 4.2.

239. *Id.* ¶ 2.18.

240. *Id.* ¶ 2.22.

241. *Id.* ¶ 2.21.

242. *Id.* ¶ 2.1 (e).

243. *See id.* ¶ 2.3 ("The Leniency Policy for Undertakings Engaged in Cartel Conduct applies only to cartel conduct in contravention of the First Conduct Rule.").

respect of the cartel conduct without delay.”²⁴⁴ Any breach of the agreement could lead to the termination of the agreement on the part of the HKCC, which has the right to revoke leniency under section 81 of the HKCO.²⁴⁵

V. LENIENCY PROGRAMS IN NEW ANTITRUST JURISDICTIONS: AN ASSESSMENT

This Article has carefully explored the international principles of leniency in antitrust, the experiences of the United States and the European Union, and the specific application of leniency in Hong Kong, one of the newest leniency policies in the world. It is now possible to conduct an assessment of how the traditional challenges of leniency manifest in young antitrust regimes and the ways in which such obstacles may be addressed. Part II established, with the support of an extensive literature review, that leniency may effectively deter cartel activity. However, the 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.²⁴⁶ The principal external and internal hurdles affecting new leniency programs are explored in this Part.

A. *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 available. However, as the U.S. experience reveals, the first leniency applications may not be filed for some time, as cartelists will want to wait and see how others are treated to ensure that the HKCC will honor its leniency promise.²⁴⁷ Whereas positive rewards are also lacking in the E.U. and U.S. regimes, in new jurisdictions this absence may be more problematic. As seen in Part II, the incentive of leniency is unavoidably modulated by the punishment that may be escaped by resorting to it.²⁴⁸ Regimes that only contemplate limited financial penalties, such as the ones available under the HKCO, call into question the attractiveness of the “carrot.” These low fines, coupled with the fact that, in young regimes, cartels tend to be entrenched in local culture²⁴⁹ and that there is more

244. *Id.* ¶ 2.27.

245. *Id.* ¶ 2.30.

246. See *supra* subsections II.C.1–2.

247. See *supra* Section III.A.

248. Spagnolo, *Divide et Impera*, *supra* note 23, at 4–5.

249. Bryane Michael, *Hong Kong Needs a Whistle-blower Law for Better Governance and Business Practices, Researcher Says*, SOUTH CHINA MORNING POST (Aug. 11, 2015), <http://www.scmp.com/news/hong-kong/law-crime/article/1848274/hong->

fear of potential reprisal against those who report,²⁵⁰ indicate that it may well take time and effort for leniency programs to bear fruit where there is no supplementary incentive of positive rewards.

B. Prize for Second Best

Leniency in new regimes tends to be limited to the first to report. As previously discussed, the decision to restrict leniency to the first applicant is backed by the findings of 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 addressed by allowing for the possibility of affording more beneficial treatment to companies who do not qualify for leniency but do offer their cooperation on an *ad hoc* basis (similar to plea agreements into which the DOJ might enter).²⁵¹ 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.

C. Low Financial Penalties and Damages: Too Severe a Stick?

Another fundamental question relating to leniency is whether, given the lack of protection from follow-on damages 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,²⁵² the fine imposed on Sotheby's was \$45 million, but damages amounted to \$256 million, which would have left the company bankrupt had it not been for its former CEO paying part of this sum out of his own pocket. And, in the E.U. context, a 2014 leniency beneficiary, Lufthansa, was sued for €1.76 billion by Deutsche Bahn for the damages suffered as a consequence of the former's participation in an air freight cartel.²⁵³ To make matters worse, the duty to cooperate in the investigation bears elevated legal and administrative fees, which are not covered by leniency.

kong-needs-whistle-blower-law-better-governance-and [https://perma.cc/CKH5-UFP4] (archived Feb. 4, 2017).

250. Johan Nylander, *Why Hong Kong Needs a Whistleblowing Policy*, FORBES (Aug. 14, 2015), <http://www.forbes.com/sites/jnylander/2015/08/14/why-hong-kong-needs-a-whistleblowing-policy/#218c460f71f5> [https://perma.cc/F6E6-CX79] (archived Feb. 14, 2017).

