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Reconditioning Corporate Leniency: The Possibility of Making Compliance Programmes a Condition of Immunity

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I. INTRODUCTION

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 programme, 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 programmes 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, those conditions are:[2]

— *High risk of detection and serious sanctions being imposed*—Competition agencies have to demonstrate a commitment to vigorous investigation of cartels using robust investigatory powers. Those participating in cartels must perceive that, first, there is a real risk of detection and that, second, in the absence of a leniency application, enforcement action and the imposition of sanctions is certain to follow. This will encourage cartel participants to come forward before they are caught. There are further benefits if a leniency programme can create a race between cartel participants to be 'first through the door' and/or ahead of others that may be eligible for lenient treatment (including between a company and its employee).

— *Sanctions imposed are significant*—The sanctions imposed on cartel participants who are not part of the leniency programme, including both companies and individuals, must be significant. If sanctions are inadequate, cartel participants will not come forward as the benefits from leniency are reduced or non-existent. Essentially, the value of the cartel for cartel participants must be less than the cost of getting caught.

* 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: The Social Control of Corporate Behavior* (New York, Harper & Row, 1975) ch 6.

[2] International Competition Network, 'Drafting and Implementing an Effective Leniency Policy' in *Anti-Cartel Enforcement Manual* (2014) 5–6, www.internationalcompetitionnetwork.org/uploads/library/doc1005.pdf. See also SD Hammond, 'Cornerstones of an Effective Cartel Leniency Programme' (2008) 4(2) *Competition Law International* 4.

— *Transparency and certainty*—There must be transparency and certainty in the operation of a leniency policy. Competition agencies need to build the trust of leniency applicants and their attorneys by consistently applying the leniency policy. A leniency applicant needs to be able to predict with a high degree of certainty how it will be treated if it reports anticompetitive conduct and what the consequences will be if it does not come forward. Therefore, competition agencies should ensure that their leniency policies are clear, comprehensive, regularly updated, well publicised, coherently applied, and sufficiently attractive for the applicants in terms of the rewards that may be granted.

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 programme in place. The chapter proceeds as follows. Section II surveys the limited extent to which compliance programmes are recognised in current corporate leniency policies. Section III highlights the laxity of corporate leniency policies that do not require an adequate compliance programme to be in place. Section IV criticises the apparent influence of theories of optimal incentivisation of corporate action on corporate leniency policies and their neglect of compliance programmes. Section V discusses the feasibility of making an adequate compliance programme a requirement of corporate leniency. Section VI concludes with a summary of the main points of the chapter.

It is necessary at the outset to clarify the scope of this chapter and some of the terminology used in it. 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 co-operation with the 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 programme' refers to a set of internal controls used to promote or facilitate compliance with the law or a legally enforceable obligation.

II. COMPLIANCE PROGRAMMES AND CURRENT CORPORATE LENIENCY POLICIES

Current corporate leniency policies address compliance programmes only to a limited extent. Compliance programmes 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 programme being put in place.

Consider first the United States Department of Justice (DOJ)'s Corporate Leniency Policy.[5] This policy specifies conditions of leniency that do not include expected or required

[3] The use of the term 'leniency' to refer to immunity is a misnomer but it is widely used as a result of its usage by the United States Department of Justice.

[4] On that topic, see, eg, C Beaton-Wells and B Fisse, *Australian Cartel Regulation: Law, Policy and Practice in an International Context* (Melbourne, Cambridge University Press, 2011) 392–405.

[5] DOJ, 'Corporate Leniency Policy' (10 August 1993) www.justice.gov/atr/public/guidelines/0091.pdf.

corporate internal controls.[6] Nor are compliance programmes mentioned in the DOJ's Model Corporate Conditional Leniency Letter[7] or in the frequently asked questions published on the DOJ's website.[8] There is no official DOJ statement on antitrust compliance programmes, but recent papers by DOJ representatives are instructive, and appear to deviate from previous DOJ statements that have generally reflected a refusal to acknowledge the value of compliance programmes, 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 European Commission Notice on Immunity from fines and reduction of fines in cartel cases[11] does not make leniency conditional on having a compliance programme. Nor is the relationship between leniency and corporate internal controls addressed in the Commission's website on leniency[12] or in its brochure on the leniency policy.[13] However, compliance programmes are recommended in the Commission's brochure, 'Compliance Matters: What Companies Can Do Better to Respect EU Competition Rules',[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 German Bundeskartellamt's leniency policy[16] does not make a compliance programme a condition of leniency. Nor does the Bundeskartellamt have a policy statement on compliance programmes. However, in an Organisation for Economic Co-operation and Development policy roundtable, the Germany agency has said that compliance programmes 'should contain the same elements as the policies of the competition authorities

[6] See ibid, pt B.

[7] See DOJ, 'Model Corporate Conditional Leniency Letter' (19 November 2008) www.justice.gov/atr/public/criminal/239524.pdf. 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 it discovered its involvement in that activity, but adoption or revision of a compliance programme goes beyond what is required by this condition.

[8] See SD Hammond and BA Barnett, 'Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters' (19 November 2008) www.justice.gov/atr/public/criminal/239583.pdf.

[9] See B Baer, 'Prosecuting Antitrust Crimes' (Georgetown University Law Center Global Antitrust Enforcement Symposium, Washington DC, 10 September 2014) www.justice.gov/atr/public/speeches/308499.pdf; B Snyder, 'Compliance Is a Culture, Not Just a Policy' (International Chamber of Commerce/United States Council of International Business Joint Antitrust Compliance Workshop, 9 September 2014) www.justice.gov/atr/public/speeches/308494.pdf. For a discussion of the DOJ position, see J Murphy, 'Combining Leniency Policies and Compliance Programmes to Prevent Cartels', ch 16 in this volume.

[10] See Organisation for Economic Co-operation and Development, 'Promoting Compliance with Competition Law', DAF/COMP(2011)20 (2012) 199 www.oecd.org/daf/competition/Promotingcompliancewithcompetitionlaw2011.pdf (Note by the Delegation of the United States).

[11] [2006] OJ C298/17 (Commission Notice).

[12] European Commission, 'Leniency' (8 October 2013) http://ec.europa.eu/competition/cartels/leniency/leniency.html.

[13] European Commission, 'The European Commission's Leniency Programme' (2012) http://bookshop.europa.eu/en/the-european-commission-leniency-programme-pbKD3211988/.

