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Bounties as Inducements to Identify Cartels

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I. Introduction

[1] Commissioner, U.S. Federal Trade Commission. The views in this paper are the author's alone and not necessarily reflect the views of the Federal Trade Commission or its individual members.

Competition policy today treats horizontal schemes to fix prices, rig tenders, allocate customers, stabilize market shares, or divide geographic territories as grave transgressions.[2] Modern efforts to challenge cartel arrangements have taken two basic forms. One is to raise sanctions for culpable parties.[3] The second is to increase the detection of forbidden activity. The foremost recent innovation in detection has consisted of providing powerful inducements for cartel participants to inform government competition agencies of wrongdoing.[4] Among other features, these leniency or amnesty measures significantly reduce the punishment for the first cartel member to reveal the cartel's existence.

This paper makes the case for taking the practice of giving rewards to informants a step

[2] International Competition Policy Advisory Committee to the Assistant Attorney General for Antitrust, Final Report 164 (2000) (noting a "heightened degree of international consensus among enforcers that cartels should be detected and prosecuted"); Cartel Enforcement Goes Global: Jail, Fines, & Videotape, Antitrust, vol. 14, no. 3, at 6-45 (Summer 2000) (expansion of efforts by competition enforcement bodies to attack cartels); John M. Connor, Global Antitrust Prosecutions of Modern International Cartels, 4 Journal of Industry, Competition and Trade 239 (2004) (reviewing antitrust penalties imposed on 167 international cartels discovered between 1990-2003); Harry First, The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law, 68 Antitrust Law Journal 711 (2001) (prosecution of vitamins cartel suggests broader international acceptance of anti-cartel norm).

[3] The expansion of antitrust sanctions for cartel behavior is traced in Stephen Calkins, Corporate Compliance and the Antitrust Agencies' Bi-Modal Penalties, 60 Law & Contemporary Problems 127 (1997); Wouter P.J. Wils, Is Criminalization of EU Competition Law the Answer?, 28 World Competition: Law and Economics Review (2005).

[4] On the development and operation of modern leniency programs, see Joe Chen & Joseph E. Harrington, Jr, The Impact of the Corporate Leniency Program on Cartel Formation and the Cartel Price Path, in Political Economy of Antitrust (Vivek Ghosal & Johan Sennek eds.) (Forthcoming); Julian M. Joshua, Leniency in U.S. and EU Cartel Cases," Antitrust, vol. 14, no. 3, at 19 (Summer 2000) (comparing U.S. and EU leniency programs); Donald C. Klawiter, Corporate Leniency in the Age of International Cartels: The American Experience, Antitrust, vol. 14, no. 3, at 13 (Summer 2000) (describing development of U.S. leniency policy); Massimo Motta & Michele Polo, Leniency Programs and Cartel Prosecution, 21 International Journal of Industrial Organization 347 (2003).

further.[5] It argues that competition agencies should pay bounties to individuals, including employees of the cartel members, who provide information that leads to the successful prosecution of cartels. A bounty system could provide a source of cartel instability more acute and disruptive than existing leniency programs and, by raising the likelihood that government prosecutors would discover illegal collusive schemes, would deter their formation or impede their operation.

The paper first describes the U.S. Civil False Claims Act (CFCA), which relies heavily on bounties to attackl fraud against the government. The paper then discusses the rationales for using private monitoring and prosecution to enforce public laws. Using the CFCA as an illustration, the paper considers how private participation interacts with other elements of a legal regime to inform a firm's decision to obey the law. The paper concludes by examining the possible contributions to the deterrence of cartels by bounty systems that boost incentives for private monitoring.

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[5] The paper draws heavily on proposals presented in Cecile Aubert, Patrick Rey & William E. Kovacic, The Effect of Leniency and Whistleblowing Programs on Cartels, International Journal of Industrial Organization (Forthcoming); William E. Kovacic, Private Monitoring and Antitrust Enforcement: Paying Informants to Reveal Cartels, 69 George Washington Law Review 766 (2001); William E. Kovacic, The Identification and Proof of Horizontal Agreements Under the Antitrust Laws, 38 Antitrust Bulletin 5, 81 (1993); William E. Kovacic, Antitrust Policy and Horizontal Collusion in the 21st Century, 9 Loyola Consumer Law Reporter 97, 104-07 (1997). For another recent treatment of bounties as an inducement for cartel detection, see Giancarlo Spagnolo, Fines, Leniency and Whistleblowers in Antitrust, in Advances in the Economics of Antitrust Law (P. Buccirossi ed.) (Forthcoming).

II. An Overview of the Civil False Claims Act

In 1986, Congress amended the Civil False Claims Act (CFCA)[6] and bolstered a mid-19th Century by enhancing incentives for private individuals to bring *qui tam* actions to challenge fraud against the government.[7] The 1986 Amendments transformed the enforcement of rules involving the payment or collection of funds by the U.S. government.[8] Before 1986, *qui tam* actions under the CFCA amounted to several each year. From 1986 to 2000 alone, over 3000 *qui tam* cases were filed, resulting in over $3.5 billion in recoveries to the U.S. Treasury and the payment of over $500 million in rewards to the *qui tam* informants.[9]

A. Prohibited Conduct

The CFCA creates civil liability for any person who knowingly submits a false claim for payment to the U.S. government, knowingly uses a false statement to induce the government to pay a false claim, conspires to defraud the government to pay a false claim, or knowingly uses a false

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[6] False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153 (1986) (codified at 31 U.S.C. §§ 3729-31 (1994)).

[7] William E. Kovacic, Whistleblower Bounty Lawsuits as Monitoring Devices in Government Contracting, 29 Loyola of Los Angeles Law Review 1799, 1801-07 (1996) (hereinafter *Whistleblower Bounty Lawsuits*) (discussing adoption of 1986 Civil False Claims Act Amendments). "*Qui tam*" is an abbreviation of the phrase "*Qui tam pro domino rege quam pro si ipso in hac parte sequitur*," which means "Who sues on behalf of the King as well as for himself." Black's Law Dictionary 1251 (6th ed. 1990).

[8] See William E. Kovacic, "The Civil False Claims Act as a Deterrent to Participation in Government Procurement Markets," 6 Supreme Court Economic Review 201, 217-23 (1998) (hereinafter *Civil False Claims Act*) (describing significance of 1986 CFCA reforms).

[9] Stuart E. Schiffer, Deputy Assistant Attorney General, Civil Division, U.S. Department of Justice, Statement Before the Subcommittee on Energy and Mineral Resources of the U.S. House Committee on Resources Concerning Oil Royalty Overpayment False Claims Act Litigation (May 18, 2000), *available at* <http://www.usdoj.gov/civil/speeches/schiffer051800.htm>.

statement to decrease an obligation to pay money to the government.[10] "Claims" include all requests for payment of money or property where the federal government pays for any of the money or property in question.[11] "Knowing" conduct embraces actual knowledge of a falsehood, as well as "deliberate ignorance" or "reckless disregard" of the truth.[12]

B. Enforcement Mechanism

[10] 31 U.S.C. § 3729(a) (1994).

