RECONDITIONING CORPORATE LENIENCY: THE POSSIBILITY OF MAKING COMPLIANCE PROGRAMS A CONDITION OF IMMUNITY

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I Introduction – essential conditions of effective corporate leniency policies and neglect of compliance programs

Corporations are the prime target of offers of leniency in anti-cartel enforcement. However, under current corporate leniency policies an applicant is not required to have a compliance program, existing or future. Corporations applying for leniency are treated as black boxes the inner controls of which are spared from examination.[1] Within the black boxes, antitrust compliance programs may or may not be deployed to guard against repetition of cartel conduct or ignorance or evasion of a leniency policy.

Conventionally, there are said to be three essential conditions of 'effective' leniency policies; as formulated by the International Competition Network (ICN), those conditions are:[2]

- *High risk of detection* – agencies must adopt a strong enforcement program to detect cartels. [Competition authorities] have to commit to vigorously investigate cartels using robust investigatory powers and to ensure that they are taking action against infringements. Those participating in cartels must perceive that there is a real risk of detection and that, in the absence of a leniency application, subsequent enforcement action will necessarily follow. This will encourage them to come forward before they are caught. In addition, there are .. further benefits if a leniency policy can create a race between the members of the cartel to be "first in the door", or even between the company and an employee.
- *Significant sanctions* – the sanctions imposed on cartel participants who are not part of the leniency [policy] must be significant. If sanctions are inadequate, cartel participants will not come forward since the [incentives to apply for leniency are reduced or eliminated by the benefits of entering into or staying in the cartel]. Essentially, the value of the cartel for cartel participants should not be greater than the cost of getting caught.
- *Transparency and certainty* – there must be transparency and certainty in the operation of a leniency [policy]. [Competition authorities] need to build up the trust of applicants and their legal representatives [through] a consistent application of the [policy]. An applicant needs to be able to predict with a high degree of certainty how

* I thank Caron Beaton-Wells for comments; the usual disclaimers apply.

1 On the treatment of corporations as black boxes in externally imposed legal sanctions, see CD Stone, *Where the Law Ends* (New York, Harper & Row, 1975) ch. 6.

2 International Competition Network, *Anti-Cartel Enforcement Manual* (2009) section 2.3. See also SD Hammond, 'Cornerstones of an Effective Leniency Program' (Nov. 22-23 2004), pp. 4-5, available at: http://www.justice.gov/atr/public/speeches/206611.pdf.

> it will be treated if it reports the conduct and what the consequences will be if it does not come forward. This is why [authorities] ensure that their leniency policies are clear, comprehensive, regularly updated and well publicized.

This chapter argues that there should be a fourth essential condition, namely that leniency not be granted to a corporation unless it undertakes to have an adequate compliance program in place. Part II surveys the limited extent to which compliance programs are recognised in current corporate leniency policies. Part III highlights the laxity of corporate leniency policies that do not require an adequate compliance program to be in place. Part IV criticises the apparent influence of theories of optimal incentivisation of corporate action on corporate leniency policies and their neglect of compliance programs. Part V discusses the feasibility of making an adequate compliance program a requirement of corporate leniency. The main points are summarised in the Conclusion (Part VI).

In this chapter the term 'leniency policy' means an enforcement agency policy that seeks to induce disclosure of cartel conduct by means of an offer of *immunity* from criminal liability or civil penalty.[3] Leniency in the sense of reduction of sentence or mitigation of penalty by reason of cooperation with agency competition authority or remedial action is not the focus of this commentary.[4]

The term 'internal controls' refers generally to any policy, procedure, process or incentive used as a means of guarding against breaches of the law. 'Compliance program' refers to a set of internal controls used to promote or facilitate compliance with the law or a legally enforcable obligation.

II Limited extent to which compliance programs are addressed in current corporate leniency policies

Current corporate leniency policies address compliance programs only to a limited extent. Compliance programs are commended by competition authorities in some jurisdictions on the basis that they help to prevent or detect breaches of the law and, in the event of cartel conduct, may increase the chance of early detection and the ability to be the first to make an application for leniency. However, present leniency policies do not make corporate leniency conditional on an adequate compliance program being put in place.

Consider first the US Department of Justice (DOJ) *Corporate Leniency Policy* (1993).[5] This policy specifies conditions of leniency that do not include expected or required corporate internal controls.[6] Nor are compliance programs mentioned in the 'Model Corporate Conditional

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3 The use of the term 'leniency' to refer to immunity is a misnomer but widely used as a result of its usage by the US DOJ.

4 On that topic see eg C Beaton-Wells and B Fisse, *Australian Cartel Regulation: Law, Policy and Practice in an International Context* (Cambridge University Press, Melbourne, 2011) section 10.2.2.

5 Available at: http://www.justice.gov/atr/public/guidelines/0091.htm.

6 See section B of the *Corporate Leniency Policy*.

Leniency Letter' (2008)[7] or in the 'Frequently Asked Questions' published on the DOJ's website.[8] There is no official DOJ statement on antitrust compliance programs but recent papers by DOJ representatives are instructive, and appear to deviate from previous DOJ sttatements in that the latter have generally reflected a refusal to acknowledge the value of compliance programs, or their potentially complementary relationship with leniency.[9] If a violation does occur, 'an effective compliance program increases the chances of early internal detection and thus of being the first company to self-report and qualify for leniency under the Division's leniency program.'[10]

The EU *Commission notice on immunity from fines and reduction of fines in cartel cases* (2002)[11] does not make leniency conditional on having a compliance program. Nor is the relationship between leniency and corporate internal controls addressed in the Commission's statement on 'Leniency' (2013)[12] or the brochure 'The leniency programme' (2012).[13] However, compliance programs are recommended in the Commission's brochure 'Compliance Matters' (2011)[14] and are encouraged by pointing out that the detection mechanisms provided by an effective compliance strategy can help 'to get the best out of the Commission's leniency programme'.[15]

The Bundeskartellamt *Leniency Programme* (2006)[16] does not make a compliance program a condition of leniency. Nor does the Bundeskartellamt have a policy statement on compliance programs. However, in an OECD Policy Roundtable the agency has said that compliance programs 'should contain the same elements as the policies of the competition authorities when promoting compliance with competition law: guidance, detection and sanctions' and that these elements 'can be tailored by the companies to their particular industry and their own specific

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7 One condition of the *Corporate Leniency Policy* is that the applicant took prompt and effective action to end its involvement in the cartel activity when its discovered its involvement in that activity, but adoption or revision of a compliance program goes beyond what is required by this condition.

8 See SD Hammond & BA Barnett, 'Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters' (Nov. 18, 2008), available at: http://www.justice.gov/atr/public/criminal/239583.htm.

9 See B Baer, 'Prosecuting Antitrust Crimes' (Sept. 10 2014), available at: http://www.justice.gov/atr/public/speeches/308499.pdf; and B Snyder, 'Compliance is a Culture, Not Just a Policy' (Sept. 9 2014), available at: http://www.justice.gov/atr/public/speeches/308494.pdf.

10 See OECD, Directorate for Financial and Enterprise Affairs Competition Committee, *Roundtable on Promoting Compliance with Competition Law*, Note by the Delegation of the United States (2011) p. 193 at p. 198, available at: http://www.oecd.org/daf/competition/Promotingcompliancewithcompetitionlaw2011.pdf.

11 Official Journal of the European Union, 8.12.2006, C 298/17, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006XC1208(04)&from=EN.

12 Available at: http://ec.europa.eu/competition/cartels/leniency/leniency.html.

13 Available at: http://bookshop.europa.eu/en/the-european-commission-leniency-programme-pbKD3211988/.

14 Available at: http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en_GB/-/EUR/ViewPublication-Start?PublicationKey=KD3211985.

15 At p. 19.

16 Available at: http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitlinien/Notice%20-%20Leniency%20Guidelines.pdf;jsessionid=0845D3999C857B62251282A64D767EA0.1_cid362?__blob=publicationFile&v=5.

needs'.[17] If effective, such programs, 'will at least help to uncover the infringement faster than the competitors'.[18]

The UK Competition and Markets Authority (CMA) has adopted the OFT guidance document, *Applications for leniency and no-action in cartel cases: OFT's detailed guidance on the principles and process* (July 2013)[19] but the guidance does not extend to corporate internal controls. However, the connection with compliance programs is discussed in the OFT guidance document, *How your business can achieve compliance with competition law* (June 2011).[20] This document notes that one potential advantage of an 'effective competition law compliance culture' is:

> 'the early detection and termination of any infringements that have been committed by the business allowing, in appropriate cases, immunity or leniency applications to be made, potentially helping to reduce or eliminate financial penalties'.[21]

The OFT guidance document also suggests that, as part of competition law compliance training with respect to potential cartel risks, attention be drawn to the fact and significance of immunity and leniency programs:[22]

> 'This can have the benefit of illustrating to employees that disclosing the existence of a cartel is in the business's best interests. Doing so can also convey the message that, owing to the benefits conferred by immunity and leniency programmes, the existence of a cartel may well come to the attention of competition authorities such as the OFT and the personal and business consequences of not being covered by an immunity or leniency agreement in such a situation are very significant.'

The Canadian Competition Bureau's *Leniency Program* (2010)[23] also does not discuss corporate internal controls. However, the Commission's bulletin on compliance programs, *Corporate Compliance Programs* (2010),[24] includes a section on 'Immunity from Prosecution and Leniency' where the following linkage is made:[25]

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17 OECD, Directorate for Financial and Enterprise Affairs Competition Committee, *Roundtable on Promoting Compliance with Competition Law*, Note by the Delegation of Germany (2011) p. 107 at p. 111, available at: http://www.oecd.org/daf/competition/Promotingcompliancewithcompetitionlaw2011.pdf.

18 Id. at p. 112.

19 Office of Fair Trading, OFT 1495, available at: https://www.gov.uk/government/publications/leniency-and-no-action-applications-in-cartel-cases.

20 Office of Fair Trading, OFT 1341, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284402/oft1341.pdf. OFT 1341 has been adopted by the CMA Board.