[14] European Commission, 'Compliance Matters: What Companies Can Do Better to Respect EU Competition Rules' (2012) http://bookshop.europa.eu/en/compliance-matters-pbKD3211985/downloads/KD-32-11-985-EN-C/KD3211985ENC_002.pdf?FileName=KD3211985ENC_002.pdf&SKU=KD3211985ENC_PDF&CatalogueNumber=KD-32-11-985-EN-C.

[15] ibid 19.

[16] Bundeskartellamt, 'Notice No 9/2006 of the Bundeskartellamt on the Immunity from and Reduction of Fines in Cartel Cases—Leniency Programme—of 7 March 2006' (7 March 2006) www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitlinien/Notice%20-%20Leniency%20Guidelines.pdf;jsessionid=0845D3999C857B62251282A64D767EA0.1_cid362?__blob=publicationFile&v=5.

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

The United Kingdom Competition & Markets Authority has adopted the Office of Fair Trading guidance document, 'Applications for Leniency and No-Action in Cartel Cases: OFT's Detailed Guidance on the Principles and Process',[19] but the guidance document does not extend to corporate internal controls. However, the connection with compliance programmes is discussed in the Office of Fair Trading guidance document, 'How Your Business Can Achieve Compliance with Competition Law'.[20] This guidance 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 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 programmes:

> 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 [Office of Fair Trading] and the personal and business consequences of not being covered by an immunity or leniency agreement in such a situation are very significant.[22]

The Canadian Competition Bureau's leniency policy[23] also does not discuss corporate internal controls. However, the Commission's bulletin on compliance programmes[24] includes a section on 'Immunity from Prosecution and Leniency', where the following linkage is made:

> [T]he 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.
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> 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

[17] Organisation for Economic Co-operation and Development (n 11) 111 (Note by the Delegation of Germany).
[18] ibid 112.
[19] Office of Fair Trading, 'Applications for Leniency and No-Action in Cartel Cases: OFT's Detailed Guidance on the Principles and Process' (OFT1495, July 2013) www.gov.uk/government/uploads/system/uploads/attachment_data/file/284417/OFT1495.pdf.
[20] Office of Fair Trading, 'How Your Business Can Achieve Compliance with Competition Law' (Guidance, OFT1341, June 2011) www.gov.uk/government/uploads/system/uploads/attachment_data/file/284402/oft1341.pdf. This guidance document has been adopted by the Board of the Competition & Markets Authority.
[21] ibid 6 (footnote omitted).
[22] ibid 23.
[23] Competition Bureau Canada, 'Leniency Program' (Bulletin) (29 September 2010) www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/LeniencyProgram-sept-2010-e.pdf/$FILE/LeniencyProgram-sept-2010-e.pdf.
[24] Competition Bureau Canada, 'Corporate Compliance Programs' (27 September 2010) www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CorporateCompliancePrograms-sept-2010-e.pdf/$FILE/CorporateCompliancePrograms-sept-2010-e.pdf.

> 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.[25]

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 Australian Competition & Consumer Commission's (ACCC) leniency policy[28] does not require a compliance programme as a condition of immunity.[29] The ACCC's policy document, 'ACCC Compliance and Enforcement Policy',[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'.[31] Under the 'ACCC Immunity and Cooperation Policy for Cartel Conduct', 'a corporate culture conducive to compliance' is a factor relevant to penalty agreements.[32] The 'ACCC Cooperation Policy for Enforcement Matters'[33] 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',[34] 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

[25] ibid 15.

[26] Competition Bureau Canada, 'Corporate Compliance Programs' (Consultation Draft Bulletin) (18 September 2014) 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] ibid 20.

[28] Australian Competition & Consumer Commission, 'ACCC Immunity and Cooperation Policy for Cartel Conduct' (Policy Document) (September 2014) 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: Guidelines for the Making of Decisions in the Prosecution Process' (2014) annexure B, 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 programme condition would be futile given that most of the corporate immunity applicants to date already had compliance programmes in place at the time of the conduct: CY Beaton-Wells, 'Immunity for Cartel Conduct: Revolution or Religion? An Australian Case Study' (2014) 2 *Journal of Antitrust Enforcement* 126, 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 programmeme 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 programmes—'a programme 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] ACCC, 'ACCC Compliance and Enforcement Policy' (Policy Document) (February 2014) www.accc.gov.au/system/files/ACCC%20Compliance%20and%20Enforcement%20Policy_0.pdf.

[31] ibid 3.

[32] ACCC, 'ACCC Immunity and Cooperation Policy for Cartel Conduct' (Policy Document) (September 2014) 12, www.accc.gov.au/system/files/884_ACCC%20immunity%20and%20cooperation%20policy%20for%20cartel%20conduct_FA.pdf.

[33] ACCC, 'ACCC Cooperation Policy for Enforcement Matters' (July 2002) www.accc.gov.au/system/files/ACCC%20cooperation%20policy%20July%202002.pdf.

[34] ibid 3.

applies to cartel conduct.[35] There is no current ACCC guidance document on antitrust compliance programmes.[36]

Caron Beaton-Wells has recommended that the ACCC immunity policy be revised to include compliance programme instigation or revision as a condition of corporate leniency. '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'.[37] Leniency policies in other jurisdictions, including France, Italy, Spain, Sweden, Japan, Korea, Brazil, Argentina, Chile, South Africa and New Zealand, do not make a compliance programme a condition of corporate leniency.[38] A survey in 2012 of leniency policies in many countries asked whether a compliance programme was a condition of leniency but received null responses to that question.[39]

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 and the State Administration for Industry and Commerce.[40] Leniency is discretionary and, given the breadth of the discretion conferred, it is conceivable that a compliance programme could be made a condition of the favourable exercise of that discretion.[41]

The International Competition Network's guidance on drafting and implementing an effective leniency policy, contained in its *Anti-Cartel Enforcement Manual*,[42] and the European Competition Network's 'Model Leniency Programme'[43] do not refer to a compliance programme as a condition of leniency. By contrast, the Antitrust and Competition Law Compliance Discussion Group's 'Model Agency Policy for Promoting Anti-Cartel Compliance Programs' (Model Agency Policy)[44] does; § 1.4 of that Policy requires that, to

[35] It has been superceded by the 'ACCC Immunity and Cooperation Policy for Cartel Conduct', which does not refer to rectification measures. See ACCC, 'ACCC Immunity and Cooperation Policy for Cartel Conduct' (n 32) para 8.