[11] Id. at § 3729(c).

[12] Id. at § 3729(b).

The CFCA delegates the decision to prosecute to the Department of Justice (DOJ) and to any "private person."[13] Courts have interpreted the law to give standing to a broad range of "relators" -- individual citizens, employees of entities that receive federal funds, and private firms.

1. Jurisdictional Limits on Private Suits

The CFCA precludes private suits that are:

* Brought by a former or present member of the armed forces against a member of the armed forces arising out of such a person's service in the armed forces;

* Brought against a member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the government when the action was brought;

* Based on allegations that are the subject of a civil suit or an administrative civil money penalty action in which the government is already a party; or

* Based on public disclosure of allegations in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accountability Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

The "original source" exception to the last of these limits applies to "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the government before filing an action ... which is based on the information."[14]

2. The Government's Role in Private Suits

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[13] Id. at 3730(b).

[14] Id. at § 3730(e)(4)(B).

The relator begins a *qui tam* action by serving DOJ with a copy of the complaint and "written disclosure of substantially all material evidence and information the person possesses."[15] The complaint is placed under seal with the U.S. district court for at least sixty days and is not served on the defendant until sixty days elapse. The waiting period allows DOJ to investigate and evaluate the relator's allegations. DOJ may seek extensions of the sixty-day waiting period. After reviewing the relator's complaint, DOJ has four options: prosecute the action;[16] let the relator proceed independently, while retaining the right to intervene later in the proceedings;[17] ask the court to dismiss the action after notice to the relator and an opportunity for the relator to be heard;[18] and, subject to court approval, settle the action following notice to the relator and an opportunity for the relator to critique the proposed settlement.[19]

3. Controls on Abusive or Baseless Suits

Beyond seeking to dismiss *qui tam* suits, DOJ can move to restrict the relator's participation if DOJ prosecutes the case.[20] This lets DOJ bar the relator from pursuing duplicative or fruitless evidentiary paths. The court also may limit the relator's role if the defendant shows that unrestricted participation "would be for the purposes of harassment or would cause the defendant

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[15] 31 U.S.C. § 3730(b)(2) (1994).

[16] Id at § 3730(b)(4)(A).

[17] Id. at § 3730(b)(4)(B).

[18] Id. at § 3730(c)(2)(A).

[19] Id. at § 3730(c)(2)(B).

[20] 31 U.S.C. § 3730(c)(2)(C) (1994).

undue burden or unnecessary expense."[21] If DOJ does not prosecute and the relator proceeds alone, the defendant can receive reasonable attorneys fees and expenses if it prevails and the court finds that relator's claim was "clearly frivolous, clearly vexatious, or brought primarily for the purposes of harassment."[22] Few decisions have imposed these sanctions.[23]

C. Sanctions

[21] Id. at § 3730(c)(2)(D).

[22] Id at § 3730(d)(4).

[23] E.g., United States ex rel Herbert v. Nat'l Acad. of Sciences, 1992 WL 247587 (D.D.C. Sept. 15, 1992) (sanctioning *qui tam* plaintiff who stated invalid claim and sued to harass defendant).

The CFCA penalizes violations with (1) a civil penalty of at least $5000 and not more than $10,000 for each violation and (2) three times the actual damage the government has sustained from the defendant's misconduct.[24] The first measure is important where the defendant engages in many activities that constitute claims. For example, if a supplier submits numerous vouchers for payment under a government-funded program, each voucher tainted by fraud is a separate claim for which a civil penalty of $5000 to $10,000 can be assessed.

D. Rewards for the Relator

The CFCA entitles relators to a share of amounts recovered. If DOJ prosecutes, the relator receives 15-25% of the recovery, plus reasonable attorneys fees, costs, and expenses.[25] The bounty varies according to "the extent to which the person substantially contributed to the prosecution of the action."[26] The court may limit the bounty to 10% or less if the action rested mainly on public disclosures of information (other than information provided by the relator) concerning "allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accountability Office report, hearing, audit, or investigation, or from the news media."[27] If DOJ does not prosecute the action, the bounty is 25-30% of the recovery.[28]

One reason for paying generous bounties is to compensate the informant for endangering her

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[24] 31 U.S.C. § 3729(a) (1994).

[25] Id. at § 3730(d)(1).

[26] Id.

[27] Id.

[28] Id. at § 3730(d)(2).

investment in her career and damaging her standing in the community.[29] Even with safeguards against retaliation by an employer, informing likely precludes an employee's advancement within her firm and, possibly, future employment in the industry. Informing also may expose an individual to social ostracism. A bounty arguably must be large enough to compensate the employee for liquidating her career and accepting the costs of social stigma might be result from informing.

[29] See Kovacic, *Whistleblower Bounty Lawsuits*, at 1819 (rationale for substantial bounties).

The CFCA curtails recoveries by relators who participate in the challenged misconduct. The relator gets nothing if she is convicted of criminal conduct that also violates the CFCA. If there is no criminal conviction, the court may reduce the bounty of a relator who plans and initiates violations. The reduction must account for the relator's role "in advancing the case to litigation and any relevant circumstances pertaining to the violation."[30]

The CFCA provides safeguards for employees who are punished by their employers because of the employees' lawful acts in investigating, initiating, testifying for, or otherwise assisting in a *qui tam* action.[31] The aggrieved employee may obtain "all relief necessary to make the employee whole,"[32] including restoring seniority, two times back pay, interest on back pay, special damages, litigation costs, and reasonable attorneys fees.

III. Rationales for Monitoring and Prosecution by Private Parties

A legal command's impact depends on the quality of implementation,[33] which encompasses various actions through which legal commands are applied to specific conduct. Four key steps stand out.[34] *Monitoring* is the observation of conduct by parties subject to the law to detect violations and to collect proof of misconduct. *Prosecution* involves filing charges, presenting evidence before a

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[30] 31 U.S.C. at § 3730(d)(3).

[31] Id. at § 3730(h).

[32] Id.

[33] Richard A. Posner, Antitrust Law 266 (2d ed. 2001) ("It is not enough to have good doctrine; it is also necessary to have enforcement mechanisms that ensure, at reasonable cost, a reasonable degree of compliance with the law.").

[34] A complete list would add activities such as the physical apprehension and, in some cases, detention of alleged violators. For example, a jurisdiction could recruit private bounty hunters to find and apprehend fugitive offenders.

judicial tribunal, proposing remedies, and negotiating settlements. *Adjudication* involves making decisions about guilt or innocence and selecting remedies. *Punishment* is the execution of remedies.

