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ROUNDTABLE ON PROMOTING COMPLIANCE WITH COMPETITION LAW

-- Issues Paper by the Secretariat --

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PROMOTING COMPLIANCE WITH COMPETITION LAW

1. Introduction

1. “In the last two decades, the world has seen the proliferation of effective leniency programs, ever-increasing sanctions for cartel offenses, and a growing global movement to hold individuals criminally accountable,” a top antitrust enforcement official recently observed.¹ Statistics from several of the largest OECD economies do show dramatic growth in the fines imposed for corporate and (in some jurisdictions) individual cartel activity over the past twenty years. During the same time, prison sentences for cartel participants became more frequent and severe in the US, while leniency programmes and the criminalisation of cartel violations spread to more countries. Yet cartels remain a substantial problem, as do recidivists.² Between 1990 and 2005, 174 companies violated laws against price-fixing at least twice, with some reoffending as many as 26 times – that we know of.³

2. These trends raise troubling questions. Courts and competition agencies have been sending stronger and stronger signals to potential offenders for years. But is anyone receiving the message? If they are, do they care?

3. The statistics raise other questions, as well. What factors other than fines and prison might motivate compliance with competition law? What factors undermine it? How can competition authorities promote better compliance? What strategies have not been tried yet that are worth considering?⁴ What (if

¹ Scott Hammond, “The Evolution of Criminal Antitrust Enforcement over the Last Two Decades,” Speech before the National Institute on White Collar Crime (25 February 2010) at p. 1.

² Douglas Ginsburg & Joshua Wright, “Antitrust Sanctions,” 6 Competition Policy International 3, 4 (2010). See also John Connor, “The United States Department of Justice Antitrust Division’s Cartel Enforcement: Appraisal and Proposals” American Antitrust Institute Working Paper No 08-02 (June 2008) at 9 (“the number of cartels being discovered each year continues to rise as [does] the number of firms that are price-fixing recidivists”); but see the comments of the US delegate in the Summary of Discussion for this roundtable (arguing that Connor’s conclusions about recidivism are inaccurate because he does not distinguish concurrent offences from successive ones, and he counts situations in which separate subsidiaries of large companies commit violations and situations in which violations occur many years apart as instances of recidivism).

³ John Connor & C. Gustav Helmers, Statistics on Modern Private International Cartels, 1990-2005 at 38 (Working Paper, January 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=%201103610; see also Ron Knox, “Is DG Comp More Likely to Raise a Fine Than to Lower It?,” Global Competition Review (21 November 2010) at p.2, available at www.globalcompetitionreview.com/indepth/analysis/29350/is-dg-comp-likely-raise-fine-lower-it/ (finding that the most common reason DG Comp increased fines between 2005 and 2010 was recidivism, which resulted in higher fines 35 times).

⁴ Note that this paper does not cover merger-related issues, in particular because the Competition Committee is holding a separate roundtable on the impact evaluation of merger decisions during this (June 2011) session. Instead, this paper focuses on compliance in the context of non-merger violations, especially those related to cartels, which are a top priority for most competition agencies and which are subject to a wider variety of deterrents than unilateral conduct violations.

anything) should competition agencies be doing to encourage and improve competition compliance programmes in the private sector? This paper provides some background to help address those issues.

2. Determinants of compliance

4. The competition policy literature mentions quite a few factors that affect the degree of compliance with competition laws. (This part of the paper simply identifies the range of possible influences on compliance. It does not discuss how strong they are. That topic is addressed in Part 3.) These include the following, most of which are self-explanatory:

2.1 Factors that encourage compliance

- *Fear of monetary sanctions imposed on corporations or individuals.*
- *Fear of imprisonment.*
- *Fear of damage to individual or corporate reputation.*
- *Morality.*
- *Good training.*
- *Employer-driven incentives for employees.* Rewarding compliance and/or penalising non-compliance, such as by linking bonuses and/or promotions to compliance or otherwise making it clear that management is serious about complying with competition law, can be a motivating factor.
- *Desire to avoid the diversion of the company's attention that competition investigations and litigation cause.*
- *A culture of competition within the firm, industry, and/or country.* Companies and individuals that operate in environments where the value of competition is widely understood and appreciated, and in which competition laws are respected, are more likely to comply with those laws.

5. Notably, this simple list of factors suggests that promoting compliance could involve more than deterrence alone.

2.2 Factors that encourage non-compliance

- *A culture of non-compliance – or at least lack of a culture of compliance – within the firm, industry, and/or country.*
- *Mixed signals about compliance from management.* For example, a company's top executives might express support for competition law compliance, but simultaneously give signals in other contexts that they really do not care how sales targets are met, just as long as they *are* met.
- *Market conditions that facilitate collusion or an abuse of dominance.* The market conditions that facilitate cartels are well known and include features such as a small number of players, price transparency, a homogenous product, pervasive exchanges of information among competitors, and/or sending public signals about planned price and/or output levels. Conditions that facilitate abuses of dominance vary, depending on the conduct. As an example, characteristics that favour predatory pricing include a dominant incumbent with very high market share, deep pockets, excess capacity and low price elasticity of demand.
- *The perception that the likely gains from not complying outweigh the likely costs.*
- *Ignorance of the likely legal consequences of not complying.*

- *Arrogance among the senior leaders and/or perpetrators.* When individuals in a company believe they are above the law or that they are so smart that they will not get caught or convicted, they are more likely to violate the law.
- *The insularity of large organizations.* To the people who work in them, large organizations' internal priorities and incentive systems may have a much greater bearing on their behaviour than the seemingly distant threat of external rules.

What other factors influence companies' decisions to comply or not comply with competition laws?

3. Promoting better compliance

6. Depending on how certain data are interpreted, one might conclude that the tools and strategies that competition authorities currently use to promote compliance are not working as well as desired, at least with respect to hard core cartels. Over the past 20 years or so, the average amount of fines imposed for cartel violations increased dramatically in the EU, US and other jurisdictions; imprisonment became an option for dealing with cartelists in more OECD jurisdictions; in the US, courts imposed more and lengthier prison sentences on violators; and leniency programmes proliferated around the world. Meanwhile, "there is evidence that the number, size, and injuriousness of discovered cartels is increasing."⁵ We might infer that tools like fines, prison, and leniency have not been very effective because there seems to be at least as much cartel activity now as there ever was. If that is true, enforcers need to determine why their methods are not working better and to start using new approaches.

7. Alternatively, the inference that current tools are not working so well would be erroneous if a higher percentage of violations are detected now than in the past (perhaps due to the rise of leniency programmes) but the total number of detected plus undetected cartels has decreased.

8. In either case, the enforcement community will benefit by asking questions and sharing answers about which approaches work, which ones do not, and why.

3.1 Are the main approaches to promoting compliance working?

9. The main enforcement methods used by competition authorities for encouraging compliance with competition laws are fines, imprisonment (where available), and leniency programmes. The frequency and intensity with which all three methods have been used increased sharply over the years, yet cartel activity, in particular, continues without any apparent abatement. The total number of detected international cartels, for example, climbed from an average of 6.3 per year in the 1990-1995 period to an average of 32.9 in the 2004-2007 period.⁶ One might fairly expect that if conventional approaches to deterrence have been working well, the number of cartel prosecutions would be dwindling by now. Perhaps sanctions are still too low, or prison sentences should be lengthened and used more widely.

10. Actually, it is impossible to know exactly how well or how poorly the current approaches are working because it is impossible to observe how many cartels go undetected. At least four different factors might explain the increase in the number of international cartels that have been uncovered: 1) leniency programmes were used more widely; 2) more national competition authorities pursued cartels and shared information with each other; 3) competition authorities began focusing more on international cartels than domestic ones; and 4) the rate of cartel formation increased. Some commentators, such as Connor, believe

⁵ Connor, *supra* note 2, at 1.

⁶ *Id.* at 6.

that factor 4) is at least partially responsible. He contends that even if detection rates have increased it is doubtful that they have increased by a factor of 5 or 6 – which is how much the number of international cartels detected annually has grown since the early 1990s.⁷ It therefore appears that cartel formation rates have risen, as well.

