PART I

Introduction

1

Leniency in Asian Competition Law

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There is an international consensus that cartels[1] should be eradicated from society.[2] The Organisation for Economic Co-operation and Development (OECD) expressed this view in 1998 by considering that 'cartels are the most egregious violations of competition law'[3] in its recommendation on effective actions against hard-core cartels. A similar formulation can be found in the documents of the International Competition Network (ICN). The ICN holds that '[c]artels are generally among the most serious competition infringements'.[4] National enforcement agencies often use more colourful language to convey a similar message. Mario Monti, the European Union (EU) Commissioner for Competition between 1999 and 2004, for example, expressed it in this way: '[c]artels are cancers on the

[1] Cartels could be understood as 'an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories or lines of commerce.' See OECD Council, 'Recommendation of the OECD Council Concerning Effective Action against Hard Core Cartels' (1998), p. 2, para. A2(a). Retrieved from www.oecd.org/daf/competition/2350130.pdf. Some other definitions focus on the secret nature of cartels but are expressing the same message. See Argenton, C., Geradin, D. and Stephan, A., *EU Cartel Law and Economics* (Oxford: Oxford University Press, 2020), p. 5 (proposing the following definition: 'Cartels are instances of formal, often secret, cooperation between competing firms with a view to suppressing or softening the rivalry between them by reaching an agreement on outputs, sales, prices or other commercial variables').

[2] Harding, C. and Joshua, J., *Regulating Cartels in Europe* (Oxford: Oxford University Press, 2010, 2nd ed.), p. 1.

[3] OECD, 'Recommendation of the Council Concerning Effective Action against Hard Core Cartels', C(98)35/FINAL (25 March 1998). Retrieved from https://legalinstruments.oecd.org/public/doc/193/193.en.pdf.

[4] ICN Working Group on Cartels, 'Building Blocks for Effective Anti-Cartel Regimes' (2005), p. 1.

open market economy'.[5] In the United States (US), enforcement officials started to speak of the 'war against international cartels'.[6] The US Supreme Court added to this list with the view that collusion is the 'supreme evil of antitrust',[7] which was repeated by Thomas O. Barnett, an assistant attorney general at the Antitrust Division of the US Department of Justice (DOJ), in 2007.

The international consensus is built around the idea of consumer protection. The OECD phrases the problem of cartels in terms of an injury to consumers caused 'by raising prices or restricting supply, thus making goods and services completely unavailable to some purchasers and unnecessarily expensive for others'.[8] The ICN stated that '[c]onsumers benefit from competition through lower prices and better products and services'.[9] Consumers are deprived of these benefits if competitors start to collude. Joel Klein, the Assistant Attorney General at the Antitrust Division of the DOJ, bluntly stated that 'cartel behavior … is bad for consumers'.[10] As a justification for this statement, he held that 'cartels are the equivalent of theft by well-dressed thieves'.[11] Monti taught us that the consumer will pay the bill for the fact that cartels produce less and earn higher profits.[12] Neelie Kroes, the EU Commissioner for Competition between 2010 and 2014, repeated the linkage of theft and cartels. The breaking-up of cartels, she says, 'is to stop money being stolen from customers' pockets'.[13]

Against this background, it should not come as a surprise that 'deterring, detecting and prosecuting cartel conduct is a high priority for

[5] Monti, M., 'Fighting Cartels Why and How? Why Should We Be Concerned with Cartels and Collusive Behaviour?' (Presentation at 3rd Nordic Competition Policy Conference, Stockholm, 11–12 September 2000). Retrieved from http://europa.eu/rapid/press-release_SPEECH-00-295_en.htm.

[6] Klein, J. I., 'The War against International Cartels: Lessons from the Battlefront' (Presentation at Fordham Corporate Law Institute 26th Annual Conference on International Antitrust Law & Policy, 14 October 1999). Retrieved from www.justice.gov/atr/speech/war-against-international-cartels-lessons-battlefront.

[7] *Verizon Communications* v. *Law Offices of Curtis* v. *Trinko*, 540 U.S. 398, 408 (2004).

[8] OECD, 'Recommendation of the Council' (n. 3 above), p. 5.

[9] ICN Working Group on Cartels, 'Building Blocks' (n. 4 above), p. 1.

[10] Klein, 'War against International Cartels' (n. 6 above).

[11] Ibid.

[12] Monti, 'Fighting Cartels' (n. 5 above).