Which individuals or institutions should perform these functions? A jurisdiction could make the state the monopoly provider of all these services. Under a purely public implementation scheme for a law forbidding cartels, government investigators would identify suspicious conduct by studying industry developments and would use compulsory process to gather documents and testimony that prove a violation. A government prosecutor would initiate and litigate charges against offenders, a public court would decide guilt or innocence, and public institutions would execute the remedy.

By contrast to a state monopoly model, a law could engage private parties to perform all or some implementation functions. In practice, governments routinely enlist private parties to perform implementation tasks. Through various devices, public laws enlist private parties to supplement efforts by government bodies to detect and prosecute illegal conduct.[35] Governments rely on voluntary disclosures of information by insiders,[36] and some laws give private parties financial rewards to give public agencies information about violations of statutes or regulations.[37] Other laws decentralize prosecutorial power by creating private rights of action.[38] Some government programs

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[35] See William M. Landes & Richard A. Posner, The Private Enforcement of Law, 4 Journal of Legal. Studies 1 (1975) (rationale for private enforcement mechanisms); A. Mitchell Polinsky, Private Versus Public Enforcement of Fines, 9 Journal of Legal Studies 105 (1980) (same).

[36] An unsolicited tip from an Archer Daniels Midland official (Mark Whitacre) set in motion the DOJ inquiry that unveiled a global cartel of food additives producers and yielded massive criminal fines for the corporate participants and convictions for a number of individuals. The investigation and prosecution of the food additives cartel is recounted in Kurt Eichenwald, The Informant (2000).

[37] See, e.g., 26 C.F.R. § 301.7623-1 (2000) (allowing payment of bounties to individuals who provide information to the U.S. Government leading to recovery of underpaid federal taxes).

[38] Private rights to enforce antitrust laws once were unique to the United States. In recent years

hire private parties to operate prisons and, in effect, contract out the administration of remedies.[39] As described above, the CFCA decentralizes implementation by giving private parties financial incentives to perform the monitoring and prosecution functions of law enforcement.

A. Rationales for Private Monitoring

other jurisdictions have created private rights for antitrust and still others are considering whether to do so. Private rights also are common in U.S. environmental protection and civil rights statutes.

[39] E.g., Kevin Brown, New Prisons to Be Built By Private Companies, Financial Times, Oct. 2, 2001, at 9 (privatization of prison programs in England and Wales).

The enforcement of a legal command and the punishment of offenders gives potential wrongdoers incentives to take precautions to avoid creating observable evidence of misconduct. Prospective offenders may plan and execute illegal behavior by using subtle, covert measures that government prosecutors find difficult to detect. As the participants' skill in concealing misconduct increases, the likelihood of being prosecuted and punished for violations fades.[40]

Private monitoring can be an antidote to concealment. When confronted with the possibility of severe sanctions if their conduct is detected, a cartel's members will exercise care to conceal the fact of their unlawful collaboration from any jurisdiction that will prosecute them A government enforcement body could rely exclusively upon its own personnel to detect the cartel. Public enforcement agencies could monitor an industry to detect patterns of behavior that appear consistent with supplier collusion, and government investigators could obtain warrants to search business premises for documents, to wiretap telephones, or engage in other forms of surveillance.

Monitoring by cartel insiders can be a more effective means of detection than observation by government officials alone. The chief virtue of private monitoring is that it gives monitoring tasks to individuals closest to the relevant information. An insider's greater knowledge of the cartel's activities may enable her to identify and assess relevant information at lower cost than external government monitors. For example, compared to external observation by a public enforcement

[40] To achieve optimal deterrence, deficiencies in the ability of prosecutors to detect violations can be offset by increasing punishments for offenders. Setting sanctions to account correctly for concealment requires hard judgments about detection rates. See Posner, *Antitrust Law*, at 269-73 (importance of probability of detection in setting punishment levels in antitrust cases).

agency, a cartel member's employees may more easily detect that their employers meet covertly with their rivals to discuss plans to coordination behavior.

Where private monitoring enhances the likelihood and speed of detection, it may deter misconduct more powerfully than public monitoring. As discussed more extensively below, the likelihood of detection influences a party's decision to obey or violate the law. By increasing the likelihood of detection, robust private monitoring can decrease the expected payoff from violating the law and boost the incentive to obey. Private monitoring can be destabilizing where the success of an illegal practice requires covert collective action. Adherence to a common scheme may be harder to achieve if each participant recognizes that employees entrusted with the cartel's tasks, or employees who simply happen to learn of the cartel's existence, may act as a private monitor.

Will antitrust tribunals regard informants as credible witnesses in the trial of a cartel's members? When a cartel's participants refuse to settle charges of misconduct and contest the prosecutor's allegations in court, they may depict informant witnesses as incredible because the informants' testimony is shaped by the pursuit of personal financial gain. In a legal system that gives cooperating witnesses immunity from criminal sanctions, defendants often assert that the immunity recipient testified falsely to avoid or reduce her own punishment. Attacks on an informant's credibility will be no less intense where the anticipated benefit of cooperation is a cash payment rather than the mitigation of criminal sanctions.[41]

[41] An informer seeking a cash reward might be accused by defendants of having a still greater incentive to distort testimony if the reward is paid only if the prosecutor obtains a conviction. One

could argue that a testifying informant who is promised a payment contingent upon the defendant's conviction would face greater temptations to misrepresent events than a cooperating witness who receives criminal immunity (or a payment of cash) without regard to the success of the prosecution.

Defense arguments that attack the testifying informant's motives sometimes may resonate with judges and juries. Yet it is unclear that efforts to avoid liability by destroying an informant's credibility inevitably or even regularly succeed.[42] Nor is it likely that an informant can make useful contributions to the prosecution of a cartel only if she testifies at trial. Informing can facilitate successful enforcement even if the informant never appears in court. The informant may provide internal company records that document the cartel's operations and establish how the conduct has injured consumers. An informant may help the government develop a blueprint for the investigation by describing the cartel's organization and operations, by identifying key participants, and suggesting records that the antitrust agency might obtain through compulsory process. Some informers may be willing to cooperate with government prosecutors by recording comments by cartel members. A non-testifying informant sometimes may help the government amass such conclusive evidence of illegality that the participating companies and individuals agree to plead guilty and forego trials.

B. Rationales for Private Prosecution

At least two reasons can justify the delegation of prosecutorial power to private individuals or institutions. The first is that private rights can vindicate legal commands where public institutions have weak incentives to challenge violations. For example, when it detects supplier fraud, a public

[42] The individuals prosecuted in the U.S. cartel cases involving art auction houses and lysine made the credibility of informants a key part of their defense and were convicted nonetheless. See United States v. Andreas, 216 F.3d 645, 658-62 (7th Cir.) (affirming convictions of Archer Daniels Midland executives for participation in food additives cartel; rejecting argument that misconduct of government informant, Mark Whitacre, tainted guilty verdict); Ralph Blumenthal & Carol Vogel, Ex-Chief of Sotheby's Is Convicted of Price-Fixing, N.Y. Times, Dec. 6, 2001, at A6 (attacks on credibility of government's cooperating witnesses, who received dispensations from criminal prosecution, failed to sway jury).

purchasing body might not prosecute because it fears that a scandal will endanger funding for a favored program, or because the supplier has captured its regulator.