11. Other commentators paint a more optimistic picture. Clarke and Evenett, for instance, studied the vitamins cartel of the 1990s and found that exports from countries where the conspirators were located to nations in Africa, Europe, and Latin America that did not have anti-cartel laws tended to grow faster than exports to those nations that did have such laws. It therefore appeared that the cartel particularly targeted nations without anti-cartel laws. In fact, the pattern of discrimination between export destinations was especially strong in Europe, suggesting that the deterrent value of European anti-cartel laws is relatively high.⁸

3.1.1 *Fines*

12. In a classic article, Gary Becker solidified in economic terms the idea that decisions about whether to engage in criminal behaviour can be reduced to expected value calculations. In other words, he showed how rational actors would compare the anticipated economic value of a contemplated crime with the product of the probability of detection and the cost of the consequences of being detected.⁹ One of the results of his work was the theoretical insight that there was another, less expensive way to deter competition law violations besides trying to catch every one of them and making the offenders pay fines that merely equalled the social cost of their crimes. Instead, detection rates could remain well below 100 percent but the level of the fines that are imposed on violators could be increased until the expected value of violations is negative. If fines are high enough, Becker contended, even a low probability of detection could be consistent with sufficient deterrence.¹⁰

13. About 40 years after Becker's article was published, a report commissioned by the OFT confirmed that "at a fundamental level, the most important result [of a review of the literature] is that high fines are a crucially important element of deterrence."¹¹ There is no denying that agencies like the European Commission and the USDOJ's Antitrust Division have succeeded in imposing higher and higher fines over the years.¹²

14. The total fines imposed at the EU level for cartel violations, adjusted for Court judgments, rose from 344 million euros in the 1990-1994 period to 9.6 billion euros during 2005-2009, a total increase of roughly 2700 percent.¹³ The average corporate fine grew from less than two million euros in 1990-1994 to

⁷ Connor, *supra* note 2, at 9.

⁸ Julian Clarke & Simon Evenett, "The Deterrent Effects of National Anticartel Laws: Evidence from the International Vitamins Cartel," 48 *Antitrust Bulletin* 289 (2003).

⁹ Gary Becker, "Crime and Punishment: An Economic Approach," 76 *Journal of Political Economy* 169 (1968).

¹⁰ More precisely, the total optimal sanction would equal the expected gain from the violation multiplied by the inverse of the probability of detection (plus the enforcement cost of imposing the sanction).

¹¹ Office of Fair Trading, *An Assessment of Discretionary Penalties Regimes*, OFT1132 (2009) at p. 8.

¹² The methodologies that competition authorities in several OECD jurisdictions use to calculate fine levels are explained and compared in Office of Fair Trading, *An Assessment of Discretionary Penalties Regimes*, *supra* note 11. The jurisdictions are Australia, the EU, Germany, the Netherlands, the US, and the UK.

¹³ European Commission Cartel Statistics (as of 13 April 2011), available at <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf>.

46 million euros during 2005-2009, or approximately 2200 percent.¹⁴ Meanwhile, the number of cartel cases decided by the European Commission climbed from 11 in 1990-1994 to 33 in 2005-2009.¹⁵

15. Over the same time periods, the Antitrust Division at USDOJ chalked up similarly impressive numbers. It collected \$142 million in total corporate fines during 1990-1994, a figure that rose to \$3.35 billion in the 2005-2009 timeframe (an increase of about 2250 percent). During the same time intervals, the average corporate fine rose from \$480,000 to about \$44 million (about 9000 percent).¹⁶ The average fine levied on individuals rose from \$125,000 in 1998 to more than \$600,000 in 2007.¹⁷ Interestingly, those figures were all rising during a period when the total number of criminal price fixing cases brought per year by DOJ was falling. In fact, the figure fell by 68 percent from the early 1990s to the 2004-2006 timeframe. The downward trend applies both to cases brought against corporations as well as cases brought against individuals.¹⁸ These statistics suggest that DOJ has been targeting a relatively small number of “big cases” with the potential for large penalties rather than a great number of “little cases” with smaller penalties. That strategy is consistent with the rising number of cases brought against large, international cartels.

16. The EU and US are not alone in imposing substantial fines for competition law violations. Germany's Bundeskartellamt, for example, fined corporate and individual offenders a total of €969.2 million from 2001-2006. France's Autorité de la Concurrence imposed a total of €2 billion from 2001 to 2008.¹⁹ Just this year, Mexico's Comisión Federal de Competencia imposed a US\$1 billion fine on Telcel, a mobile telecommunications company for monopolistic practices.

17. Should other competition authorities follow suit? And should those who have already increased their fines to very high levels continue to raise them? According to some commentators, higher monetary sanctions are needed to achieve deterrence even in the jurisdictions that have already had years of steeply increasing fines. Connor and Helmers, for instance, argued in 2007 that even though monetary sanctions imposed on international cartels had reached their highest levels ever, “extensive recidivism implies that present cartel sanctions are inadequate to deter cartel formation.”²⁰

18. That same year, Connor published an article with Lande in which they compared the average amounts cartels gained from their illegal overcharges with the levels of fines imposed in the US and EU. After finding that cartel overcharges ranged from 18 to 37 percent in the US and from 28 to 54 percent in the EU, the authors concluded that the gains were significantly higher than the resulting fines. They therefore recommended that both the US and the EU raise fines substantially.²¹ Wils concurs that fines are

¹⁴ Ginsburg & Wright, *supra* note 2, at 11.

¹⁵ European Commission Cartel Statistics (as of 13 April 2011), available at <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf>.

¹⁶ Ginsburg & Wright, *supra* note 2, at 10.

¹⁷ Office of Fair Trading, *An Assessment of Discretionary Penalties Regimes*, *supra* note 11, at 154; but see Connor, *supra* note 2, at 33 (pointing out that the average is distorted by a few very high individual fines, and contending that “[c]ompared with the wealth and high positions of the majority of convicted cartel managers, personal fines are an insignificant potential source of deterrence”).

¹⁸ Connor, *supra* note 2, at 18-19.

¹⁹ Ginsburg & Wright, *supra* note 2, at 13.

²⁰ *Id.* at 15 (citing Connor & Helmers, *supra* note 3); see also Office of Fair Trading, *An Assessment of Discretionary Penalties Regimes*, *supra* note 11, at 19 (noting that “[t]he literature suggests that current antitrust fines in practically all jurisdictions are too low to achieve cartel deterrence”).

²¹ John Connor & Robert Lande, “Cartel Overcharges: Implications for U.S. and EU Fining Policies,” 51 *Antitrust Bulletin* 983 (2007).

too low, having calculated that they need to be at least 150 percent of the defendant's turnover in the relevant market(s).²² The view that fines need to be higher seems to be the prevailing one, among both academics and agencies.

19. Other commentators have interpreted the data quite differently, though. Rather than calling for even higher fines, they question the ability of *any* level of fines to achieve effective deterrence. Ginsburg & Wright point to Connor's and Helmer's finding that in the US, "detected instances of price-fixing remained relatively frequent from 1990 to 2005, extracting from consumers (in constant 2005 dollars) aggregate overcharges exceeding \$200 billion, with an average overcharge of \$2.1 billion per cartel,"²³ and then remind us that the increase in total fines for cartels could mean different things. Either agencies have gotten better at uncovering and prosecuting cartels, or detection/prosecution rates have not changed but the rate of cartel formation has increased in spite of higher fines. But if fines are the best way to deter cartels, then we should have seen a decrease in the number of cartel cases as fines increased. That has not happened. "At this point, we do not have any evidence that a still higher corporate fine would deter price-fixing more effectively. It may simply be that corporate fines are misdirected, so that increasing the severity of sanctions along this margin is at best irrelevant and might counter-productively impose costs upon consumers in the form of higher prices as firms pass on increased monitoring and compliance expenditures."²⁴

20. Moreover, there are limits to what a corporation can pay and to what sound policy dictates that it should be made to pay. At some point, imposing higher and higher fines can become counterproductive. A very heavy fine might be beyond the ability of a company to pay²⁵ and thus may push it into bankruptcy and cause it to exit the market permanently. The market might then be less competitive than it would have been if the company had been punished but allowed to survive. Consequently, consumers might pay higher prices, receive poorer service, or benefit from less innovation.²⁶ The European Parliament identified another reason to avoid relying too heavily on fines last year, stating that "the use of ever higher fines as the sole instrument [for sanctioning competition law violations] may be too blunt, not least with a view to potential job losses as a result of the inability to pay[.]"²⁷ Thus it is possible for a fine to be optimal for the purpose of achieving deterrence, but sub-optimal for preserving competition or promoting other policy objectives such as employment.