[13] Kroes, N., 'Taking Competition Seriously – Anti-Trust Reform in Europe' (Presentation at the International Bar Association/European Commission Conference Anti-trust Reform in Europe: A Year in Practice, Brussels, 10 March 2005). Retrieved from http://europa.eu/rapid/press-release_SPEECH-05-157_en.htm.

competition agencies worldwide'.[14] However, because of the illegal nature of cartel conduct, participants will go to great lengths to keep their conduct secret. Participants will do whatever is necessary either not to create documents that could serve as proof of illegal conduct or, if these documents come into existence at any point, endeavour to ensure they are hidden or destroyed. Such behaviour, therefore, makes it extremely difficult for the relevant competition agencies to produce the necessary evidence in order to convict cartel participants.[15]

To deal with the problem of secrecy, in 1978 the DOJ developed a new enforcement tool, the leniency programme, to trigger the reporting of illegal cartel conduct. The aim of the programme was to offer immunity to a cartel participant reporting the existence of a cartel. In other words, the reporting cartel participant would not have to pay any monetary fine, nor would any employee be sent to jail for their involvement. The details of the programme were outlined in the DOJ's Corporate Leniency Policy.[16]

The initial experimentation with leniency programmes was not very successful, however.[17] It was only when the DOJ altered the incentive structure for reporting that major successes were achieved. And many of these enforcement successes involved international cartels. For example, the Lysine cartel, one of the earliest successful detections that was attributed to the leniency programme, operated internationally, and comprised American, European, Korean and Japanese corporations.[18] Closely following the developments on the other side of the Atlantic and Pacific Ocean, the EU and the Republic of Korea (Korea) rolled out their respective leniency programmes in 1996.[19]

The early implementers of the leniency programmes started to share their experience on an international level in the hope of convincing others to follow their lead. The OECD, the ICN and later the United Nations Conference on Trade and Development (UNCTAD) all endorsed this new approach.[20] International guidelines and best practices, all based on the

[14] Beaton-Wells, C., 'Leniency Policies: Revolution or Religion', in Beaton-Wells, C. and Tran, C. (eds.) *Anti-Cartel Enforcement in a Contemporary Age: Leniency Religion* (Oxford: Hart Publishing, 2015), 3, p. 3.
[15] Van Uytsel, S., 'A Comparative US and EU Perspective on the Japanese Antimonopoly Law's Leniency Program' (2008) 75(3) *Hosei Kenkyu* F1.
[16] For an explanation, see Balasingham, Chapter 2 in this volume.
[17] Ibid.
[18] See Van Uytsel, Chapter 5 in this volume.
[19] See O'Brien, A., 'Leadership of Leniency', in Beaton-Wells and Tan, *Anti-Cartel Enforcement* (n. 14 above), 17, p. 19.
[20] Van Uytsel, Chapter 3 this volume.

experience of the early implementers, soon developed. The international advocacy for the leniency programme also led to a gradual proliferation of this enforcement tool. Since mid-2018, there are more than sixty jurisdictions that have adopted some form of leniency programme.[21] Among these sixty jurisdictions are several Asian countries. Most of the leniency programmes in Asia were adopted between 2010 and 2020, with Korea (1996),[22] Japan (2005)[23] and Singapore (2006)[24] as exceptions.[25]

It is the aim of this book to critically review the turn to leniency programmes in Asian competition law. The choice of jurisdictions is as follows: Hong Kong, India, Japan, Malaysia, People's Republic of China (China), Republic of China (Taiwan), Korea and Singapore.[26] The choice of these jurisdictions is justified because the majority of them have actively used their respective leniency programme for the enforcement of competition law. The book also discusses the Philippines and Thailand. The Philippine leniency programme has only been adopted recently and has not yet rendered any substantive decision. Yet the unique conceptualisation, especially institutionally, makes a detailed discussion worthwhile.[27] Thailand is interesting because it does not have a leniency programme and this was a deliberate choice. This begs the question of why a country would opt not to create a leniency programme, and, eventually, how cartel enforcement might be advanced without utilising this innovative new enforcement tool.[28]

This introductory chapter to the book is structured as follows. Section 1.1 provides an overview of the origins of the leniency programme. Both the practical necessity of a leniency programme and the first use of the

[21] OECD, 'Challenges and Co-Ordination of Leniency Programmes – Background Note by the Secretariat', DAF/COMP/WP3(2018)1 (2018), pp. 3–4. Retrieved from https://one.oecd.org/document/DAF/COMP/WP3(2018)1/en/pdf.

[22] Choi, Chapter 7 this volume.

[23] Van Uytsel, Chapter 5 this volume; Van Uytsel and Uemura, Chapter 6 this volume.

[24] Clements and Shiau, Chapter 10 this volume.