251. See *supra* subsection III.A.C.

252. See *supra* Section III.B.

253. *Deutsche Bahn Sues Airlines Over Price-fixing*, DEUTSCHE WELLE (Jan. 12, 2014), <http://www.dw.com/en/deutsche-bahn-sues-airlines-over-price-fixing/a-18103348> [https://perma.cc/B7M8-EYPP] (archived Feb. 7, 2017). The case was eventually settled out of court.

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 reporting is that over 98 percent of businesses in Hong Kong are small- or medium-sized enterprises (SMEs).²⁵⁴ If they are engaged in cartels, fines on local turnover would have a much more significant impact on them than they would on larger, multinational corporations that 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 on international cartels might be secondary and complementary to that of experienced leniency policies, they may still be 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 breaking up cartels; it also increases 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 in other parts of the world. 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.

D. *Enhancing Cartel Detection Risk through Non-Leniency Tools*

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. As in other young antitrust regimes, in Hong Kong, until the recent introduction of the HKCO, the chances of getting away with collusion were 100 percent, as the conduct was not illegal. This makes it even more difficult to push companies to come forward

254. *Support and Consultation Centre for Small and Medium Enterprises (SMEs)*, GOV'T OF THE H.K. SPECIAL ADMIN. REGION, TRADE AND INDUSTRY DEPT., https://www.success.tid.gov.hk/english/aboutus/sme/service_detail_6863.html (last updated Sept. 30, 2016) [<https://perma.cc/44DH-26JQ>] (archived Feb. 5, 2017).

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 in sectors where collusion is likely to occur is commendable in this regard.²⁵⁵ The HKCC'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.²⁵⁶ Such techniques are advisable, wherever possible, in young antitrust jurisdictions.

E. *The Boundaries of Agency Discretion*

This analysis of the HK Leniency Policy illustrates 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 in the termination of leniency agreements. In the negotiation stage, for instance, a marker can only be granted if the Commission determines that the information provided is "sufficient."²⁵⁷ 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,²⁵⁸ but the actions that are considered coercion are not detailed.

The Hong Kong Competition Association criticized this ambiguity in its submissions on the draft leniency policy and asked the HKCC to come up with a precise set of criteria similar to that available in the United Kingdom.²⁵⁹ As for termination, there is little clarity as to the circumstances under which the HKCC might decide to end an 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 . . ."²⁶⁰ The term "reasonable grounds" in this context grants the HKCC very broad powers, at the expense of predictability and transparency. While unnecessary discretion and

255. See *supra* subsection IV.B.3

256. Companies can be expected to base their decisions on the basis on the risks they perceive, rather than on thorough cost-benefit analyses. See Wils, *The Use of Leniency*, *supra* note 71, at 25–26.

257. HK Leniency Policy, *supra* note 179, ¶ 2.8.

258. *Id.* ¶ 2.26 (b).

259. HONG KONG COMPETITION ASSOCIATION, COMMENTS ON THE DRAFT LENIENCY POLICY, https://www.compcomm.hk/en/enforcement/consultations/past_consultations/files/S16_Hong_Kong_Competition_Association.pdf (last visited Feb. 5, 2017) [<https://perma.cc/R5R7-YJKP>] (archived Feb. 5, 2017).

260. HK Leniency Policy, *supra* note 179, ¶ 3.1.

uncertainty should be avoided, such vagueness is not uncommon at this introductory stage. Practice should progressively contribute towards providing greater clarity.

