

Leniency policies and criminal sanctions: Happily married or uneasy bedfellows?

Professor Caron Beaton-Wells

University of Melbourne

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.



— Ann O'Brien, Assistant Chief, US DOJ, 2015

- 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

HART STUDIES IN COMPETITION LAW



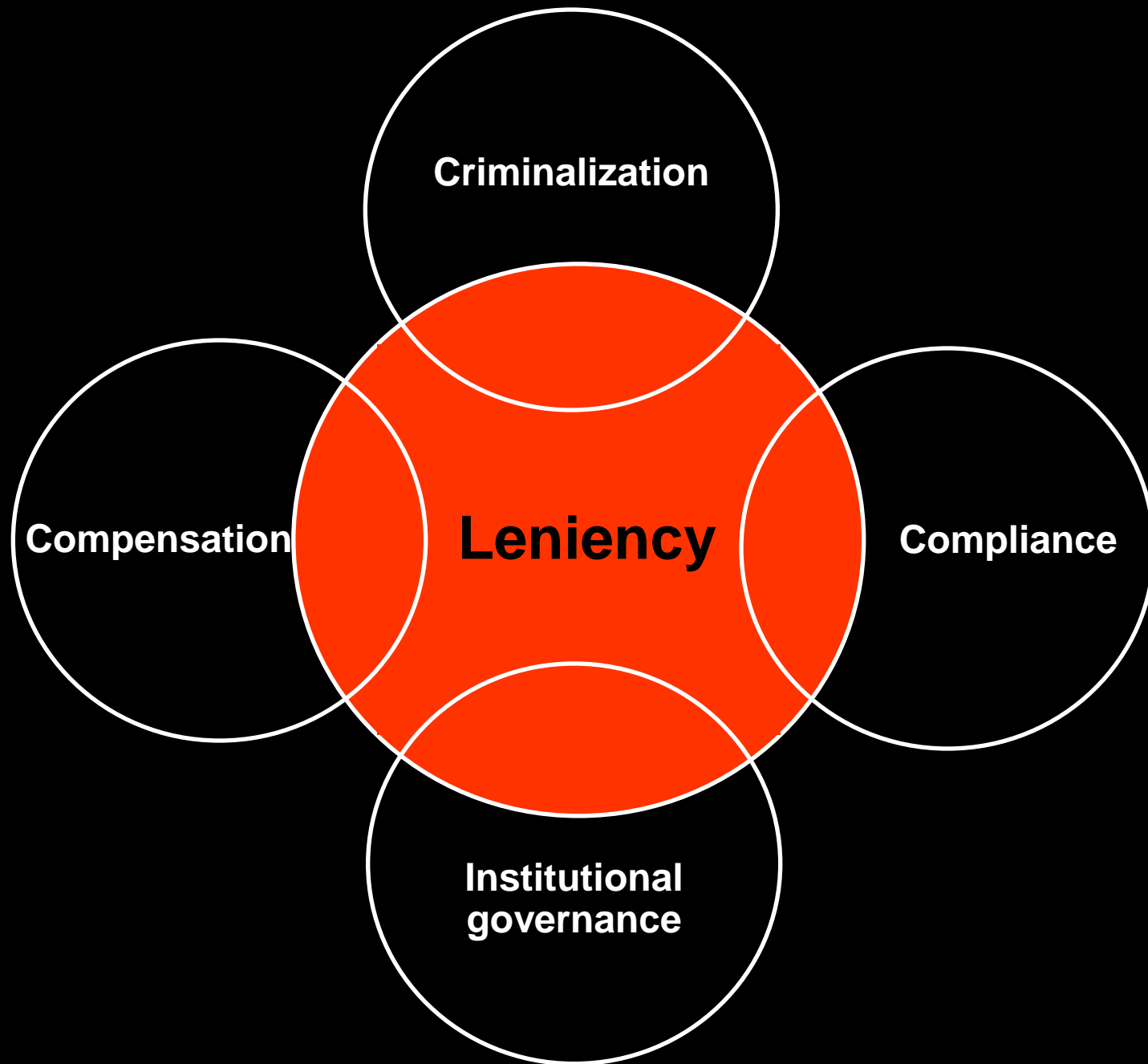
ANTI-CARTEL
ENFORCEMENT IN A
CONTEMPORARY AGE

Leniency Religion

Edited by
Caron Beaton-Wells
and Christopher Tran

- Does leniency rhetoric match reality?
- Does leniency policy involve trade-offs?

BLOOMSBURY



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?

This isn't working at all... I should warn others not to put their cart before the horse.