[36] A former ACCC guidance document, 'Corporate Trade Practices Compliance Programs' (now obsolete), did not refer to the implications of the ACCC immunity policy. See ACCC, 'Guide to Corporate Trade Practices Compliance Programs' (Media Release No 302/05, 9 December 2005) www.accc.gov.au/media-release/guide-to-corporate-trade-practices-compliance-programs.

[37] Beaton-Wells (n 29) 168.

[38] See generaly SJ Mobley and R Denton (eds), *Global Cartels Handbook: Leniency: Policy and Procedure* (Oxford, Oxford University Press, 2011).

[39] T Banks and N Jalabert-Doury, 'Competition Law Compliance Programs and Government Support or Indifference' [2012] (2) *Concurrences* 3, 49–52 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/fine reductions?'

[40] See S Oded, 'Leniency and Compliance: Towards an Effective Leniency Policy in the Chinese Anti-Monopoly Law' in M Faure and X Zhang (eds), *The Chinese Anti-Monopoly Law: New Developments and Empirical Evidence*, New Horizons in Competition Law and Economics (Cheltenham, Edward Elgar Publishing, 2013) 154–59; PJ Wang, SJ Evrard and Y Zhang, 'China's New Leniency Procedure in Cartel Investigations' (Jones Day, January 2011) www.jonesday.com/china_new_leniency_procedure/.

[41] For a more detailed discussion of the leniency policy in the People's Republic of China, see M Williams, 'Leniency Policy with Chinese Characteristics', ch 3 in this volume.

[42] International Competition Network (n 2) ch 2.

[43] European Competition Network, 'ECN Model Leniency Programme' (2012) http://ec.europa.eu/competition/ecn/model_leniency_en.pdf.

[44] Antitrust and Competition Law Compliance Discussion Group, 'Model Agency Policy for Promoting Anti-Cartel Compliance Programs', www.compliance-network.com/resources/miscellaneous/model-policy/ (Model Agency Policy). This discussion group is a non-profit network of individuals 'who share an interest in the development of effective anti-cartel compliance programs as a means to prevent and detect cartel behavior'. See Antitrust and Competition Law Compliance Discussion Group, 'Our Mission', www.compliance-network.com/about-us/.

be granted corporate leniency, an applicant 'must either have in existence an effective anti-cartel compliance program or agree to implement one'. The Organisation for Economic Co-operation and Development's policy roundtable on 'Promoting Compliance with Competition Law' barely mentions the issue.[45]

III. THE LAXITY OF CURRENT CORPORATE LENIENCY POLICIES

Current corporate leniency policies, as surveyed in Section II, do not require a corporate leniency applicant to do anything to establish a compliance programme or affirm or revise its existing compliance programme 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 programme',[46] other enforcement agencies have not done likewise. Moreover, a recommendation that an effective compliance programme 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 programme be in place is questionable given the resulting cracks in anti-cartel enforcement.

The first fault line 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 and unlawful, recovery does not require any effort to prevent recurrence. Moreover, the message sent to other corporations is that even 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.[47] Consider this scenario:

> XCO and YCO engaged in price-fixing. XCO did not have a compliance programme. YCO had a programme 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 co-operate with the investigation of the cartel but was too busy to discuss the possible introduction of a compliance programme, and was not required to undertake to introduce a programme for the purposes of gaining leniency. XCO qualified for leniency despite its non-existent compliance efforts. By contrast, YCO improved its programme 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.

[45] Organisation for Economic Co-operation and Development (n 10) 15. A Riley and M Bloom, 'Antitrust Compliance Programmes—Can Companies and Antitrust Agencies Do More?' (2011) 10 *Competition Law Journal* 21 (included as part of the Organisation for Economic Co-operation and Development's policy roundtable at 327) almost studiously avoids the question.

[46] Competition Bureau Canada, 'Corporate Compliance Programs' (n 24) 15.

[47] As satirised in J Murphy, 'Introducing the FAST RAT Program: From The Devil's Advocate LLC' (2011) www.compliance-network.com/wp-content/uploads/2012/09/Fast-Rat-Booklet-copy-PDF.pdf.

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.[48]

A successful corporate leniency applicant does need to conduct an internal investigation in order to co-operate with an investigation,[49] and that investigation may have a salutary impact on attitudes towards compliance within the firm. However, compliance programmes are not concerned only with the internal investigation of past conduct. They are also concerned with a range of controls (for example, reporting procedures, employee incentives and compliance training) that are geared to preventing future unlawful conduct.

A second fault line is that it is possible for corporations to play the game of 'enter into cartel, get immunity' on more than one occasion.[50] For example, it was reported in April 2014 that UBS AG might receive immunity in the European Union 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.[51] Repeated 'enter into cartel, get immunity' games are possible, given that almost all current leniency policies do not preclude leniency applications by recidivists.[52] This is a concern, given that the incidence of cartel recidivism appears to be high.[53]

Thirdly, disregard of compliance programmes in the context of leniency policies is difficult to reconcile with the prominence and perceived value of such programmes elsewhere in the antitrust firmament. At least since the heavy electrical equipment conspiracies surfaced in the 1950s,[54] compliance programmes have been adopted widely by corporations in practice, and their worth has been advocated by numerous commentators and

[48] See the discussion of recidivism in the sources cited in n 53 below.

[49] 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 and RE Barkow (eds), *Prosecutors in the Boardroom: Using Criminal Law to Regulate Corporate Conduct* (New York, New York University Press, 2011) 72. On the co-operation with an investigation required as a condition of leniency, see the salutary reminders in Baer (n 9) 3–4.

[50] For a discussion of gaming the leniency policy, see C Harding, C Beaton-Wells and J Edwards, 'Leniency and Criminal Sanctions in Anti-Cartel Enforcement: Happily Married or Uneasy Bedfellows?', ch 12 in this volume.

[51] G Sebag, 'UBS First to Report FX Rigging Shows EU Immunity Flaws' *Bloomberg* (2 April 2014) www.bloomberg.com/news/2014-04-02/ubs-said-poised-to-receive-eu-immunity-in-currency-rigging-probe.html. The comments in the text relate to the position in the European Union. UBS was fined £233 million in the UK; see 'Foreign exchange fines: banks handed £2.6bn in penalties for market rigging' *The Guardian* (12 November 2014) www.theguardian.com/business/2014/nov/12/foreign-exchange-fines-ubs-hsbc-citibank-jp-morgan-rbs-penalties-market-rigging.