21. In addition, extremely high fines could raise questions about the proportionality of the punishment relative to the harm caused by the violation. Regardless of their mathematical optimality, if fines become so high that the public begins to perceive them as vindictive, they may undermine respect for

²² Wouter Wils, "Is Criminalization of EU Competition Law the Answer?", 28 *World Competition: Law and Economics Review* (2005). This is not to suggest that Wils believes it is actually advisable to raise fines to such a high level, though. The point is simply Wils's conclusion that following a pure Becker type of analysis leads to "optimal" fines that would have to be set at 150 percent of the defendant's turnover in the relevant market.

²³ Ginsburg & Wright, *supra* note 2, at 12 & n.32 (citing Connor & Helmers, *supra* note 3).

²⁴ Ginsburg & Wright, *supra* note 2, at 12.

²⁵ See Frederic Jenny, "Optimal Antitrust Enforcement: From Theory to Policy Options", in *The Reform of EC Competition Law: New Challenges* (Ioannis Lianos & Ioannis Kokkoris, eds. 2010) 121, 128 (citing a study showing that firms might need assets as much as six times their annual sales to be able to pay an optimal fine, Gregory Werden & Marilyn Simon, "Why Price Fixers Should Go to Prison," 32 *Antitrust Bulletin* 917 (1987)).

²⁶ Gregory Werden, "Sanctioning Cartel Activity: Let the Punishment Fit the Crime", 5 *European Competition Journal* 1, 30-31 (2009).

²⁷ European Parliament Resolution of 9 March 2010 on the Report on Competition Policy 2008, para. 45.

competition law and thus do more harm than good. Very high fines might also raise concerns about over-deterrence, as companies may react to them by over-investing in monitoring and compliance and by avoiding conduct that is not actually anticompetitive. Those outcomes would ultimately impose higher costs on consumers.

22. Another drawback is that although there is some intuitive logical appeal to the idea of imposing “optimal” fines that are calculated to reduce the expected value of anticompetitive behaviour to zero, doing that consistently in practice is all but impossible. Reliable case-by-case data on the risks of detection and conviction, as well as on the likely amount of the gain from the unlawful conduct, is not usually available.

23. Furthermore, practical considerations suggest that high corporate fines alone cannot provide sufficient deterrence. For example, the interests of individuals in a company may not align perfectly with the best interests of the company. If executives or officers believe they can advance more rapidly, collect higher bonuses, or gain prestige by padding profits via cartel activity, they may be inclined to do so even though the company could eventually be fined as a result. By then, the responsible individuals may have moved on to another company. Even if they did not, it is unlikely that the costs imposed on those individuals will match the costs imposed on the company.²⁸ Simply put, a divergence of interests is likely to be a problem whenever directors, officers, or managers believe they personally have more to gain from committing a violation than they stand to lose if their company is fined.

24. In response to that latter point, proponents of relying heavily on corporate fines tend to reason that fines have the desired effect on individual behaviour because when corporations are stung by optimal fines, they (and other corporations, as well) respond by putting controls and incentives in place to prevent conduct that could lead to further fines. While that view may make sense for privately held corporations, Ginsburg and Wright acknowledge, it does not reflect the reality of how publicly traded corporations function. Directors oversee officers who oversee employees. The owners are shareholders, and most shareholders are merely passive investors who have little control over the corporation’s conduct. They therefore cannot prevent price fixing by the corporation’s employees. Instead, they will simply make decisions about buying, holding, and selling their shares based on how the corporation’s conduct is affecting profits, and thus the value of their shares, within a given time horizon. In fact, shareholders may benefit greatly from the corporation’s participation in a cartel, and the same is true of the directors and officers, who may not only benefit from an increase in the value of their shares but from bonuses and greater prestige triggered by higher profits. As the data suggest and scholars like Connor have argued, price-fixing does still seem to be profitable, despite the trend of higher corporate fines.²⁹

25. Of course, some agencies impose fines on individuals, as well. But there is not much faith in the deterrent value of individual fines because it is easy for corporations to provide compensation for monetary sanctions on individuals.³⁰

Should fines for competition law violations be increased beyond current levels? Where optimal deterrence might clash with the preservation of competition in a market (because a heavy fine could cause an important competitor to exit), which objective should enforcement agencies prioritise? Can one be achieved without the other? Furthermore, what causes recidivism? Why are some firms repeat offenders

²⁸ Office of Fair Trading, An Assessment of Discretionary Penalties Regimes, supra note 11, at 21.

²⁹ Ginsburg & Wright, supra note 2, at 17-18.

³⁰ See OECD, Cartel Sanctions against Individuals, [DAF/COMP\(2004\)39](#) at 8 (“There appears to be widespread agreement that financial penalties on individuals alone are relatively ineffective because it is difficult to prevent a corporation from reimbursing the individual.”), available at www.oecd.org/dataoecd/61/46/34306028.pdf.

while others are not? Why do certain sectors (e.g., construction³¹) have a chronic problem complying with competition laws, regardless of the number or the severity of the punishments imposed?

3.1.2 Imprisonment

26. One thing that corporations cannot give back to their executives, officers and employees is time spent behind bars. Imprisonment, therefore, certainly has the ability to realign individuals' incentives in a way that fines cannot. It is being adopted as a form of cartel deterrence in a growing number of jurisdictions. Seventeen OECD countries now have competition laws that authorise prison terms for cartel offences.³²

27. The US has the lion's share of experience with using imprisonment as a deterrent for cartel behaviour and has long been an enthusiastic proponent of this approach.³³ Prison sentences for cartelists in the US have increased quite substantially since 1990, both in the aggregate and in terms of their average length. Total incarceration days imposed rose from about 18,000 in 1990-1994 to nearly 90,000 during 2005-2009. Not only has the average number of persons per year receiving prison sentences for price fixing increased, but the proportion of defendants imprisoned has grown, as well. Meanwhile, the average sentence length grew from 247 days to 717 days.³⁴

28. Some commentators argue that the threat of serving time in jail has unparalleled power to deter cartels. A recent report by London Economics states that "[i]mprisonment is widely regarded as a very strong means of deterring anti-trust infringements and even a relatively low probability of facing a jail term may prove significantly deterrent relative to jurisdictions where this possibility is altogether absent."³⁵ The results of a 2007 survey of UK businesses yielded results that attest to the deterrent power of imprisonment. When asked to rank the factors that motivate compliance with UK competition law, the companies rated criminal penalties higher than any other type of sanction. (Interestingly, fines were rated fourth out of five.³⁶) The same respondents indicated that the perceived risk of attracting an OFT investigation caused them to abandon or significantly modify between 5 out of 6 and 16 out of 17 potential cartel-related infringements.³⁷ Thus the study suggests that competition regimes that feature imprisonment as a potential sanction are highly effective at achieving deterrence.

³¹ See OECD, Construction Industry (2008), [DAF/COMP\(2008\)36](#) (exploring cartel recidivism in the construction sector).

³² See *id.* at Appendix. Note that Mexico very recently amended its Federal Economic Competition Law and Federal Criminal Code to authorise imprisonment as a sanction for hard-core cartel violations.

³³ Scott Hammond, "Recent Developments, Trends, and Milestones in the Antitrust Division's Criminal Enforcement Program," Speech before the Cartel Enforcement Roundtable, ABA Section of Antitrust Law, 2007 Fall Forum, Washington, DC, (November 16, 2007) at p. 2 ("The Division has long emphasised that the most effective way to deter and punish cartel activity is to hold culpable individuals accountable by seeking jail sentences").

³⁴ Connor, *supra* note 2, at 34.

³⁵ Office of Fair Trading, An Assessment of Discretionary Penalties Regimes, *supra* note 11, at 10.

³⁶ OFT, The Deterrent Effect of Competition Enforcement by the OFT, OFT962 (November 2007), available at www.of.gov.uk/shared_of/reports/Evaluating-OFTs-work/of962.pdf. The other factors that the responding companies said motivated compliance were, in order: (2) disqualification of directors; (3) adverse publicity; (4) fines; and (5) private damages actions.