21 Id. at p. 6.

22 Id. at p. 23.

23 Available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/LeniencyProgram-sept-2010-e.pdf/$FILE/LeniencyProgram-sept-2010-e.pdf.

24 Available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CorporateCompliancePrograms-sept-2010-e.pdf/$FILE/CorporateCompliancePrograms-sept-2010-e.pdf.

25 Id. at pp. 14-15.

'... the timing of a request for lenient treatment is important. A program may assist a company in the early detection of a violation of the criminal provisions of the Competition Act, and thereby allow it to benefit from the advantages of being either the first-in immunity applicant or receiving a greater degree of leniency.

A company, after making an application for immunity or leniency, may choose to either implement a new corporate compliance program or make adjustments to a pre-existing program to better enable it to comply with the provisions of the Competition Act. This will assist in ensuring that it adopts policies and practices that conform with the law in the future.

The Bureau will strongly recommend that an immunity or a leniency applicant implement a credible and effective program using this Bulletin as a guide.'

A recent consultation revised draft of this bulletin[26] states that the Bureau 'may encourage' the Public Prosecution Service of Canada 'to require that an applicant implement a credible and effective program using this Bulletin as a guide in conjunction with any grant of immunity or leniency.'[27]

In Australia, the *ACCC immunity and cooperation policy for cartel conduct* (2014)[28] does not require a compliance program as a condition of immunity.[29] The *ACCC compliance and enforcement policy* (2014)[30] states that the Commission's strategy includes 'encouraging compliance with the law by educating and informing consumers and businesses about their rights and responsibilities under the Act'. Under the *ACCC immunity and cooperation policy for cartel conduct* 'a corporate culture conducive to compliance' is a factor relevant to penalty

26 *Corporate Compliance Programs* (consultation draft), available at: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Corporate-Compliance-Programs-2014-09-18-e.pdf/$file/Corporate-Compliance-Programs-2014-09-18-e.pdf.

27 Id. at p. 20.

28 This policy document was revised in September 1014 and is available at: https://www.accc.gov.au/system/files/884_ACCC%20immunity%20and%20cooperation%20policy%20for%20cartel%20conduct_FA.pdf. See also Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth* (2014) Annexure B, available at: http://www.cdpp.gov.au/wp-content/uploads/Prosecution-Policy-of-the-Commonwealth.pdf.

29 ACCC interviewees in a recent research inquiry appeared to suggest that adding a compliance program condition would be futile given that most of the corporate immunity applicants to date already had compliance programs in place at the time of the conduct: C Beaton-Wells, 'Immunity for cartel conduct: revolution or religion? An Australian case study' (2014) 2 *Journal of Antitrust Enforcement* 126 at p. 161. As Beaton-Wells points out, however, even if that is so, the absence of such a condition is still highly questionable because 'a condition that required the applicant to update, revise or reinforce its program would readily address such situations and serve the overall policy objective of encouraging the effective use of compliance systems'. The ACCC interviewees, also expressed some reservations about adding a potential disincentive to immunity applications and pointed out that there is or should not be a 'one size fits all' approach to compliance programs – 'a program for a large company operating in many markets in more than one country would have to differ in scale and scope to that required, if one was required at all, for a sole trader or small business'. However, as Beaton-Wells responds, there is no reason why a compliance condition could not be tailored to accommodate such differences.

30 Available at: https://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy.

agreements.[31] The *ACCC cooperation policy for enforcement matters* (2002)[32] states that leniency (in the sense of mitigation) may be given to a corporation if it 'is prepared to take immediate steps to rectify the situation and ensure that it does not happen again, undertakes to do so and complies with the undertaking',[33] but it appears that, in practice, the ACCC has not required the taking of rectification steps as a condition of leniency and, in any event, that policy no longer applies to cartel conduct.[34] There is no current ACCC guidance document on antitrust compliance programs.[35]

In Australia, Caron Beaton-Wells has recommended that the ACCC immunity policy be revised to include compliance program instigation or revision as a condition of corporate leniency: [36]

Making the establishment or refurbishment of a compliance programme a condition of eligibility .. seems an obvious common sense measure that would bolster the ACCC's efforts to inculcate a greater 'culture' of compliance in the Australian business community.Leniency policies in other jurisdictions surveyed do not make a compliance program a condition of corporate leniency.[37] Those jurisdictions include France, Italy, Spain, Sweden, Japan, Korea, Brazil, Argentina, Chile, South Africa and New Zealand. A survey in 2012 of leniency policies in many countries asked whether a compliance program was a condition of leniency but received null responses to that question.[38]

In China provision is made for corporate leniency in the Anti-Monopoly Law and in the rules adopted by the National Development and Reform Commission (NDRC) and the State Administration for Industry and Commerce (SAIC).[39] Leniency is discretionary and, given the breadth of the discretion conferred, it is conceivable that a compliance program could be made a condition of the favourable exercise of that discretion.

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31 Id. at [78].

32 Available at: https://www.accc.gov.au/system/files/ACCC%20cooperation%20policy%20July%202002.pdf.

33 Id. at p. 3.

34 It has been superceded by the *ACCC immunity and cooperation policy for cartel conduct*, which does not refer to rectification measures (see [8]).

35 A former ACCC guidance document, 'Corporate Trade Practices Programs' (2005) (now obsolete), did not refer to the implications of the ACCC immunity policy.

36 'Immunity for cartel conduct: revolution or religion? An Australian case study' at p. 168.

37 See S Mobley & R Denton, *Global Cartels Handbook: Leniency, Policies and Procedure* (Oxford University Press; 2012).

38 T Banks & N JalaBert-Doury, 'Best practices for compliance programs: Results of an international survey' Concurrences N° 2-2012 , available at: http://www.scharfbanks.com/pav/docs/speaking-publications/Concurrences_2-2012_Tendances_Compliance.pdf. The question put was: 'If a leniency program exists in your jurisdiction, please explain whether adopting a compliance program is a condition to obtain immunity/finereductions?'

39 See M Faure & X Zhang, *Chinese Anti-Monopoly Law* (Edward Elgar Publishing, 2013) pp. 154 ff; Jones Day, 'China's New Leniency Procedure in Cartel Investigations' (2011), available at: http://www.jonesday.com/china_new_leniency_procedure/.

The ICN *Anti-Cartel Enforcement Manual* guidance on drafting and implementing an effective leniency policy[40] and the European Competition Network *Leniency Model* (2012)[41] do not refer to a compliance program a condition of leniency. By contrast, the Antitrust & Competition Law Compliance Forum's *Model Agency Policy for Promoting Anti-Cartel Compliance Programs* (2012)[42] does; §1.4 of that Policy requires that, to be granted corporate leniency, an applicant 'must either have in existence an effective anti-cartel compliance program or agree to implement one'.

The OECD *Roundtable on Promoting Compliance with Competition Law* (2011) barely mentions the issue.[43]

III Laxity of not requiring an adequate compliance program to be in place as a condition of corporate leniency

Current corporate leniency policies, as surveyed in Part II, do not require a corporate leniency applicant to do anything to establish a compliance program or affirm or revise its existing compliance program or other internal controls. These policies are dedicated to the aims of detecting and deterring cartel conduct that is unlikely otherwise to be detected or deterred. Although the Canadian Competition Bureau will 'strongly recommend that an immunity or a leniency applicant implement a credible and effective program',[44] other enforcement agencies have not done likewise. Moreover, a recommendation that an effective compliance program be implemented lacks the teeth of a leniency condition or an enforceable undertaking.

The absence of any requirement in current corporate leniency policies that an adequate compliance program will be in place is questionable given the resulting cracks in anti-cartel enforcement.

The first faultline is that a corporation that has failed to prevent the commission of cartel conduct is free to accept the risk of failing again without doing anything to reduce that risk. Even a corporation that has brazenly allowed or encouraged employees to engage in cartel conduct can qualify for immunity without taking precautions against future cartel conduct. The message sent to that corporation is that, although cartel conduct is serious unlawful, recovery does not require any effort to prevent recurrence. Moreover, the message sent to other corporations is that even

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40 International Competition Network, *Anti-Cartel Enforcement Manual* (2009) ch 2.

41 Available at: http://ec.europa.eu/competition/ecn/model_leniency_en.pdf.

42 Available at: http://www.compliance-network.com/resources/miscellaneous/model-policy/. The Antitrust & Competition Law Compliance Forum is a non-profit network of individuals 'dedicated to the global advancement of highly effective anti-cartel compliance programs, as a means to prevent and detect cartel behavior'.

43 OECD, Directorate for Financial and Enterprise Affairs Competition Committee, *Roundtable on Promoting Compliance with Competition Law* (2011) at p. 15, available at: http://www.oecd.org/daf/competition/Promotingcompliancewithcompetitionlaw2011.pdf. The paper at p. 327, A Riley & M Bloom, 'Antitrust Compliance Programmes – Can Companies and Antitrust Agencies Do More?' almost studiously avoids the question.

44 *Compliance Programs*, at pp. 14-15.

exemplary efforts to take compliance seriously may be trumped by a rogue corporation that has put its effort into being the first to file a leniency application.[45] Consider this scenario:

> XCO and YCO engaged in price fixing. XCO did not have a compliance program. YCO had a program that failed on this occasion despite YCO's best endeavours. XCO made a leniency application one hour before YCO did and YCO was the second marker-holder. XCO agreed to cooperate with the investigation of the cartel but was too busy to discuss the possible introduction of a compliance program, and was not required to undertake to introduce a program for the purposes of gaining leniency. XCO qualified for leniency despite its non-existent compliance efforts. By contrast, YCO improved its program and planned to keep on implementing and continuously improving it. at the time it applied for leniency and after the test at the one year milestone. Yet YCO did not qualify for immunity despite its far superior compliance efforts, past and future.

While it is to be hoped that most corporations that discover their involvement in cartel conduct will respond by reviewing and strengthening their compliance controls as a matter of self-regulation, that may not occur.[46]

A successful corporate leniency applicant does need to conduct an internal investigation in order to cooperate with an investigation[47] and that investigation may have a salutary impact on attitudes towards compliance within the firm. However, compliance programs are not concerned only with the internal investigation of past conduct. They are also concerned with a range of controls (eg reporting procedures; employee incentives; compliance training) that are geared to preventing future unlawful conduct.