[52] The Korean corporate leniency policy is an exception. A corporation is not allowed to receive immunity more than once in five years: Korea Fair Trading Commission, 'Public Notification on Implementation of Leniency Program Including Corrective Measures against Voluntary Confessors, etc of Unfair Cartel Activities' (2012) art 6-3, http://eng.ftc.go.kr/bbs.do?command=getList&type_cd=62&pageId=0401. See also Beaton-Wells (n 29) 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').

[53] See JM Connor, 'Recidivism Revealed: Private International Cartels 1990–2009' (2010) 6 *Competition Policy International* 101; WPJ Wils, 'Recidivism in EU Antitrust Enforcement: A Legal and Economic Analysis' (2012) 35 *World Competition* 5. On recidivism, multi-product cartelists and the appropriate investigative approach for competition authorities to adopt, see LM Marx and C Mezzetti, 'Leniency, Profiling and Reverse Profiling in Multi-Product Markets', ch 6 in this volume.

[54] See RA Smith, *Corporations in Crisis* (New York, Anchor Books, 1966) chs 5–6; G Geis, 'The Heavy Electrical Equipment Cases of 1961' in G Geis and RF Meier (eds) *White-Collar Crime: Offenses in Business, Politics, and the Professions* (New York, Free Press, 1977) 117–32; B Fisse and J Braithwaite, *The Impact of Publicity on Corporate Offenders* (Albany, State University of New York Press, 1983) ch 16.

professional bodies.[55] An effective compliance programme is relevant as a mitigating factor in sentencing under the Sentencing Guidelines of the United States Sentencing Commission (Sentencing Guidelines),[56] but not to the exercise of discretion as to whether or not to prosecute an antitrust offence.[57] Moreover, the value of compliance programmes has been endorsed at conferences by antitrust enforcement officers, as in the following attestation by a DOJ official:

> 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. 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.[58]

Fourthly, compliance programmes and leniency policies potentially reinforce each other.[59] 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 programmes by highlighting how and why leniency policies increase the risk of detection of cartel conduct and elevate the danger of enforcement action.

[55] See, eg, International Chamber of Commerce, 'The ICC Antitrust Compliance Toolkit' (2013) www.iccwbo.org/Data/Policies/2013/ICC-Antitrust-Compliance-Toolkit-ENGLISH/; Section of Antitrust Law, American Bar Association, *Antitrust Compliance: Perspectives and Resources for Corporate Counselors*, 2nd edn (Chicago IL, American Bar Association, 2010); J Murphy and W Kolasky, 'The Role of Anti-Cartel Compliance Programs in Preventing Cartel Behavior' (2012) 26(2) *Antitrust* 61; RC Marshall and LM Marx, 'Section 1 Compliance from an Economic Perspective' in N Charbit and E Ramundo (eds), *William E. Kovacic: An Antitrust Tribute Liber Amicorum—Volume II* (Paris, Institute of Competition Law, 2014); DD Sokol, 'Cartels, Corporate Compliance, and What Practitioners Really Think about Enforcement' (2012) 78 *Antitrust Law Journal* 201; RM Abrantes-Metz and DD Sokol, 'Antitrust Corporate Governance and Compliance' in RD Blair and DD Sokol (eds), *The Oxford Handbook of International Antitrust Economics* Vol 2 (New York, Oxford University Press, 2014).

[56] United States Sentencing Commission, 'Guidelines Manual' (November 2013) §§ 8B2.1, 8C, www.ussc.gov/sites/default/files/pdf/guidelines-manual/2013/manual-pdf/2013_Guidelines_Manual_Full.pdf (Sentencing Guidelines). For a discussion of these Guidelines, see J Murphy, 'Combining Leniency Policies and Compliance Programmes to Prevent Cartels', ch 16 in this volume. For Australia, see Beaton-Wells and Fisse (n 4) 500. Mitigation of penalty on the basis of effective compliance programmes is proposed in Canada: see Competition Bureau Canada, 'Corporate Compliance Programs' (Consultation Draft Bulletin) (n 26) 20. Contrast the position in the European Union where compliance programmes are not relevant to the mitigation or aggravation of cartel fines: see J Faull and A Nikpay, *The EU Law of Competition*, 3rd edn (Oxford, Oxford University Press, 2014) ss 8.616, 8.658.

[57] DOJ, 'United States Attorneys' Manual' (August 2008) § 9-28.400B, www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm#9-28.400.

[58] Snyder (n 9) 1–2.

[59] Beaton-Wells (n 29) 159–60.

Enforcement agencies often refer to these supporting roles of compliance programmes. However, they neglect to explain why a corporate leniency applicant is free not to have a compliance programme in place or to adopt a programme 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.[60] Bill Baer, Assistant Attorney General for the Antitrust Division of the DOJ, 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:

> 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 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.[61]

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.[62] The wisdom or otherwise of this approach is discussed in Section VD below.

A further fault line worth heeding is that compliance programmes 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 into 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 Section VE.

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

[61] Baer (n 9) 8.

[62] In the case of second-in corporations, some leniency policies (for example, the DOJ's Corporate Leniency Policy) enable immunity to be granted to those employees who are not carved out as targets for prosecution.

To conclude this section, 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 programme when determining the conditions of corporate leniency. However, as discussed in Section 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 programme be put in place. However, as discussed in Section V below, a workable approach is conceivable.

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.[63] As explained below, those theories have obscured rather than illuminated how much the impact of corporate leniency policies on corporations depends on corporate internal control systems, including compliance programmes.

The theories of optimal incentivisation of corporate action in question are based on economic models of the firm. These models treat a corporation as one of two kinds of actor:

(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.[64]

These theoretical postulates have a superficial appeal. They simplify the construct of corporate action and avoid opening the 'black box' of organisational behaviour.[65] As a result, antitrust compliance programmes 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.[66]

[63] See, eg, G Spagnolo, 'Leniency and Whistleblowers in Antitrust' in P Buccirossi (ed), *Handbook of Antitrust Economics* (Cambridge MA, MIT Press, 2008); M Polo and M Motta, 'Leniency Programs' in American Bar Association, *Issues in Competition Law and Policy* Vol III (Chicago IL, American Bar Association, 2008); C Aubert, P Rey and WE Kovacic, 'The Impact of Leniency and Whistle-Blowing Programs on Cartels' (2006) 24 *International Journal of Industrial Organization* 1241.

