Leniency, Whistle-Blowing and the Individual: Should We Create Another Race to the Competition Agency?

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I. Introduction

Leniency policies are premised on a race to the competition agency.[1] Competition authorities generally discuss one race, but several races can lead to their door. The first race is among the cartel's firms. The second race, which competition authorities discuss less frequently, is between the guilty individuals and the companies that employ them. And the third race, which the competition authorities rarely discuss, is between whistle-blowers[2] and the price-fixers.

In Part II, this chapter outlines corporate and individual leniency policies and why they have not optimally deterred cartels.[3] In Part III, the chapter discusses a key issue for competition authorities: why and under what circumstances do people report misconduct, in particular conduct they know is illegal? Relatedly, can competition agencies advance the third race to their doors by paying whistle-blowers for information about cartels?[4]

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[1] SD Hammond, 'The Evolution of Criminal Antitrust Enforcement over the Last Two Decades' (The 24th Annual National Institute on White Collar Crime, Miami, 25 February 2010) 3, www.justice.gov/atr/public/speeches/255515.pdf ('Effective leniency programs create a race among conspirators to disclose their conduct to enforcers, in some instances even before an investigation has begun, and quickly crack cartels that may have otherwise gone undetected').

[2] This chapter uses the term 'whistle-blower' to mean one who provides information about the misconduct of others to a person or agency capable of investigating the complaint and facilitating the correction of wrongdoing. The whistle-blower is not complicit in the misconduct, either directly or indirectly. For this use of the term, see, eg, Comments on Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934 [Release No 34-63237; File No S7-33-10] by SH McDonald and GS Goodale (17 December 2010) 1, www.sec.gov/comments/s7-33-10/s73310-154.pdf.

[3] This chapter discusses the leniency policies adopted by the Antitrust Division of the United States Department of Justice. The discussion has broader relevance, however, because these policies have served 'as a model for similar programs that have been adopted by antitrust authorities around the world': GF Masoudi, 'Cartel Enforcement in the United States (and beyond)' (Cartel Conference, Budapest, 16 February 2007) 6, www.justice.gov/atr/public/speeches/221868.pdf.

[4] See, eg, A Stephan, 'Is the Korean Innovation of Individual Informant Rewards a Viable Cartel Detection Tool?' in T Cheng, B Ong and S Marco Colino (eds), *Cartels in Asia* (Alphen aan den Rijn, Wolters Kluwer Law & Business, 2014) (forthcoming), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2405933; JM Connor and RH Lande, 'Cartels as Rational Business Strategy: Crime Pays' (2012) 34 *Cardozo Law Review* 427, 482 (noting that 'Bounty proposals have the potential to enhance cartel detection and to destabilize cartels even more than the current leniency and amnesty programs'); CR Leslie, 'Cartels, Agency Costs, and Finding Virtue in Faithless Agents' (2008) 49 *William and Mary Law Review* 1621, 1628 (recommending that 'faithless agents who expose illegal cartels should receive significant rewards, including leniency from criminal prosecution, immunity from private liability, and substantial monetary incentives in the form of antitrust bounties'); C Aubert, P Rey and WE Kovacic, 'The Impact of Leniency and Whistle-Blowing Programs on Cartels' (2006) 24 *International Journal of Industrial Organization* 1241, 1254; WE Kovacic, 'Private Participation in the Enforcement of Public Competition Laws' in M Andenas, M Hutchings and P Marsden

Part IIIA first describes existing whistle-blower policies. Part IIIB next examines the benefits and concerns associated with offering bounties to whistle-blowers. Part IIIC explores whether whistle-blowers are primarily driven by financial incentives. The empirical whistle-blowing literature and behavioural economics studies cast doubt on the assumption that they do. One risk in offering a financial reward, as Part IIID discusses, is that market norms can crowd out the social, ethical and moral norms for whistle-blowing (and thereby reduce the quality of whistle-blowing tips). In promoting a financial incentive, the competition agency encourages individuals to focus on whistle-blowing's financial costs and benefits; as a result, the bounty would likely have to far exceed the bounties a few competition authorities currently offer. In Part IIIE, the chapter examines other factors found to motivate whistle-blowing, and their implications for competition agencies interested in promoting whistle-blowing. Part IV concludes.

II. Why Two Races Are Insufficient to Deter Cartels

A. The First Race — Among Corporate Leniency Applicants

Under the Corporate Leniency Policy of the United States Department of Justice (DOJ), as revised in 1993, a 'corporation can avoid criminal conviction and fines, and individuals can avoid criminal conviction, prison terms, and fines, by being the first to confess participation in a criminal antitrust violation, fully cooperating with the [Antitrust] Division, and meeting other specified conditions'.[5] Amnesty is automatic for any antitrust violator if there is no pre-existing investigation, and it may be available if the company co-operates after an investigation is underway. All officers, directors and employees of a corporation qualifying for amnesty are protected from criminal prosecution. Simply put, under the DOJ's Corporate Leniency Policy, 'The company pays no fine. Its culpable executives do not go to jail. The key is that only one company can qualify for leniency'.[6]

The DOJ, among others, praises its Corporate Leniency Policy as its 'most effective investigative tool'.[7] Indeed, most of the DOJ's criminal antitrust cases now arise

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(eds), *Current Competition Law: Volume II* (London, British Institute of International and Comparative Law, 2004) 173–75; WE Kovacic, 'Private Monitoring and Antitrust Enforcement: Paying Informants to Reveal Cartels' (2001) 69 *George Washington Law Review* 766, 796 (outlining a 'system of rewards for private parties who inform on cartels [which] would pay a percentage of amounts ultimately recovered by the government where the informant's cooperation contributes significantly to the identification and successful prosecution of a collusion offense').

[5] SD Hammond and BA Barnett, 'Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters' (19 November 2008) 1, www.justice.gov/atr/public/criminal/239583.pdf. For more information about the DOJ's Corporate Leniency Policy, see DOJ, 'Corporate Leniency Policy' (10 August 1993) www.justice.gov/atr/public/guidelines/0091.pdf. For a history of this policy, see A O'Brien, 'Leadership of Leniency', ch 2 in this volume.

[6] SD Hammond, 'Cornerstones of an Effective Cartel Leniency Programme' (2008) 4(2) *Competition Law International* 4, 5.

[7] SD Hammond, 'Recent Developments, Trends, and Milestones in The Antitrust Division's Criminal Enforcement Program' (The 56th Annual Spring Meeting of the ABA Section of Antitrust Law, Washington DC, 26 March 2008) 13, www.justice.gov/atr/public/speeches/232716.pdf.

from corporate leniency applications.[8]

The Corporate Leniency Policy seeks to sow distrust among existing and potential cartel members to prevent cartels from forming and to quickly destabilise existing cartels. As a senior DOJ official has said:

> The more anxious a company is about possible discovery of its cartel participation by the Government, the more likely it is to report its wrongdoing in exchange for amnesty. If cartel members perceive a genuine risk of detection, then an amnesty programme can build on that fear and create distrust and panic inside the cartel. The cartel members can no longer afford to trust one another. The rewards for self-reporting are too great, and the consequences of getting caught too severe. The dynamic literally creates a race to be the first to the enforcer's office.[9]

B. The Second Race — Between Companies and Their Employees

Individuals can be criminally and civilly liable in the United States for violating the Sherman Act.[10] An individual can face a criminal fine of up to $1 million and jail time of up to 10 years. As reflected below, many individuals convicted under the Sherman Act go to jail, are fined, or both.

[Insert Table 1 here with the following caption]

Table 1: Penalties for those convicted of violating the Sherman Act between 2004–13[11]

The belief in the United States is that incarceration and corporate fines are the greatest deterrents for cartels.[12] As one corporate executive is said to have explained:

> [A]s long as you are only talking about money, the company can at the end of the day take care of me … but once you begin talking about taking away my liberty, there is nothing that the company can do for me.[13]

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[8] See United States Government Accountability Office, 'Criminal Cartel Enforcement: Stakeholder Views on Impact of 2004 Antitrust Reform Are Mixed, But Support Whistleblower Protection', Report to Congressional Committees, GAO-11-619 (July 2011) 60, www.gao.gov/assets/330/321794.pdf (GAO Report).

[9] Hammond, 'Cornerstones' (n 6) 6–7.

[10] 15 USC §§ 1–3.

[11] These figures are from Antitrust Division, DOJ, 'Workload Statistics: FY 2004 – 2013', www.justice.gov/atr/public/workload-statistics.pdf.

[12] See, eg, GAO Report (n 8) 20 ('interviews with attorneys representing leniency applicants indicate ACPERA's [the Antitrust Criminal Penalty Enhancement and Reform Act's] offer of relief from civil damages had a slight positive effect on leniency applicants' decisions to apply for leniency, though the threats of jail time and corporate fines were the most motivating factors both before and after ACPERA's enactment').