A second faultline is that it is possible for corporations to play the game of 'enter into cartel, get immunity' on more than one occasion. For example, it was reported in April 2014 that UBS AG may receive immunity in the EU from penalties for currency-rigging after it was the first to apply for leniency and despite the fact that it had previously received immunity from the European Commission in late 2013 for a similar case of collusive manipulation of benchmark interest rates.[48] Repeated 'enter into cartel, get immunity' games are possible given that almost all

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45 As satirised in J Murphy, 'Introducing the FAST RAT Program' (2011), available at: http://www.compliance-network.com/wp-content/uploads/2012/09/Fast-Rat-Booklet-copy-PDF.pdf.

46 See the discussion of recidivism in the articles referenced in Note 51 below.

47 This helps to overcome the disincentive to investigate discussed in J Arlen, 'Removing Prosecutors from the Boardroom: Limiting Prosecutorial Discretion to Impose Structural Reforms,' in AS Barkow & RE Barkow (eds), *Prosecutors in the Boardroom* (New York University Press, New York, 2011) p. 62 at p. 72. On the cooperation with an investigation required as a condition of leniency see the salutary reminders in Baer, 'Prosecuting Antitrust Crimes' at pp. 3-4.

48 G Sebag, 'UBS First to Report FX Rigging Shows EU Immunity Flaws', Bloomberg 2 April 2014, available at: http://www.bloomberg.com/news/2014-04-02/ubs-said-poised-to-receive-eu-immunity-in-currency-rigging-probe.html.

current leniency policies do not preclude leniency applications by recidivists.[49] This is a concern given that the incidence of cartel recidivism appears to be high.[50]

Thirdly, disregard of compliance programs in the context of leniency policies is difficult to reconcile with the prominence and perceived value of such programs elsewhere in the antitrust firmament. At least since the heavy electrical equipment conspiracies surfaced in the 1950s,[51] compliance programs have been adopted widely by corporations in practice and their worth has been advocated by numerous commentators and professional bodies.[52] An effective compliance program is relevant as a mitigating factor in sentencing under the US Sentencing Guidelines[53] but not to the exercise of discretion as to whether or not to prosecute an antitrust offence.[54] Moreover, the value of compliance programs has been endorsed at conferences by antitrust enforcement officers, as in the following attestation by a DOJ official:[55]

> '... A truly well-run compliance program should prevent a company from conspiring to fix prices, rig bids, or allocate markets. Effective compliance programs should prevent that crime from beginning or, at a minimum, detect it and stop it shortly after it starts.

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49 The Korean corporate leniency policy is an exception. A corporation is not allowed to receive immunity more than once in 5 years: Korean Fair Trading Commission, *Public Notification on Implementation of Leniency Program* (2012) Article 6-3, available at: http://eng.ftc.go.kr/bbs.do?command=getList&type_cd=62&pageId=0401. See further Beaton-Wells, 'Immunity policy for cartel conduct: revolution or religion? An Australian case –study' at p. 165 (previous policy had been seen as permitting unfair exploitation by large multinational companies operating in multiple markets and repeatedly applying for immunity, leaving domestic companies to 'cop the full brunt of penalties time after time').

50 See JM Connor, 'Recidivism Revealed: Private International Cartels 1990–2009' (2010) 6 *Competition Policy International* p. 101; WPJ Wils, 'Recidivism in EU Antitrust Enforcement: A Legal and Economic Analysis' (2012) 35 *World Competition* 5.

51 See RA Smith, *Corporations In Crisis* (Anchor Books, New York, 1966) chs. 5-6; G Geis, 'The Heavy Electrical Equipment Cases of 1961' in G Geis & R Meier, eds, *White Collar Crime* (Free Press, New York, 1977) 117-132; B Fisse & J Braithwaite, *The Impact of Publicity on Corporate Offenders* (State University of New York Press, 1983) ch. 16.

52 See eg International Chamber of Commerce, *The ICC Antitrust Compliance Toolkit* (2013), available at: http://www.iccwbo.org/advocacy-codes-and-rules/areas-of-work/competition/icc-antitrust-compliance-toolkit/; American Bar Association, *Antitrust Compliance: Perpsectives and Resources for Corporate Counselors* (ABA, Chicago, 2nd ed, 2010; J Murphy & W Kolasky; 'The Role of Anti-Cartel Compliance Programs In Preventing Cartel Behavior' (2012) (Spring) *Antitrust* 61; RC Marshall & LM Marx, 'Section 1 Compliance from an Economic Perspective' in N Charbit & E Ramundo, *William E Kovacic, An Antitrust Tribute, Liber Amicorum* (Institute of Competition Law, 2014) 293; DD Sokol, 'Cartels, Corporate Compliance and What Practitioners Really Think About Enforcement' (2012) 78 *Antitrust Law Journal* 201; R Abrantes-Metz & DD Sokol, 'Antitrust Corporate Governance and Compliance' (2013) available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2246564.

53 *US Sentencing Guidelines Manual* (2013) §8B2.1, §8C, available at: http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2013/manual-pdf/2013_Guidelines_Manual_Full.pdf. For Australia see Beaton-Wells & Fisse, *Australian Cartel Regulation*, at p. 500. Mitigation of penalty on the basis of effective compliance programs is proposed in Canada: *Corporate Compliance Programs* (consultation draft) at p. 20. Contrast the position in the EU where compliance programs are not relevant to the mitigation or aggravation of cartel fines; see J Faull & A Nikpay, *The EU Law of Competition* (Oxford University Press, Oxford, 2rd ed, 2014) sections 8.616, 8.658.

54 *United States Attorneys Manual* (2014) 9-28.400B, available at: http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm#9-28.400.

55 Snyder, 'Compliance is a Culture, Not Just a Policy' at pp. 1-2.

> Without question the best outcome for a company and its shareholders is to never be a subject of an international cartel investigation. And an effective compliance program has the potential to be a significant contributor to that end.
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> The risks of participating in a price-fixing cartel should be obvious: high fines for the company; significant jail time for executives; expensive attorneys' fees; substantial civil damages owed to customers; and exposure to further criminal investigations – not to mention the associated bad publicity and internal distraction from the actual business of the company. All these outcomes can be avoided if companies implement effective compliance programs. ...
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> In an ideal world, every company would have an effective compliance program, and all compliance programs would prevent cartel activity.'

Fourthly, compliance programs and leniency policies potentially reinforce each other.[56] Information communicated about leniency policies via compliance policies, procedures and training can:

- reinforce leniency policies by prompting employees to look out for and detect cartel conduct, and report detected cartel conduct to a manager who is authorised to make a leniency application; and
- reinforce compliance programs by highlighting how and why leniency policies increase the risk of detection of cartel conduct and elevate the danger of enforcement action.

Enforcement agencies often refer to these supporting roles of compliance programs. However, they neglect to explain why a corporate leniency applicant is free not to have a compliance program in place or to adopt a program that fails to convey the significance of corporate and individual leniency policies.

Fifthly, individual accountability is widely believed to be a necessary or at least highly desirable means of social control, including the control of cartel conduct.[57] Bill Baer, DOJ Assistant Attorney General, Antitrust Division, has emphasised the importance of internal individual accountability in the context of corporate plea agreements and the position of the Division towards corporations that want to plead guilty but avoid upholding individual accountability within their organisations:[58]

> Guilty companies sometimes want to continue to employ culpable senior executives who do not accept responsibility and are carved out of the corporate plea agreement, while at the same time arguing that their compliance programs are effective and their remediation

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56 Beaton-Wells, 'Immunity for cartel conduct: revolution or religion? An Australian case study' at pp. 159-160.

57 See generally B Fisse and J Braithwaite, *Corporations, Crime and Accountability* (Melbourne, Cambridge University Press, 1993).

58 Baer, 'Prosecuting Antitrust Crimes' at p. 8.

> efforts laudable. That creates an obvious tension. It is hard to imagine how companies can foster a corporate culture of compliance if they still employ individuals in positions with senior management and pricing responsibilities who have refused to accept responsibility for their crimes and who the companies know to be culpable. If any company continues to employ such individuals in positions of substantial authority; or in positions where they can continue to engage directly or indirectly in collusive conduct; or in positions where they supervise the company's compliance and remediation programs; or in positions where they supervise individuals who would be witnesses against them, we will have serious doubts about that company's commitment to implementing a new compliance program or invigorating an existing one. Indeed, the Sentencing Guidelines go so far as to suggest that companies that do so cannot be said to have an "effective" compliance program. In such cases, the division will consider seeking court-supervised probation as a means of assuring that the company devises and implements an effective compliance program. We reserve the right to insist on probation, including the use of monitors, if doing so is necessary to ensure an effective compliance program and to prevent recidivism.

That position contrasts starkly with that taken in the context of corporate leniency policies. In that context a successful applicant may abstain from taking internal disciplinary action against the employees who participated in the cartel conduct or failed to take reasonable steps to prevent that conduct. Moreover, the employees who participated in the cartel conduct are likely to receive derivative immunity from criminal liability or liability to civil penalties if immunity has been granted to the corporate employer.[59] The wisdom or otherwise of this approach is discussed in Part V Section D below.

A further faultline worth heeding is that compliance programs may be calculated to obstruct or circumvent leniency policies. Various techniques conceivably may be used, including the use of incentives designed to preserve the secrecy of cartel conduct and the development of methods for playing repeated 'enter cartel, get immunity' games. Should a blind eye be turned to the potential use of such techniques? The problem and how it might be kept under watch are discussed in Part V Section E below.

To conclude this Part, current corporate leniency policies are lax in the respects indicated above. The laxity seems remarkable. Is it justified? A possible theoretical justification is that economic theories of optimal incentivisation of corporate action do not indicate the need to address the presence or absence of a compliance program when determining the conditions of corporate leniency. However, as discussed in Part IV below, those theories are unrealistic and impractical. A possible practical justification is that it is unworkable to make corporate leniency subject to a condition requiring an adequate compliance program to be put in place. However, as discussed in Part V below, a workable approach is conceivable.