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

[65] See further Stone (n 1) ch 6; Fisse and Braithwaite, *Corporations, Crime and Accountability* (n 60) ch 4.

[66] The relevant literature includes RM Cyert and JG March, *A Behavioral Theory of the Firm* (Englewood Cliffs NJ, Prentice-Hall, 1963); RA Gordon, *Business Leadership in the Large Corporation* (Berkeley CA, University of California Press, 1966); CD Shearing and PC Stenning (eds), *Private Policing* (Newbury Park NJ, Sage Publications,

First, it is unrealistic to treat corporations as rational unitary actors.[67] A corporation is not a human being. Human beings act on behalf of corporations, but their roles and interests differ, often diverge and may conflict. Moreover, corporate conduct is not merely the sum of the conduct of managers and 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.[68] 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.[69] Others include metaphors of the corporation as machines, as cultures, as political systems and as private micro-legal systems.[70] 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.[71] 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.

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

1987); AK Sen, 'Rational Fools: A Critique of the Behavioral Foundations of Economic Theory' (1977) 6 *Philosophy & Public Affairs* 317; C List and P Pettit, *Group Agency: The Possibility, Design, and Status of Corporate Agents* (Oxford, Oxford University Press, 2011); Stone (n 1); Fisse and Braithwaite, *Corporations, Crime and Accountability* (n 60); WS Laufer, *Corporate Bodies and Guilty Minds: The Failure of Corporate Criminal Liability* (Chicago IL, University of Chicago Press, 2006); C Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (Cambridge, Cambridge University Press, 2002); C Parker and VL Nielsen, *Explaining Compliance: Business Responses to Regulation* (Cheltenham, Edward Elgar Publishing, 2011); SS Simpson, *Corporate Crime, Law, and Social Control* (New York, Cambridge University Press, 2002); TR Tyler, *Why People Obey the Law* (Princeton NJ, Princeton University Press, 2006); V Braithwaite, *Defiance in Taxation and Governance: Resisting and Dismissing Authority in a Democracy* (Cheltenham, Edward Elgar Publishing, 2009); CR Sunstein (ed), *Behavioral Law and Economics* (New York, Cambridge University Press, 2000); RE Goodin (ed), *The Theory of Institutional Design*, Theories of Institutional Design (Cambridge, Cambridge University Press, 1996); D Vaughan, *Controlling Unlawful Organizational Behavior* (Chicago IL, University of Chicago Press, 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* (Oxford, Hart Publishing, 2011); DD Sokol, 'Policing the Firm' (2013) 89 *Notre Dame Law Review* 785; Sokol, 'What Practitioners Really Think' (n 55); LA Cunningham, 'Deferred Prosecutions and Corporate Governance: An Integrated Approach to Investigation and Reform' (2014) 66 *Florida Law Review* 1; Beaton-Wells (n 29).

[67] See Fisse and Braithwaite, *Corporations, Crime and Accountability* (n 60) 73–74; TF Malloy, 'Regulating by Incentives: Myths, Models, and Micromarkets' (2002) 80 *Texas Law Review* 531.

[68] See Fisse and Braithwaite, *Corporations, Crime and Accountability* (n 60) 75–78.

[69] ibid 76–77. See further G Morgan, *Images of Organization* (Beverly Hills CA, Sage Publications, 1986).

[70] See, eg, Morgan (n 69); Shearing and Stenning (n 66).

[71] See B Fisse, 'Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions' (1983) 56 *Southern California Law Review* 1141, 1159–66.

managers and employees behave in the real world.[72] 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.[73] That is because key variables (for example, 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.[74] 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 programme, the elements of which are based on long-standing practical experience. That practical experience is distilled in the United States Sentencing Guidelines, guidance documents by enforcement agencies and numerous professional and academic publications.[75]

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;
(4) compliance programmes are the main type of corporate internal controls likely to assist in the prevention of cartel conduct;[76] and
(5) individual accountability is a cornerstone of social control, and compliance programmes can be harnessed to help ensure that individuals who participate in cartel conduct or who unreasonably fail to prevent such conduct are held accountable.[77]

[72] See, eg, HA Simon, 'A Behavioral Model of Rational Choice' (1955) 69 *Quarterly Journal of Economics* 99; 99 (1955); A Tversky and D Kahneman, 'Judgment under Uncertainty: Heuristics and Biases' (1974) 185 *Science* 1124; Stucke (n 66).

[73] See J Byrne and SM Hoffman, 'Efficient Corporate Harm: A Chicago Metaphysic' in B Fisse and PA French (eds), *Corrigible Corporations & Unruly Law* (San Antonio TX, Trinity University Press, 1985); Fisse and Braithwaite, *Corporations, Crime and Accountability* (n 60) 88–93.

[74] See Fisse and Braithwaite, *Corporations, Crime and Accountability* (n 60) 92; A Etzioni, *The Moral Dimension: Toward a New Economics* (New York, Macmillan, 1988) ch 10.

[75] See text to nn 54–58.

[76] This is not to contend that compliance programmes necessarily will be effective. For sceptical views about their efficacy, see, eg, Laufer (n 66) chs 4–5; C Parker and VL Nielsen, 'Corporate Compliance Systems: Could They Make Any Difference?' (2009) 41 *Administration & Society* 3.

[77] See further Fisse and Braithwaite, *Corporations, Crime and Accountability* (n 60) chs 1, 5 and 6.

V. MAKING AN ADEQUATE COMPLIANCE PROGRAMME A CONDITION OF CORPORATE LENIENCY

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

A a compliance programme 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 Programme as a Condition of Corporate Leniency and the Mechanism of Enforced Self-Regulation

The approach proposed in the Antitrust and Competition Law Compliance Discussion Group's Model Agency Policy[78] may be taken as a starting point. The compliance programme condition required under the Model Agency Policy is as follows:

> 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.[79]

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

First, it is difficult to understand why it is sufficient that an adequate compliance programme 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 programme will be in place in a specified time frame, and that such a programme 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[80] 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

[78] Model Agency Policy (n 44).
[79] ibid § 1.4.
[80] See J Braithwaite, 'Enforced Self-Regulation: A New Strategy for Corporate Crime Control' (1982) 80 *Michigan Law Review* 1466.

by a suitably qualified independent reviewer with access to all relevant information.[81] The compliance reports would need to cover how the requisite elements of an adequate compliance programme 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.[82]

Thirdly, the requirement of only one compliance report, as appears to be contemplated by the Model Agency Policy, is questionable. The period of required co-operation 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[83] 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 programme 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 programme not only a condition of corporate leniency but also a requirement of an undertaking by deed or a statutory court-enforceable undertaking.