F. The Protection of Confidentiality: The Boundaries of Transparency and Predictability

Requiring a written confession will be of concern for leniency applicants, given the broadly construed scenarios under which disclosure of confidential information may take place. 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 European Union, the Court of Justice in *Pfleiderer v. Bundeskartellamt* avoided providing clarification on the issue, and left it up to the national courts to conduct a “weighing exercise” of the interests in favor of disclosure versus the protection of confidentiality on a case-by-case basis.²⁶¹ Subsequently, *Bundeswettbewerbshörde v. Donau Chemie AG* reiterated the inadequacy of rigid rules.²⁶² 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.”²⁶³ Requests should be “assessed on a case-by-case basis, taking into account all the relevant factors in the case.”²⁶⁴ With regard to disclosure requests from other jurisdictions, it is understandable that the HKCC would want to leave the door open to honoring these, so as to comply with bilateral cooperation agreements with other jurisdictions. However, the “stick” faced by leniency applicants would be so severe if they could be sued in other jurisdictions on the basis of the leniency agreements entered into in Hong Kong that it could well eliminate the entire appeal of the leniency “carrot.”

Despite these criticisms, the existing uncertainty can be defended along at least three lines. First, at a time when the law has only just been fully implemented and only one case has been brought before the HKCT, ambiguity is to be expected. The HKCC could not, and ought not, close off room for interpretation in the policy document, as it would imply an extra-limitation on its policy-drafting powers. The role of the Competition Tribunal in the clarification of some of the pending issues will be crucial, and the court should have room to ultimately decide whether leniency should be granted. Second, since most of the undertakings in Hong Kong are small and medium-sized enterprises (SMEs), if they do not operate internationally, there is less reason to

261. Case C-360/09, *Pfleiderer AG v. Bundeskartellamt*, 2011 E.C.R. I-5161.

262. Case C-536/11, *Bundeswettbewerbshörde v. Donau Chemie AG*, 2013 5 E.C.R. I-366.

263. *Id.*

264. *Id.*

fear that disclosure could lead to massive damages claims in other jurisdictions. Third, uncertainty might be a goal in itself. One should not forget that leniency applicants are outlaws, engaged in an activity that is highly detrimental to 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.”²⁶⁵ 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.²⁶⁶

VI. CONCLUSION

While the antitrust trendsetters have principally molded their legislation into shape through a history of trial-and-error, antitrust trend followers are able to take advantage of the catalog of good (and bad) antitrust practices that they have at their disposal because of the experience of established jurisdictions. Leniency policies constitute a vital part of that catalog. They can act as successful weapons of mass cartel dissuasion where there are established effects on both detection and deterrence of 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, leniency policies result in an increase in the financial resources of antitrust authorities that is very enticing for newly established competition agencies. It comes as no surprise then that leniency is a tool that young regimes crave and are implementing at a rapid 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,²⁶⁷ of which leniency is a vital component. Efficient policy design is a challenge in every situation, but particularly in jurisdictions with a limited competition culture. Borrowing from international experience helps these new jurisdictions to cut corners and to achieve admirable results at a faster pace, but young antitrust regimes exhibit specific problems that must be taken

265. Case T-53/03, *BPB plc v. Commission* 2008 E.C.R. II-254.

266. See Stephan & Nikpay, *supra* note 28, at 7–8 (describing how the European Commission “deliberately maintains a policy of uncertainty when it comes to the calculation of fines”).

267. Margaret C. Levenstein & Valerie Y. Suslow, *Breaking Up Is Hard to Do: Determinants of Cartel Duration*, 54 J. L. & ECON. 455, 484 (2011).

into account in the design and application of each individual leniency program.

In particular, this Article makes three principal proposals. First, 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 follow-on damages claims, and enhance the attractiveness of leniency in regimes that do not envisage particularly stiff penalties against collusion. Second, while transparency and predictability remain essential, some uncertainty is unavoidable at the 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. Third, 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 Ann O'Brien notes, transparency is "a journey, not a destination," something to strive towards in daily decision making that requires the passage of time.²⁶⁸

These proposals are by no means a panacea for all ills. Leniency should be viewed as an investigatory instrument in the hands of the enforcer as part of a greater strategy to bring down cartels. To ensure its maximum potential, it requires the support of 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, or wider reporting strategies such as the EU's Anonymous Whistleblower Tool. 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 these proposals 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 Article, 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 operating across jurisdictions cannot expect to continue to take advantage of disparate antitrust standards across jurisdictions to

268. O'Brien, *supra* note 39, at 24.

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.