[13] BA Barnett, 'Criminalization of Cartel Conduct — The Changing Landscape' (Joint Federal Court of Australia/Law Council of Australia (Business Law Section) Workshop, Adelaide, 3 April 2009) 1, www.justice.gov/atr/public/speeches/247824.pdf.

With price-fixers serving longer prison sentences over the past 20 years, employees with potential liability should have an even greater incentive to seek amnesty.

The DOJ's Corporate Leniency Policy offers amnesty to the applicant's directors, officers and employees (current and former[14]) who come forward with the company, confess and cooperate:

> If a corporation qualifies for leniency … all directors, officers, and employees of the corporation who admit their involvement in the illegal antitrust activity as part of the corporate confession will receive leniency, in the form of not being charged criminally for the illegal activity, if they admit their wrongdoing with candor and completeness and continue to assist the Division throughout the investigation. If a corporation does not qualify for leniency … the directors, officers, and employees who come forward with the corporation will be considered for immunity from criminal prosecution on the same basis as if they had approached the Division individually.[15]

Thus, the company that seeks amnesty first can spare its culpable executives from jail. If the DOJ's practice 'is to insist on jail sentences for *all defendants* domestic and foreign',[16] and if 'Individuals have the most to lose — their freedom — and so avoiding jail sentences is the greatest incentive for seeking amnesty',[17] then the potentially liable company insiders should pressure the company's management and board to seek amnesty, and increase the company's incentive to race to the competition agency.

But as the DOJ recognises, some companies need prodding. Accordingly, the DOJ has a separate leniency policy that 'applies to all individuals who approach the Division on their own behalf, not as part of a corporate proffer or confession, to seek leniency for reporting illegal antitrust activity of which the Division has not previously been made aware'.[18] Under the DOJ's Individual Leniency Policy, those who co-operate 'receive

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[14] The Corporate Leniency Policy does not describe how the Antitrust Division will treat former employees of the amnesty applicant who participated in the cartel. In 1999, the then Deputy Assistant Attorney General noted that 'the issue has arisen as to how such employees should be treated'. Although the Antitrust Division 'is under no obligation to grant leniency to former employees who cooperate fully and provide complete and truthful information', it 'has the power to agree not to prosecute former employees who come forward' so it 'is therefore permissible, and in many cases advisable, to negotiate with the applicant to include in the amnesty agreement protection for former employees on the same basis as current employees'. GR Spratling, 'Making Companies an Offer They Shouldn't Refuse: The Antitrust Division's Corporate Leniency Policy — An Update' (Washington DC, Bar Association of the District of Columbia's 35th Annual Symposium on Associations and Antitrust, 16 February 1999) 5, www.justice.gov/atr/public/speeches/2247.pdf . See also DOJ, 'Model Corporate Conditional Leniency Letter' (19 November 2008) 2, www.justice.gov/atr/public/criminal/239524.pdf (referencing non-prosecution protection to 'current [and former] directors, officers, and employees of Applicant') (footnote omitted) (brackets in original).

[15] USDOJ, 'Corporate Leniency Policy' (n 5) 4.

[16] Hammond, 'Evolution' (n 1) 7.

[17] Hammond, 'Cornerstones' (n 6) 6.

[18] USDOJ, 'Leniency Policy for Individuals' (10 August 1994) 1, www.justice.gov/atr/public/guidelines/0092.pdf.

amnesty and a promise of non-prosecution for the anti-competitive activity they report'.[19] Thus, since 1994, the DOJ has promoted a second race to its door through its Individual Leniency Policy, which seeks to split the interests of the culpable individual and those of the firm recalcitrant in seeking amnesty. The firm would now be concerned about its and its co-conspirators' employees racing to the competition agency. As a DOJ official has observed:

> If a company detects a violation and its employees are subject to jail sentences (in at least one of the jurisdictions where the offence was committed), then the company is in a race not only with its competitors but also with its culpable employees, since they have the most to lose.[20]

So how effective is the DOJ's Individual Leniency Policy in detecting and deterring antitrust offences? It is unclear. The DOJ receives few individual amnesty applications.[21] As the United States Government Accountability Office (GAO) has stated in a report to Congress, 'the vast majority' of leniency applications submitted to the DOJ are corporate leniency applications.[22] But, as a DOJ official has argued, one cannot judge the Individual Leniency Policy's efficacy by its number of applications.[23] The belief is that an individual amnesty policy 'helps prevent companies from covering up their misconduct' as 'it acts as a watchdog to ensure that companies report cartel conduct themselves'.[24] If the 'company delays or decides not to report … then the company puts itself in a race for leniency with its own employees'.[25]

C. If There Is a Race, Why Does It Take So Long to Reach the Prosecutor's Door?

If each conspirator believes its co-conspirators or employees will seek amnesty, and if each conspirator must be first to request amnesty, then no collusion should occur. The mutual distrust, in theory, should prevent cartels from ever forming. Yet cartels are still forming, despite over 50 jurisdictions having corporate leniency policies,[26] and in the

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[19] Hammond, 'Cornerstones' (n 6) 7.
[20] ibid.
[21] See ibid.
[22] GAO Report (n 8) 16 fn 40.
[23] Hammond, 'Cornerstones' (n 6) 7.
[24] ibid. Hammond goes on to explain:

> It is easy to imagine how the threat of jail sentences for culpable executives can alter a corporation's decision whether to self-report, particularly when the individuals who make or influence that decision are the same ones who face jail time if the race for amnesty is lost. Even when the corporate decision makers are different, the decision to report may be affected if the exposed individuals are valued by the company. However, self-preservation instincts and humanitarian impulses are not the only factors at play here. The threat of individual exposure can tilt the balance and cause a company to seek amnesty even in the absence of personal exposure by the company's decision makers.

[25] ibid.
[26] Hammond, 'Evolution' (n 1) 3 (noting that in 'the last decade, many other jurisdictions around the world have implemented leniency programs and today over 50 jurisdictions have leniency programs in place',

face of increasing fines and longer prison sentences in the United States for convicted cartelists. Evidently, many conspirators are overcoming this distrust to collude on price or output or to allocate markets. Moreover, the average duration of prosecuted cartels does not appear to have changed substantially over the past century.[27] Cartels broken up through amnesty policies are not necessarily less stable and of shorter duration than other cartels. The fact that firms are lining up for amnesty may mean good business for the competition authorities. Yet over many years, the amnesty policy has failed to deter cartels from forming and overcharging consumers.

Indeed, in 2004, the United States sought to increase the attractiveness of the DOJ's leniency policies with an even bigger stick and tastier carrot. The Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA) increased the maximum fine[28] and maximum jail time (from three years to 10 years) for Sherman Act violations. It also reduced the successful leniency applicant's exposure in follow-on civil actions: unlike its conspirators who face joint and several liability for treble civil damages caused by the cartel, successful leniency applicants are liable only for the actual damages caused by their conduct if they provide 'satisfactory cooperation' to the private plaintiffs.[29] By strengthening both cartel disincentives (the stick) and leniency incentives (the carrot), Congress intended to 'increase the number of companies and individuals self-reporting anticompetitive behavior as well as benefit consumers by encouraging leniency applicants to cooperate with plaintiffs in their civil cases'.[30] But, as one federal study has found, the statute's effectiveness is unclear:

> After ACPERA's enactment, there was little change in the number of wrongdoers applying for leniency, an increase in successful applicants reporting previously unknown criminal conduct, and higher penalties in criminal cartel cases. Analysis of DOJ data indicate ACPERA may have resulted in little change in the number of leniency applications submitted—78 submitted in the 6 years before ACPERA versus 81 in the 6 years after—the most relevant indicator of ACPERA's impact, according to Antitrust Division officials. In addition, most defense attorneys representing leniency applicants in [the study's] sample

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which have 'led to the detection and dismantling of the largest global cartels ever prosecuted and resulted in record-breaking fines in Australia, Brazil, Canada, the European Union, Japan, Korea, Poland, the United Kingdom, the United States, and other jurisdictions').

[27] MC Levenstein and VY Suslow, 'Breaking Up Is Hard to Do: Determinants of Cartel Duration' (2011) 54 *Journal of Law & Economics* 455, 462–63 (examining 81 international cartels that the United States or the European Commission found to have engaged in collusion since 1990, with the oldest cartel in their sample (organic peroxides) beginning in 1971, with the average duration of cartels being approximately 8.1 years, with a standard deviation of 5.8 years and with one-third of cartels that survive beyond five years surviving beyond 10 years).

[28] Pub L No 108-237, § 215, 118 Stat 661, 668 (2004) (increasing fines from $10 million to $100 million for corporations and from $350000 to $1 million for individuals). Alternatively, criminal fines in excess of the statutory maximum may be imposed under 18 USC § 3571(d), which provides for a fine of twice the gross gain derived from the crime or twice the gross loss of the crime's victims, ie twice the gain derived by or twice the loss caused by the cartel rather than by the defendant.