³⁷ *Id.*

29. Intuitively, it should not be surprising that prison is a strong deterrent to people who are in a position to form a cartel. As Arthur Liman wrote in a frequently quoted passage, "To the businessman . . . prison is the inferno, and conventional risk-reward analysis breaks down when the risk is jail. The threat of imprisonment, therefore, remains the most meaningful deterrent to antitrust violations."³⁸ US officials confirm that their enforcement experience is in line with Liman's insight. They cite instances in which their investigations have revealed that the threat of imprisonment has deterred global cartels from expanding to the US, even though the individual cartel members already operated there.³⁹

30. There are additional reasons for using imprisonment as a sanction for price fixing. One, discussed earlier, is that effective deterrence via corporate sanctions alone might require impossibly high fines. The threat of prison helps to shrink the deterrence deficit left by sub-optimal corporate fines. Another advantage is that fining corporations does not necessarily ensure that responsible individuals will have proper incentives to comply with competition laws. It is consumers and shareholders, not abstract "corporations," who are hurt most by corporate sanctions. But it is the officers and directors who violated the law or might have prevented the violation. Therefore it is the officers and directors who should typically feel the heat of deterrence, and imprisonment definitely provides that heat.⁴⁰

31. It is interesting, by the way, to contrast that view with one expressed by the Deputy Director General for Antitrust of DG COMP, who said in a recent speech that "[i]t is the companies that pocket the extra profits resulting from the cartel and they must therefore bear responsibility for their actions. We believe that such sanctions are able to ensure a high degree of deterrence and that criminal sanctions are not warranted in our enforcement system."⁴¹

32. A third advantage is that the possibility of going to prison motivates both individuals and corporations to use leniency programmes and co-operate with investigators, at least with respect to leniency programmes that offer immunity from jail sentences. Knowing that, in order to avoid prison, their own employees may expose a company's involvement in cartel activity, the company's board and executives are more likely to apply for corporate leniency when they discover the cartel activity, and to avoid cartel schemes in the first place whenever possible.⁴² On the other hand, leniency programmes that only reduce fines could be harmed by criminalisation because the threat of prison creates a wedge between individual and corporate interests. This possibility could arise, for example, with respect to leniency programmes in jurisdictions that do not impose prison sentences for competition law violations. Executives participating in an international cartel might wish to take advantage of that programme for purposes of reducing fines, but opt not to do so because of the concern that competition agencies in other jurisdictions might then impose prison sentences on them.

33. Finally, making a violation punishable by a prison sentence communicates a message that the activity is not just undesirable, but immoral. That will matter to executives and managers who feel some

³⁸ Arthur Liman, "The Paper Label Sentences: Critique," 86 Yale Law Journal 619, 630-31 (1977).

³⁹ Scott Hammond, "Cornerstones of an Effective Leniency Program," Speech before the ICN Workshop on Leniency Programs (Sydney, 22-23 November 2004).

⁴⁰ Ginsburg & Wright, *supra* note 2, at 18; Wils, *supra* note 22, at C.1.2.

⁴¹ Cecilio Madero Villarejo, "Introductory Remarks," Speech before IBA/KBA Competition Law Conference (Seoul, 28 April 2011).

⁴² Hammond, *supra* note 39.

moral responsibility, or at any rate a moral responsibility to follow the law. Wils notes that psychological research suggests that moral commitment is an important factor in motivating people to comply with laws.⁴³

34. In spite of all those strengths and the incorporation of prison as a sanction for cartel conduct in 17 OECD countries, jail sentences are rarely imposed on price fixers outside Canada and the US. Clearly, some enforcers and courts are not entirely persuaded by the arguments for imprisonment, and there are detractors among the commentators, as well. For example, just as they doubt the effectiveness of higher and higher fines, Ginsburg and Wright are sceptical about the deterrent effect that imprisonment has had so far:

*There is no indication that the dramatic increase in both corporate fines and the average length of jail sentences has resulted in a significant decline in cartel activity. . . . While it is impossible to quantify what, if any, effect the increase in criminal antitrust sanctions has had upon the level of cartel activity, the available data on the duration of price-fixing conspiracies, on stock price movements in response to cartel-related indictments, and on recidivism among companies all suggest current penalties under-deter.*⁴⁴

35. In a forthcoming article, Beaton-Wells and Fisse question the idea that imprisonment is a highly effective deterrent to cartel activity, labelling it under-scrutinised and unproven. They point out that in spite of record-level numbers of convictions and sentence lengths for cartel participants in the US, the available evidence shows that the number, size and harm to consumers of discovered cartels are all increasing.⁴⁵ They contend that the empirical work that has been done so far to analyze the impact of imprisonment on compliance actually provides little support for the idea that jail is a strong deterrent to cartel activity. Among other things, they quote a 2005 report by this Committee, which found that “there is no systematic empirical evidence available to prove the deterrent effects of criminal sanctions or, more importantly, to assess whether the marginal benefit of introducing sanctions against individuals . . . exceeds the additional costs that a system of criminal sanctions entails[.]”⁴⁶

36. Beaton-Wells and Fisse also assert that rising convictions and growing sentences do not necessarily show anything about effectiveness in achieving individual accountability. Those figures alone do not contain information about which individuals are prosecuted and which ones negotiate pleas. The authors point to Connor’s observation that the USDOJ “does not indict all guilty individual price fixers in a company convicted for price-fixing” and that “in a large proportion of cases, no individuals are charged.”⁴⁷ While it would probably be a poor use of resources to press charges against every underling involved in a

⁴³ Wils, supra note 22, at 31 & nn.137, 138 (citing Christopher Stone, “Sentencing the Corporation,” 71 Boston University Law Review 383, 389 (1991); Tom Tyler, Why People Obey the Law (1990)).

⁴⁴ Ginsburg & Wright, supra note 2, at 14; but see id. at 19 for a surprisingly contrary view by the same authors (“[t]here is ample evidence that jail sentences significantly deter individuals in general and business executives in particular.”) For more on recidivism, see id. at 15, Figure 7 (citing Connor & Helmers, supra note 3).

⁴⁵ Caron Beaton-Wells & Brent Fisse, “U.S. Policy and Practice in Pursuing Individual Accountability for Cartel Conduct: A Preliminary Critique,” 56(2) Antitrust Bulletin 277 (2011) (citing Connor, supra note 2 and Ginsburg & Wright, supra note 2).

⁴⁶ OECD, Hard Core Cartels: Third Report on the Implementation of the 1998 Council Recommendation 27 (2005), available at www.oecd.org/dataoecd/58/1/35863307.pdf.

⁴⁷ Connor, supra note 2, at 35, 112 n.137 (noting that while DOJ obtained guilty pleas from companies involved in 53 international cartels from 1990 to 2007, no individuals from about half of those cartels were indicted). As Beaton-Wells and Fisse also mention, though, the decision not to charge individuals may be made for a variety of valid reasons, such as that it is not always possible to determine who within a corporation should be held accountable and that the responsible individual(s) may not be located in or extraditable to the US.

cartel conspiracy, charging the ringleaders would probably be an efficient way to achieve deterrence. Yet “it is evident that the Division does not indict all the leaders either.”⁴⁸ DOJ officials have publicly stated, though, that the Division has been prosecuting more and more culpable executives from corporate defendants since 1999.⁴⁹

37. Beaton-Wells and Fisse add that an individual’s choice to take part in a cartel is likely to be influenced just as much, if not more, by dispositional, organisational, situational and cultural factors as it is by legal sanctions, including jail. That claim echoes points raised by Parker, who finds that the empirical literature on cartel enforcement shows that rational choice is influenced not only by formal legal sanctions, but by the confluence of many other factors such as normative views about the prohibition of cartel conduct and social pressures to engage (or not engage) in it.⁵⁰ For example, individuals may be told by a firm’s top executives to follow the law while their immediate superiors, the industry culture and the criteria for performance appraisals push them in a different direction. In that kind of an environment, people may feel just as much or more pressure from the other factors as they do from the threat of formal legal sanctions. That, in turn, can lead to situations in which the junior people blame the senior people and vice-versa when cartel activity is detected.⁵¹

38. Parker also attacks the methodologies underlying studies that have been used to support the criminalisation of competition law violations.⁵² For example, she commends the Deloitte study commissioned by the OFT as the best of the ones that survey business people about their perceptions of deterrence and their involvement in cartel behaviour. Nevertheless, she calls one of its results – that as many as 16 contemplated or actual cartels are abandoned or modified for every enforcement action – “nonsense” for a variety of reasons.⁵³ The primary one is that

*. . . ideally, law and enforcement activity should make cartel activity unthinkable. From a competition policy perspective, it is surely preferable that the company not think about it at all, rather than propose illegal activity and then abandon it. But the more cartel behaviours are proposed, the more successful the OFT’s deterrence appears to be on this measure. If the OFT succeeds in making cartel activity mostly unthinkable (and therefore not even proposed), it appears less successful.*⁵⁴

⁴⁸ Connor, supra note 2, at 35.