[25] The Indian Competition Act of 2002 provided for the possibility of lenient treatment, but the Competition Commission of India (CCI) only created the guidelines in 2009. See Koradia, Manokaran and Hirani, Chapter 13 this volume.

[26] The choice to leave out other jurisdictions is based on various reasons. Vietnam adopted a leniency programme in 2018. However, the Vietnamese enforcement has, so far, not focused on cartel formation. The main enforcement focus is on unfair trade practices, which do not fall under the leniency programme. Indonesia, in contrast, has not adopted a leniency programme yet. A draft leniency programme has been elaborated in the framework of a broader review of its competition law.

[27] Ditucalan and Van Uytsel, Chapter 14 this volume.

[28] Porananond, Chapter 15 this volume.

leniency programme in the US will be highlighted. In Section 1.2, the focus will shift to Asia. We will indicate that competition law in Asia is a relatively recent phenomenon, which, in turn, has an impact on the implementation of the leniency programme in Asia. Section 1.3 gives an overview of how the literature in relation to leniency has developed and how this book fills the gap in the literature by providing a comprehensive regional study on the use of leniency programmes.

1.1 The Leniency Programme and Its Origin

1.1.1 The Leniency Programme: The Concept and Its Use

A leniency programme is situated in the realm of law enforcement, for the purpose of this book competition law enforcement. Within competition law enforcement, a leniency programme is designed to assist enforcement of anti-cartel provisions. A leniency programme does so by incentivising cartel participants to defect and report a cartel. This incentive is either immunity for or reduction of the sanction prescribed for infringing the relevant anti-cartel provisions.[29]

The need to rely on cartel participants for the enforcement of the anti-cartel provisions relates to the character of a cartel. Having engaged in prohibited conduct, participants of a cartel will go to extreme lengths to hide the existence of the cartel and their involvement. Everything needs to happen in secrecy and any paper trail revealing the existence of a cartel needs to be avoided as it would provide a road map for regulators.[30] Consequently, letters, emails and faxes will not be the primary means of communication for a cartel. At least historically, telephone communications were much safer. However, as more and more jurisdictions allow telephone tapping and other surveillance, cartel participants will prefer meetings in person and this would either be difficult to trace or not trigger any suspicion. A coincidental meeting in the lobby of an airport when transiting in the same country, a friendly talk during a round of golf or

[29] Barlund, I. M. H., *Leniency in EU Competition Law* (Alphen aan de Rijn: Wolters Kluwer, 2020), pp. 3–4; Salemme, E., *Enforcing European Competition Law through Leniency Programmes in the Light of Fundamental Rights: With an Overview of the US Leniency Programme* (Baden-Baden: Nomos, 2019), p. 85; Balasingham, B., *The EU Leniency Policy: Reconciling Effectiveness and Fairness* (Alphen aan de Rijn: Wolters Kluwer, 2017), p. 2.

[30] If, for one reason or another, paper documents were to be created, these documents would be destroyed or kept at secret places outside the premises of the firms participating in the cartel.

an organised meeting in a backroom during an official trade association meeting, for example, provide the favourite communication channels for organising a cartel.[31]

This makes it very difficult for competition law enforcement agencies to precisely determine that a cartel exists and, if they can find the existence of a cartel, to gain enough evidence to sustain a case against the participants of the cartel. In this context, relying on inside information to detect cartels becomes a rational strategy for the enforcement agencies.

To explain the willingness of cartel participants to defect, scholars have often referred to the prisoner's dilemma, whereby it is claimed that confessing is the dominant strategy if one does not know what the other parties to the cartel are doing.[32] Thus, the leniency programme presupposes that the cartel participants act rationally within the premises of a prisoner's dilemma. Baskaran Balasingham will, in Chapter 2 of this volume, further explain the details of how the prisoner's dilemma functions to activate this desired result.[33]

One should be aware, however, that not all cartel participants are caught within the rationale of a prisoner's dilemma. There will be cartel participants who are, for whatever reason, not responsive to the risk of being caught and punished. First, an 'overconfidence bias' could exist, whereby there is a tendency to 'overestimate the probability of good things happening to them, and underestimate the probability of bad things happening to them',[34] which builds trust among cartel participants. It is this trust among the cartel participants that prevents a cartel from internally disintegrating. Second, a change of management might also trigger leniency

[31] Van Uytsel, S., 'Leniency under the Japanese Antimonopoly Law: Towards the End of the Cartel Archipelago?' in Cheng, T., Marco Colino, S. and Ong, B. (eds.), *Cartels in Asia* (Hong Kong: Wolters Kluwer Law & Business, 2015), pp. 75–76.