[29] ACPERA, Pub L No 108-237, § 213, 118 Stat 661, 666–67.

[30] GAO Report (n 8) 13.

indicated that ACPERA's offer of relief from some civil damages had a slight positive effect on leniency applicants' decisions to apply for leniency, though the threat of jail time and corporate fines were the most motivating factors both before and after ACPERA's enactment.[31]

III. Encouraging a Third Race — Between the Cartel Participants and Whistle-Blowers

With evidence that cartels are undeterred, the predictable response under optimal deterrence theory is to increase: (i) the probability of detection (which could be seen as difficult given the already generous amnesty policy to induce price-fixers to implicate their co-conspirators); or (ii) the criminal (and/or civil) penalties, as they are presumably sub-optimal in deterring cartels.[32] Some, however, have argued for a third race to the competition agency, namely offering potential whistle-blowers a financial bounty to expose cartels.[33]

A. Whistle-Blower Policies

Whistle-blower policies are neither new nor unique to antitrust law enforcement. Several competition authorities offer bounties to foster another race to their doors.

Since 2002, South Korea's Informant Reward Program has provided 'monetary rewards based on certain rules and process for those who report or provide information on certain violations of competition law with supporting evidence'.[34] The Korea Fair Trade Commission (KFTC) added confidentiality protections and increased the bounty in 2005, before increasing it again in 2012 to potentially 3 billion won.[35] According to the KFTC, the Informant Reward Program 'has an effect of promoting compliance with competition law in that it helps uncover and redress law violations early on by encouraging people's participation and providing incentives for companies to strengthen

[31] GAO Report (n 8) Highlights. The GAO did find that the number of leniency applications where the DOJ had no knowledge of cartel activity nearly doubled in the six-year period after the ACPERA was enacted (33 compared to 17 applications). See GAO Report (n 8) 19. For a more favourable assessment of the ACPERA, see DA Crane, 'Why Leniency Does Not Undermine Compensation', ch 13 in this volume.

[32] As to the latter, see Letter from AA Foer, JM Connor and RH Lande to United States Sentencing Commission (28 July 2014) www.antitrustinstitute.org/sites/default/files/AAI%20USSC%20Comments%202014.pdf (comments from the American Antitrust Institute on the Commission's reconsideration of antitrust fines).

[33] See the sources cited in n 4.

[34] Directorate for Financial and Enterprise Affairs Competition Committee, Organisation for Economic Co-operation and Development, 'Promoting Compliance with Competition Law', DAF/COMP(2011)20 (30 August 2012) 125, www.oecd.org/daf/competition/Promotingcompliancewithcompetitionlaw2011.pdf (OECD Compliance). See generally Stephan, 'Korean Innovation' (n 4).

[35] See Organisation for Economic Co-operation and Development, 'Asia-Pacific Competition Update' (January 2013) 1, www.oecd.org/daf/competition/OECD_NEWSLETTER_8_final.pdf; KR Sullivan, K Ball and S Klebolt, 'The Potential Impact of Adding a Whistleblower Rewards Provision to ACPERA', *Antitrust Source* (October 2011) 2, www.americanbar.org/content/dam/aba/publishing/antitrust_source/oct11_sullivan_10_24f.authcheckdam.pdf.

its efforts to prevent law violations'.[36]

A second example is Hungary's Informant Rewards Program. As Sullivan, Ball and Klebolt have explained:

> [A]ny natural person who has knowledge of a cartel and provides to the Hungarian Competition Authority essential written evidence will receive an award amounting to at least 1 percent, but no more than 50 million forints (approximately $238,000 USD), of the fine levied against the participants in the cartel.[37]

Pakistan provides a third example. Since 2007, the Competition Commission has offered a reward for information that is 'accurate, verifiable and useful in the Commission's anti-cartel enforcement work'.[38] The bounty is based on 'the usefulness of the information provided, seriousness of the cartel, efforts made by the informant, and level and nature of the informant's contribution/cooperation'.[39] To the extent consistent with its disclosure obligations, the Commission must also keep the whistle-blower's identity confidential.[40]

In 'appropriate cases',[41] the Competition Commission of Singapore will provide informants up to S$120,000 within one month of an infringement decision.[42] The amount of the reward is at the Commission's 'sole discretion', and it 'may also reject offers of information without giving reasons for doing so'.[43] Although information on any of Singapore's three main activities prohibited under the Competition Act (anti-competitive agreements, decisions and practices; abuse of a dominant position; and anti-competitive mergers and acquisitions) is eligible for a reward, 'the primary object of the Reward Scheme is to offer rewards for information relating to cartel activity'.[44] Like the other countries' bounty policies, the evidence must be accurate and useful.[45] Moreover, the cartel's participants are generally ineligible for the reward.[46]

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[36] OECD Compliance (n 34) at 125.

[37] Sullivan, Ball and Klebolt (n 35) 3.

[38] Competition Commission of Pakistan, 'Revised Guidelines on "Reward Payment to Informants Scheme"', cl 3(3), www.cc.gov.pk/images/Downloads/guidlines/reward_paymentannexure_ii.pdf.

[39] ibid cll 3(1)–(2). The Revised Guidelines provide for bounties between 200000 rupees and five million rupees, whereas reg 3 of the Competition (Reward Payment to Informant) Regulations, 2014 provides for a maximum reward of two million rupees only.

[40] Competition (Reward Payment to Informant) Regulations, 2014, reg 7.

[41] Competition Commission of Singapore, 'Reward Scheme' (13 January 2014) www.ccs.gov.sg/content/ccs/en/Reporting-to-CCS/reward-scheme.html.

[42] Competition Commission of Singapore, 'FAQ: Reward Scheme' (23 December 2013) www.ccs.gov.sg/content/ccs/en/faq/reward-scheme.html.

[43] ibid.

[44] ibid.

[45] ibid (only whistle-blowers with 'direct or, at the very least, indirect access to *inside* information surrounding the competition infringements' (emphasis in original) should contact the Commission. 'Hearsay information eg an overheard conversation from unknown third parties is unlikely to be useful' to the Commission).

[46] ibid ('Where you have initiated or are directly involved in the infringing activities, you are not eligible for a reward unless your role in the infringing activities was merely peripheral').

Finally, since 2008, the United Kingdom has offered awards to individuals who provide tips about cartel activity.[47] While the reward is generally reserved for whistle-blowers who have not participated in the cartel,[48] whether or not to grant it is ultimately at the discretion of the United Kingdom's Competition & Markets Authority (CMA). The CMA 'is entirely free to reject offers of information and it does not have to give reasons for doing so'.[49] The amount of a reward, if any, depends on 'the value of the information in terms of what [the CMA has] been able to achieve from it', 'the amount of harm to the economy and consumers which [the CMA] believe[s] the information given has helped to put a stop to and/or has helped to disclose', the effort you have had to invest in order to give [the CMA] the information' and 'the risk [the informant has] had to take in order to give [the CMA] the information'.[50] The CMA 'won't bargain over how much will be paid' but it 'aim[s] to pay a fair price'.[51] Rewards can range up to £100000 in exceptional circumstances.[52]

Bounties in the United States are also available for exposing fraudulent claims against the federal government and for exposing securities and tax fraud. Most notably, the False Claims Act[53] was enacted over 150 years ago to prevent the Union Army being defrauded by suppliers during the Civil War.[54] Under the False Claims Act,

> a person with evidence of fraud against the federal government, also known as a whistleblower or relator, is authorized to file a qui tam case in federal court. A qui tam case allows the whistleblower to sue, on behalf of the government, persons engaged in the fraud and to share in money the government may recover. DOJ has the responsibility to decide on behalf of the government whether to join the whistleblower in prosecuting these False Claims Act cases.[55]

Thus, for example, whistle-blowers can benefit financially by exposing bid-rigging cartels where the federal government is a purchaser.[56]

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[47] OECD Compliance (n 34) 39. See generally Competition & Markets Authority, 'Rewards for Information about Cartels' (31 March 2014) www.gov.uk/government/uploads/system/uploads/attachment_data/file/299411/Informant_rewards_policy.pdf.

[48] CMA (n 47) 5 (making an exception 'where the role of the person in the cartel was relatively peripheral – for example that of an employee who was occasionally directed by his superiors to attend a cartel meeting and who was not asked to take an active part in decision-making about the cartel').

[49] ibid.

[50] ibid 4.

[51] ibid.

[52] ibid 1.

[53] 31 USC §§ 3729–33.

[54] DOJ, 'The False Claims Act: A Primer', www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Primer.pdf.

[55] GAO Report (n 8) 13.