⁴⁹ Hammond, supra note 1, at 9-10.

⁵⁰ Christine Parker, “Criminalisation and Compliance: The Gap Between Rhetoric and Reality,” Presentation at University of Oxford Centre for Competition Law and Policy on Criminalising Cartels (12 November 2009); Christine Parker, “Criminal Cartel Sanctions and Compliance: The Gap Between Rhetoric and Reality,” in *The Reform of EC Competition Law: New Challenges* (Ioannis Lianos & Ioannis Kokkoris, eds. 2010) 239; see also Maurice Stucke, “Am I a Price Fixer? A Behavioural Economics Analysis of Cartels,” in *The Reform of EC Competition Law: New Challenges* (Ioannis Lianos & Ioannis Kokkoris, eds. 2010) 272, 279 (describing situational factors that may lead people to engage in cartel conduct).

⁵¹ Parker (presentation), supra note 50, at 4.

⁵² Parker (chapter), supra note 50.

⁵³ *Id.* at 243-44. The reasons “include the inherent unreliability of asking people to report on their own firms’ ‘existing or proposed’ illegal activity and then generalising the results from those who answered to all businesses; the questionable validity of trying to define to what extent ‘proposed’ cartel activity had to be ‘agreed’ before it was deterred; and seeking to draw conclusions about effectiveness from the number of contemplated cartel activities not undertaken at one point in time without comparing it with a benchmark at another time when there was less enforcement activity by the OFT.”

⁵⁴ *Id.* at 244.

39. Likewise, the choice to comply or not comply with a law is influenced by the degree to which society accepts the idea that the illegal behaviour should be illegal and, if it is punishable with criminal sanctions, that it should be treated as a crime. There needs to be a general consensus, in other words, that the conduct is very harmful and that criminal sanctions are appropriate. In this regard, competition authorities – especially those in jurisdictions that have just recently introduced criminal penalties for competition violations – may have some advocacy work to do.⁵⁵ But authorities in jurisdictions where cartel conduct has been criminalised for years can make some improvements, too. A review of hundreds of U.S. newspapers, magazines and trade publications over the period 1990-2009 by Daniel Sokol shows that accounting fraud cases receive far more attention in the press than cartel cases do, despite the fact that global cartel overcharges in some cases have been more significant than the biggest accounting frauds of the last decade.⁵⁶ Similarly, Florian Wagner-von Papp recently criticized the lack of publicity in Germany of the Bundeskartellamt’s criminal convictions.⁵⁷ The implications are that cartels do not matter much outside the insular world of antitrust practitioners and companies that have already been caught, and that competition authorities have been inattentive in allowing that to happen.

40. The good news is that when it comes to cartels, at least, the message can be both simple and powerful. Werden succinctly states the case:

*Cartel activity is properly viewed as a property crime, like burglary or larceny, although cartel activity inflicts far greater economic harm. Cartel activity robs consumers and other market participants of the tangible blessings of competition. Cartel activity is never efficient or otherwise socially desirable; cartel participants can never gain more than the public loses.*⁵⁸

Should imprisonment be introduced in more jurisdictions as a punishment for participation in cartels? Should sentences be lengthened in those jurisdictions that already imprison price fixers?

3.1.3 Leniency Programmes

41. Leniency programmes (LPs) are widespread and well known to the competition community. They raise cartel detection rates by offering corporate and/or individual applicants reduced penalties in exchange for disclosing their participation in cartels and otherwise co-operating with authorities. The mere existence of these programmes can have a destabilising effect on cartels because participants know that their co-conspirators may turn them in at any moment and that they have powerful incentives to do so, as the first participants to apply for leniency are typically granted greater reductions than subsequent applicants.

⁵⁵ See Vasiliki Brisimi & Maria Ioannidou, “Criminalizing Cartels in Greece: A Tale of Hasty Developments and Shaky Grounds,” 34 *World Competition* 157 (2011) (noting that although Greece’s Competition Act was amended in 2009 to include imprisonment as a sanction for horizontal agreements, there have not been any cases yet in which criminal sanctions were imposed under the law, and suggesting that one reason for this outcome is that cartel conduct is still not perceived as a real crime in Greece, so there is no strong sense of moral condemnation toward them).

⁵⁶ D. Daniel Sokol, “Cartels, Corporate Compliance and What Practitioners Really Think About Enforcement,” 78 *Antitrust Law Journal* __ (2012) (forthcoming).

⁵⁷ Florian Wagner-von Papp, “Criminal Antitrust Law Enforcement in Germany,” in *Criminalising Cartels* (Caron Beaton-Wells & Ariel Ezrachi, eds. 2011).

⁵⁸ Werden, *supra* note 26, at 23. For perspectives on how enforcement programmes can be designed to win acceptance of the idea of treating certain anticompetitive conduct as criminal violations, see William Kovacic, “Criminal Enforcement Norms in Competition Policy: Insights from US Experience,” in *Criminalising Cartels* (Caron Beaton-Wells & Ariel Ezrachi, eds. 2011) 45.

42. The adoption of LPs around the world has been called the “single most significant development in cartel enforcement.”⁵⁹ They have the very substantial advantage of motivating cartel participants to come forward with information that is otherwise usually difficult or impossible for competition authorities to obtain. Because cartels are necessarily secretive, the participants usually hold the best information about their illegal activities. In fact, they may be the only parties that have the information needed by competition authorities to secure a conviction. Leniency may be the only way to get that information in some cases. In addition, leniency frees up agency resources so that they can be used to pursue other matters. On the negative side, because LPs remove some or all of the punishment for committing competition law violations, they clash with the objective of persuading society that those violations are morally wrong.

43. Of course, LPs are effective only when they are part of a well designed enforcement regime. The system must, first and foremost, have real teeth. If it does not, then potential offenders will not fear the consequences of unlawful behaviour very much, so they will lack an incentive to come forward and apply for leniency. They must also perceive a substantial risk of being caught and convicted. In addition, the laws and likely outcomes must be transparent and consistent so that potential offenders can reliably predict and compare what will happen to them if they apply for leniency and what will happen to them if they do not.⁶⁰

44. In terms of the number of applicants, LPs have been very successful across jurisdictions. “There is no question that there have been large numbers of leniency applications in response to the [USDOJ Antitrust] Division’s Corporate Leniency Program after 1993, to the EU’s revised leniency policy after 2002, and adoption of similar programs in a dozen or more additional antitrust authorities.”⁶¹ Furthermore, both theoretical models and early empirical evidence indicated that leniency programs raise deterrence in the long run.

45. Motta and Polo, however, have shown that LPs might actually *encourage* collusion under some circumstances.⁶² In essence, their point is that there is a trade-off between leniency and fines because agencies offer reductions in fines as an enticement for companies to disclose the existence of a cartel. If the reductions are too high and/or the information disclosed is only marginally helpful to the agency, then the increase in the probability of detection due to the LP might be outweighed by the lower deterrent effect of the reduced fines.

46. Such concerns can be overstated, though. Connor, for example, has written that in the US “[a]mnesty recipients pay no fines, and since 2004 are liable for only single rather than treble private damages. The routine approval of qualified amnesty applicants means that the total amount of fines and private monetary penalties collected for price fixing is reduced compared to a no-leniency regime.”⁶³ That statement ignores the fact that LPs also raise detection rates and expose other companies. Thus, while it is true that LPs reduce the financial burden on applicants if one takes for granted that they would have been caught, it is also true that many of those price-fixers would not have been caught but for the LP, that co-conspirators often receive harsher penalties than the first applicant that exposes a given cartel, and that the co-conspirators, too, might not have been caught but for the LP.

47. Similarly, Veljanovski laments that 90 percent of 39 EU cartel decisions that resulted in fines between 1998 and 2004 involved some type of leniency: “The Commission’s leniency program is

⁵⁹ Hammond, *supra* note 1, at 1.