By bolstering private rights of action, the 1986 CFCA Amendments reduced reliance on public bodies that might not attack government contractor misconduct aggressively. The amended law counteracted the possibility of lax public prosecution of misconduct in two ways. First, it gave DOJ greater access to fraud-related information that procurement agencies might suppress or, owing to halfhearted monitoring, might not discover. The CFCA compels the private enforcer to serve DOJ with the complaint and supporting data. This tripwire alerts DOJ to misconduct that purchasing agencies might not independently reveal to the Department. Second, by deputizing private parties to sue on the government's behalf, the CFCA decreased the likelihood that meritorious cases will languish because the purchasing agency or DOJ -- due to sloth, negligence, or deliberate efforts to protect specific programs from needed scrutiny -- declines to investigate and attack apparent fraud.

A second reason to create private rights is to use private initiative to supplement public law enforcement resources. Private suits not only can increase total enforcement of a legal command but also may be more efficient enforcement tools. Given a choice between spending resources on monitoring by private parties or monitoring by public officials, one might prefer private monitoring when private parties can identify misconduct at lower cost than public employees.[43]

C. Models of Participation by Private Parties

Law enforcement systems vary in how they elicit private parties to identify and prosecute misconduct. The principal models of private participation are described below.

[43] See Gary S. Becker & George J. Stigler, Law Enforcement, Malfeasance, and Compensation of Enforcers, 3 Journal of Legal Studies 1, 15 (1975) (private enforcement may be more efficient that public enforcement).

1. Monitoring as Pure Volunteerism

One model of private participation in law enforcement is to rely solely on volunteers whom the government neither protects against retaliation nor compensates for giving information. In this model, private parties voluntarily to supply information that helps identify misconduct and establish guilt in the judicial process. To attract volunteers, government prosecutors might appeal to the private party's sense of civic duty or patriotism.

Some private actors may act as monitors without assurances of protection or compensation. Where the potential costs to the private monitor are great, a system that relies on volunteerism alone may elicit low levels of private monitoring. Informing can expose the private party to physical danger, professional retaliation, and social stigma, and it may require an expenditure of time and emotional capital to detect behavior, share information with prosecutors, or testify in judicial proceedings. Many potential monitors may refuse to incur these costs if the government declines to insure against risks or pay some of the monetary benefits that flow from a private party's contributions to the detection and prosecution of violations.

2. Monitoring with Compensation

Law enforcement systems can encourage private monitoring by compensating such effort. One form of compensation is to protect informants against physical harm or to bar retaliation by employers. The government could promise to protect private monitors against physical attacks by wrongdoers and shield private monitors from retribution by employers.[44] By such protection, the government insures against some adverse consequences that private monitors if they inform.

[44] One safeguard consists of programs that relocate witnesses and give them new identifies in return for cooperating with prosecutors.

The public prosecutor could supplement these measures by giving amnesty or immunity from prosecution to private monitors who have engaged in illegal behavior. This is the strategy of antitrust policies that give leniency to individual or corporate wrongdoers. Or a law enforcement body could give private monitors cash for providing information. Payments could consist of a predetermined sum announced publicly,[45] or the government could negotiate cash rewards with each private party who offers to supply information.[46] Alternatively, the payment could be set as a percentage of amounts ultimately recovered by public prosecutors from wrongdoers.[47]

[45] An example would be a public announcement that said the government will pay a specific cash award for information leading to the apprehension of an offender.

[46] Here the government would announce a general policy of paying rewards to informants and would delegate authority to negotiate the amount of bounties to law enforcement officials.

[47] This is the approach used in the CFCA.

To encourage the swift detection of misconduct, a private monitoring system might emphasize priority in providing information that leads to the successful prosecution of wrongdoers. Eligibility for rewards might be restricted to the first individual to come forward. A difficulty with a strict rule of priority is that the first informant might not be the best source of information; a second informant might provide information that advances a government investigation more than the contributions of the initial source. A compromise between priority and completeness would be to provide the largest reward to the first informant but also give a substantial bounty to later informants who supply valuable data.[48] Whether the monitoring mechanism compensates only the first mover or permits rewards to multiple parties, the body responsible for assigning bounties (e.g., an enforcement bureau or court) will face disputes concerning which informant achieved priority or, if multiple awards are possible, how to weigh the contributions of each informant.

3. Monitoring with Compensation and the Power to Prosecute

The first two forms of monitoring described above assume that a public agency alone has power to prosecute violations. If the public agency declines to prosecute, a prospective private monitor who desires insurance against retaliation or cash payments must negotiate such arrangements with the prosecutor as a condition of revealing the information initially. Without such an agreement, a prospective monitor who anticipates recovering a percentage of fines or penalties ultimately paid to the government bears the risk that the monopolist public enforcement body will decline to prosecute, leaving the monitor with no compensation.

A more robust model of private participation would compensate private parties for

[48] The CFCA does not limit rewards to the first mover. It sets a cap on the bounty to be paid to all informers and lets the court allocate rewards according to the relative contributions of each.

monitoring (via insurance, immunity from prosecution, or cash payments) and give them the right to prosecute. The delegation of prosecutorial authority occurs in three basic forms. The law creating the private right of action might:

* Require the private party to inform the public prosecutor of apparent misconduct and give the prosecutor an option to undertake the matter or allow the private party to proceed alone;

* Adopt the notification requirement described immediately above and authorize the public prosecutor to seek dismissal of any private suit, regardless of whether the prosecutor assumes the case; or

* Allow the private party to sue independently and require no prior consultation with or subsequent participation by the public enforcement body.

The first model resembles private rights under U.S. statutes banning employment discrimination,[49] the second describes the CFCA, and the third governs private suits under the U.S. antitrust laws.[50]

[49] 42 U.S.C. § 2000e-5(f)(1) (1994).

[50] 15 U.S.C. §§ 15, 26. Under the third model, a public enforcement body usually retains the right to advise the court in an amicus capacity and may have the power to intervene by right.

Laws that combine private monitoring with private prosecution vary in the quality of insurance and monetary compensation they offer the private monitor. Private enforcement systems sometimes compensate prevailing plaintiffs for their attorneys' fees and litigation costs.[51] More powerful incentive schemes (such as the U.S. antitrust laws) entitle the prevailing plaintiff to attorneys fees and costs and to monetary recoveries based upon the harm caused by the wrongdoer.[52] The CFCA not only provides a share of amounts recovered by the U.S. Treasury and mandates payment of the relator's attorneys fees, but also supplies anti-retaliation safeguards.

