Leniency policies and criminal sanctions: Happily married or uneasy bedfellows?
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The Pros and Cons of Leniency and Criminalization
Swedish Competition Authority
Stockholm, 13 November 2015
Leniency policies have revolutionised cartel enforcement. Whether you call it leniency, amnesty or immunity, all must call the core concept of leniency a wildly successful idea.

Today more than 50 jurisdictions have leniency policies in their anti-cartel armoury

In the US, between 1996 and 2010, more than US$5b in fines were imposed on companies for cartel conduct – 90% of those fines resulted from a leniency application

In the EU all cartel decisions adopted since 2000 (66 cases) appear to have involved at least one leniency applicant
• Does leniency rhetoric match reality?
• Does leniency policy involve trade-offs?
Leniency and criminalization

1. Characterization of the relationship
   - complex

2. Implications of the relationship
   - troubling
Since the late 1990s...

- 30 countries have criminalised
- 50 countries have adopted leniency

Coincidence?
LENIENTY AND CRIMINALIZATION –
complex to characterize
Leniency as criminalization-led?

...reflecting the normative nature and function of criminal law...
..the racketeer who siphons off money from the public in crooked gambling..

..theft by well dressed thieves carrying brief cases..

..cartel formation clearly can be theft and those who are guilty of it on a large scale are guilty of substantial theft..
Criminalization as leniency-led?

...reflecting the instrumental nature and function of criminal law...
“The first prerequisite to creating an effective amnesty program is the threat of severe sanctions for those who lose the race for amnesty. ... So how does one determine what constitutes a severe sanction? ... I think most people would agree that the threat of criminal sanctions and individual jail sentences passes the test and provides the foundation for an effective leniency program.”
Leniency and criminalization

Reinforcing  OR  Conflicting
LENIENCY AND CRIMINALIZATION – troubling implications
Four blind spots

Assumptions about effectiveness
Retributive compromise and foreclosure
Cheating reinforcements and contradictions
Gaming and capture risks
Effectiveness assumptions

CRIMINAL SANCTIONS + LENIENCY

= MORE DETECTION

= MORE DETERRENCE
Effectiveness assumptions
CRIMINAL SANCTIONS + LENIENCY = MORE DETECTION

- No individual or ‘criminal’ sanctions at EU level
- In Australia, leniency applications lower after criminal sanctions introduced
  - 2005-2009 vs 2009-2013: 13% decline in markers; 15% decline in proffers
Effectiveness assumptions
CRIMINAL SANCTIONS + LENIENCY = MORE DETECTION

Are leniency policy administrators mostly digging up dead bodies?
In deciding whether to apply for leniency you need to estimate:

- the chances of submitting a leniency application before other cartelists
- the chances of providing detailed information on the cartel that constitutes significant added value compared to what the EC already has in its file following previous leniency applications, dawn raids or requests for information
- the potential fine and potential reduction in the fine
- the chances of being uncovered if you does not apply for leniency
- the chances of challenging the EC’s findings on appeal
- economic or social drawbacks to denouncing friends or colleagues in the industry
- the consequences in other jurisdictions of a decision to seek leniency in Europe, or vice versa
- the chances of influencing the EC’s finding on the gravity and scope of the infringement with and without applying for leniency;
- chances of influencing the EC’s fine calculation with and without applying for leniency
- the burden of the duty of continuous co-operation as leniency applicant with the burden of building a solid defence

- Forrester and Berghe, 2015...
Effectiveness assumptions
CRIMINAL SANCTIONS + LENIENCY = MORE DETECTION

“Paradoxically, the multiplication of competition law regimes and leniency policies may thus be the most serious threat to leniency…”
- Forrester and Berghe, 2015

Given the “enormous costs involved with a global strategy of cooperation.. Companies now more than ever have to conduct a serious cost-benefit analysis when considering leniency…”
- Spratling, 2015
Effectiveness assumptions
CRIMINAL SANCTIONS + LENIENCY = MORE DETERRENCE

58% of Australian business people do not know cartel conduct is a criminal offence and 77% do not know that jail applies.

Business people perceive the likelihood of detection and enforcement action as low and only marginally higher when criminal sanctions are available.

Business people perceive the likelihood of a jail sentence as low.

1 in 10 would still engage in cartel conduct, even knowing the law and sanctions applicable!!

- Beaton-Wells et al, The Cartel Project, 2010
Effectiveness assumptions
CRIMINAL SANCTIONS + LENIENCY = MORE DETERRENCE

EU leniency investigation and cartel end date

- Cartel Ended BEFORE Leniency Investigation: 41%
- Cartel Ended AFTER Leniency Investigation: 53%
- Cartel Ended at the Same Time: 6%

- Stephan and Nikpay, 2015
Weaknesses in the relationship between criminal sanctions and leniency effectiveness
Retributive compromise and foreclosure
DOING THE DEAL?

Risks of alienating public support

<table>
<thead>
<tr>
<th>Country</th>
<th>% public disagreement with leniency</th>
</tr>
</thead>
<tbody>
<tr>
<td>United States</td>
<td>32</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>31</td>
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<tr>
<td>Germany</td>
<td>42</td>
</tr>
<tr>
<td>Italy</td>
<td>42</td>
</tr>
<tr>
<td>Australia</td>
<td>50</td>
</tr>
</tbody>
</table>

- Stephan & Nikpay, 2015; Beaton-Wells et al, 2010
Retributive compromise and foreclosure

DOING THE DEAL?

Threats to normative compliance from the ‘game’ of leniency
Retributive compromise and foreclosure
DOING THE DEAL?

Diversion and distortion of the judicial process
Surrender of ‘justice’ in return for enforcement ‘success’
Cheating reinforcements
TRICKSTER MAKES THIS WORLD?

1st • Cartelists cheat the market and the public by fixing prices, dividing markets, rigging bids, etc

2nd • Cartelists cheat each other by deviating from terms of the cartel

3rd • Cartelists cheat each other by applying for leniency

4th • Cartelists cheat on the competition authority by reporting and cooperating/disclosing selectively
Contradictions in cheating paradise…

1st: Contrary to competition

2nd: Consistent with competition

3rd: Promotes competition law enforcement

4th: Undermines competition law enforcement
Promotion of cheating through leniency policy
Gaming and capture risks
REVERSE EXPLOITATION?
Gaming and capture risks
REVERSE EXPLOITATION?

“[S]uccessful cartels tend to be sophisticated organisations, capable of learning. It is thus safe to assume that cartel participants will try to adapt their organisation to leniency policies, not only so as to minimise the destabilising effect, but also, where possible, to exploit leniency policies to facilitate the creation and maintenance of cartels. This raises the question whether there could be features of leniency programmes that risk being exploited to perverse effects.”

- Wils, 2008
Evidence of leniency gaming...

- Practitioner accounts (Sokol)
- Economic modelling (Spagnolo)
- Cartel recidivism and serial leniency applicants
DG Comp official complains of leniency repeat players

- GCR, 2015
Increase in ‘strategic’ leniency
Comments and questions welcome

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