⁶⁰ *Id.* at 3-4.

⁶¹ Connor, *supra* note 2, at 7.

⁶² Massimo Motta & Michele Polo, “Leniency Programs and Cartel Prosecution,” 21 *International Journal of Industrial Organization* 347 (2003).

⁶³ Connor, *supra* note 2, at 42.

essentially in the business of 'buying' convictions by discounting penalties[.]”⁶⁴ This is presented as a defect, or perhaps as an injustice. But that is what all LPs do, and that is why they are called "leniency" programmes. It is what LPs *ought* to do because they have to do it to be effective. The real issue is not whether convictions should be bought, but whether the price being paid is too high.

48. Then again, there is another genuine issue, which is how effective LPs are at deterring cartels. It is difficult to know the answer because no one knows how many undetected cartels there are, so we cannot know how effective LPs have been at reducing the number of cartels. But as Stucke points out, there is another way to approach the problem, and it does not suggest that LPs have been very useful. If LPs have significantly increased the probability of detection, then the average duration of cartels should have decreased. That has not occurred, though. The average duration of prosecuted cartels in the US does not seem to have changed much during the past century, which is especially interesting because cartels were not always illegal during that time.⁶⁵

What solid evidence do we have that LPs are working? What is the best evidence on each side? If they are useful, then should the benefits that attract leniency applicants be enhanced? If so, why? And how?

3.2 Other Approaches and Considerations

3.2.1 Private Actions

49. Private actions for damages arising from competition law violations augment the deterrent effect of fines imposed by enforcement agencies. They also put money back in the actual victims' pockets, rather than in the public treasury. In addition, private actions may raise the probability of detection. In fact, in some cases private enforcement may be superior to public enforcement in terms of efficiency, such as when private plaintiffs have access to more or higher quality information.⁶⁶ However, the deterrent effect of private actions is limited by the same factors that apply to high fines imposed as a result of public enforcement actions.

50. While it is possible to bring private competition law actions in several jurisdictions, this form of deterrence is by far most prevalent in Canada and the US, where its financial impact on defendants exceeds that of the fines imposed via public enforcement. A 2008 study of 40 of the largest successful private antitrust actions in the US since 1990 found that when only the cases that also resulted in a criminal fine or prison sentence were counted, they netted a total of between US\$6.2 and 7.5 billion in damages. In contrast, the total of *all* criminal antitrust fines imposed in cases brought by the USDOJ since 1990 was US\$4.2 billion.⁶⁷

⁶⁴ Cento Veljanovski, "Penalties for Price Fixers: An Analysis of Fines Imposed on 39 Cartels by the EU Commission," 27 *European Competition Law Review* 510, 511 (2006).

⁶⁵ Stucke, *supra* note 50, at 268.

⁶⁶ Office of Fair Trading, *An Assessment of Discretionary Penalties Regimes*, *supra* note 11, at 27 (citing Mitchell Polinsky & Steven Shavell, "The Economic Theory of Public Enforcement of Law," 38 *Journal of Economic Literature* 45 (2000)).

⁶⁷ Robert Lande & Joshua Davis, "Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases," 42 *University of San Francisco Law Review* 879 (2008).

If private actions become more common in a given jurisdiction, should the competition authority lower its detection rate and/or fine levels? Do private actions undermine leniency programmes?

3.2.2 *Plea Bargaining/Settlement*

51. Sometimes competition agencies will offer reduced penalties to offenders in exchange for their agreement not to contest the charges that have been brought. As with LPs, there is an important trade-off. While settlements help authorities to be more efficient and raise their conviction rates, they also reduce the severity of the punishment. If the settlement terms are too gentle, then there will not be an adequate deterrent effect left. Furthermore, settlements can harm the effectiveness of LPs if the settlement terms are too generous relative to leniency because companies that would otherwise have applied for leniency might instead wait to see if they get caught. If they do, they will negotiate a settlement. If they do not get caught, though, they would continue to behave illegally.

52. 90 percent of US antitrust cases are settled.⁶⁸ Connor finds that troubling, particularly because in the cartel area there have been almost no prosecutions of price fixers at trial in the past 18 years. He worries that corporations will begin to view the possibility of being brought to court by DOJ as an empty threat, compromising its ability to impose meaningful fines. He would rather see DOJ make a point of bringing one or two companies to trial per year.⁶⁹

Given that they save agency resources and secure convictions, can settlements nevertheless be used too often? If so, how often is too often? If an example needs to be set by bringing defendants to trial from time to time, how should agencies determine which cases to use for that purpose?

3.2.3 *Reputational Effect of Prosecution*

53. Both corporations and individuals may suffer reputational damage if they are prosecuted for competition law violations. That could reduce the levels of fines and prison sentences needed for effective deterrence. The next section on debarment describes one way to use reputational effects as a deterrent. Another way to do it is simply to publicise findings of infringements. Most competition agencies issue a press release when a defendant is found to have violated the law. Brazil's CADE can go farther, though, by requiring competition law violators to publish (at their own expense) an acknowledgement of their infringement in newspapers.⁷⁰ Similarly, France's Conseil de la Concurrence can order violators to pay for the publication of an infringement announcement in newspapers, or to put an announcement about the infringement in a company's own annual report.⁷¹

54. To the extent that the fear of reputational damage (at either the individual or corporate level) has a strong influence on behaviour, it raises the possibility that being prosecuted is more important than the severity of fines or imprisonment, at least to some potential offenders. In fact, Parker states that "[e]mpirical deterrence research persistently finds that the factors that make the most difference to compliance behaviour are the perceived likelihood of detection and enforcement, rather than the objective severity and subjective fearsomeness of the sanctions imposed."⁷² If the studies she cites are correct, they

⁶⁸ Office of Fair Trading, *An Assessment of Discretionary Penalties Regimes*, supra note 11, at 11.

⁶⁹ Connor, supra note 2, at 76-77.

⁷⁰ Law No. 8.8884 (1994), as amended in 2000 and 2007 (cited in George Lusty, "Refining the Anti-cartel Tool Kit: Complements to Corporate Fines", 9 *Competition Law Journal* 338, 345 (2010)).

⁷¹ Article L464-2 I, para. 5 of the Commercial Code (cited in Lusty, supra note 70, at 346).

⁷² Parker (chapter), supra note 50, at 250 (citing John Braithwaite & Toni Makkai, "Testing an Expected Utility Model of Corporate Deterrence," 25 *Law & Society Review* 7, 8-9 (1991); Raymond Paternoster &

indicate that Becker was wrong about the probability of detection and the magnitude of the sanctions being equally important. Accordingly, they also suggest that competition agencies would deter more violations by raising the probability of detection than by only continuing to amplify the legal consequences of detection.

Should detection efforts be stepped up, so that the likelihood of simply getting caught (regardless of the penalty imposed) increases? Are potential offenders deterred more when competition authorities catch a small number of prominent defendants and assess very large average penalties, or when authorities catch a large number of defendants and assess smaller average penalties? In what other ways can courts and competition authorities use companies' and individuals' desire to maintain good reputations as a means of deterrence?

3.2.4 Debarment/Disqualification

55. One approach that capitalises on reputational effects is debarment, also known as disqualification. Like imprisonment, debarment is a sanction aimed at individuals. Rather than taking away all of the defendant's liberties, though, debarment only removes the offender from his or her position as a company's director, officer, or manager and prevents him or her from serving in a similar position in any company for some defined period. Both prison and debarment tarnish the defendant's reputation, prevent him or her from committing a similar offence again, and at least when these sanctions are imposed on directors or executives, all but guarantee that the way a company does business will change. That is something that fines do not necessarily do. But debarment is much less expensive to society than incarceration.