[32] Barlund, *Leniency in EU Competition Law* (n. 29 above), pp. 36–37; Salemme, *Enforcing European Competition Law* (n. 29 above), pp. 96–101; Zingales, N., 'European and American Leniency Programmes: Two Models towards Convergence' (2008) 5(1) *Competition Law Review* 5, pp. 8–12; Leslie, C. R., 'Antitrust Amnesty, Game Theory, and Cartel Stability' (2006) 31 *Journal of Competition Law* 453.

[33] Balasingham, Chapter 2 this volume.

[34] Sharot, T., 'The Optimism Bias' (2011) 21(23) *Current Biology* R941–R945. For application in legal scholarship, see Van Uytsel, S., 'The Hybridization of Competition Law Enforcement: Some Lessons from Japan's Introduction of the Leniency Program' (ASLI Working Paper Series No. 027, 2012), pp. 23–26; Stucke, M. E., 'Am I a Price Fixer? A Behavioral Economics Analysis of Cartels', in Beaton-Wells, C. and Ezrachi, A. (eds.), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Oxford: Hart Publishing, 2011), 263, p. 271.

applications.[35] This has been exemplified by the Sotheby's–Christie's cartel, whereby the new management of Christie's sought to end the cartel and applied for leniency. Third, some leniency applications are not motivated by the existence of a leniency programme itself, but by investigations of the same cartel elsewhere in the world. Fourth, several studies have indicated that many leniency applications are submitted when the cartel is already disbanded and has no future, in which case the application seems to be driven by strategic considerations rather than by deterrence.[36]

1.1.2 The Leniency Programme First Develops in the United States

The first competition agency to experiment with a leniency programme was the DOJ. In 1978, the DOJ issued the Corporate Leniency Policy (1978 Leniency Policy),[37] a programme in which immunity was offered to the first cartel participant defecting from the cartel and providing with candour and completeness previously unknown information.[38] However, even though the defecting cartel participant complied with all the other conditions attached to the 1978 Leniency Policy, the DOJ had the final decision on whether to grant immunity. The DOJ could refuse immunity if it had a reasonable expectation that it could have discovered the reported cartel conduct by itself. This uncertainty of outcome made cartel participants ignore the existence of the 1978 Leniency Policy. Staff of the DOJ have reported that it only received, on average, one leniency application per year.[39]

[35] Interview by Steven Van Uytsel (Professor, Kyushu University) with Miriam Driessen-Reilly (Cartel Section, European Commission Directorate-General for Competition), in Brussels (26 March 2012). See Van Uytsel, 'The Hybridization of Competition Law Enforcement' (n. 34 above), p. 26.

[36] For a popular account of the cartel, Mason, C., *The Art of the Steal* (New York: Berkeley Publishing Group, 2005).

[37] Further discussion, Balasingham, Chapter 2 this volume.

[38] It is said that the US DOJ started to discuss the implementation of a leniency programme as early as 1976.

[39] Hammond, S. D., 'The Evolution of Criminal Antitrust Enforcement: Over the Last Two Decades' (Presentation at the ABA Criminal Justice Section and the ABA Center for Continuing Legal Education, 2010), p. 2. Retrieved from www.justice.gov/atr/file/518241/download. Bruce Kobayashi reports that seventeen corporations applied for leniency between 1978 and 1993. Six requests were denied and ten corporations qualified for amnesty. Only four out of these ten corporations qualified for amnesty before 1987, the year in which a leniency programme for individuals started. At the time of revision of the 1978 Leniency Policy in 1993, there was still one request pending. Kobayashi also concedes that the initial 1978 Leniency Policy had an average of approximately one leniency application per year. See Kobayashi, B. H., 'Symposium: Antitrust Agency and Amnesty: An Economic Analysis of the Enforcement of Antitrust Laws against Corporations' (2001) 69 *George Washington*

Despite the low detection rate of the 1978 Leniency Policy, Vivek Ghosal and Daniel Sokol point out that there was a general increase of prosecuted cartel cases in the US after 1978.[40] Between 1978 and 1980, there were about twenty cartel cases per year prosecuted and the number rose to an average of sixty cartel cases from 1981 onwards.[41] This result was made possible by focusing on the prosecution of one specific type of cartel: bid rigging.[42] It seems that for public procurement projects, the enforcement agencies had enough instruments to successfully make their case and this goal could be achieved without relying on a good cartel story from an inside participant. But even the prosecution of bid rigging started to diminish as the DOJ's motive became 'hands-off markets, irrespective of the nature of the violations' under the George H. W. Bush administration.[43]

Things changed, however, with the Clinton administration. At the start of this administration in 1993, the Federal Investigation Bureau had, via a large undercover operation in the lysine sector, an indication that price fixing was as prevalent as bid rigging.[44] The enforcement agencies realised that price fixing had been neglected, probably because of the belief that setting up successful cartels was as good as impossible.