[56] See, eg, DOJ, 'Justice Department Settlement Requires Gunnison Energy and SG Interests to Pay the United States a Total of $550,000 for Antitrust and False Claims Act Violations' (Press Release, 15 February 2012) www.justice.gov/atr/public/press_releases/2012/280273.pdf (DOJ investigation resulting from a whistle-blower lawsuit filed under the False Claims Act's *qui tam* provisions); AK Bingaman, 'The Clinton Administration: Trends in Criminal Antitrust Enforcement' (Corporate Counsel Institute, San Francisco, 30 November 1995) www.justice.gov/atr/public/speeches/0471.pdf (noting that the DOJ's

Bounties are also offered for reporting violations of the United States securities and tax laws. As the GAO has noted,

> other [United States] agencies that administer whistleblower reward programs, such as the [Internal Revenue Service] and the [Securities and Exchange Commission], rely on statutes that do not provide whistleblowers with a private right of action to sue on behalf of the government where there is potential wrongdoing, but instead offer a reward—or bounty—when whistleblowers provide information leading to a successful prosecution.[57]

Before 2010, United States securities law required a company's audit committee to establish procedures for internal whistle-blowing.[58] In addition, as part of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act, the US Securities and Exchange Commission (SEC) created a new office to administer monetary awards to whistle-blowers.[59] The policy is 'designed to incentivize individuals' to voluntarily provide the SEC with 'specific, credible, and timely' original information about 'possible securities law violations' that leads to 'a successful enforcement action resulting in monetary sanctions of over $1,000,000'.[60] Individuals can receive an award 'equal to 10-30% of the monies collected by the Commission or in a related action'.[61] Between August 2011, when the SEC's whistle-blower policy began, and the end of its 2013 fiscal year, the SEC 'received 6,573 tips and complaints from whistleblowers', with one whistle-blower receiving over $14 million.[62] Over the same period, the SEC's Office of the Whistleblower made awards to six persons, four of which were in the 2013 fiscal year.[63] The Dodd-Frank Wall Street Reform and Consumer Protection Act and the SEC's implementing regulations also 'prohibit retaliation against whistleblowers who report possible wrongdoing based on a reasonable belief that a possible securities violation has occurred, is in progress or is about to occur'.[64]

Antitrust Division created a relationship with the DOJ's Civil Division to obtain referrals on qui tam actions and co-ordinate the investigation and prosecution of criminal antitrust violations uncovered by those qui tam actions).

[57] GAO Report (n 8) 13–14.

[58] See Sarbanes-Oxley Act, Pub L No 107-204, § 301, 116 Stat 745, 776 (2002) (requiring the company's audit committee to establish procedures for '(A) the receipt, retention, and treatment of complaints received by the issuer regarding accounting, internal accounting controls, or auditing matters; and (B) the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters').

[59] See Pub L No 111-203, § 922, 124 Stat 1841, 1841–48 (2010) (codified at 15 U.S.C. § 78u-6).

[60] SEC, '2013 Annual Report to Congress on the Dodd-Frank Whistleblower Program' (2013) 1, www.sec.gov/about/offices/owb/annual-report-2013.pdf.

[61] ibid.

[62] ibid.

[63] ibid 14.

[64] ibid 3. Six rewards from 6572 tips may suggest a *de minimis* percentage (.09 per cent) of successful outcomes, especially when compared to Brazil's 42 per cent of useful antitrust tips from its whistle blower hotline where no bounty is offered (see n 100 below). The SEC does not explain the numbers further. Some tips, while valuable to SEC enforcement, perhaps were ineligible for a reward because the sanctions fell below $1000001. Another factor may be that the SEC is still investigating many tips. The SEC may have forwarded some tips to other regulatory or law enforcement agencies. Nonetheless, at some point in

B. Why Don't More Competition Authorities Use Whistle-Blowing Policies?

Far more competition authorities have a leniency policy than a whistle-blower bounty policy. One wonders why. As the Organisation for Economic Co-operation and Development has explained, a bounty can foster a race to the competition authority:

> 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 [leniency programmes] for individuals use reduced penalties as an enticement, though, bounty systems actually pay reward money to informants.[65]

Professor Andreas Stephan has discussed how whistle-blowing policies can help deter cartels by (i) increasing distrust and thus the cartel's instability, (ii) increasing the cost of collusion by requiring the cartel to compensate 'every *individual* involved in the infringement or aware of its existence' and (iii) reducing the cartel's effectiveness by limiting those involved in the cartel and by forcing its members to take more measures to conceal their activity.[66]

A whistle-blower policy can further sow distrust among the cartel members who must now fear any current or former employee or other person likely to be privy to damaging information racing to the agency. The conspirators will be concerned about not only the 'empty chair' left by a co-conspirator, but also any number of people who might overhear or discover the collusion. Since whistle-blowing bounties are used to deter and prosecute other hard-to-detect corporate violations, like securities and tax fraud, should more competition authorities reward whistle-blowers?

This is not simply an academic exercise. The GAO recently examined the benefits of and concerns about competition authorities adopting a whistle-blower policy.[67] The GAO interviewed government officials, law professors, economists, ten plaintiffs' attorneys who served as class counsel in 17 private civil antitrust cases and 11 defence attorneys who 'represented the publicly disclosed leniency applicants in 14 of the 17 cases'.[68] The GAO sought their views on the pros and cons of 'adding rewards or antiretaliatory protection for those who report criminal antitrust violations'.[69] Their views

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the next few years, the government should evaluate whether the SEC policy is worth its costs. After all, the SEC devotes resources to administer the policy and evaluate each tip to identify those that are sufficiently specific, credible and timely to warrant further investigation.

[65] OECD Compliance (n 34) 39.

[66] Stephan, 'Korean Innovation' (n 4) (emphasis in original) See also Kovacic, 'Private Monitoring' (n 4).

[67] GAO Report (n 8) 2 (when re-authorising ACPERA in 2010, Congress required the GAO to report on 'ACPERA's effect and the appropriateness of adding informant rewards—such as a bounty or qui tam provision—and antiretaliatory protection for employees who report illegal anticompetitive conduct' (footnote omitted)).

[68] ibid 3, 5.

[69] ibid 3.

on offering bounties were mixed.[70] The GAO found:

> Nine of 21 key stakeholders [it] interviewed and DOJ officials stated that incentives such as a whistleblower reward might motivate more whistleblowers to report criminal cartel activity to DOJ which, in turn, could result in greater cartel detection by the agency. However, 11 of 21 key stakeholders and DOJ officials noted disadvantages that could hinder DOJ's enforcement program by jeopardizing witness credibility, undermining companies' internal compliance programs, generating more claims that do not result in prosecutions, or requiring additional DOJ resources to administer.[71]

The DOJ's primary concern was that 'a paid whistleblower might not be regarded as a credible witness if the case went before a jury',[72] thereby making it harder for the DOJ to prove its criminal case beyond a reasonable doubt. This, in turn, 'would affect [the DOJ's] leverage in obtaining plea agreements and deter companies from settling with DOJ'.[73] Thus, for the DOJ, the disadvantages of offering bounties, 'most importantly the threat to witness credibility,' outweighed its benefits.[74] Other competition agencies have also questioned the benefits of a whistle-blower policy.[75]

The DOJ's concern is not far-fetched. One United States court has observed:

> Legitimizing the payment of money to witnesses can be a risky business, particularly when the payment greatly outstrips any anticipated expense. The payment becomes a reward, and as with any reward, the danger is that the recipient, out of gratitude or greed, might be inclined to alter or bend the truth. Accordingly, the government must act with great care when engaging in the practice of paying for more than expenses.[76]

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[70] There was greater support for legislation to provide antitrust whistle-blowers civil remedies to protect against retaliation. See ibid 47, 50 ('[b]y considering a civil remedy for whistleblowers who are retaliated against for reporting criminal antitrust violations, Congress could provide existing whistleblowers an assurance of protection for their efforts and, further, could motivate additional individuals to come forward with evidence of criminal cartel activity'). The United States Senate subsequently voted in favour of the Bill, titled the Criminal Antitrust Anti-Retaliation Act of 2013, and it remains pending as of August 2014 in the United States House of Representatives.

[71] GAO Report (n 8) 36 (footnotes omitted).

[72] ibid 39.

[73] ibid.

[74] ibid 45.

[75] See OECD Compliance (n 34) 140 (citing concern that bounty systems could promote allegations of false testimony, and the New Zealand Ministry of Economic Development's conclusion that a whistle-blowing policy was 'unlikely to have a large impact on deterrence' in New Zealand). Corporate directors have also expressed concern that whistle-blower rewards could increase false reports. See Scott Ladd, 'Financial Execs Wary of New Whistleblower Laws' (2011) 27(9) *Financial Executive* 11, 11 (noting that nearly four in five surveyed corporate directors of public company boards believed that the tougher whistle-blower provisions adopted as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act could lead to 'an increase in false allegations and, as a result, a negative impact on the company', although 66 per cent did not 'feel the financial incentives [would] undermine internal anti-fraud and compliance programs mandated by previous regulations').

[76] *US v Anty*, 203 F.3d 305, 311–12 (4th Cir, 2000).