D. Defining the Universe of Eligible Private Monitors and Prosecutors

Beyond determining the scope of the private party's role in monitoring or enforcing the law, designing a private participation system requires one to define the universe of eligible participants. A private participation mechanism could make any individual eligible to qualify for rewards as monitors or prosecutors. For a hypothetical corporate wrongdoer, a system that broadly defined eligibility might entertain monitoring by the firm's employees, its customers, its suppliers, and individual government employees engaged in regulating its affairs. In practice, private enforcement systems often screen potential participants according to several criteria.

1. Employment Status

[51] This is the mechanism used in the U.S. Clean Air Act, 33 U.S.C. § 1365(a) (1994).

[52] 15 U.S.C. § 15.

Some private enforcement systems limit eligibility by certain government employees. U.S. Internal Revenue Service tax regulations that authorize bounties for private monitoring of tax delinquencies deny eligibility to employees of the Department of the Treasury or any other federal employee who acquired information relating to the underpayment of taxes in the course of official duties.[53] Such limits seek to discourage perverse conduct by government bodies and their employees. Bounties might provide a greater incentive for public officials to threaten to attack comparatively minor violations[54] or to challenge benign conduct as a way to extract side payments from the violator. Such threats are more credible if the government employee can sue unilaterally rather than having to gain the approval of superiors to whom the alleged wrongdoer can appeal to discourage the prosecution of legitimate conduct or behavior that amounts to an insignificant violation.

2. Nature of and Proximity to the Injury

Many decentralized enforcement systems determine eligibility by examining the nature of the claimant's injury and proximity to the misconduct. Judicially created antitrust doctrines impose formidable standing limitations upon private plaintiffs and generally deny standing to employees who allege that their employers have engaged in antitrust violations.[55] The private cause of action for employment discrimination limits private standing to individuals who have wrongfully

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[53] 27 C.F.R. § 301.7623-1 (2000).

[54] By "minor" violations I have in mind harmless departures from stated regulatory requirements.

[55] The ban on employee standing assumes that employees of antitrust violators benefit from the firm's anticompetitive conduct because the firm gives some of its monopoly profits to workers via better wages and amenities. See Apperson v. Fleet Carrier Corp., 879 F.2d 1344, 1352 (6th Cir. 1089) (standing denied to employees; employees could have been economic beneficiaries of violation).

been denied employment.[56] Public institutions responsible for enforcing these laws do not pay rewards to employees who provide information about their employers' illegal hiring practices, and the statute does not give a right of action to third parties who observe unlawful behavior.[57]

3. Participation or Acquiescence in Illegal Conduct

Some law enforcement systems restrict participation in private enforcement by individuals who engaged in illegal conduct or passively acquiesced in its execution. For example, the CFCA precludes eligibility for persons who are convicted of the illegal behavior and reduces (but does not eliminate) the reward for those who helped plan the misconduct. Such safeguards seek to curb incentives for individuals to cooperate in illegal schemes. Yet many systems designed to detect crimes elicit assistance from those engaged in illegal behavior. Prosecutors in criminal cases give immunity to individuals in return for their promise to provide evidence that assists in apprehending or convicting other wrongdoers. The U.S. antitrust regime grants criminal amnesty to a cartel member which discloses the cartel's existence and is not the cartel's ringleader. The U.S. system gives full amnesty from criminal prosecution only to the first party to inform. Immunity from prosecution, not a cash payment, constitutes the informant's reward.

IV. How Private Monitoring and Enforcement Affect the Impact of a Legal Command

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[56] 42 U.S.C. § 2000e-5(f)(1) (1994)

[57] Suppose that a company's hiring committee refuses to offer a job to a candidate on grounds that law forbids employers to consider. The excluded candidate would have standing to sue under U.S. law, but a hiring committee member who objected to the committee's decision would not.

The impact of any legal command depends heavily on five variables:[58]

- The substance of the command (e.g., a prohibition upon cartels).
- The legal standards by which an adjudicatory tribunal decides whether the defendant has transgressed the command.
- The likelihood that violations will be detected.
- The likelihood that detected violations will be prosecuted.
- The power of the sanctions imposed for violating the command.

A legislature can determine a law's impact by adjusting any of these variables. It can expand or curb the law's substantive requirements; bolster or weaken the legal standard that plaintiffs must satisfy to establish culpability; increase or reduce the probability that violations will be observed, strengthen or weaken the means for prosecuting violations; or augment or diminish the consequences that flow from a violation. Any single adjustment alters the law's significance.

The creation or enhancement of private monitoring and prosecution affects the third and fourth variables by raising the probability that violations of the law will be detected and prosecuted. Even if one holds the other three variables (substantive requirements, legal standard, and sanctions) constant, giving private parties stronger inducements to serve as monitors and prosecutors will tend to increase the incentives of affected actors to comply with the law.

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[58] For a further elaboration of this taxonomy, see Andrew I. Gavil, William E. Kovacic, & Jonathan B. Baker, Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy 923-27 (2002); William E. Kovacic, Competition Policy and Cartels: The Design of Remedies, in Criminalization of Competition Law Enforcement (Katalin J. Cseres, Maarten Pieter Schinkel & Floris O.W. Vogelaar eds.) (Forthcoming 2006).

F. Criteria for Expanding Private Participation in Implementing a Law

Three major factors are relevant to deciding how much to engage private parties in implementing a legal command. The first is one's judgment about the wisdom of the underlying substantive commands to be enforced. The sensibility of implementing a law more vigorously, such as by eliciting greater private involvement in detecting or prosecuting violations, depends on one's confidence that the command forbids truly harmful behavior. The more egregious the misconduct, the greater the potential value society might derive from expanding implementation efforts through private participation.

Careful assessment of the wisdom of the substantive rules to be enforced is important to evaluating an expansion of private participation where the existing legal regime relies heavily on the exercise of discretion by public prosecutors. In drafting legal commands, legislators inadvertently may condemn behavior that the legislature regards as acceptable. Or experience with enforcing a law may suggest that selected prohibitions contradict existing social norms or contemporary conceptions of sound policy. In these and other circumstances, a public prosecutor might choose not to challenge conduct that violates a nominal legal commands.

Robust private participation, especially independent rights of action that eliminate a public prosecutorial monopoly, reduce or eliminate the ability of government officials to use prosecutorial discretion as a non-legislative tool for altering the law. Private prosecutors motivated by strong rewards may try to enforce all existing rules aggressively, not simply the rules that public prosecutors currently deem sensible. Thus, a regime with private rights of action must ensure that the rules subject to private enforcement are non over-inclusive in their definition of forbidden conduct.