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59 In the case of second-in corporations, some leniency policies (eg the DOJ *Corporate Leniency Policy*) enable immunity to be granted to those employees who are not carved out as targets fro prosecution.

IV Theories of optimal incentivisation of corporate action

Theories of optimal incentivisation of corporate action underlie much of what leading proponents of leniency policies say about corporate leniency.[60] As explained below, those theories have obscured rather than illuminated how the impact of corporate leniency policies on corporations much depends on corporate internal control systems including compliance programs.

The theories of optimal incentivisation of corporate action in question are based on economic models of the firm. Economic models of the firm treat a corporation as one or other of two kinds of actor:[61]

(a) as a unitary actor that, given a sufficient deterrent threat or incentive, will make a rational cost-benefit calculation and decide to comply; or

(b) as a principal that, given a sufficient deterrent threat or incentive, will make a rational cost-benefit calculation and decide to induce its human agents to comply by means of contractual obligations and/or contractual incentives.

These theoretical postulates have a superficial appeal. They simplify the construct of corporate action and avoid opening the 'black box' of organisational behaviour.[62] As a result, antitrust compliance programs and other corporate internal controls tend to be occluded.

Different perspectives about the nature of corporate action emerge from everyday experience, corporate law, sociology, organisation theory, management theory, political science, philosophy, studies of corporate regulation and compliance, criminology, behavioural economics and empirical inquiries into how leniency policies work in practice.[63]

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60 See eg G Spagnolo, 'Leniency and Whistleblowers in Antitrust' in P Buccirossi (ed), *Handbook of Antitrust Economics* (MIT Press, Cambridge, Mass,, 2008), ch. 7; M Polo & M Motta, 'Leniency Programs' in American Bar Association, *Issues in Competition Law and Policy* (ABA, Chicago, 2008) Vol III, ch 89; C Aubert, W Kovacic & P Rey, 'The impact of leniency programs on cartels' (2006) 24 *International Journal of Industrial Organization* 1241.

61 See GS Becker, *The Economic Approach to Human Behavior* (University of Chicago Press, Chicago, 1976); KG Elzinga & W Breit, *The Antitrust Penalties: A Study in Law and Economics* (Yale University Press, New Haven, 1976) ch. 7; MC Jensen & WH Meckling, 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure' (1976) 3 *Journal of Finance and Economics* 305; R Kraakman, 'Corporate Liability Strategies and the Costs of Legal Controls' (1984) 93 *Yale Law Journal* 857

62 See further Stone, *Where the Law Ends*, ch 6; Fisse & Braithwaite, *Corporations, Crime and Accountability*, ch. 4.

63 The relevant literature includes: RM Cyert & JG March, *A Behavioral Theory of the Firm* (Prentice-Hall, New Jersey, 1963); RA Gordon, *Business Leadership in the Large Corporation* (University of California Press, Berkeley, 1966); CD Shearing & PC Stenning (eds), *Private Policing* (Sage Publications, California, 1987); AK Sen, 'Rational Fools: A Critique of the Behavioral Foundations of Economic Theory' (1977) 6 *Philosophy & Public Affairs* 317; C List & P Pettit, *Group Agency: The Possibility, Design, and Status of Corporate Agents* (Oxford University Press, Oxford, 2011); (Stone, *Where the Law Ends;* Fisse & Braithwaite, *Corporations, Crime and Accountability*; WS Laufer, *Corporate Bodies and Guilty Minds: The Failure of Corporate Criminal Liability* (University of Chicago Press, Chicago, 2006); C Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (Cambridge University Press, Cambridge, 2002); C Parker & VL Nielsen, *Explaining Compliance: Business Responses to Regulation* (Edward Elgar

First, it is unrealistic to treat corporations as rational unitary actors.[64] A corporation is not a human being. Human beings act on behalf of corporations but their roles and interests differ and often diverge and may conflict. Morever, corporate conduct is not merely the sum of the conduct of managers or employees. Corporate organisations are systems and system characteristics and effects shape or influence what people do within organisations. Corporate internal controls are part of those systems.

Secondly, the agency theory of the firm is inconsistent with the actual legal status of officers, managers and employees, who are not contractual agents of shareholders and whose duties include fiduciary obligations.[65] Moreover, from a sociological perspective, the agency theory of the firm is tunnel-visioned: the principal-agent contractual metaphor is merely one among many relevant and useful metaphors.[66] Other relevant and useful metaphors include those of the corporation as machines, as cultures, as political systems, and as private micro legal systems.[67] Corporate internal controls immediately come into focus by using such metaphors as lenses.

Thirdly, threats or incentives directed to corporations do not operate in the same way as threats or incentives directed to individuals.[68] Deterrent signals or incentives are received and processed by a corporate system for receiving and managing external information. Managers and employees participate in that management process but the output is not merely self-restraint or self-activation – it is an input into the internal controls of the organisation. Those internal controls include policies, procedures and processes. If the external threat or incentive is to be heeded, those policies, procedures or processes need to be applied and if necessary, revised.

Fourthy, the model of rational cost-benefit calculation of deterrent threats or compliance incentives is idealistic and often inconsistent with how corporations and their managers and

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Publishing, 2011); SS Simpson, *Corporate Crime, Law, and Social Control* (Cambridge University Press, Cambridge, 2002); TR Tyler, *Why People Obey the Law* (Princeton University Press, Princeton, 2006); V Braithwaite, *Defiance In Taxation And Governance: Resisting and Dismissing Authority in a Democracy* (Edward Elgar Publishing, 2009); CD Sunstein (ed), *Behavioral Law & Economics* (Cambridge University Press, New York, 2000); RE Goodin (ed), *The Theory of Institutional Design* (Cambridge University Press, Cambridge, 1996); D Vaughan, *Controlling Unlawful Organizational Behavior* (University of Chicago Press, Chicago, 1983); D Vaughan, 'Rational Choice, Situated Action, and the Social Control of Organizations' (1998) 32 *Law & Society Review* 23; ME Stucke, 'Am I a Price Fixer? A Behavioural Economics Analysis of Cartels' in C Beaton-Wells and A Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing, 2011) 263; DD Sokol, 'Policing the Firm' (2013) 89 *Notre Dame Law Review*785; DD Sokol, 'Cartels, Corporate Compliance and What Practitioners Really Think About Enforcement' (2012) 78 *Antitrust Law Journal* 201; Beaton-Wells, 'Immunity for cartel conduct: revolution or religion? An Australian case study'.

64 See Fisse & Braithwaite, *Corporations, Crime and Accountability*, at pp 73-74; TF Malloy, 'Regulating by Incentives: Myths, Models, and Micromarkets' (2002) 80 *Texas Law Review* 531.

65 See Fisse & Braithwaite, *Corporations, Crime and Accountability*, at pp 75-78.

66 Fisse & Braithwaite, *Corporations, Crime and Accountability*, at pp. 76-77. See further G Morgan, *Images of Organization* (Sage Publications, California, 1986).

67 See eg Morgan, *Images of Organization*; Shearing & Stenning (eds), *Private Policing*.

68 See B Fisse, 'Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault and Sanctions' (1983) 56 *Southern California Law Review* 1141 at pp. 1159-1166.

employees behave in the real world.[69] Many 'irrational' factors and influences govern corporate decision-making. These include optimism, bureaucratic politics, leadership, inertia, preoccupation with 'getting through the day', and lack of fascination with theories of the firm. Another major reality gap is that the optimal cost-benefit decisions postulated cannot be made readily in practice.[70] That is because key variables (eg the risk that agents will deviate from their 'contracts' with principals; the risk of detection by an enforcement agency; and the risk of imposition of liability) are uncertain and defy accurate calculation.

A customary response to the uncertainty and impracticality of trying to make optimal cost-benefit decisions is to act on the basis of practical 'rules of action' or rules of thumb.[71] A rule of action or rule of thumb approach is widely used as a mechanism of social control in order to avoid the need to make difficult and unreliable probabilistic calculations about economic and non-economic incentives. In the context of antitrust, one rule of action widely followed by corporations is to adopt and implement an antitrust compliance program the elements of which are based on longstanding practical experience. That practical experience is distilled in the US Sentencing Guidelines, guidance documents by enforcement agencies, and numerous professional and academic publications.[72]

To conclude, in working out what can usefully be done to improve the efficacy of corporate leniency policies it is advisable not to fall under the spell of economic theories of optimal incentivisation of corporate action. A more realistic and more fruitful approach is to work on the basis of common understandings about how corporations act and what is likely to influence their conduct. These common understandings are:

(1) corporations have internal control systems that often shape or affect corporate action;

(2) the impacts of external incentives on corporate action are often uncertain and typically the data needed to calculate the magnitude or probability of those impacts does not exist;

(3) corporate internal controls are likely to assist the prevention of cartel conduct if they are well-designed and used in accordance with that design;

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69 See eg HA Simon, 'A Behavioral Model of Rational Choice' (1955) 69 *Quarterly Journal of Economics* 99; 99 (1955); A Tversky & D Kahneman, 'Judgment Under Uncertainty: Heuristics and Biases' (1974) 185 *Science* 1124; ME Stucke, 'Am I a Price Fixer?'

70 See J Byrne and SM Hoffman, 'Efficient Corporate Harm: A Chicago Metaphysic' in B Fisse and PA French (eds), *Corrigible Corporations and Unruly Law* (San Antonio, Trinity University Press, 1985) 101; Fisse & Braithwaite, *Corporations, Crime and Accountability*, at pp. 88-93.

71 See Fisse & Braithwaite, *Corporations, Crime and Accountability*, at p. 92; A Etzioni, *The Moral Dimension: Towards a New Economics* (Macmillan, New York, 1988) ch. 10.