It is unlikely that making a compliance programme a condition of corporate leniency would significantly discourage leniency applications.[84] 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 programme. This is especially so in jurisdictions 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 a high risk.[85]

B. The Requirement of an 'Adequate Compliance Program'

The Model Agency Policy requires an 'effective compliance program', which is defined as follows:

> 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

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

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

[83] This is the typical requirement in compliance programme undertakings under s 87B of the Competition and Consumer Act 2010 (Cth).

[84] The interview-based research reported in Beaton-Wells (n 29) 161 indicated that the practitioner interviewees did not have such a concern.

[85] As in the United States. See DOJ, 'Antitrust Division 2014 Criminal Enforcement Update' (2014) www.justice.gov/atr/public/division-update/2014/criminal-program.html; J Terzaken and M Kelley, 'You're Fired!

> 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 listed management steps]…[86]

This definition is imperfect in several respects:

— the criterion that a programme 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 programmes may sometimes fail to prevent unlawful conduct—'adequate' is a more apposite term; and
— the 18 management steps said to characterise an effective compliance programme 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:

(a) the desired elements of an effective compliance programme are cast as a series of 'management steps', rather than as a set of principles or guidelines geared to flexible and tailored interpretation 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 programme 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 programme 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 programme, as far as practicable, into 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 programme. As noted in Section II above, the position of some enforcement agencies is that it is important for compliance programmes to refer to leniency policies and to spell out the practical implications of those policies for the corporation and

The Expanding Role of Behavioral Remedies in Cartel Enforcement' in N Charbit and E Ramundo (eds), *William E. Kovacic: An Antitrust Tribute Liber Amicorum* Vol II (Paris, Institute of Competition Law, 2014). 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: Critical Studies of an International Regulatory Movement* (Oxford, Hart Publishing, 2011).

[86] Model Agency Policy (n 44) § 1.1.

its employees.[87] However, there is no requirement that compliance programmes include such content and it is possible that many do not. It is also possible that compliance programmes 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 United States antitrust compliance programmes:

> [A]ntitrust compliance programs generally do not include the information that would enlighten employees about the benefits of betraying a price-fixing employer … [E]ven 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 analysis with respect to confession. This undermines the ability of any such program to expose or deter price fixing.[88]

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

> *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.[89]

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 co-operate with an investigation by an enforcement agency may constrain internal disciplinary action against employees whose co-operation is needed in order to satisfy the corporate leniency condition.[90]

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.[91]

Fourthly, there are various possible ways in which corporate leniency applicants might try to obstruct or circumvent the operation of a leniency policy.[92] The Model Agency Policy does not address what can or should be done to guard against attempted hindrance or manipulation of leniency policies.

[87] See text to nn 10, 15, 18, 20–21.

[88] CR Leslie, 'Cartels, Agency Costs, and Finding Virtue in Faithless Agents' (2008) 49 *William and Mary Law Review* 1621, 1683–84 (citations omitted). For a discussion of whistle-blowing as a third race to the competition authority's door, see ME Stucke, 'Leniency, Whistle-Blowing and the Individual: Should We Create Another Race to the Competition Agency?', ch 11 in this volume.

[89] Model Agency Policy (n 44) §§ 1.1.16, 1.1.18.

[90] See the discussion in Section VC below.

[91] See the discussion in Section VD below.

[92] See the discussion in Section VE below.

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 addressed by corporate leniency applicants when introducing or revising compliance programmes in order to satisfy a corporate leniency condition requiring that they have an adequate compliance programme 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 on corporate compliance programmes.[93] They should be in sufficiently general terms to enable flexibility and to facilitate innovation. They should also deal with the main questions about compliance programmes that are raised by corporate leniency policies.

The approach proposed above could be derived from the guidelines on compliance programmes set out in § 8B2.1 of the United States Sentencing Guidelines,[94] with modifications to suit the corporate leniency context. Under § 8B2.1(a), the following general criterion is to be applied when assessing whether or not a corporation has 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 programme;
— reasonable efforts not to confer 'substantial authority' on personnel who have engaged in unlawful or other conduct inconsistent with an effective compliance and ethics programme;
— reasonable steps to communicate periodically and in a practical manner the organisation's standards and procedures and other aspects of the compliance and ethics programme, by conducting effective training programmes and otherwise disseminating information appropriate to the roles and responsibilities of employees and agents;
— reasonable steps to ensure that the compliance and ethics programme is followed (including monitoring and auditing to detect criminal conduct), periodic evaluation of the effectiveness of the programme, and 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;

[93] See the references in n 55 above.
[94] Sentencing Guidelines (n 56).

— promotion of the compliance and ethics programme 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; and
— reasonable steps to respond appropriately to criminal conduct and to prevent further similar criminal conduct (including making any necessary modifications to the compliance and ethics programme).

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 any criminal conduct identified.

For the purpose of reformulating corporate leniency policies to include a condition requiring an adequate compliance programme 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'.[95] The main need would be to add guidelines that address the significant issues that arise from the relationship between corporate leniency and compliance programmes. 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.[96]
— Internal disciplinary action against employees implicated in cartel conduct may be delayed where necessary to secure the co-operation of such employees in order to satisfy a corporate leniency condition requiring the corporation to co-operate with an investigation of that cartel conduct.[97]
— 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.[98]
— A compliance programme is not an adequate compliance programme where the design or implementation of the programme has the purpose or likely effect of obstructing, evading or manipulating a leniency policy.[99]
— Compliance training should make it clear that the corporation will not indemnify employees against sanctions or the costs of their defence, whether directly or indirectly.[100]

C. Internal Disciplinary Action in Relation to the Cartel Conduct Subject to Conditional Corporate Leniency

As discussed in Section III, a corporate leniency applicant may decide to refrain from taking internal disciplinary action and yet remain eligible for corporate leniency. Corporate

[95] The concept of 'adequate' procedures is used in Bribery Act 2010 (UK), s 7.
[96] See text to nn 87–88.
[97] See Section VC below.
[98] See Section VD below.
[99] See Section VE below.
[100] See further Beaton-Wells and Fisse (n 4) s 11.3.8.

leniency policies now require co-operation in the investigation of the cartel conduct but that requirement of co-operation does not extend to the taking of internal disciplinary action.[101] 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;[102] 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 VA and VB above is to make corporate leniency conditional on an undertaking to have an adequate compliance programme in place and to include appropriate internal disciplinary action as an element of such a programme. 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 it is a form of enforced self-regulation.[103] A corporation would be required to report what internal disciplinary action it has taken and that report would be reviewed by an independent compliance programme reviewer. In the event of a manifestly inadequate report the result would be revocation of corporate leniency or breach of a compliance programme undertaking. There is no question of a corporation being directed to terminate the employment of 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:

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 co-operate 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 they risk exposure to criminal liability or liability to a civil penalty. In some cases

[101] See, eg, DOJ, 'Corporate Leniency Policy' (n 5) conditions A.3, B.4; Commission Notice, para 12(a); ACCC, 'ACCC Immunity and Cooperation Policy for Cartel Conduct' (n 28) paras 16(a)(vii), 17, 21(h), 22.