Beyond analyzing the soundness of the substantive law, a second factor affecting the choice among low-powered and high-powered public participation should be an evaluation of why existing public enforcement mechanisms are inadequate. Suppose that the source of weak enforcement is the incompetence, corruption, or capture of public prosecutors. In such circumstances, one might prefer to establish private rights. Private enforcement can offer an important implementation safeguard if there is a serious possibility that public prosecutors will default in executing their duties.

Where the source of inadequate public enforcement is weak access to evidence, different forms of enhanced private participation would be appropriate. The payment of rewards for providing information – without conferring a private right to prosecute -- may suffice. Public prosecutors with a demonstrated proclivity to prosecute cartels are likely to use information provided by an informant effectively. Thus, decisions about how to expand private participation in implementing the law requires an assessment of the quality of existing enforcement institutions, including the capability, intentions, and motivations of public prosecutors.

A third factor for consideration is the adequacy of safeguards against mistaken or perverse private efforts to detect or prosecute violations.[59] A private participation mechanism might impose stronger safeguards -- e.g., by giving a public prosecutor a greater gate keeping function -- where the possibilities for error or counterproductive behavior by private parties are substantial. In the case of the U.S. CFCA, injecting powerful forms of private participation into the regulation of contracts between the government and its suppliers without strong safeguards against error, opportunism, and

[59] On the importance of accounting for potential adverse side effects in creating a private rights, see Robert C. Marshall, Michael J. Meurer & Jean-Francois Richard, The Private Attorney General Meets Public Contract Law: Procurement Oversight by Protest, 20 Hofstra Law Review 1 (1991) (analyzing benefits and costs of bid protest oversight in government procurement).

malice may damage the government's ability to attract an optimal range and quality of contractors.[60]

B. Relying on Judicial Adjustment

[60] See Kovacic, *Civil False Claims Act,* at 235 (describing how excessively broad CFCA oversight can discourage desirable levels of private participation in public procurement markets)..

Where the legislature authorizes powerful forms of private participation, courts have been known to interpret statutes in ways that seek to reduce the adverse consequences of private oversight. Judicial retrenchment of modern antitrust doctrine in the United States has resulted substantially from rulings that have imposed restrictive standing and injury tests for private plaintiffs.[61] Automatic trebling of damages in private antitrust cases in the United States may have induced courts to toughen liability tests and may have increased the willingness of judges to grant defendants' motions to dismiss or motions for summary judgment.[62] These developments have been possible

because the open texture of the principal U.S. antitrust statutes gives courts considerable discretion to apply restrictive procedural screens and to alter requirements governing liability and standing.[63]

Relying on judicial interpretation to limit private enforcement of overly broad statutory commands presents risks. Courts might try to compensate through distorted constructions that forestall the socially harmful private claims but also impede the pursuit of valid private and public cases. Failures in the legislative design of a private participation mechanism can create irresistible pressure for courts to impose their own solutions. Strained interpretations to restrict participation by

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[61] The restrictive impact in private suits of judicially developed standard and injury doctrines is analyzed in William H. Page, The Chicago School and the Evolution of Antitrust: Characterization, Antitrust Injury, and Evidentiary Sufficiency, 75 Virginia Law Review 1221 (1989).

[62] See William Breit & Kenneth G. Elzinga, Antitrust Penalty Reform 62 (1986) (courts have reacted to "inefficiencies of private actions" by imposing "stricter standards regarding liability, standing, and damage estimation"); Stephen Calkins, Equilibrating Tendencies in the Antitrust System, With Special Attention to Summary Judgment and Motions to Dismiss," in Private Antitrust Litigation 185, 229 (Lawrence J. White ed. 1988) ("One of the ways in which courts have adjusted to the treble damage remedy is by being relatively more willing to keep cases from going to trial.").

[63] William E. Kovacic, The Influence of Economics on Antitrust Law, 30 Economic Inquiry 294, 295 (1992).

some parties can set legal principles that unduly bind worthy private claimants, as well.

V. Expanding Private Participation Through Bounty Hunting

As the framework from the preceding section suggests, a jurisdiction seeking to increase efforts to defeat cartels can do so in five basic ways: (1) strengthen substantive prohibitions against collusion (e.g., treata certain acts as illegal per se); (2) lighten the evidentiary burden that plaintiffs must bear to prove a violation (e.g., treat parallel conduct as an indication of unlawful agreement); (3) take measures to increase detection (e.g., give cartel insiders stronger inducements to inform); (4) increase the likelihood that misconduct, once discovered, will be prosecuted (e.g., create private rights of action); (5) boost sanctions for infringements (e.g., imprison culpable individuals). This section discusses how a bounty system could increase the rate at which cartels are detected and, by making detection more likely, deter the formation of cartels or impede their operations.

At first glance, the widespread adoption of leniency programs might seem to exhaust possibilities for improving detection rates. This paper makes two assumptions about the capacity of leniency systems to take the process of detection to its furthest boundaries and ultimately supply a decisive, lasting deterrent to cartels. First, the history of competition policy efforts to control cartels – reflected in studies of old and newer cartels, alike -- illuminates the extraordinary ingenuity of cartels and their remarkable capacity for adaptation.[64] The attention given to the obstacles to

[64] See, e.g., How Cartels Endure and How They Fail: Studies of Industry Collusion (Peter Z. Grossman ed., 2004) (essays on operation of cartels). John M. Connor, Global Price Fixing: Our Customers Are Our Enemies (2001); Doughlas Bernheim, Expert Report of R. Douglas Bernheim, M.D.L. No. 1285, In Re: Vitamins Antitrust Litigation, Misc. No. 99-0197 (TFH) (May 24, 2002); Simon J. Evenett, Margaret C. Levenstein & Valerie Y. Suslow, International Cartel Enforcement: Lessons from the 1990s (OECD Global Forum on Competition 2002); David Genesove & Wallace P. Mullin, Rules, Communication and Collusion: Narrative Evidence from the Sugar Institute Case, 91 American Economic Review 379 (2001); Robert C. Marshall, Leslie M. Marx & Matthew E. Raiff, Cartel Price Announcements: the Vitamins Industry (Duke University Working Paper, 2005).

successful coordination has obscured the creativity of cartel members in surmounting such barriers when the gains to be had are substantial. This history gives good reason to fear that any single system of defenses, no matter how impressive at the moment, can become a Maginot Line as the arms race between cartels and government prosecutors inspires cartels to devise countermeasures.

This paper also assumes that bounties can disrupt cartel coordination more powerfully than leniency. With a system of bounties, each company insider who becomes aware of the cartel is a potential informant. The firm's managers not only must worry about the possible moves of their cartel partners, but about the actions of each employee who is enlisted to assist in the illegal plan or who learns about the plan inadvertently. Each meeting or conversation or act in furtherance of the cartel is beset with doubt about whether each knowledgeable individual can be trusted to remain faithful to the illegal enterprise, or whether employees who merely observe irregular activities will keep their suspicions to themselves.