72 See the text at Notes 52-56 above and accompanying references.

(4) compliance programs are the main types of corporate internal controls likely to assist in the prevention of cartel conduct;[73] and

(5) individual accountability is a cornersone of social control and compliance programs can be harnessed to help ensure that individuals who participate in cartel conduct or who unreasonably fail to prevent such conduct are held accountable.[74]

V Making an adequate compliance program a condition of corporate leniency

This Part discusses what would be needed to make an adequate compliance program a workable requirement of corporate leniency. Discussion proceeds under the following heads:

A a compliance program as a condition of corporate leniency and the mechanism of enforced self-regulation;

B the requirement of an 'adequate' compliance program;

C internal disciplinary action in relation to the cartel conduct subject to conditional corporate leniency;

D internal leniency policies; and

E attempts by a corporate leniency applicant to obstruct, evade or manipulate a leniency policy.

A. A compliance program as a condition of corporate leniency and the mechanism of enforced self-regulation

The approach proposed in Antitrust & Competition Law Compliance Forum's *Model Agency Policy for Promoting Anti-Cartel Compliance Programs*[75] may be taken as a starting point. The compliance program condition required under the *Model Agency Policy* is as follows:[76]

> In determining any company's eligibility for admission into the Leniency Program, the existence of an effective compliance program [as defined in §1.1] shall be considered in determining whether the company is acting in good faith. To be granted Leniency a company must either have in existence an effective anti-cartel compliance program or agree to implement one. The burden will be on the company to prove to the agency's satisfaction that it has implemented such a program within one year of admission into the Leniency program, or the grant of leniency shall be revoked.

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73 This is not to contend that compliance programs necessarily will be effective. For sceptical views about their efficacy see eg Laufer, *Corporate Bodies and Guilty Minds*, chs. 4–5; C Parker and VL Nielsen, 'Corporate Compliance Systems: Could They Make any Difference?'(2009) 41 *Administration & Society* 3.

74 See further Fisse & Braithwaite, *Corporations, Crime and Accountability*, especially chs. 1, 5 and 6.

75 Available at: http://www.compliance-network.com/resources/miscellaneous/model-policy/.

76 §4.

This proposed compliance program condition and the related mechanism for enforced self-regulation have several avoidable limitations.

First, it is difficult to understand why it is sufficent that an adequate compliance program was in place at the time of the cartel conduct. What should matter is whether or not there is sufficient assurance that an adequate compliance program will be in place under a specified time frame and that such a program will be responsive to flaws or weaknesses shown up by the failure to prevent the cartel conduct in respect of which immunity is sought.

Secondly, the mechanism of enforced self-regulation[77] needs some further machining. To foster ease of administration by the enforcement agency and to help guard against corporate cheating, the mechanism should include the filing of compliance reports that are prepared by a suitably qualified independent reviewer with access to all relevant information.[78] The compliance reports would need to cover how the requisite elements of an adequate compliance program have been addressed by the leniency applicant and include an assessment of the adequacy of the steps taken. The steps taken should be accepted unless manifestly inadequate or disproportionate.[79]

Thirdly, the requirement of only one compliance report, as appears to be contemplated by the Model Agency Policy, is questionable. The period of required cooperation with an investigation in current conditional leniency agreements is not limited to one year and may extend over a much longer period. Moreover, a requirement of one report one year out from the making of a leniency application is vulnerable to manipulation. An alternative approach would be to require annual reports for three years[80] and an interim special report in the event that a corporation granted leniency has failed to comply with the obligation to have an adequate compliance program in place.

Fourthly, if conditional leniency is revoked, enforcement action in relation to the underlying cartel conduct at or after the time of revocation may be barred by a statute of limitations. One possible solution would be to amend the statutory limitation period so as to enable it to be tolled by the period between entry into a conditional leniency agreement and revocation of conditional leniency. An alternative and better approach would be to make having an adequate compliance program not only a condition of corporate leniency but also a requirement of an undertaking by deed or a statutory court-enforceable undertaking.

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77 See J Braithwaite, 'Enforced Self-Regulation: A New Strategy for Corporate Crime Control' (1982) 80 *Michigan Law Review* 1466.

78 This is the approach adopted in Australia under s 87B of the Competition and Consumer Act 2010 (Cth) in undertakings that require a corporation to have a satisfactory compliance program in place. However, such undertakings do not appear to have been used for the purposes of immunity.

79 An alternative possible test is that of satisfaction that there has been 'substantial compliance' or the exercise of reasonable endeavours to comply.

80 This is the typical requirement in compliance program undertakings under s 87B of the Competition and Consumer Act 2010 (Cth).

It is unlikely that such an approach would significantly discourage leniency applications.[81] The carrot of immunity from criminal or civil penalty liability is highly attractive in comparison with the lower likely cost of installing and maintaining an adequate compliance program. This is especially so in jurisidictions where the severity of penalties against corporations for cartel conduct is increasing and/or where enforcement action against individuals who have participated in cartels is high risk.[82]

B. The requirement of an 'adequate compliance program'

The *Model Agency Policy for Promoting Anti-Cartel Compliance Programs* requires an 'effective compliance program'. This concept is defined as follows: [83]

> An effective anti-cartel program is a management commitment to free market competition and against cartels, and effective management steps to implement that commitment. The failure of a program to prevent or detect one particular offense does not necessarily mean that the program is not generally effective in preventing cartel conduct. An effective program is characterized by [18 management steps]:

This definition is imperfect in several respects:

- the criterion that a program be generally effective in preventing cartel conduct is tucked away behind a double negative;
- the reference to 'free market competition' introduces loose ideology;
- 'effective' is not an apt descriptor given the inevitable risk that compliance programs may sometimes fail to prevent unlawful conduct – 'adequate' is a more apposite term; and
- the 18 management steps said to characterise an effective compliance program are over-prescriptive and under-inclusive, as explained below.

The 18 management steps set out in the *Model Agency Policy* are *over-prescriptive* in the following main respects:

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81 The interview-based research reported in Beaton-Wells, 'Immunity for cartel conduct: revolution or religion? An Australian case study' at p. 161 indicated that the practitioner interviewees did not have such a concern.

82 As in the US; see Department of Justice, *Antitrust Division 2014 Criminal Enforcement Update* (2014) available at: http://www.justice.gov/atr/public/division-update/2014/criminal-program.html; J Terzaken & M Kelley, 'You're Fired! The Expanding Role of Behavioural Remedies in Cartel Enforcement' in N Charbit & E Ramundo, *William E Kovacic, An Antitrust Tribute, Liber Amicorum* (Institute of Competition Law, 2014) 243. On a possible solution to the limits of monetary penalties as a sanction aginst corporations see B Fisse, 'Cartel Offences and Non-Monetary Punishment: The Punitive Injunction as a Sanction against Corporations' in C Beaton-Wells and A Ezrachi (eds), *Criminalising Cartels* (Hart Publishing, 2011) ch. 14.

83 Id at §1.

(a) the desired elements of an effective compliance program are cast as a series of 'management steps' rather than as a set of principles or guidelines geared to flexible and tailored interpretration and application;
(b) the aim of 'promotion' of 'the laws of free market competition' goes beyond the scope of a leniency policy or a compliance program policy directed at cartel conduct;
(c) the management steps listed relate mainly to larger corporations and include precautions that may not suit the structure and management of small companies;
(d) the proposal that there should be a 'senior chief ethics and compliance officer (CECO)' is much too prescriptive – corporations legitimately may want to avoid using any such tag and may prefer to allocate the relevant compliance functions to a number of senior managers; and
(e) the position that the compliance program should be integrated into 'the compliance and ethics infrastructure' presupposes that corporations have or should have such an infrastructure – a more commendable approach is to integrate the compliance program, as far as practicable, with routine standard operational functions and procedures.

The 18 management steps laid out in the *Model Agency Policy* are *under-inclusive* in four major respects.

First, the *Model Agency Policy* does not require that leniency policies be covered in an effective compliance program. As noted in Part II above, the position of some enforcement agencies is that it is important for compliance programs to refer to leniency policies and to spell out the practical implications of those policies for the corporation and its employees.[84] However, there is no requirement that compliance programs include such content and it is possible that many do not. It is also possible that compliance programs may refer to the implications of corporate leniency but not to those of individual leniency, a concern stressed by Christopher Leslie in the context of US antitrust compliance programs:[85]

> ... antitrust compliance programs generally do not include the information that would enlighten employees about the benefits of betraying a price-fixing employer. ... even when employees are told about the penalties for price fixing, they are often not informed about the benefits of confession, including individual amnesty. Firms rationally exclude such material because, in order to receive credit for having an effective compliance program, the Sentencing Guidelines do not require the firm to inform its employees of the benefits of selling out a cartel. Given that the high-level executives who run cartels often have some input into what messages are communicated about antitrust compliance, it is hardly surprising that a pro-confession theme is not conveyed. In short, most antitrust compliance programs do not allow employees to accurately perform a cost-benefit

84 See text at Notes 10, 15, 18, 20 and 21 above.

85 CR Leslie, 'Cartels, Agency Costs, and Finding Virtue in Faithless Agents' (2008) 49 *William and Mary Law Review* 1621 at pp. 1683-1684.

analysis with respect to confession. This undermines the ability of any such program to expose or deter price fixing.

Secondly, the *Model Agency Policy* refers to internal disciplinary action as part of two management steps that should be taken in an effective compliance program:[86]

> *Appropriate discipline*. Appropriate discipline, consistently applied to address violations, at all levels of the company, of laws against cartels and the company's compliance and ethics program, including discipline of managers for failure to take reasonable steps to prevent and detect violations. ...
>
> *Response to violations.* Responding reasonably to violations, and allegations of violations, by conducting investigations professionally and enhancing the program to prevent recurrence of violations.

However, leniency policies complicate what can or should be done by way of internal disciplinary action and further guidance is needed. The requirement that a corporate leniency applicant cooperate with an investigation by an enforcement agency may constrain internal disciplinary action against employees whose cooperation is needed in order to satisfy the corporate leniency condition.[87]

Thirdly, the *Model Agency Policy* does not provide guidance on whether or not corporate leniency applicants and corporations generally should have an internal leniency policy that offers immunity from internal disciplinary action to the first employee to report participation in a cartel.[88]

Fourthly, there are various possible ways in which corporate leniency applicants might try to obstruct or circumvent the operation of a leniency policy.[89] The *Model Agency Policy* does not address what can or should be done to guard against attempted hindrance or manipulation of leniency policies.[90]

A better approach than that taken in the *Model Agency Policy* would be to set out at a higher level the principles or guidelines that should be to be addressed by corporate leniency applicants when introducing or revising compliance programs in order to satisfy a corporate leniency condition requiring that they have an adequate compliance program in place. These principles or guidelines would also inform, structure and delimit the work of independent reviewers when preparing compliance reports. They should reflect the key lessons that emerge from the extensive literature

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86 Id at §1.1.16, §1.1.18.