[102] See Fisse and Braithwaite, *Corporations, Crime and Accountability* (n 60) 8–12.

[103] See J Braithwaite (n 80). The approach proposed here is consistent with the detailed model advanced in ibid chs 5–6.

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 increase 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.[104] 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 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.[105]

There is a possible risk that some employees may be less inclined to co-operate 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 co-operation with an investigation.[106]

The second concern flagged above is that internal disciplinary action may need to be delayed for a considerable time until the need to co-operate 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 co-operation of such employees during the enforcement agency's investigation.[107] The practical implications are spelt out in the Antitrust Compliance Toolkit of the International Chamber of Commerce:

> [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/

[104] As exemplified by the practice of the DOJ. See, eg, Department of Justice, 'Antitrust Division 2014 Criminal Enforcement Update' (n 85). By contrast, employees are not subject to individual liability in the European Union and no apparent attempt is made to compel internal disciplinary action by taking such action or the lack of it into consideration when assessing penalties against corporate defendants.

[105] See the discussion in Section VD below.

[106] See, eg, DOJ, 'Corporate Leniency Policy' (n 5) condition C; ACCC, 'ACCC Immunity and Cooperation Policy for Cartel Conduct' (n 28) paras 24–25; Office of Fair Trading, 'Applications for Leniency and No-Action in Cartel Cases' (n 19) para 2.7.

[107] Additional relevant factors include preserving the morale of other employees and safeguarding confidential information and other corporate assets.

absence (in some countries now known euphemistically as 'gardening leave') until a final resolution of the antitrust case against the company.[108]

If dismissal cannot occur when the company no longer requires co-operation 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 for failing to take internal disciplinary action may be impractical or unjust. An undertaking to take such action as part of having an adequate compliance programme in place would be enforceable for the period of that undertaking, but that period may be limited.[109] A pragmatic response to this possible difficulty is that requiring an employee to go on 'gardening leave' and co-operate 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.[110] Fuzzy as the criterion is, it has been in the United States Sentencing Guidelines for decades.[111] 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.[112]

The use of enforced self-regulation to bring about internal disciplinary sanctions raises further possible concerns, including the risk of scapegoating. These possible concerns and constructive solutions to them are discussed in detail elsewhere.[113]

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.[114] If corporate leniency requires that an 'adequate compliance program' be put in place, is a compliance programme adequate if it includes an internal leniency policy that provides for such immunity?

[108] International Chamber of Commerce (n 55) 48–49 (footnotes omitted).

[109] See text at n 89 above.

[110] Another 'fuzzy' requirement is that of 'co-operation' under leniency policies. See DC Klawiter and JC Everett, 'The Legacy of *Stolt-Nielsen*: A New Approach to the Corporate Leniency Program?', *Antitrust Source* (December 2006) www.americanbar.org/content/dam/aba/publishing/antitrust_source/Dec06_FullSource12_19f.authcheckdam.pdf.

[111] The term 'appropriate disciplinary action' is often used in private and public organisations. See, eg, Australian Red Cross, 'Disciplinary Action Policy' (13 March 2013) s 5, www.redcross.org.au/files/HR_SUP_15_-_Disciplinary_Action_Policy.pdf.

[112] See text at n 79 above.

[113] See Fisse and Braithwaite, *Corporations, Crime and Accountability* (n 60) ch 6.

[114] This is one of various possible internal analogs of external regulatory mechanisms. Another, as suggested to me by John Braithwaite, is the possibility of internal *qui tam* actions where whistle-blowers are rewarded by a percentage of the amount clawed back from bonuses paid to offending employees. This is not to say that internal controls should necessarily mirror external regulatory mechanisms. Far from it: corporations have the ability to develop innovative mechanisms of social control that are beyond the capacity or will of formal legal systems.

The leading commentary on the desirability and design of internal leniency policies is by Donald Klawiter and Jennifer Driscoll.[115] They advocate the following approach:

> 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.[116]

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 candor and completeness' and provide 'full, continuing, and complete cooperation that advances the company's investigation'.[117]

Another key condition is that the applicant for internal leniency make amends 'in a significant and meaningful way outside of his usual employment responsibilities'.[118] As Klawiter and Driscoll explain:

> 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.[119]

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'[120] and for precautions to be taken against the potential hazard of employees trying to 'game the system'.[121]

[115] DC Klawiter and JM Driscoll, 'A New Approach to Compliance: True Corporate Leniency for Executives' (2008) 22(3) *Antitrust* 77.
[116] ibid 77.
[117] ibid 78.
[118] ibid 79.
[119] ibid.
[120] ibid.
[121] ibid 80–81, where it is recommended that 'To 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'.

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. Enforcement agencies 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 persuading employees of the need to report cartel conduct; enforcement agencies have no such role or responsibility. Moreover, 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.[122] Compromising individual accountability in such a way is not only undesirable in terms of managerial control, but it is also difficult to reconcile with the United States Sentencing Guidelines. The Sentencing Guidelines require 'appropriate' disciplinary action as distinct from an 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.[123] The spectre has been raised of a salesperson being fired for padding a $200 expense report, while a vice-president for sales receives internal immunity for engaging in an international cartel.[124]

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.[125] 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.

[122] A concern reflected in, for example, 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' (January 2010) 25, www.meti.go.jp/english/report/downloadfiles/201001complaw.pdf.

[123] Sentencing Guidelines (n 56) § 8B2.1(6).

[124] DC Klawiter, T Bridgeford and RE Connolly, 'Internal Corporate Leniency Programs: If Prevention Fails Is Early Detection the Next Best Thing?' (2013) 17 (copy on file with author).