To rectify the situation, the DOJ started to revise the 1978 Leniency Policy. In August 1993, the DOJ issued its new Corporate Leniency Policy (1993 Leniency Policy). By making immunity automatic for a leniency application prior to the start of an investigation, making leniency available to corporations even after an investigation had begun, and extending immunity to all officers, directors and employees who came forward with the corporations, the DOJ improved the incentive structure. These changes proved to be successful. The 1993 Leniency Policy, being more transparent and predictable, attracted on average two leniency applications per month.[45]

Law Review 715, pp. 728–31. This number is more or less confirmed by Christopher Leslie, who, by referring to James Griffin, speaks of an average of three per month. See Leslie, C. R., 'Editorial: Antitrust Leniency Programmes' (2011) 7 *Competition Law Review* 175. Ann O'Brien further reports that there was not a single` international or large domestic cartel revealed by the 1978 Leniency Policy: O'Brien, 'Leadership of Leniency' (n. 19 above), p. 18.

40 Ghosal, V. and Sokol, D. D., 'The Rise and (Potential) Fall of U.S. Cartel Enforcement' (2020) 2 *University of Illinois Law Review* 471, p. 478.

41 Ghosal, V. and Sokol, D. D., 'The Evolution of U.S. Cartel Enforcement' (2014), p. 7. Retrieved from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2345983.

42 Ghosal and Sokol, 'The Rise and (Potential) Fall of U.S. Cartel Enforcement' (n. 40 above), p. 477.

43 Ibid., p. 485.

44 Ibid., pp. 480 and 498.

45 Ibid., pp. 479–80.

Canada did not wait for the success of the leniency programme to be proven in practice when its Competition Bureau created some form of leniency programme in 1991.[46] The EU and Korea were inspired by the immediate success of the 1993 Leniency Policy and implemented a leniency programme in 1996.[47] Both EU and Korean leniency programmes suffered from shortcomings.[48] Without being transparent and predictable, these leniency programmes did not offer sufficient incentives for the cartel participants to defect and report the existence of the cartel conduct. It is only with subsequent revisions that the latter two became more effective.

Leaving aside the Korean leniency programme, Ann O'Brien observed that the leniency programmes in the US and the EU have moved towards each other. She even goes as far as suggesting that these two leniency programmes underwent substantial convergence.[49] This substantial convergence, she further claims, has been 'based initially on the US DOJ Antitrust Division's experience, followed closely by the experience of the European Commission and other jurisdictions, and reflected in the approach endorsed by international and regional organisations such as the Organisation for Economic Co-operation and Development, the International Competition Network and the European Competition Network'.[50] As the basic principles for leniency programmes have been set out by the US and the EU, and then further spread by the OECD and the ICN, both aspects are covered in this book.[51] Since the OECD and ICN are not the only international organisations dealing with the proliferation of competition law institutions,

[46] O'Brien, 'Leadership of Leniency' (n. 19 above), p. 19.

[47] Ibid.

[48] For Europe: Stephan, A. and Nikpay, A., 'Leniency Theory and Complex Realities' (CCP Working Paper 14-8, 2014). Retrieved from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2537470; Stephan, A. 'An Empirical Assessment of the 1996 Leniency Notice' (CCP Working Paper 05-10, 2005). Retrieved from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=911592. For Korea: Han, K. J., 'Cartel Leniency Program and Cartel Enforcement in South Korea' (2015) MPA/MPP Capstone Projects 225, p. 3. Retrieved from https://uknowledge.uky.edu/mpampp_etds/225; Nayoung, K. and Yungsan, K., 'Who Confesses for Leniency: Evidence from Korea' (2016) 12(2) *Journal of Competition Law & Economics* 351, p. 353.

[49] O'Brien, 'Leadership of Leniency' (n. 19 above), p. 19, noting that '[a]fter Canada issued its Immunity Bulletin in 2000 and the European Commission issued its revised Leniency Notice in 2002, the "Big Three" corporate leniency policies –those of the United States, the European Union and Canada – underwent substantial convergence.'

[50] Ibid., p. 16 (abbreviations added).

[51] Balasingham, Chapter 2 this volume; Van Uytsel, Chapter 3 this volume.