87 See the discussion in Section C below.

88 See the discussion in Section D below.

89 See the discussion in Section E below.

90 See the discussion in Section E below.

on corporate compliance programs.[91] They should be in sufficiently general terms to enable flexibility and to facilate innovation. They should also deal with the main questions about compliance programs that are raised by corporate leniency policies.

The approach proposed above could be derived from the guidelines on compliance programs set out in §8B2.1 of the US Sentencing Guidelines,[92] with modifications to suit the corporate leniency context.

Under §8B2.1(a) of the Sentencing Guidelines the following general critierion is to be applied when assessing whether or not a corporation has an an 'effective compliance and ethics program':

> '... an organization shall –
>
> (1) exercise due diligence to prevent and detect criminal conduct; and
>
> (2) otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.
>
> Such compliance and ethics program shall be reasonably designed, implemented, and enforced so that the program is generally effective in preventing and detecting criminal conduct. The failure to prevent or detect the instant offense does not necessarily mean that the program is not generally effective in preventing and detecting criminal conduct.'

§8B2.1(b) then provides that due diligence and the promotion of an organisational compliance culture 'minimally require' seven basic elements to be present. In summary, these elements are:

- organisational standards and procedures to prevent and detect criminal conduct;
- allocation of high-level and day-to-day responsibility for the content and operation of the compliance program;
- reasonable efforts not to confer 'substantial authority' on personnel who have engaged in unlawful or other conduct inconsistent with an effective compliance and ethics program;
- reasonable steps to communicate periodically and in a practical manner the organisation's standards and procedures and other aspects of the compliance and ethics program, by conducting effective training programs and otherwise disseminating information appropriate to the roles and responsibilities of employees and agents;
- reasonable steps to ensure that the compliance and ethics program is followed (including monitoring and auditing to detect criminal conduct), periodical evaluation of the effectiveness of the program, and to to have and publicise a system whereby the organisation's employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation;

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91 See references at Note 53 above.

92 Available at: http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2013/manual-pdf/2013_Guidelines_Manual_Full.pdf.

- promotion of the compliance and ethics program and enforcement of it consistently throughout the organisation by means of appropriate incentives and appropriate disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect criminal conduct;
- reasonable steps to respond appropriately to the criminal conduct and to prevent further similar criminal conduct (including making any necessary modifications to the compliance and ethics program).

Under §8B2.1(c) a periodic risk assessment of criminal conduct is called for together with the taking of appropriate steps to design, implement, or modify each of the above steps in order to reduce the risk of criminal conduct identified.

For the purpose of reformulating corporate leniency policies to include a condition requiring an adequate compliance program to be in place, the wording of §8B2.1 could readily be amended to refer to 'cartel conduct' instead of 'criminal conduct' and to 'adequate compliance program' instead of 'effective compliance and ethics program'.[93] The main need would be to add guidelines that address the significant issues that arise from the relationship between corporate leniency and compliance programs. The following additional guidelines are recommended.

- The implications of cartel leniency policies, including the increased chance of detection and the right of employees to apply for individual leniency, need to be communicated clearly to employees and included in compliance training.[94]
- Internal disciplinary action against employees implicated in cartel conduct may be delayed where necessary to secure the cooperation of such employees in order to satisfy a corporate leniency condition requiring the corporation to cooperate with an investigation of that cartel conduct.[95]
- The incentive offered to employees to admit participation in cartel conduct under an internal leniency policy should be limited to a reduction in the disciplinary sanction that would otherwise apply and not extend to a grant of immunity.[96]
- A compliance program is not an adequate compliance program where the design or implementation of the program has the purpose or likely effect of obstructing, evading or manipulating a leniency policy.[97]
- Compliance training should make it clear that the corporation will not indemnify employees against sanctions or the costs of their defence, directly or indirectly.[98]

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93 The concept of 'adequate' procedures is used in Bribery Act 2010 (UK) s 7.

94 See text at note 86 above.

95 See Section C below.

96 See Section D below.

97 See Section E below.

C. Internal disciplinary action in relation to the cartel conduct subject to conditional corporate leniency

As discussed in Part III, a corporate leniency applicant may decide to refrain from taking internal disciplinary action and yet remain eligible for corporate leniency. Corporate leniency policies now require cooperation in the investigation of the cartel conduct but that requirement of cooperation does not extend to the taking of internal disciplinary action.[99] This approach is impotent in two respects: first, a successful corporate leniency applicant is not subject to a fine or other sanction and hence does not have the same incentive to take internal disciplinary action as corporate cartel offenders that are subject to punishment;[100] and secondly, employees who have participated in cartel conduct typically will have derivative immunity from liability if their employer is granted corporate leniency and will escape deterrent sanctions unless internal disciplinary action is taken against them.

The alternative approach proposed in Sections A and B above is to make corporate leniency conditional on an undertaking to have an adequate compliance program in place and to include appropriate internal disciplinary action as an element of such a program. Is this approach workable?

The proposed approach does not involve a highly intrusive or inflexible form of government intervention in the internal affairs of corporations but is a form of enforced self-regulation.[101] A corporation would be to required to report what internal disciplinary action it has taken and that report would be reviewed by an independent compliance program reviewer. In the event of a manifestly inadequate report the result would be revocation of corporate leniency or breach of a compliance program undertaking. There is no question of a corporation being directed to terminate particular employees or to impose particular kinds or levels of internal sanctions against them.

In some cases of course it will not be possible for a corporate leniency applicant to take internal disciplinary action, as where an employee who previously engaged in cartel conduct has left the company before the conduct was detected and investigated. However, some prime targets usually will still be on the payroll and the question is whether it is feasible to take internal disciplinary action against them.

There seem to be three main concerns about the workability of the approach proposed:

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98 See further Beaton-Wells & Fisse, *Australian Cartel Regulation*, section 11.3.8.

99 See eg Department of Justice, *Corporate Leniency Policy*. Add pinpoint reference to the cooperation condition in this policy. Please also add references to the condition in the EU notice and ACCC policy.

100 See Fisse & Braithwaite, *Corporations, Crime and Accountability*, at pp. 8-12.

101 See Braithwaite, 'Enforced Self-Regulation: A New Strategy for Corporate Crime Control'. The approach proposed here is consistent with the detailed model advanced in Fisse and Braithwaite, *Corporations, Crime and Accountability*, especially chs. 5-6.

1. the stronger the threat of internal disciplinary action for participation in cartel conduct the less the incentive to report cartel conduct to a superior or to cooperate with an investigation of that cartel conduct;
2. internal disciplinary action against employees who have participated in cartel conduct often needs to be delayed for a considerable time until co-operation with an investigation has been completed; and
3. the criterion that 'appropriate' internal disciplinary measures be taken is 'fuzzy'.

These possible concerns are reviewed below.

If internal disciplinary action were to be required as a condition of corporate leniency, some employees may be less inclined to report cartel conduct to their employers. However, employees who fail to report their participation in cartel conduct to a superior jeopardise the chance of their corporation being able to make a leniency application in time to succeed. In turn, they jeopardise their own chance of being able to rely on derivative immunity and risk exposure to criminal liability or liability to a civil penalty. In some cases employees will perceive the likelihood or the severity of external liability as being relatively low and decide to keep silent. However, enforcement agencies can take steps to increased the perceived risk of serious external sanctions by actively taking enforcement action against individuals implicated in cartels and publicising that action and the sentences or penalties imposed.[102] Employees should also be advised of these risk exposures in compliance training and other communications and informed that the timely internal reporting of cartel conduct is likely to be in their own rational self-interest. That message could be accentuated if corporations were to encourage the prompt internal reporting of cartel conduct by offering a reduced internal 'sentence' to those who so report.[103]

There is a possible risk that some employees may be less inclined to cooperate with an investigation of cartel conduct if internal disciplinary action is required as a condition of corporate leniency. However, this risk does not seem to be significant given that corporate leniency policies make derivative leniency conditional on cooperation with an investigation.[104]

The second concern flagged above is that internal disciplinary action may need to be delayed for a considerable time until the need to cooperate with an investigation has ended. Dismissal is the most serious internal disciplinary sanction available and may well be warranted against employees who have participated in cartel conduct. However, it is common practice to defer the question of dismissal and to use 'gardening leave' as a lever to achieve the cooperation of such

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[102] As exemplified by the practice of the US DOJ; see eg Department of Justice, *Antitrust Division 2014 Criminal Enforcement Update*. By contrast, employees are not subject to individual liability in the EU and no apparent attempt is made to impel internal disciplinary action by taking sich action or the lack of it into consideration when assessing penalties against corporate defendants.

[103] See the discussion in Section D below.

[104] See eg the Department of Justice *Corporate Leniency Policy*; the European Commission *Commission notice on immunity from fines and reduction of fines in cartel cases*; the Competition and Markets Authority *Applications for leniency and no-action in cartel cases*; and the *ACCC immunity and cooperation policy for cartel conduct*.

employees during the enforcement agency's investigation.[105] The practical implications are spelt out in *The ICC Antitrust Compliance Toolkit* (2013): [106]

> ... a decision to discipline (and when to discipline) an employee for a very serious antitrust infringement (such as engaging in a cartel) is complicated if the company needs to apply for immunity/leniency. In such cases it will be important for your company to secure the ongoing cooperation of the employees involved in the violation in order to meet your company's own obligations (as part of the conditional grant of immunity or leniency) to assist and fully cooperate with relevant antitrust agencies in their investigations. This means your company will need to keep employees available for the purposes of the external antitrust investigation and any subsequent antitrust proceedings. Dismissal (however much your company may wish to discipline the offending employee) may therefore not be an option for the duration of the antitrust proceedings, or until such time as the antitrust agencies no longer require the employee's input.
>
> Your company may therefore want to decide how "deferred sanctions" might apply in antitrust investigations. A decision to postpone the application of a sanction must not generate false expectations on the part of the employee: for instance, where your company must satisfy cooperation obligations towards investigating antitrust agencies (which is usually a precondition for immunity from antitrust fines or leniency), your company may need to retain the employee on paid leave/absence (in some countries now known euphemistically as "gardening leave") until a final resolution of the antitrust case against the company.