Compared to leniency, a bounty system denies the managers of the cartel firms control over the timing of when to reveal their illegal operations to prosecutors. The choice of when to inform no longer is governed simply by conjectures about whether other cartel members will seek leniency. With bounty hunting, the managers of the cartel participants confront the possibility that any employee of any cartel member with knowledge of the cartel will reveal the illegal arrangements to prosecutors. In any event, bounty hunting and leniency can be viewed as complements rather than substitutes. Because it gives each employee the capacity to inform, a bounty hunting system may accelerate recourse by cartel members to leniency.

A. Exploiting the Cartel's Operational Vulnerabilities

The adoption of legal standards condemning cartels and the establishment of severe sanctions

for violators has motivated cartel members to take ever greater precautions to avoid detection. One means to this end is to adopt coordination strategies that are less likely to arouse suspicion.[65] For example, a coordination rule that allocates market shares is superior to an allocation of customers or territories because the latter arrangements require the cartel member to instruct its sales staff not to make sales to specific buyers or within specific areas. Rather than give this suspicious guidance to a sales force, cartel members instead can allocate market shares, tell sales personnel to accept orders from any source, and make side payments to ensure that market share targets are honored.

In executing a coordination strategy, cartels members also will strive to avoid creating evidence that readily would prove an unlawful agreement. As the power of an enforcement scheme increases, cartel members will try not to generate corporate records that a prosecutor could use to show illegal concerted action. These precautions can limit the amount of direct evidence – testimony or documents – that show the existence of concerted action. In addition to measures to curb the creation of written or electronic records, a cartel member can curtail the distribution of information about the collusive arrangement within its own organization. Attempts to control the flow of information on a "need to know" basis can reduce the number of company insiders who have a full, informative picture of the cartel.

Even with precautions in structuring operations and in managing information, the cartel inevitably must rely to some degree on written or electronic records and must share information with a number of individuals. For example, despite efforts to avoid detection, the members of the

[65] See William E. Kovacic, Robert Marshall, Leslie Marx & Matthew Raiff, "Bidding Rings and the Design of Anti-Collusion Measures for Auctions and Procurements" (2005).

vitamins and food additives cartels found it necessary to employ complex coordination mechanisms. In vitamins, for example, coordination could be achieved only through a careful accounting of actual sales in order to match sales to the market share targets that supplied the foundation for cooperation among the vitamins producers. Additional records were maintained to document the transfer payments – often masked in the form of buy-sell agreements or asset transfers – that were necessary to compensate cartel members whose acutal sales lagged behind the market share targetes.

The payment of bounties to informants could place extreme pressure at the some of the most vulnerable joints of the cartel's operations by making the execution of each cartel management task an opportunity for various individuals – managers, sales people, secretaries, accountants, administrators – to acquire information about the existence and operation of the cartel. No cartel of any consequence can avoid the need to formulate and execute operational plans. Even with policies that seek to limit the internal dissemination of such information, to select seemingly loyal employees for participation in the cartel's affairs, and to provide special compensation to employee participants, the cartel is unlikely to bond everyone to silence. To the degree that the firm must pay larger salaries or bonuses to individual employees to discourage them from seeking bounties for informing, the costs of the cartels operations increase and the rewards to the firm for illegal coordination decline.

B. The Design of a System of Bounties to Undermine Cartels

A jurisdiction can design a bounty hunting system that exploits the vulnerabilities described above in a manner that is compatible with larger goals of competition policy and sound public administration. The basic ingredients of an anti-cartel bounty hunting system are outlined below.

1. The Desirability of the Substantive Rule

Rewards for private participation are likely to generate the largest social benefits when incentives focus private initiative upon detecting or prosecuting unambiguously harmful conduct. Most commentators regard the enforcement of stringent rules against cartels as antitrust's most important positive contribution to economic efficiency.[66] By contrast, the prosecution of antitrust prohibitions against abuses of dominance, mergers, and distribution practices pose greater analytical ambiguity and arouse greater debate, particularly when private lawsuits are the means for implementing such commands.[67] A nation contemplating an expansion of private participation might best begin by focusing private activity exclusively upon the enforcement of rules governing antitrust's most serious offenses – namely, hard core horizontal restraints.

2. Analyzing the Causes of Inadequate Enforcement

The second criterion seeks to pinpoint the inadequacies of the implementation status quo. In some jurisdictions, the main obstacle to executing an effective anti-cartel policy is the government prosecutor's inability to obtain information that reveals the existence of cartels and aids their prosecution. Where the problem is poor access to information and not a deficiency in the commitment, resources, or effort by public agencies to implement the law, the appropriate solution

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[66] See Robert H. Bork, The Antitrust Paradox 263 (1978) (praising per se ban against horizontal price-fixing and market divisions; concluding that "[i]ts contributions to consumer welfare over the decades have been enormous"); Organization for Economic Cooperation and Development, Recommendation of the Council Concerning Effective Action Against Hard Core Cartels, OECD C(98)35 (1998) (hard core cartels are "the most egregious violations of competition law"), available at <http://www.oecd.org/daf/clp/Recommendations/Rec9com.htm>. This view is not universal. See Holman W. Jenkins, Jr., "Silly Trial, Silly Law," Wall Street Journal, Dec. 12, 2001, at A19 (criticizing U.S. prosecution of art auction cartel and attacking law against horizontal price fixing).

[67] See Edward A. Snyder & Thomas E. Kauper, Misuse of the Antitrust Laws: The Competitor Plaintiff, 90 Michigan Law Review 551, 596-98 (1991) (proposing limits on capacity of competitors to pursue various antitrust claims)..

may be to strengthen incentives for private parties to act as monitors. In such circumstances, it is not necessary to go beyond creating a system of bounties for detection and take the further step of creating private rights of action for insiders. A diligent, competent, and adequately funded public enforcement body is likely to prosecute cartels identified by information supplied by the insider.

Experience in the United States provides an example of this scenario. Since the mid-1930s, DOJ actively has prosecuted cartels. Despite variations over time in the mix of government initiatives, anti-cartel measures have formed the core of modern U.S. federal enforcement policy.[68] Given the history and norms of U.S. public enforcement policy, one confidently can expect DOJ to prosecute illicit conduct identified by private informants. For DOJ and for other competition agencies with similar anti-cartel preferences, there is no need to give the private informant an independent, action-forcing right to bring lawsuits if the public prosecutor declined to pursue the matter. In these conditions, the public agency is likely to desist only if the information provided failed to identify a cartel.

An expanded bounty system, consisting of rewards for informing and privates right of action, may be desirable in jurisdictions where the public authority is unlikely to intervene even when an informant supplies information that reveals a cartel. Various causes – among them, corruption, sloth, weak technical capacity, overpowering political pressure, or inadequate resources – might lead a public agency to default. If the public prosecutor is likely to ignore an informant's data, it may be necessary to give the informant a reward and a right to sue if the government does not.