56. Ginsburg and Wright argue that continually increasing corporate fines to solve the under-deterrence problem is unwise and that in any case, neither fines nor prison sentences seem to be adequate no matter how severe they are. Consumers and shareholders suffer more than the corporation itself does when corporate sanctions are imposed. It would be more effective to punish the officers and directors, the authors reason.⁷³

57. With regard to imprisonment, it is an appropriate measure for all types of actual perpetrators, in Ginsburg's and Wright's view. But debarment is appropriate and effective as a complementary sanction not only for officers and directors who were direct participants in cartels, but also as a stand-alone sanction for officers and directors who negligently failed to prevent such participation by employees. Debarment, they argue, not only imposes an opportunity cost (in the form of lost wages and bonuses), but it raises the likelihood and severity of the reputational effect. To the extent that debarment augments deterrence, it also shortens the length of both the optimal prison sentence and the optimal personal fine, thereby reducing costs to society. What is more, debarment – like imprisonment – protects against recidivism by keeping offenders out of positions from which they could re-offend.⁷⁴ Thus, while the authors would like to see more severe individual sanctions, their preferred approach is to incarcerate and debar individuals who are directly involved in price fixing while debarring negligent corporate officers whose conduct does not warrant imprisonment.⁷⁵

58. Debarment does seem to be a potent sanction. A survey of UK corporations commissioned by the OFT in 2010 found that debarment is the second most powerful deterrent (behind criminal penalties) of

Leeann Iovanni, "The Deterrent Effect of Perceived Severity: A Reexamination," 64 *Social Forces* 751 (1986).

⁷³ Ginsburg & Wright, *supra* note 2, at 18.

⁷⁴ *Id.* at 19.

⁷⁵ *Id.* at 6.

competition law violations.⁷⁶ In the UK, regulators may seek court orders debaring directors from serving again as directors or participating in the management of any UK company for up to 15 years.⁷⁷

59. Debarment is also a possible penalty for price-fixers in Australia, Canada, Slovenia, Spain and Sweden. In the US, there is some precedent for the use of debarment, but not directly in the antitrust context. The FTC has signed consent decrees that have the same effect as debarments, but only in consumer protection matters. The financial regulator, the Securities and Exchange Commission, has also signed consent decrees that prevent securities law violators from acting as officers or directors of public companies.

3.2.5 *Bounty systems*

60. Behaviour that is beneficial for executives might not be beneficial for other staff in a firm, and anyone in a firm could have ethical qualms about anticompetitive business conduct. Bounty systems aim to leverage these possibilities into better compliance by giving uneasy potential informants financial incentives to become whistleblowers.

61. Bounty systems have some similarity to leniency programmes for individuals. In both instances, the strategy works by driving or expanding a wedge between the individual's incentives and the employer's incentives. Whereas LPs for individuals use reduced penalties as an enticement, though, bounty systems actually pay reward money to informants.

62. At least two competition authorities have bounty systems in place. Korea's Fair Trade Commission implemented a bounty system in 2006 that rewards informants with a modest share of fines imposed against exposed cartels. The UK's OFT has had a program since 2008 that awards up to £100,000 to individuals who provide tips about cartels.

Where are non-compliance risks generally largest? Specifically, which sectors, which types of firms within sectors, and which types of employees are causing the greatest problems? What are the most effective compliance tools currently used by competition authorities? What potentially helpful strategies have not been tried yet? Should the private sector be recruited into the fight against anticompetitive conduct? If so, how should that be done? Behaviour that is beneficial for executives might not be beneficial for other staff in the firm. How might that fact be leveraged into better compliance?

4. Corporate competition compliance programmes

63. There is no international consensus on whether competition law violators that have corporate antitrust compliance programmes (CPs) should receive lighter (or heavier) sanctions. Some jurisdictions encourage companies to implement bona fide CPs by granting a reduction in fines when there is a violation despite the programme. In the UK, for example, the OFT may reduce a defendant's fine by up to ten percent if it has a CP.⁷⁸ In France, the Autorité de la Concurrence gives credit to companies who

⁷⁶ UK Office of Fair Trading, *The Deterrent Effect of Competition Enforcement by the OFT*, OFT 962 at paras. 5.55 – 5.59 (November 2007).

⁷⁷ See *Company Directors Disqualification Act 1986*; Article 204, *Enterprise Act 2002*.

⁷⁸ Office of Fair Trading, *Drivers of Compliance and Non-Compliance with Competition Law*, OFT 1227 (2010) at p. 8. The UK's Competition Appeal Tribunal recently issued a judgment stating that a defendant should be "given credit for its early and extensive post-infringement compliance programme." *Kier Group plc v Office of Fair Trading* [2011] CAT 3. The Tribunal said in another recent decision, though, that undertakings should be encouraged to adopt strong compliance measures before any infringement occurs. *Hays PLC v Office of Fair Trading* [2011] CAT 8.

demonstrate the existence of a genuine CP.⁷⁹ Some authorities are neutral toward CPs, neither awarding reductions nor enhancing fines if a defendant has a CP in place.⁸⁰ Finally, some agencies brandish the possibility of using the existence of a CP as a reason to *enhance* fines in the event of a competition law violation. The OFT, for instance, is generally opposed to using the existence of a CP as an aggravating factor when calculating fines. Nevertheless, it reserves the right to increase a company's fine in exceptional circumstances, such as if a CP was used to conceal an infringement or to mislead the OFT during an investigation.⁸¹

64. Those who say CPs should be ignored tend to ask why any credit should be given for a programme that did not work. They also argue that giving a discount for CPs will actually encourage cartels by making them cheaper. Those in favour of awarding credit for CPs usually reply that if the programme is genuine, one or two bad apples should not represent the whole barrel and the programme might actually be doing a lot of good by preventing other cartels from forming. Proponents also tend to argue that the way to handle companies who would view the discounts as a way to make their cartel activity cheaper is to penalise them for having sham programmes.

65. But, say those who are opposed, any good that the CP does is its own reward. After all, it keeps the company out of greater trouble and thereby saves it money by avoiding fines.⁸² So why is there any need to enhance those savings by piling on reductions when cartels are formed in spite of the CP? The savings already generated by the CP should be adequate to create and sustain the incentive to have a good CP. Yes, proponents might respond, but it is not only the company itself that benefits when it stays out of cartel trouble. Consumers benefit, too, as do the competition authority and the courts, which will save resources and be able to devote them to other matters. To reflect the true level of the benefits from CPs, then, a reduction should be granted for having a good one.

66. Wils acknowledges that effective CPs can help to prevent violations and, failing that, to detect them. Nevertheless, he is not persuaded that agencies should reduce fines just because a defendant has a genuine CP in place. If fines are set at a level that deters adequately in the first place, he reasons, then companies should already have all the incentive they need to prevent violations.⁸³ Yet Wils himself argues elsewhere that fines would have to be 150 percent of turnover in the relevant market(s) to achieve adequate cartel deterrence – a level that he describes as “impossibly high.”⁸⁴ Although the shortfall in deterrence might be made up by the threat of imprisonment, that is not a possibility in many jurisdictions. If Wils' estimate is correct, therefore, companies do not have all the incentives they need to prevent violations, at

⁷⁹ Other competition authorities that give credit for CPs include those in Israel, Canada, and India.

⁸⁰ The European Commission is one such authority. See, e.g. Joaquín Almunia, “Compliance and Competition Policy,” Speech before BusinessEurope and the US Chamber of Commerce (Brussels, 25 October 2010) (“[W]hy should I reward a compliance programme that has failed?”); Electrical and Mechanical Carbon and Graphite Products, Case COMP/E-23/38.359 (3 December 2003) (“It is not appropriate to take the existence of a compliance programme into account as an attenuating circumstance for a cartel infringement, whether committed before or after the introduction of such a programme.”); see also Judgments of the Court of First Instance, e.g. *ABB Asea Brown Boveri v Commission*, Case T-31/99 [2002] ECR II-1884, (20 March 2002) at para. 221.

⁸¹ Office of Fair Trading, *Drivers of Compliance and Non-Compliance with Competition Law*, supra note 78, at 80.

⁸² See *id.* at 8 (“The key reward of an effective compliance programme is the avoidance of an infringement decision in the first place.”)

⁸³ Wouter Wils, “Optimal Antitrust Fines: Theory and Practice,” 29 *World Competition* 183 (2006).

⁸⁴ Wils, supra note 22, at C.1.1.

least in some settings. Then again, if the problem is that fines are already too low, then the best solution probably is not to make them even lower.

67. Connor points out a different reason for not granting reductions to violators that have CPs: truly effective CPs lead to self-reporting, and most self-reporting leads to a grant of amnesty, which nullifies the fine.⁸⁵ But Connor would have to acknowledge that even the very best CPs probably cannot catch all illegal conduct 100 percent of the time, so there cannot be self-reporting in every case.