The credibility of a witness who stands to gain financially from the defendant's conviction can be drawn into question. A financial interest, as the behavioural economics literature shows, can subtly slant one's views, even if one believes one is impartial.[77] Jurors accordingly are instructed that:

> The testimony of an informer who provides evidence against a defendant for pay, or for immunity from punishment, or for personal advantage or vindication, must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. The jury must determine whether the informer's testimony has been affected by interest or by prejudice against a defendant.[78]

Yet this jury instruction would apply to the testimony of both leniency applicants (who are granted immunity from punishment that could include incarceration) and whistle-blowers (who stand to gain financially). So in antitrust cases, whose testimony would jurors discredit more? The DOJ has responded to this question by stating that:

> [T]he issue of witness credibility is more of a problem for witnesses who receive a monetary reward than witnesses who receive criminal leniency because at least witnesses who receive leniency have to publicly admit criminal wrongdoing and subject their company to civil liability.[79]

On the other hand, a leniency policy is more problematic morally than a whistle-blowing policy. A leniency policy rewards companies and individuals who broke the law (often for years) to the detriment of consumers and society. Giving them amnesty may undercut the moral outrage associated with price-fixing. Offering complete leniency to one culpable price-fixer to catch other cartel members, prosecutors can argue, enables them to better prosecute difficult-to-detect cartels. But citizens may disagree.[80] In

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[77] See MH Bazerman and AE Tenbrunsel, *Blind Spots: Why We Fail to Do What's Right and What to Do about It* (Princeton, Princeton University Press, 2011) 81–83 (discussing how financial incentives can motivate ethical blindness and how the behavioural ethics literature questions the objectivity of auditors, managers and lawyers, who have a significant pecuniary interest in the transaction or outcome); S Killingsworth, '"C" Is for Crucible: Behavioral Ethics, Culture, and the Board's Role in C-Suite Compliance' (2013) RAND Center For Corporate Ethics and Governance Symposium on Culture, Compliance, and the C-Suite: How Executives, Boards, and Policymakers Can Better Safeguard against Misconduct at the Top, www.ssrn.com/abstract=2271840.

[78] *US v Luck*, 611 F.3d 183, 186–87 (4th Cir, 2010) (quoting US v Brooks, 928 F.2d 1403, 1409 (4th Cir, 1991), in turn quoting EJ Devitt and CB Blackmar, *Federal Jury Practice and Instructions: Civil and Criminal*, 3rd edn (St Paul, West Publishing Co, 1977) § 17.02).

[79] GAO Report (n 8) 40.

[80] See A Stephan, 'Survey of Public Attitudes to Price-Fixing and Cartel Enforcement in Britain' (2008) 5 *Competition Law Review* 123 (survey of British residents); C Beaton-Wells and C Platania-Phung, 'Anti-Cartel Advocacy — How Has the ACCC Fared?' (2011) 33 *Sydney Law Review* 735, 758–68 (discussing University of Melbourne survey on issues relating to cartel conduct where the majority of Australian respondents did not find leniency policies acceptable). For a further discussion of public perceptions and leniency policy, see C Harding, C Beaton-Wells and J Edwards, 'Leniency and Criminal Sanctions in Anti-

contrast, a bounty policy rewards whistle-blowers (typically those not guilty of the crime) who provide the competition authority with accurate, verifiable and useful information about illegal behaviour.

Empirically, it is unknown whom jurors would find less credible. But suppose the DOJ were right. This has not prevented the DOJ from frequently using paid informants to prove other crimes.[81] Its concern also appears not to be with whistle-blowing per se, but rather with whistle-blowing for the primary purpose of receiving a significant monetary reward.

Two issues need to be explored, neither of which the DOJ and the GAO discuss: why do people blow the whistle, and to what extent are financial incentives their primary motivation for doing so?

C. Are Most Whistle-Blowers Driven by Money?

One simplistic assumption regarding whistle-blowing policies is that whistle-blowers are rational, self-interested individuals who weigh the economic costs and benefits of whistle-blowing. The behavioural economics literature has drawn into question the extent to which people are self-interested.[82] The empirical literature also rejects the assumption that people are solely motivated by greed; many people care about fairness. The bargaining setting experiments summarised by economist Samuel Bowles systematically show 'that substantial fractions of most populations adhere to moral rules, willingly give to others, and punish those who offend standards of appropriate behavior, even at a cost to themselves and with no expectation of material reward'.[83] Many see this when they donate blood, tip a waiter in a city they are unlikely to re-visit, volunteer to help others, or take the time and expense to punish unfair behaviour.

Accordingly, one definition of whistle-blowing suggests that it is predominantly motivated by public interest rather than financial gain:

> Whistleblowing is an open disclosure about significant wrongdoing made by a concerned citizen totally or predominantly motivated by notions of

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Cartel Enforcement: Happily Married or Uneasy Bedfellows?', ch 12 in this volume.

[81] See *Anty* (n 76) 310 (noting that the development of 'a pattern jury instruction … to address the credibility of testimony by paid informants, indicat[es] that the use of such testimony is a common and accepted practice').

[82] For a survey of the literature and its implications on competition policy, see ME Stucke, 'Are People Self-Interested? The Implications of Behavioral Economics on Competition Policy' in J Drexel and others (eds), *More Common Ground for International Competition Law?* (Cheltenham, Edward Elgar Publishing, 2011); ME Stucke, 'Money, Is That What I Want?: Competition Policy and the Role of Behavioral Economics' (2010) 50 *Santa Clara Law Review* 893.

[83] S Bowles, 'Policies Designed for Self-Interested Citizens May Undermine "The Moral Sentiments": Evidence from Economic Experiments' (2008) 320 *Science* 1605, 1606. See also LA Stout, *Cultivating Conscience: How Good Laws Make Good People* (Princeton, Princeton University Press, 2011); PJ Richerson and R Boyd, 'The Evolution of Free Enterprise Values' in PJ Zak (ed), *Moral Markets: The Critical Role of Values in the Economy* (Princeton, Princeton University Press, 2008) 111–18; J Henrich and others, 'In Search of Homo Economicus: Behavioral Experiments in 15 Small-Scale Societies' in LA Fennell and RH McAdams (eds), *Fairness in Law and Economics*, Economic Approaches to Law 40 (Cheltenham, Edward Elgar, 2013).

> public interest, who has perceived the wrongdoing in a particular role and initiates the disclosure of her or his own free will, to a person or agency capable of investigating the complaint and facilitating the correction of wrongdoing.[84]

The evidence to date does not show that financial incentives primarily motivate whistle-blowing. One concern about the SEC's whistle-blowing policy, for example, was that employees would circumvent internal corporate hotlines and directly report the wrongdoing to the SEC in order to obtain the bounty.[85] This incentive, however, has existed for years under the False Claims Act. A review of *qui tam* cases filed between 2007 and 2010 under the False Claims Act found that 'The existence of a *qui tam* [action] or whistleblower rewards program has no negative impact whatsoever on the willingness of employees to utilize internal corporate compliance programs or report potential violations to their managers' as 'the overwhelming majority of employees voluntarily utilized internal reporting processes, despite the fact that they were potentially eligible for a large reward under the [False Claims Act]'.[86] Likewise, a study of 1000 whistle-blowers who called the Public Concern at Work advice line in the United Kingdom found that the whistle-blowers overwhelmingly raised their concerns first internally within the company (82 per cent) rather than externally (15 per cent) or to a union (three per cent).[87] As the business literature discusses, 'Whistleblowers are frequently quoted as claiming that financial incentives play little or no role in their decision to blow the whistle' and 'many claim that the most important motivational factor in whistleblowing is an individual's sense of ethical obligation to report the wrongdoing'.[88]

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[84] CC Verschoor, 'Increased Motivation for Whistleblowing' (2010) 92(5) *Strategic Finance* 16, 16 (quoting definition publicised by Professor Brian Martin).

[85] See, eg, Latham & Watkins LLP, 'The SEC's Whistleblower Program: Meeting the Challenges, Minimizing the Risks' *Corporate Governance Commentary* (June 2011) www.lw.com/thoughtLeadership/corporate-governance-commentary-june-2011 (noting that the 'potentially adverse impact of the [SEC's proposed] new rules on companies' internal compliance programs was the greatest source of controversy during the rulemaking process', that many 'companies feared that, regardless of the strength of their commitment to ferreting out noncompliance, the new rules would push whistleblowers to bypass internal reporting mechanisms in favor of notifying the SEC in the first instance', and that the 'corporate community thus urged the [SEC] to require whistleblowers to report violations internally as a prerequisite for qualifying for an award', which the SEC declined to do).

[86] National Whistleblowers Center, 'Impact of *Qui Tam* Laws on Internal Compliance: A Report to the Securities Exchange Commission' (17 December 2010) 4 www.whistleblowers.org/storage/whistleblowers/documents/DoddFrank/nwcreporttosecfinal.pdf (finding '89.7% of employees who would eventually file a qui tam case initially reported their concerns internally, either to supervisors or compliance departments' whereas '10.3% of employees who would eventually file a qui tam case reported their concerns directly to the government').