**LENIENCY 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..**

US

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

AUS

**..cartel formation
clearly can be theft
and those who are
guilty of it on a large
scale are guilty of
substantial theft..**

UK

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

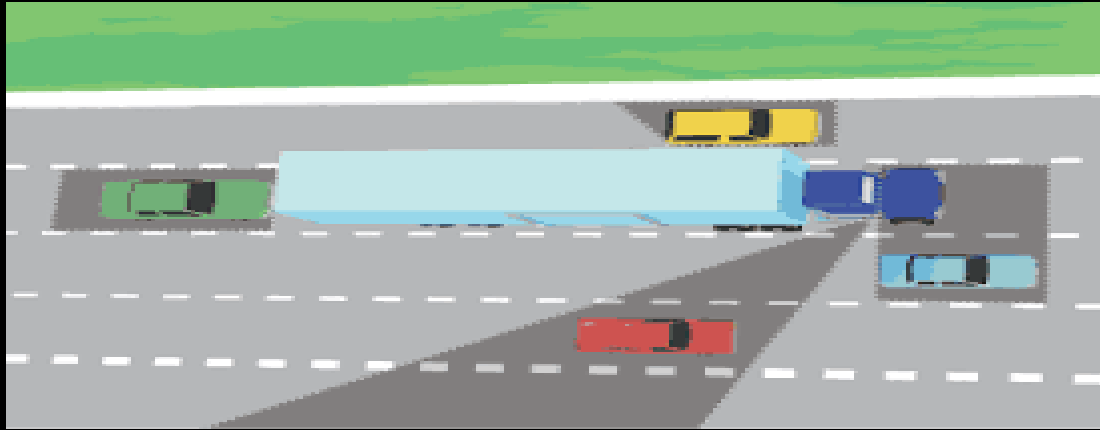
OR



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?



Effectiveness assumptions

CRIMINAL SANCTIONS + LENIENCY = MORE DETECTION

LEGAL ADVICE TO THE BOARD

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

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

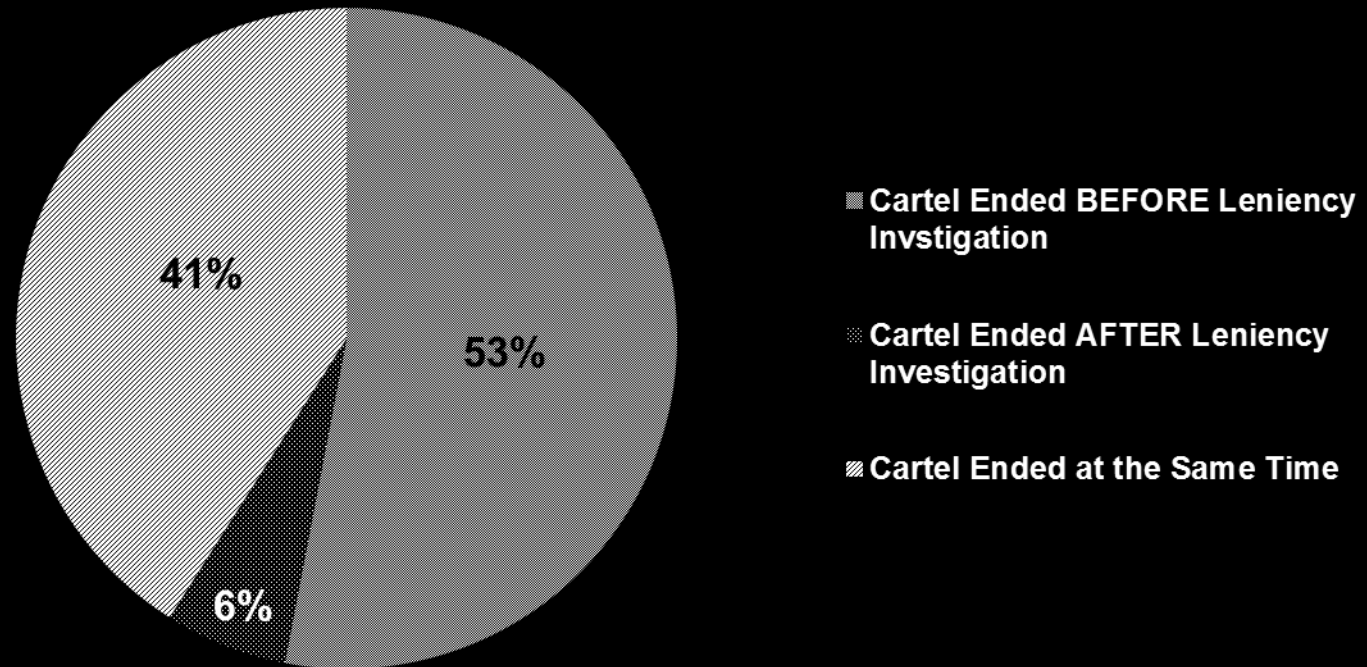
Business people perceive the **likelihood of a jail sentence** as **low**

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

Effectiveness assumptions

CRIMINAL SANCTIONS + LENIENCY = MORE DETERRENCE

EU leniency investigation and cartel end date



Weaknesses in the relationship between criminal sanctions and leniency effectiveness



Retributive compromise and foreclosure DOING THE DEAL?

Risks of alienating public support

Country	% public disagreement with leniency
United States	32
United Kingdom	31
Germany	42
Italy	42
Australia	50

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





Increase in 'strategic' leniency

Comments and questions welcome

c.beaton-wells@unimelb.edu.au