If dismissal cannot occur while the company no longer requires cooperation by an employee who should be dismissed, it may be impossible or undesirable to complete the internal disciplinary process within the time frame needed for the operation of corporate leniency conditions. Revoking corporate leniency at a late stage by reason of failure to take internal disciplinary action may be impractical or unjust. An undertaking to take such action as part of having an adequate compliance program in place would be enforceable for the period of that undertaking, but that period may be limited.[107] A pragmatic response to this possible difficulty is that requiring an employee to go on 'gardening leave' and cooperate with a cartel investigation is itself a significant albeit imperfect internal disciplinary sanction.

A further possible concern is the fuzziness of the criterion that 'appropriate' internal disciplinary measures be taken.[108] Fuzzy as the criterion is, it has been in the US Sentencing Guidelines for

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105 Additional relevant factors include preserving the morale of other emplyees and safeguarding confidential information and other corporate assets.

106 Id at pp. 48-49.

107 See text at note 81 above.

108 Another 'fuzzy' requirement is that of cooperation under leniency policies. See DC Klawiter & JC Everett, 'The Legacy of *Stolt-Nielsen*: A New Approach to The Corporate Leniency Program?' (2006) (December) *The Antitrust Source* 1.

decades.[109] Another consideration is that the mechanism of enforced self-regulation leaves it to corporations initially to determine what internal disciplinary sanctions are appropriate and the action proposed would not be contestable unless manifestly inadequate or disproportionate.[110]

The use of enforced self-regulation to bring about internal disciplinary raises further possible concerns, including the risk of scapegoating. These possible concerns and constructive solutions to them are discussed in detail elsewhere.[111]

D. Internal leniency policies

Some commentators have recommended that corporations encourage the reporting of cartel conduct within their organisations by adopting an internal leniency policy that offers employees immunity from internal disciplinary action if they are the first to report internally their participation in cartel conduct. If corporate leniency requires that an adequate compliance program be put in place, is a compliance program 'adequate' if it includes an internal leniency policy that provides for such immunity?

The leading commentary on the desirability and design of internal leniency policies is by Donald Klawiter and Jennifer Driscoll.[112] They advocate the following approach: [113]

> Under our proposal, the company's board of directors will adopt a formal antitrust corporate compliance and leniency policy (Corporate Leniency Policy) that establishes specific and severe zero-tolerance penalties for employees who participate in antitrust misconduct, but will offer "leniency" or protection from adverse consequences in the work setting, such as termination, demotion, or financial forfeiture, for the executive or other employee who is the first to report such conduct. In effect, the corporate executive or employee who meets the criteria of the Corporate Leniency Policy would be exempt from corporate punishment for illegal conduct, just as the Antitrust Division exempts the company from criminal prosecution and fines if it self-reports before the Antitrust Division has opened a cartel investigation or has evidence to sustain a conviction.

Klawiter and Driscoll set out how each condition in the DOJ *Corporate Leniency Policy* should be adapted and applied in the setting of an internal leniency policy. One of the main conditions of the proposed internal leniency policy is that the employee must report the wrongdoing 'with

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109 The term 'appropriate disicipinary action' is often used in private and public organisations; see eg Australian Red Cross, *Disciplinary Action Policy* (2013), section 5, available at: http://www.redcross.org.au/files/HR_SUP_15_-_Disciplinary_Action_Policy.pdf.

110 See text at note 80 above.

111 See Fisse & Braithwaite, *Corporations, Crime and Accountability*, ch. 6.

112 DC Klawiter & JM Driscoll, 'A New Approach To Compliance: True Corporate Leniency for Executives' (2008) 22 (3)*Antitrust* 77.

113 Id at p. 77.

candor and completeness' and provide 'full, continuing, and complete cooperation that advances the company's investigation'.[114]

Another key condition is that the applicant for internal corporate leniency make amends 'in a significant and meaningful way outside his usual employment responsibilities'[115]

> This is essential if the executive, especially a very senior executive, is to continue to function credibly among his peers. The leniency recipient must be viewed as someone who ultimately did the right thing to the benefit of the company, even though he violated the law by his cartel behavior. Company morale could suffer and make relationships difficult unless it is made clear that the executive accepts responsibility for his wrongdoing and very publicly shows his colleagues how to avoid this problem in the future.
>
> The company may condition leniency on the executive's cooperation with internal compliance training, to educate coworkers about the severe consequences of illegal cartel activity. This may be difficult and embarrassing, especially for a CEO or senior executive, but will further the company's ongoing antitrust compliance efforts and may help explain to co-workers why the individual still is employed. Another option is for the employee to perform community service on behalf of the company for a specific time.

Other features of the internal leniency policy proposed include the need for the policy to be backed up by a 'Corporate Policy of Severe Punishment for the Wrongdoer'[116] and for precautions to be taken against the potential hazard of employees trying to 'game the system'.[117]

This is a thoughtful proposal. However, it is questionable whether *immunity* (exemption) from dismissal or other internal disciplinary action is justifiable, at least in the case of senior executives who have engaged in cartel conduct. Several points may be made.

First, leniency policies in public anti-cartel enforcement owe their existence partly to the secrecy of cartels from the standpoint of enforcement agencies who have no control over the internal controls of corporations that participate in cartels and over the personnel who are far removed from that cartel activity. From this external standpoint it is understandable why immunity is offered as a way of breaking the codes of secrecy and silence that protect cartels. By contrast, from the internal standpoint of corporations, those who participate in cartels are insiders, not outsiders, and the visibility of what insiders get up to is not the same as their more limited visibility to external enforcement agencies. Managers are also expected to exercise leadership by

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114 Id at p. 78.

115 Id at p. 79.

116 Id at p. 79.

117 Id at pp. 80-81where it is recommended that '[t]o reinforce these risks, the Corporate Leniency Policy should provide that the company can deny leniency if there is credible evidence that the executive engaged in such gaming.'

persuading employees of the need to report cartel conduct; enforcement agencies have no such role or responsibility. Morover, many incentives short of immunity can be offered to employees in order to encourage them to report cartel conduct. Those incentives include structuring severance packages in a way that benefits an employee who is the first to come forward and report a cartel.

Secondly, granting immunity to a high-level executive significantly compromises the deterrent value of upholding individual accountability within an organisation, especially on the part of those in positions of authority or influence.[118] Compromising individual accountability in such a way is not only undesirable in terms of managerial control but also difficult to reconcile with the US Sentencing Guidelines. The Sentencing Guidelines require 'appropriate' disciplinary action as distinct from offer of immunity, and 'consistent' disciplinary action throughout an organisation as distinct from highly differential and unequal treatment, which could result from Klawiter and Driscoll's approach.[119] The spectre has been raised of a salesman getting fired for padding a $200 expense report, and a vice-president for sales receiving internal immunity for engaging in an international cartel.[120]

An alternative approach consistent with upholding individual accountability would be for corporations to adopt an internal leniency policy that offers a reduction in the severity of internal disciplinary action to the first employee to come forward and report participation in a cartel. One merit of the model advanced by Klawiter and Driscoll is that it encourages corporations to revisit what they say to employees about the consequences of antitrust violations and the incentives to report unlawful conduct, and to give guidance on that question instead of making nebulous statements.[121] Empirical study of cartel-related corporate internal disciplinary practices, current and proposed, would also assist. At present there is little empirical work on these practices.

E. Attempts by a corporate leniency applicant to obstruct, evade or manipulate a leniency policy

Attempts by corporate leniency applicants to obstruct, evade or manipulate leniency policies are readily imaginable and infinitely various. Some have been documented.[122] Compliance programs

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118 A concern reflected in eg Japan, Ministry of Economy, Trade and Industry, *Report by a Study Group regarding Competition Law Compliance - Anti-cartel Measures by Japanese Corporations and Trade Associations in Light of Enhanced Global Enforcement of Competition Law* (2010) at p. 25, available at: http://www.meti.go.jp/english/report/downloadfiles/201001complaw.pdf..

119 *US Sentencing Guidelines Manual* (2013) §8B2.1(6).

120 DC Klawiter, T Bridgeford & RE Connolly, 'Internal Corporate Leniency Programs: If Prevention Fails Is Early Detection the Next Best Thing?' (2013) at p. 17, available at: http://www.google.com/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&.

121 See Klawiter & Driscoll, 'A New Approach To Compliance: True Corporate Leniency for Executives' at p. 79.

122 See eg DD Sokol, 'Cartels, Corporate Compliance and What Practitioners Really Think About Enforcement' (2012) 78 *Antitrust Law Journal* 201 at p. 212; Marshall & Marx, 'Section 1 Compliance from an Economic Perspective' at pp. 300-301.

may be misused as by deploying them to instruct employees in the rogue's art of playing repeated 'enter cartel, get immunity' games.[123] However, current corporate leniency policies do not require that an adequate compliance program be in place and do not address the risks of compliance programs being used in subversive ways.

It should be recognised at the outset that some types of attempted subversion do not get to first base because they are inconsistent with what is on offer under corporate leniency policies. Consider for instance the possibility of cartel participants filing simultaneous leniency applications in a bid to secure joint immunity. Collusive ingenuity of this kind is doomed to failure because the offer of corporate immunity is limited to one applicant.

It should also be noted that we are concerned here with conduct that is intended to defeat the operation of leniency policies, not conduct that seeks to act in accordance with them. There is a fundamental difference between liability control, on the one hand, and evasion or circumvention of liability on the other. Leniency policies are a prime example of regulation that explicitly expects and encourages corporations to engage in liability control.[124] Unfortunately, leniency policies are also prone to attempted evasion or circumvention.