[87] Public Concern at Work and University of Greenwich, 'Whistleblowing: The Inside Story' (May 2013) 4, www.pcaw.org.uk/files/Whistleblowing%20-%20the%20inside%20story%20FINAL.pdf. See also AG Brink, DJ Lowe and LM Victoravich, 'The Effect of Evidence Strength and Internal Rewards on Intentions to Report Fraud in the Dodd-Frank Regulatory Environment' (2013) 32(3) *Auditing: A Journal of Practice & Theory* 87, 89 (discussing the literature that suggests that individuals, when given a choice, are more likely to report to an internal outlet versus an external outlet).

[88] Brink, Lowe and Victoravich (n 87) 90.

One could respond that a financial benefit is a plus factor. People can be motivated by the public interest, with the financial benefit merely increasing their likelihood of whistle-blowing. As the Organisation for Economic Co-operation and Development has noted:

> 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.[89]

In theory, adding the bounty should increase the rate of whistle-blowing. The bounty should attract both self-interested employees and those public-spirited employees who need some financial security against whistle-blowing's inevitable economic toll.
The problem is that market norms can at times crowd out, rather than complement, social, ethical and moral norms. Adding financial incentives can reduce, rather than augment, public interest motivations. As Brink, Lowe and Victoravich have observed:

> The addition of extrinsic incentives may interfere with, or crowd out, intrinsic motivation causing employees who witness wrongdoing to focus less on ethical concerns and more on the extrinsic costs and benefits associated with whistleblowing. In addition, offering a monetary reward may frame the act of whistleblowing as a selfish rather than an ethical action, and employees who claim whistleblowing rewards may be viewed by others in a more negative manner than employees who blow the whistle in the absence of monetary awards.[90]

Accordingly, some research finds 'evidence that the inclusion of external monetary rewards in whistleblowing regulations can lead to less, rather than more, reporting of illegal acts to regulatory agencies in some circumstances'.[91]

This is not to say that whistle-blowers are purely altruistic. Rather, the bounty may be one among many situational and personal factors that together motivate the decision to blow the whistle on illegal conduct.[92] For example, the business literature distinguishes between intrinsic 'individual propensity' to whistle-blow, which 'represents the strength of an individual's belief that they have a duty to report wrongdoing, the belief that whistleblowing is in the best interests of the company and that whistleblowing should be encouraged' and extrinsic 'organisational propensity' to whistle-blow, which

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[89] OECD Compliance (n 34) 39.
[90] Brink, Lowe and Victoravich (n 87) 90 (citation omitted).
[91] ibid.
[92] See generally PG Cassematis and R Wortley, 'Prediction of Whistleblowing or Non-Reporting Observation: The Role of Personal and Situational Factors' (2013) 117 *Journal of Business Ethics* 615, 616.

represents 'the strength of an individual's belief that an organisation values whistleblowing and facilitates the making of a report'.[93]

One experiment sought to examine the effect of companies offering monetary incentives to encourage internal (rather than external) whistle-blowing.[94] Consistently with the prior literature, it found that despite a financial bounty offered by the SEC, most people in the study would report the described violation to the internal company hotline.[95] But when the company offered a financial reward to report internally, the results — consistent with a crowding out theory[96] — changed. First, the respondents' intention to report internally did not increase when the company offered a financial reward.[97] Second, offering a financial reward caused a change in the respondents' reporting intentions in a way companies would not likely have intended. When the evidence of securities fraud was weak, the company's offering of an internal financial incentive *decreased* the likelihood that respondents would report to the SEC; but when the evidence of securities fraud was strong, the company's financial incentive *increased* the likelihood that respondents would report directly to the SEC.[98]

Why would respondents, who seem predisposed to report violations internally, do the opposite when the company offered a financial incentive to report internally and when the evidence of securities fraud was strong? The result illustrates the unintended consequence of extrinsic financial incentives crowding out the employees' intrinsic incentives:

> When the company offers a monetary reward for internal whistleblowing, it appears that the intrinsic motivations governing internal and external reporting are replaced with a focus on extrinsic motivational factors. In the absence of an internal incentive, participants indicated a preference to report internally versus externally. In fact, the mean likelihood of reporting externally in the absence of an internal incentive is approximately neutral and is not significantly different across evidence strength conditions. However, when the company offers a monetary incentive to report internally, there is a significant effect on external reporting intentions that varies based on evidence strength. When evidence is weak, the company's monetary incentive may encourage individuals to report internally, which may be a means of avoiding the risks of external reporting. However, when evidence is strong, employees may reason that they are more likely to receive the SEC reward, which outweighs the risks of reporting externally.[99]

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[93] ibid 620.
[94] See Brink, Lowe and Victoravich (n 87) 88.
[95] ibid 95 ('overall reporting intentions to the internal hotline … are significantly greater … than external reporting intentions to the SEC', and this pattern suggests 'an overall preference for internal reporting despite the presence of a potential financial reward through the SEC's whistleblower program').
[96] ibid 97.
[97] ibid 99.
[98] ibid 97.
[99] ibid 97, 99 (footnote omitted).

So if whistle-blowers are driven primarily by financial incentives, they would simply follow the money and report infractions to those providing the greatest profit. This is not, however, happening. Despite the opportunity to profit by immediately bringing a *qui tam* action, most employees first reported the fraud internally — even though they may not profit in doing so. Moreover, the company's offer of a financial reward to report internally may decrease, rather than increase, the likelihood of employees doing so.

D. Will Financial Incentives Increase the Amount of Whistle-Blowing?

People are exposing cartels without being offered a financial bounty. Of the 81 cartel break-ups Levenstein and Suslow studied, 29 cartels ended because of 'Other sources (including whistle-blowers)', seven cartels ended because of customer complaints and 17 cartels ended because a conspirator applied for leniency.[100] Levenstein and Suslow did not provide a figure for only whistle-blowing, but let us make the aggressive assumptions that all 29 cases ended due to whistle-blowing and that these 81 cartel cases fairly represent the fate of all cartels. Even then, more than half of all cartels are not exposed as a result of whistle-blowing and customer complaints. One could, of course, add cartels that ended early because they feared exposure by whistle-blowers, but it is impossible to quantify this figure with any confidence.

If whistle-blowing were an effective means of exposing most cartels, competition authorities would not need to rely heavily on their leniency policy. Yet they do. So if competition authorities want to encourage more whistle-blowing so as to increase the rate of detecting and prosecuting cartels, what must they do?

If one assumes that whistle-blowers are driven primarily by financial incentives, the competition authority could offer a bounty. One risk in offering a financial reward, as this chapter has discussed, is that market norms can crowd out the social, ethical and moral norms for whistle-blowing and thereby reduce the quality of whistle-blowing tips. The irony is that one's willingness to do a public service can be greater if one is not paid than if one is offered a small financial incentive.[101] By offering a financial incentive, the competition authority encourages the would-be whistle-blower to focus on the financial costs and benefits of whistle-blowing, which do not necessarily result in accurate and useable information.

The fact that market norms can crowd out the social, ethical and moral norms for whistle-blowing does not mean that bounties will necessarily fail. One could potentially

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[100] Levenstein and Suslow, 'Breaking Up' (n 27) 468. See also M Calliari and DA Guimarães, 'Brazilian Cartel Enforcement: From Revolution to the Challenges of Consolidation' (2011) 25(3) *Antitrust* 67, 68 (noting that whistleblowers 'have been an important source of information about cartels' for the Brazilian Secretariat of Economic Law of the Ministry of Justice, attributable in part to the competition authority's 'efforts to increase awareness of its work on cartel enforcement, together with the creation of a hotline for reporting infringements (clique-denúncia), [which] progressively increased the number of reports' and that 'as at September 30, 2010, 327 leads have been received through this hotline of which 42 percent were considered valuable').

[101] See D Ariely, *Predictably Irrational: The Hidden Forces That Shape Our Decisions* (London, HarperCollins, 2008) 71 (more lawyers volunteered to donate their services for free to needy retirees than when they were offered a relatively small amount ($30 per hour) for doing so).

increase the rate of detection through bounties, but the bounty will have to be very high and far exceed the bounties currently offered by several jurisdictions.

First, even if the financial bounty equals or slightly exceeds the economic costs of whistle-blowing, the bounty will still be too small. Prospect theory teaches that losses hurt far more than the joy one feels in obtaining a comparable gain — so the despair we feel from losing $100 would likely outweigh the joy we receive in finding $100 by a factor of about 2 to 2.5.[102] Given this behavioural insight, the financial gain from whistle-blowing could not simply represent 1 to 1.5 times the costs of whistle-blowing. If the economic cost of whistle-blowing equalled one million dollars, then the likely bounty would have to equal at least two million dollars. Moreover, the advertised bounty would have to be higher if the probability of earning it was less than 100 per cent. Continuing the present example, if the probability of obtaining a bounty was 50 per cent, the size of the bounty would have to increase to four million dollars.