68. Parker offers yet another reason, which is that it is not clear that CPs necessarily do anything to prevent cartels. She reasons that most cartelists already know that what they are doing is illegal. In fact, they go to a lot of trouble to hide it. Furthermore, most of them are senior managers.⁸⁶

69. Ginsburg and Wright, however, not only agree with the idea of reducing corporate fines for violators that have reasonably good CPs; they believe that corporate fines should be reduced to *zero* in such cases: "If a company has made a reasonable effort to comply with the antitrust law, and an employee nevertheless engages in price-fixing, then it makes no sense to fine the corporation, or to sanction the directors or officers."⁸⁷

70. In any case, if a reduction is going to be awarded, something more than simply creating a CP in good faith and then ignoring it should be required. Otherwise, companies will have incentives merely to implement low-cost, low-maintenance, superficial CPs that do not actually contribute much to prevention. In fact, one can envision how such laissez-faire oversight might lead to a determination of negligence, with resulting penalties on individuals, despite the existence of a nominal programme. The Canadian Competition Bureau deals with this problem by requiring defendants to demonstrate that their CP was reasonably designed, implemented and enforced in the circumstances of the case, before granting any reduction in recognition of the CP.⁸⁸

71. The World Bank, in its leniency programme for corruption, requires those admitted to the programme to implement effective compliance and ethics programs.⁸⁹ Similarly, the Fraud Section of the US Department of Justice's Criminal Division has required companies that settled cases to adopt compliance programmes.⁹⁰ The Competition Commission of South Africa requires firms with which it reaches a settlement to commit to implementing a competition compliance program. In court proceedings,

⁸⁵ Connor, *supra* note 2, at 55 n.162.

⁸⁶ Parker (presentation), *supra* note 50, at 4 (citing Michelle Berzins & Francesco Sofo, "The Inability of Compliance Strategies to Prevent Collusive Conduct," 8 *Corporate Governance* 669 (2008) (finding that cartel participants in 71% of cases knew their conduct was illegal and that senior management were involved in it in 80% of cases).

⁸⁷ Ginsburg & Wright, *supra* note 2, at 18. The passage continues: "On the other hand, if the directors or officers were negligent in performing their duty to supervise the employee who actually fixed prices, then they should be held accountable along with the perpetrator." *Id.*

⁸⁸ Canadian Competition Bureau, *Bulletin: Corporate Compliance Programs* (2010), available at [www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CorporateCompliancePrograms-sept-2010-e.pdf/\\$FILE/CorporateCompliancePrograms-sept-2010-e.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/CorporateCompliancePrograms-sept-2010-e.pdf/$FILE/CorporateCompliancePrograms-sept-2010-e.pdf).

⁸⁹ World Bank Voluntary Disclosure Program Guidelines for Participants, available at: http://siteresources.worldbank.org/INTVOLDISPRO/Resources/VDP_Guidelines_2011.pdf

⁹⁰ See US Department of Justice, "Oil Services Companies and a Freight Forwarding Company Agree to Resolve Foreign Bribery Investigations and to Pay More Than \$156 Million in Criminal Penalties," (4 November 2010) (press release regarding settlements with five companies, in which the DOJ stated that "each of these companies is required to implement and adhere to a set of enhanced corporate compliance and reporting obligations"), available at www.justice.gov/opa/pr/2010/November/10-crm-1251.html

the Australian Competition and Consumer Commission regularly applies for orders that require a company to implement a CP.

72. Under the US federal criminal sentencing guidelines, which are no longer mandatory but rather are advisory,⁹¹ the existence or lack of an effective CP can change the amount of the applicable criminal fine for federal corporate criminal convictions, including antitrust convictions. Furthermore, the guidelines recommend that maintaining an effective CP should ordinarily be a condition for granting probation to corporate defendants.⁹² The Guidelines Manual helpfully specifies that organisations with “effective” CPs exercise due diligence to prevent and detect criminal conduct, and otherwise promote an organisational culture that encourages ethical conduct and a commitment to compliance. Due diligence means that the directors must be knowledgeable about the content and operation of the CP and exercise reasonable supervision over its implementation and effectiveness. The organisation must also take reasonable steps to ensure that the CP is followed through, e.g., monitoring and audits, periodic evaluations of the program, mechanisms that allow for anonymous and/or confidential reporting of violations, and reasonable steps when criminal conduct is discovered.

73. Important elements of good competition CPs can easily be found in a variety of publications.⁹³ There are many such elements, but some of the main ones include:

- *Risk assessment, prioritisation, and abatement* – The company should regularly identify and assess its compliance risks, being particularly certain to re-evaluate them when entering new markets or making new hires in key positions. Specific risks that may arise in each business unit should be considered. The idea is to identify who the violation-prone groups are, given the nature of their operations and/or personalities. For cartel violations, these groups tend to include senior executives, persons who make pricing or marketing decisions, and those who attend trade association meetings. Risks can then be prioritised and steps can be taken to mitigate them via training, monitoring, seeking expert legal advice, and setting up reward/punishment incentives for personnel.
- *Commitment* – To be effective, CPs must have the full, visible support of a company’s Board and CEO, and it must be given adequate resources, including (in larger firms) a dedicated and empowered compliance officer. It should be made clear that violations, especially price fixing, will not be tolerated, i.e. that the company will not defend or support violators and that they will lose their jobs.
- *Screening/monitoring* – Compliance should be monitored, evaluated and reported.

⁹¹ United States v. Booker, 543 U.S. 220 (2005).

⁹² US Federal Sentencing Guidelines Manual (2009) at s. 8B2.1, available at www.ussc.gov/2009guid/TABCON09.htm. For more information on the EU’s, US’s, Canada’s and Australia’s policies toward the treatment of CPs in the competition context, see Office of Fair Trading, Drivers of Compliance and Non-Compliance with Competition Law, supra note 78, at 19-24.

⁹³ See, e.g. Office of Fair Trading, Drivers of Compliance and Non-Compliance with Competition Law, supra note 78; Office of Fair Trading, How Your Business Can Achieve Compliance, OFT424 (2005); Australian Competition and Consumer Commission, Corporate Trade Practices Compliance Programs (2005); Canadian Competition Bureau, Bulletin: Corporate Compliance Programs (2010); Kai Hüschelrath, “Competition Law Compliance Programmes: Motivation, Design and Implementation,” 9 Competition Law Journal 481 (2010). Cf. OECD, Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, Annex II: Good Practice Guidance on Internal Controls, Ethics, and Compliance (18 February 2010), available at www.oecd.org/dataoecd/11/40/44176910.pdf (setting out desirable elements of a CP in the corruption/bribery context).

- *Documentation* – Compliance efforts should be well documented so that they can be not only proven in the event of a breach, but studied with regard to what went wrong and then improved.
- *Continuous improvement* – The company should periodically update its CP and ensure that it remains well-suited to the company's actual activities.

74. In sum, genuine CPs are taken seriously at every level of the corporation, and they involve regular training, audits, screening, and updates. The details are critical for all of those features. For instance, what kind of audits should be required? Should they be surprise audits or can they be pre-announced? Doing a surprise, full-scale, simulated dawn raid and/or investigation with deep document searches by external counsel would probably be not only excessive, but prohibitively expensive for most businesses. On the other hand, it might be fair to expect some incidence of surprise inspections, perhaps of a manageable number of business units within the company, selected based on their risk profiles.

75. It has to be noted that abuse of dominance and monopolisation cases are typically much more complex than cartel cases, requiring deep inquiries into the facts and economic effects. Unilateral conduct cases are difficult even for antitrust practitioners (which is one reason why criminal penalties are not imposed for unilateral conduct violations); trying to train laymen on this area of the law may be a fool's errand, as the target audience may simply ignore the message. Worse still, the audience may misunderstand the message. This area of competition policy therefore does not lend itself so well to CPs, in comparison to anti-cartel provisions. Companies that are or may soon become dominant should probably seek expert legal advice regarding new strategic conduct, rather than relying on a CP to avoid trouble.

Should competition agencies treat the fact that a competition law violator has a competition CP as an aggravating, mitigating, or neutral factor? Under what criteria should CPs be assessed? In particular, how can competition authorities distinguish sham programmes from genuine ones? Do approaches that require the implementation of CPs, such as the World Bank's and the USDOJ's (with respect to fraud) have a place in competition law enforcement?