[125] See Klawiter and Driscoll (n 115) 79.

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.[126] Compliance programmes may be misused, as by deploying them to instruct employees in the rogue's art of playing repeated 'enter into cartel, get immunity' games.[127] However, current corporate leniency policies do not require that an adequate compliance programme be in place and do not address the risks of compliance programmes 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.[128] Unfortunately, leniency policies are also prone to attempted evasion or circumvention.

The obstruction of leniency policies is exemplified by compliance programmes that seek to dissuade employees from applying for individual leniency and require them to report suspected cartel conduct exclusively through internal reporting procedures.[129] 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.[130] Evasion of a leniency policy is illustrated in Europe by *AC-Treuhand AG v Commission*, where the cartel participants engaged a third party, the consulting firm AC-Treuhand, to manage incriminating evidence.[131] AC-Treuhand advised the cartel members at meetings on what measures to take to avoid detection and maintained sensitive documents, that could not be removed 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.[132]

[126] See, eg, Sokol, 'What Practitioners Really Think' (n 55) 212; Marshall and Marx (n 55) 300–01.

[127] Suggested by the estimate that around one quarter of leniency applications in the European Union during 2006–10 were made by recidivists. See Wils (n 53) 18.

[128] On liability control as distinct from 'compliance', see Beaton-Wells and Fisse (n 4) s 12.2.2.

[129] See Leslie, 'Cartels, Agency Costs' (n 88) 1684.

[130] See I Ayres, 'How Cartels Punish: A Structural Theory of Self-Enforcing Collusion' (1987) 87 *Columbia Law Review* 295, 304–12; OE Williamson, 'Credible Commitments: Using Hostages to Support Exchange' (1983) 73 *American Economic Review* 519; CR Leslie, 'Trust, Distrust, and Antitrust' (2004) 82 *Texas Law Review* 515, 614–15.

[131] Case T-99/04 *AC-Treuhand AG v Commission* [2008] ECR II-1501. See further LM Marx and Claudio Mezzetti, 'Effects of Antitrust Leniency on Concealment Effort by Colluding Firms' (2014) 2 *Journal of Antitrust Enforcement* 305, 309–10; C Harding, 'Capturing the Cartel's Friends: Cartel Facilitation and the Idea of Joint Criminal Enterprise' (2009) 34 *European Law Review* 298.

[132] See Marx and Mezzetti (n 131) 310.

Leniency policies can potentially be manipulated 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.[133] This encourages corporations looking for loopholes in the law to play repeated 'enter into 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.[134] 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.[135]

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 co-ordinate conduct in a market.[136] 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 programme in place and to provide that a compliance programme is not 'adequate' where its design or implementation 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 focusing not on avoiding repetition of cartel conduct but on negating or blunting a leniency policy in order to evade liability for repetition.

More needs to be done to counter the danger of repeated 'enter into 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.[137] 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[138] and trebling it for a third-time offender) and to offer recidivists who are the first to report a subsequent cartel

[133] See Wils (n 53) 17–20. For the position in Korea, see n 52.

[134] See, eg, Sokol, 'What Practitioners Really Think' (n 55) 212 (leniency programme may be used to punish rivals and in some cases even to help enforce collusion).

[135] See, eg, Commerce Commission New Zealand, 'Cartel Leniency Policy and Process Guidelines' (12 April 2011) para 3.06(v), www.comcom.govt.nz/dmsdocument/9401; Competition Bureau Canada, 'Immunity Program under the *Competition Act*' (Bulletin) (7 June 2010) para 15, www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Immunity-Program-2010.pdf/$FILE/Immunity-Program-2010.pdf; Commission Notice, paras 13, 22.

[136] On the historical significance of mergers as a reaction to § 1 of the Sherman Act, see J Braithwaite and P Drahos, *Global Business Regulation* (Cambridge, Cambridge University Press, 2000) 186–87. On joint ventures, see Beaton-Wells and Fisse (n 4) s 8.3. On the possibility of integration as a single economic unit, see H Hovenkamp and CR Leslie, 'The Firm as Cartel Manager' (2011) 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.

[137] See, eg, Wils (n 53) 20.

[138] As in the European Union. See Guidelines on the method of setting fines imposed pursuant to art 23(2)(a) of Regulation No 1/2003 [2006] OJ C210/2, para 28.

the incentive of being sentenced in accordance with a lower maximum penalty than that which would otherwise apply.[139]

VI. CONCLUSION

The relationship between corporate leniency policies and compliance programmes 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 programme in place as a condition of leniency. 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 programmes in the context of corporate leniency policies is difficult to reconcile with the significance of such programmes under the United States Sentencing Guidelines, in corporate practice and in enforcement agency pronouncements.
— Compliance programmes and leniency policies potentially can reinforce each other but a corporate leniency applicant is free not to have a compliance programme in place or to adopt a programme 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.
— Compliance programmes may be used in attempts to obstruct or circumvent leniency policies, yet leniency policies do not squarely address this risk.

Economic theories of optimal incentivisation of corporate action have tended to mask the relevance of compliance programmes in the context of corporate leniency. However, those theories are unrealistic and impractical in this context.

Corporate leniency could be made subject to a condition requiring an adequate compliance programme to be put in place. The main elements of the approach proposed above are:

— amendment of corporate leniency policies so as to require as a condition of leniency the adoption and implementation of an adequate compliance programme for a period of three 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 facilitate 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;

[139] Compare the detrebling of damages under the Antitrust Criminal Penalty Enhancement and Reform Act, Pub L No 108-237, § 213, 118 Stat 661, 666–67 (2004), in the case of a defendant that has been granted immunity under the DOJ's Corporate Leniency Policy.

— delineation of the concept of an 'adequate compliance program' along the lines of § 8B2.1 of the United States Sentencing Guidelines but adding guidelines that address the significant issues that arise from the relationship between corporate leniency and compliance programmes;
— 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 programme 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 programme reviewer;
— including a guideline that internal disciplinary action against employees implicated in cartel conduct may be delayed where necessary to secure their co-operation in order to satisfy a corporate leniency condition requiring the corporation to co-operate 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 the severity of the sanction;
— countering attempts to hinder or circumvent leniency policies by providing in a guideline that a compliance programme is not adequate where its design or implementation has the purpose or likely effect of obstructing, evading or manipulating a leniency policy; and
— countering repeated 'enter into 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.