One risk under a market norm approach is that the competition authority cannot offer a bounty that is at least two to four times the economic cost of whistle-blowing on cartels. Studies show that roughly 50 to 65 per cent of employees who observe wrongdoing report it either internally or externally,[103] but increasing numbers of these employees said they experienced some form of retaliation.[104] Potential retaliation is often a key factor in employees not reporting the wrongdoing that they observe.[105] 'Retaliation comes in many forms including ad hominem attacks, increased monitoring of work performance, demotion or denial of promotion, social ostracism, referral to a mental health professional, being fired, counter accusations, and professional blacklisting'.[106] The costs of whistle-blowing a firm's misconduct can therefore be quite high.

For an employee, the cost of blowing the whistle on a cartel is likely to be higher. First, cartels are not necessarily a few mid- or lower-level executives gone wild. Cartels often involve senior company officials. Sixty-nine per cent of all individual criminal

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[102] See generally D Kahneman and A Tversky, 'Prospect Theory: An Analysis of Decision under Risk' (1979) 47 *Econometrica* 263.

[103] See A Fredin, 'The Unexpected Cost of Staying Silent' (2012) 93(10) *Strategic Finance* 53, 54–55; Ethics Resource Center, 'National Business Ethics Survey of the US Workforce' (2014) www.ethics.org/downloads/2013NBESFinalWeb.pdf (noting that fewer employees surveyed had witnessed misconduct in United States workplaces (41 per cent in 2013, down from 45 per cent in 2009 and 55 per cent in 2007) and over half of the employees reported the bad behaviour (63 per cent in 2013, 65 per cent in 2011, 63 per cent in 2009 and 53 per cent in 2005)) (ERC Survey).

[104] ERC Survey (n 103) 13 (21 per cent of reporters in 2013 said they faced some form of retribution, which was 'virtually unchanged from a record high of 22 percent in 2011'). The share of companies with weak ethics cultures was at 34 per cent in 2013: ERC Survey (n 103) 17. Workers also said that 26 per cent of the misconduct was ongoing within their organisation, and 12 per cent of wrongdoing was reported to take place company-wide: ERC Survey (n 103) 21.

[105] See, eg, Fredin (n 103) 58. See also Public Concern at Work and University of Greenwich (n 87) 4 (60 per cent of those who called Public Concern at Work's advice line did not report any response management; the most common response to those who reported receiving a response from management was formal action short of dismissal such as demotion, suspension or disciplinary action, and dismissal was 'the second most common response with 24% of individu 29% after raising a concern twice and 32% after raising a concern a third time'); H Park, J Blenkinsopp and M Park, 'The Influence of an Observer's Value Orientation and Personality Type on Attitudes toward Whistleblowing' (2014) 120 *Journal of Business Ethics* 121, 121.

[106] Cassematis and Wortley (n 92) 622. See also Park, Blenkinsopp and Park (n 105) 121.

defendants between 1955 and 1997 were corporate officers.[107] Similarly, another study found that successful cartels 'will often develop a hierarchy, separating high-level policy decisions made by executives from the more frequent ongoing monitoring and negotiations undertaken by lower-level managers'.[108] In the citric acid cartel, for example, a group of senior executives (who called themselves 'the masters') negotiated the cartel's broad terms, while a second level of executives (the 'sherpas') worked out the details.[109] Consequently, the target of the whistle-blowing will likely include senior corporate officials, who have authority over pricing, as well as a coterie of mid-level executives. These senior executives will likely have significant power to retaliate against would-be whistle-blowers. Moreover, a key factor in the organisation's ethical culture is the tone at the top. If the senior executives are price-fixers, the company will likely have a weak ethical culture that generally does not condone whistle-blowing either internally or externally. So would-be whistle-blowers should expect significant retaliation from their superiors and co-workers.

Second, unlike securities fraud, which implicates one firm, cartels involve multiple firms. Many of these firms would be expected to enjoy significant market power. Would-be whistle-blowers might therefore anticipate retaliation not only from their own firm but from the other co-conspirators.[110] Whistle-blowing may earn the honest employee a reputation as a 'troublemaker' and traitor.[111] If the market is national or international, whistle-blowers may lose their livelihood in that industry and have to incur the cost of transitioning to another line of work.

Third, whistle-blowing is 'an ethically complex act that involves several different overlapping understandings of obligation, honesty, loyalty, and duty'.[112] Would-be whistle-blowers likely will have social bonds with their co-workers and with industry participants who are engaging in the price-fixing. The whistle-blowers' identity may be intertwined with that of their employer, which brings them status within their community as well as a sense of superiority and power from their position within the firm. Moreover,

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[107] JC Gallo and others, 'Department of Justice Antitrust Enforcement, 1955–1997: An Empirical Study' (2000) 17 *Review of Industrial Organization* 75, 104–07. See also A Stephan, 'See No Evil: Cartels and the Limits of Antitrust Compliance Programs' (2010) 31 *Company Lawyer* 231 (collecting employee positions of 40 international cartels prosecuted between 1998 and 2008); ERC Survey (n 103) 12 ('Workers reported that 60 percent of misconduct involved someone with managerial authority from the supervisory level up to top management. Nearly a quarter (24 percent) of observed misdeeds involved senior managers').

[108] MC Levenstein and VY Suslow, 'What Determines Cartel Success?' (2006) 44 *Journal of Economic Literature* 43, 44.

[109] K Eichenwald, 'US Wins a Round against Cartel' *The New York Times* (New York, 30 January 1997) D1.

[110] See Stephan, 'Korean Innovation' (n 4) 16 (pointing to one study where 'most whistleblowers effectively become blacklisted from finding re-employment within their profession').

[111] See, eg, CR Leslie, 'Trust, Distrust, and Antitrust' (2004) 82 *Texas Law Review* 515, 586 fn 504 (referring to Senate testimony about the electrical equipment cartel).

[112] SR Paeth, 'The Responsibility to Lie and the Obligation to Report: Bonhoeffer's "What Does It Mean to Tell the Truth?" And the Ethics of Whistleblowing' (2013) 112 *Journal of Business Ethics* 559, 559, 565–66 (concluding that the 'act of whistleblowing is an act of truth telling in [Bonhoeffer's] sense precisely to the degree that, in bearing responsibility for the consequences of those actions undertaken by the institutions in which we participate, which pay our wages, and which demand loyalty from us, we testify to the "real" in a more profound and honest sense than we would in continuing to remain silent and evade the responsibility that we bear to those who suffer for our silence').

the price-fixing is presumably increasing the firm's profits, and thus indirectly benefitting the whistle-blowers and their co-workers.

E. If Not for Money, Why Blow the Whistle?

Arguably, any cartel whistle-blower would face these costs — whether or not the competition authority offers a financial bounty. So why do people blow the whistle? One study of whistle-blowing in Australian public sector organisations found that:

> [W]histleblowers are notable for not being particularly notable. Whistleblowers did not differ from non-reporting observers on the basis of tenure. They were not particularly good or bad organisational citizens (overall), neither satisfied or dissatisfied with their jobs, nor particularly trusting nor distrustful [of] management.[113]

According to this study, the 'most influential variables' for reporting were the 'perceived personal victimisation and perceived wrongdoing seriousness', which 'reflected the situational appraisal of the event more than characteristics of an individual'.[114]

Another study found similar results. Employees were less likely to report 'financial statement fraud than theft' and 'immaterial fraud than material fraud'.[115] One explanation for these results is the 'fundamental attribution error': when 'explaining the actions of others, individuals tend to overconfidently assume that the observed behavior is due to the other person's distinct character traits, overemphasizing these dispositional or personal factors at the expense of contextual factors that can influence behavior'.[116]
Taken together, these studies suggest that whistle-blowing is likelier when the wrongdoing is perceived as more serious. In turn, this is likelier where the fundamental attribution error is stronger, namely when the wrongdoing is easier to attribute to the violator's dispositional flaw (for example, 'theft of company assets clearly reveals intent for personal gain') than to a situational factor (for example, 'misstating financial statements' which 'is often committed as a result of external influences and could appear to benefit the organization').[117]

Although some perceive cartels as the 'supreme evil',[118] do many would-be whistle-blowers share that view? Not if the employee feels that price-fixing is a victimless crime, the full effects of which might not be immediately felt. The perceived

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[113] Cassematis and Wortley (n 92) 629–30.
[114] ibid 630.
[115] SN Robinson, JC Robertson and MB Curtis, 'The Effects of Contextual and Wrongdoing Attributes on Organizational Employees' Whistleblowing Intentions Following Fraud' (2012) 106 *Journal of Business Ethics* 213, 214.
[116] ibid 215.
[117] ibid.
[118] *Verizon Communications Inc v Law Offices of Curtis V Trinko LLP*, 540 US 398, 408 (2004). For a critique of why the economic thinking in *Verizon Communications* is wrong, and how the Supreme Court ignored its precedent involving the Sherman Act's concerns regarding monopolies' political, social and ethical implications, see ME Stucke, 'Should the Government Prosecute Monopolies?' [2009] *University of Illinois Law Review* 497.

wrongfulness of price-fixing may be less than other petty, but more salient, street crimes.[119] Moreover, would-be whistle-blowers may not perceive the human victims of price-fixing as readily as those victims affected by companies that dump carcinogens in the local water supply. Indeed, because many cartels involve 'intermediate manufactured goods and services', often the harm to the end customer is indirect.[120] And because cartels generally benefit the organisation (and the individual only indirectly), the fundamental attribution error is weaker. The whistle-blower is more likely to attribute his or her co-workers' conduct to external situational factors such as a downturn in the economy or the need to save jobs, rather than to a dispositional flaw (for example, the co-workers' immorality). So like a company's misstating of its financial statements, would-be whistle-blowers may perceive price-fixing as a less serious crime, thereby reducing the incentives to actually report it.