The obstruction of leniency policies is exemplified by compliance programs that seek to dissuade employees from applying for individual leniency and require them to report suspected cartel conduct exclusively through internal reporting procedures.[125] Other examples of obstruction include the use of side-contracts or other 'hostage' arrangements designed to lock in cartel participants and discourage them from breaking ranks by reporting the cartel to an enforcement agency and then applying for leniency.[126]

Evasion of a leniency policy is illustrated by the Organic Pesticides case in Europe where the cartel participants engaged a third party, the consulting firm AC-Treuhand, to manage incriminating evidence.[127] AC-Treuhand advised the cartel members at meetings on what measures to take to avoid detection and maintained sensitive docuuments that could not be reoved

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123 Suggested by the estimate that around one quarter of leniency applications in the EU during 2006-2010 had been made by recidivists; see Wils 'Recidivism in EU Antitrust Enforcement: A Legal and Economic Analysis' at p. 18.

124 On liability control as distinct from 'compliance' see Beaton-Wells & Fisse, *Australian Cartel Regulation*, section 12.2.2.

125 See Leslie, 'Cartels, Agency Costs, and Finding Virtue in Faithless Agents' at p. 1684.

126 See I Ayres, 'How Cartels Punish: A Structural Theory of Self-Enforcing Collusion' (1987) 87 *Columbia Law Review* 295 at pp 304-312; OE Williamson, 'Credible Commitments: Using Hostages to Support Exchange' (1983) 73 *The American Economic Review* 519; CR Leslie, 'Trust, Distrust, and Antitrust' (2004) 82 *Texas Law Review* 515 at pp. 614-615.

127 *AC-Treuhand AG v Commission* (T-99/04) [2008] 5 CMLR 13. See further L Marx & Claudio Mezzetti, 'Effects of Antitrust Leniency on Concealment Effort by Colluding Firms' (2014) 2 *Journal of Antitrust Enforcement* 305 at pp. 309-310; C Harding, 'Capturing the Cartel's Friends: Cartel Facilitation and the Idea of Joint Criminal Enterprise' (2009) 34 *European Law Review* 298.

from its premises. This type of facilitation is aimed partly at reducing the ability of cartel firms to provide sufficient evidence to qualify for leniency.[128]

Manipulation of a leniency policy is possible in various ways. The worst seems to be the exploitation by recidivists of the fact that, except in Korea, current leniency policies do not bar repeated successful leniency applications.[129] This encourages corporations looking for loopholes in the law to play repeated 'enter cartel, get immunity' games. Another risk is that leniency policies may be used by unscrupulous competitors to damage other competitors by making a leniency application that leaves those competitors exposed to prosecution and the imposition of severe sanctions.[130] This is managed to some extent by ringleader exceptions in some corporate leniency policies but in many jurisdictions the test of exclusion is now coercion, not ringleading.[131]

The practical significance of such avenues of obstruction, evasion or manipulation is reduced to some extent by the possible availability of much safer routes for escaping liability for cartel conduct. Escape is possible by means of merger, formation of a joint venture, integration as a single economic unit, or adroit use of facilitating practices that coordinate conduct in a market.[132] However, often those escape routes will not be open.

One precaution against attempts to defeat the operation of leniency policies would be to make corporate leniency conditional on an undertaking by the successful applicant to have an adequate compliance program in place and to provide that a compliance program is not an adequate compliance program where the design or implementation of the program has the purpose or likely effect of obstructing, evading or manipulating a leniency policy. This precaution would enable corporate leniency to be revoked where a successful applicant proceeds by focussing, not on avoiding repetition of cartel conduct, but on negating or blunting a leniency policy in order to assist and evade liability for repetition.

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128 See Marx & Mezzetti, 'Effects of Antitrust Leniency on Concealment Effort by Colluding Firms' at p. 310.

129 See Wils 'Recidivism in EU Antitrust Enforcement: A Legal and Economic Analysis' at pp. 17-20. For the position in Korea, see Note 50 above.

130 See eg DD Sokol, 'Cartels, Corporate Compliance and What Practitioners Really Think About Enforcement' at p. 212 (leniency program may be used to punish rivals and in some cases even to help enforce collusion).

131 See eg New Zealand Commerce Commission, *Cartel Leniency Policy and Process Guidelines* (12 April 2011) at 4-5 [3.06]; Canadian Competition Bureau, *Immunity Program under the Competition Act* (Bulletin, 7 June 2010) at 3 [15]; European Commission, *Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases* (2006/C 298/17, 8 December 2006).

132 On the historical significance of mergers as a reaction to s 1 of the Sherman Act, see J Braithwaite and P Drahos, *Global Business Regulation* (Cambridge University Press, Cambridge, 2000) pp. 186–7. On joint ventures see Beaton-Wells & Fisse, *Australian Cartel Regulation*, section 8.3. On the possibility of integration as a single economic unit see H Hovenkamp & CR Leslie, 'The Firm as Cartel Manager' (2014) 64 *Vanderbilt Law Review* 813. On facilitating practices see eg , KJ Arquit, 'The Boundaries of Horizontal Restraints: Facilitating Practices and Invitations to Collude' (1993) 61 *Antitrust Law Journal* 531.

More needs to be done to counter the the danger of repeated 'enter cartel, get immunity' games. One option would be a rule in leniency policies barring corporate leniency where an applicant has previously been granted leniency. However, it may be thought better to encourage the reporting of cartel conduct than to limit the pool of eligible leniency applicants to corporations that have not previously been granted immunity.[133] If so, another approach would be to increase the statutory maximum penalty applicable to cartel recidivists (as for example by doubling the maximum for a repeat offender[134] and trebling it for a third-time offender) and to offer recidivists who are the first to report a subsequent cartel the incentive of being sentenced in accordance with a lower maximum penalty than that which would otherwise apply.[135]

VI Conclusion – Linking corporate leniency to compliance programs

The relationship between corporate leniency policies and compliance programs is a black hole in anti-cartel enforcement today. Corporations are the prime target of offers of leniency. However, they are not required to have a compliance program in place as a condition of leniency; see Part I above. As discussed in Part III above, this latitude is highly questionable:

- a corporation that has brazenly allowed employees to engage in cartel conduct can qualify for immunity without taking precautions against future cartel conduct;
- it is possible for corporations to play repeated games of 'enter into cartel, get immunity';
- disregard of compliance programs in the context of corporate leniency policies is difficult to reconcile with the significance of such programs under the US Sentencing Guidelines, in corporate practice, and in enforcement agency pronouncements;
- compliance programs and leniency policies potentially can reinforce each other but a corporate leniency applicant is free not to have a compliance program in place or to adopt a program that fails to convey the significance of corporate and individual leniency policies;
- a successful corporate leniency applicant may abstain from taking internal disciplinary action against the employees who participated in the cartel conduct or failed to take reasonable steps to prevent that conduct; and
- compliance programs may be used in attempts to obstruct or circumvent leniency policies but leniency policies do not squarely address this risk.

Economic theories of optimal incentivisation of corporate action have tended to mask the relevance of compliance programs in the context of corporate leniency. However, as discussed in Part IV above, those theories are unrealistic and impractical in this context.

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133 See eg Wils 'Recidivism in EU Antitrust Enforcement: A Legal and Economic Analysis' at p. 20.

134 As in the EU; see European Commission, *Guidelines on the Method of Setting Fines Imposed Pursuant to Article 23(2)(a) of Regulation No. 1/2003* [2006] OJ C 210/2, [28].

135 Compare the detrebling of damages under the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (US), 15 USC 1 §213, in the case of a defendant that has been granted immunity under the DOJ *Corporate Leniency Policy*.

As discussed in Part V above, corporate leniency could be made subject to a condition requiring an adequate compliance program to be put in place. The main elements of the approach proposedabove are:

- amendment of corporate leniency policies so as to require as a condition of leniency the adoption and implementation of an adequate compliance program for a period of 3 years, backed by an undertaking by deed or statutory court-enforceable undertaking to comply with that condition;
- use of the mechanism of enforced self-regulation to foster ease of administration by the enforcement agency and to help guard against corporate cheating, with annual compliance reports and, if necessary, interim special reports, by a suitably qualified independent reviewer with access to all relevant information;
- delineation of the concept of an 'adequate compliance program' along the lines of §8B2.1 of the US Sentencing Guidelines but adding guidelines that address the significant issues that arise from the relationship between corporate leniency and compliance programs;
- including a guideline that the implications of cartel leniency policies, including the increased chance of detection and the right of employees to apply for individual leniency, need to be communicated clearly to employees and included in compliance training;
- making appropriate internal disciplinary action an element of an adequate compliance program and using the mechanism of enforced self-regulation by requiring a successful corporate leniency applicant to report what internal disciplinary action it has taken to the independent compliance program reviewer;
- including a guideline that internal disciplinary action against employees implicated in cartel conduct may be delayed where necessary to secure the cooperation of such employees in order to satisfy a corporate leniency condition requiring the corporation to cooperate with an investigation of that cartel conduct;
- guarding against the undue compromise of individual accountability by providing in a guideline that an internal leniency policy should not grant immunity from internal disciplinary sanctions but rely on other incentives such as a reduction in severity of sanction;
- countering attempts to hinder or circumvent leniency policies by providing in a guideline that a compliance program is not an adequate compliance program where the design or implementation of the program has the purpose or likely effect of obstructing, evading or manipulating a leniency policy; and
- countering repeated 'enter cartel, get immunity' games by amending corporate leniency policies to bar corporate leniency for an applicant who has previously been granted leniency or alternatively increasing the statutory maximum penalty applicable to cartel recidivists (as by doubling the maximum for a repeat offender and trebling it for a third-time offender) and offering recidivists who are the first to report a subsequent cartel the incentive of being sentenced in accordance with a lower maximum penalty than that which would otherwise apply.

These modest proposals may assist the further development and enhancement of corporate leniency policies in a way that reduces the risk of corporations treating them as a game.