Thus, only 20 per cent of British respondents in one survey were willing to immediately report a large company's price-fixing to authorities.[121] Fourteen per cent of respondents would not report it for fear that 'too much [was] at stake' and that 'they may lose their job', while two per cent would not report because they believed price-fixing should be legal.[122] Contrary to the assumption that people are self-interested maximisers, only six per cent required a monetary bounty in addition to guaranteed anonymity. Instead, 49 per cent chose the option of reporting the crime only if they could remain anonymous.[123]

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[119] Stephan, 'Survey of Public Attitudes' (n 80) 134–37 (finding 'very weak public support' for imprisoning price-fixers; few of the United Kingdom residents surveyed compared price-fixing to theft and fraud, and 65 per cent had trouble relating price-fixing to another kind of illegal act with which they were familiar). Americans in one study viewed price-fixing by several large companies more severely than some crimes (eg someone 'armed with a lead pipe, rob[bing] a victim of $1,000. No physical harm occurs') but less severely than other petty crimes ('A person steals a locked car and sells it'). See ME Wolfgang and others, 'The National Survey of Crime Severity' (NCJ-96017, June 1985) viii, www.bjs.gov/content/pub/pdf/nscs.pdf. In a later survey, Americans recommended a stiffer sentence for a street robbery than a price-fixing violation with about US$15 million in overcharges (adjusted mean sentence of 11.3 years versus 5.7 years for the antitrust violation, and a median sentence of five years versus two years for the antitrust violation). See United States Sentencing Commission, 'A National Sample Survey: Public Opinion on Sentencing Federal Crimes' (October 1995) 38 www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/surveys/19970314-public-opinion-on-sentencing/JP_CH3.pdf; Beaton-Wells and Platania-Phung (n 80) 759–60 (findings from the University of Melbourne survey on the relative seriousness of antitrust crimes versus other crimes).

[120] See Levenstein and Suslow, 'Breaking up' (n 27) 462; JM Connor and CG Helmers, 'Statistics on Modern Private International Cartels, 1990-2005' (2007) AAI Working Paper No 07-01, 22, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=944039 ('[t]he great majority of cartelized products are industrial intermediate goods'). See also F Gino, DA Moore and MH Bazerman, 'See No Evil: When We Overlook Other People's Unethical Behavior' (2008) Harvard Business School Working Paper Number 08-045, 23, www.hbs.edu/faculty/Publication%20Files/08-045_18339ad6-e675-48ee-9db8-72a3e6ef3f03.pdf (discussing the 'identifiable victim effect', where 'people are far more concerned with and show more sympathy for identifiable victims than statistical victims').

[121] See Stephan, 'Survey of Public Attitudes' (n 80) 142.

[122] ibid 142–43.

[123] ibid.

IV. Conclusion

Although the business literature has helped us better understand whistle-blowing, we still do not know when a whistle-blowing policy will yield the best results. One limitation is when the studies ask individuals of their intentions to whistle-blow under certain scenarios: their statements of intention do not necessarily accurately predict what these employees would actually do under these circumstances.[124]

What is clear from the literature, however, is that an effective whistle-blowing policy does not simply entail offering a monetary reward. Competition authorities cannot assume that money motivates whistle-blowing or that offering some money will yield better quality tips than offering no money at all. Financial incentives will work only if the amount is very large, which for prosecutors raises issues about the whistle-blowers' credibility at trial. There are alternatives to simply offering significant financial incentives. The competition authority could increase the perceived moral wrongfulness of cartels or emphasise how specific groups of consumers, including those within a community, are victimised. The competition authority could also explore ways of lowering the costs of whistle-blowing, including by lobbying legislatures for anti-retaliation legislation.[125]

Finally, rather than viewing whistle-blowing solely as a third race to the competition authority, whereby the whistle-blowing policy sows distrust, competition authorities should consider how whistle-blowing (in particular internal whistle-blowing) can promote trust and an ethical organisational culture. Internal whistle-blowing can be seen as part of an ethical organisational culture, where the firm's core values are aligned with day-to-day operations, and where employees can trust management and are encouraged to voice concerns.[126] Whistle-blowing, research finds, 'is more likely in organisations perceived to be more open to reports of wrongdoing and the presence of

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[124] See, eg, Robinson, Robertson and Curtis (n 115) 225 (noting that their study was subject to the limitation that they measured the participants' intention to whistle-blow, which does not necessarily coincide with actual whistle-blowing, and citing some of the prior ethics research indicating that statements of intention do not always result in the specific action claimed).

[125] See, eg, Australian Competition & Consumer Commission, 'Reinvigorating Australia's Competition Policy: Australian Competition & Consumer Commission Submission to the Competition Policy Review' (25 June 2014) para 4.4.4, www.accc.gov.au/system/files/Harper%20Review%20-%20Issues%20Paper%20-%20ACCC%20Submission%20-%20FINAL%20(for%20website)%20-%2025%20June%202014%20(2).pdf (requesting greater protection for third-party whistle-blowers from retaliation for assisting the competition authority).

[126] See Cassematis and Wortley (n 92) 619 (noting prior research showing how 'observers of wrongdoing who doubt a management team's ability to stop the wrongdoing tend to remain silent rather than blow the whistle' and other research that 'silence was more likely when organisational trust was low and internal whistleblowing more likely when organisational trust was high'); G Lee and N Fargher, 'Companies' Use of Whistle-Blowing to Detect Fraud: An Examination of Corporate Whistle-Blowing Policies' (2013) 114 *Journal of Business Ethics* 283, 294 (finding that the extent of whistle-blowing disclosures was 'positively associated with the number of external directors on the audit committee, the existence of more concentrated substantial shareholdings, the permissibility of anonymous reporting and organisational support for whistle-blowing', suggesting that 'with a stronger ethical environment and with better corporate governance, firms are more likely to disclose more in their whistle-blowing policy').

whistleblowing policies signals to employees that the organisation is open to reporting wrongdoing'.[127] That trust is not always present within firms.[128]

Consequently, competition agencies should encourage internal and external whistle-blowing. More thought is required in promoting such whistle-blowing, since few mid-level or senior executives will race to the door for a modest financial reward offered solely at the agency's discretion.

[127] Cassematis and Wortley (n 92) 621 (citations omitted).

[128] In one poll, when asked if whistle-blowers can rely on the internal lines offered by their organisation, only 23 per cent of those surveyed said they can. Sixty-nine per cent said only external independent lines can give full protection to a whistle-blower, and eight per cent said whistle-blowers should only approach alternative options, such as the media, to air their concerns. See 'Poll of the Month' (2013) 42(1) *Financial Management* 16, 16.

[To be inserted as Table 1]

	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
Number of Individuals Sentenced	28	27	28	39	31	44	37	39	55	39
Number of Individuals Sentenced to Incarceration Time	20	18	19	34	19	35	29	21	45	28
Percentage of Convicted Individuals Imprisoned	71.4%	66.7%	67.9%	87.2%	61.3%	79.5%	78.4%	53.8%	81.8%	71.8%
Total Number of Actual Days of Incarceration Imposed by the Court	7,334	13,157	5,383	31,391	14,331	25,396	26,046	10,544	33,603	20,999
Average Prison Sentence (Days)	366.7	730.9	283.3	923.3	754.3	725.6	898.1	502.1	746.7	750.0
Total Individual Fines (000)	$644	$4,483	$3,650	$15,109	$1,485	$605	$4,373	$1,522	$2,141	$3,069
Number of Individua	15	22	17	25	23	27	19	25	31	29

ls Fined										
Average Individual Fine	$42,933.33	$203,772.73	$214,705.88	$604,360.00	$64,565.22	$22,407.41	$230,157.89	$60,880.00	$69,064.52	$105,827.59