3. Safeguards Against Counterproductive Private Participation

[68] See William E. Kovacic, The Modern Evolution of U.S. Competition Policy Enforcement Norms, 71 Antitrust Law Journal 377, 417-25 (2003) (describing development of U.S. enforcement program against cartels).

Experience with designing and implementing the CFCA in the United States suggests possible difficulties with a system of bounties for private monitoring.[69] Some of the more important potential problems and possible solutions are identified below.

[69] See Kovacic, *Civil False Claims Act*, at 227-35 (describing possible adverse effects of private enforcement under CFCA); Kovacic, *Whistleblower Bounty Lawsuits*, at 1825-41 (describing problems with CFCA whistleblowing system).

The Class of Eligible Potential Informants is Excessively Broad. In adopting the 1986 Amendments to the CFCA, Congress inadequately delimited the categories of individuals who might serve as *qui tam* relators.[70] The CFCA and its legislative history do not preclude *qui tam* actions by government employees or advisors (such as attorneys) who have confidential relationships with the firm to be monitored. Attorneys who are willing to breach a duty of confidentiality (and be barred from the practice of law) conceivably could recover a CFCA bounty for revealing their clients' misconduct. A bounty system can solve this problem by disqualifying certain categories of informants, including government employees and the alleged violator's confidential advisors.

Informants May Erroneously Perceive the Existence of a Cartel. Insiders may misapprehend the significance of behavior they observe – for example, by erroneously concluding that a company engaged in conduct properly associated with a legitimate joint venture is participating in a cartel. Faulty insider perceptions could lead public authorities to expend resources in chasing down fruitless leads or, if there is a private right of action for informants, cause companies to spend resources defending against baseless claims.

Several antidotes to the problem of informant mistakes are available. Take the case of a jurisdiction that has a capable, well-motivated public enforcement body and creates rewards for informing, but does not give the informant a private right of action. Although it may spend some resources on pursuing the mistaken informant's suggestions, the government prosecutor is likely with modest effort to test the basis for the informant's suspicions. As long as the government alone has the right to act upon information provided by the informant, there is only a limited risk that the

[70] See Kovacic, *Whistleblower Bounty Lawsuits*, at 1834-38, 1846-48 (describing problems associated with not precluding standing for government employees under CFCA).

informant's error will inspire a challenge to benign conduct. Note that the problem of false leads exists when, as today, government prosecutors receive and act upon tips from mere volunteers.

Where the jurisdiction creates rewards and a right of action for private insiders, the informant might proceed with a matter that the prosecutor correctly perceives to be baseless. Perhaps the best cure for false positives in such matters is to give the government prosecutor the right (as does the CFCA) to intervene in the private case and ask the court to dismiss the private suit. The government may not be able to forestall the initiation of a mistaken cartel case, but it would have an express statutory basis to seek dismissal of a matter that it has reviewed and found wanting. A more drastic safeguard would be to impose a "loser pays" rule for costs and attorneys fees if the government enforcement body has decided not to pursue the case.

Informants May Deliberately Fabricate Claims. Some individuals might use the private participation scheme vexatiously. A company insider might knowingly give false agency to the government body or initiate a case based upon a fabrication of events. For example, an employee facing the loss of a job due to scheduled layoffs or a termination for good cause might take (or threaten to take) such measures to elicit more favorable severance terms from an employer.

If the bounty scheme only pays rewards for detection and gives the insider no private right of action, the bounty system is unlikely to increase incentives for vexatious behavior beyond those existing under the status quo. Under existing U.S. enforcement policy, which relies partly upon voluntary tips about possible misconduct, company insiders could give government officials false information. A bounty system is unlikely to increase the number of deliberately frivolous leads given to the government.

A private participation mechanism that combines rewards for informing and a private right of

action may give malevolent insiders greater capacity to credibly promise to impose costs on the employer by threatening pursue a lawsuit that the employer will have to spend resources to defend. To address this possibility, the private participation system could provide sanctions (as does the CFCA) for filing vexatious or frivolous suits. Allowing the government to intervene to seek dismissal of baseless suits also provides a means for screening out such actions.

Bounties Might Decrease Incentives to Oppose Misconduct. A reward scheme that is tied to the amounts ultimately recovered by the government might weaken the incentive of cartel insiders to oppose or report misconduct. Insiders might conclude that, by allowing misconduct to continue, the total size of recoverable penalties will increase and will boost the award. Rather than oppose or report misconduct at early stages of the cartel, an insider might wait until the harm increases. A countervailing factor is the use of a rule that provides awards exclusively or disproportionately to the first person to inform. An insider who observes misconduct and delays informing runs the risk that another insider will act first and capture all or the largest share of the reward.

Another scenario for concern involves the possibility that an insider might encourage or facilitate misconduct in the hope of ultimately capturing a reward. One antidote is a rule that denies any compensation to those who play a central role in orchestrating the misconduct.[71] For individuals who play a secondary or peripheral role in the misconduct, the solution would be to give the government to reduce (but not eliminate) the informant's share in the proceeds.[72]

C. Operational Elements of a Private Monitoring System

[71] By comparison, many leniency programs deny eligibility to the cartel ringleader.

[72] By comparison, the CFCA permits the relator's share to be reduced where the relator was a participant in the misconduct.

A system of rewards for private parties who inform on cartels 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. Such a bounty scheme would have the following elements:

Presentation of Information. The informant would be required to present information about suspected collusion to the public competition authority. In systems that create no independent right of action for the informant, the government would have total discretion to act upon the information or withhold prosecution. In systems that give the government a right of first refusal and then allow the insider to proceed independently, the procedure under the CFCA might be followed. The informant simultaneously would file an action under seal with the court and give the information to the government. After a set period of time, if the government takes no action, the informant could proceed with the private suit. Any system that creates a private right of action should give the government authority to petition the court to dismiss groundless suits.

Calculating Rewards. Rewards for informants should be a significant percentage – the CFCA maximum is 30% – of all criminal fines or civil penalties recovered by the competition authority. The reward scheme could provide the entire bounty to the first to inform, or could give a disproportionately large share of the total award to the first informant and divide the rest among subsequent informants who provide valuable information. The amount paid to any informant could be adjusted downward where the informant has participated in executing the scheme. Individuals who orchestrated the illegal behavior would be ineligible.

Administering the Reward Mechanism. The public enforcement agency would make the initial decision about the amount of the reward to be paid to individual informants. The agency's

decisions would be subject to judicial review. Informants would be represented by counsel, who would be entitled to payment (by the violators) of reasonable attorneys fees and costs for their assistance to the informer.

Retaliation Safeguards. The statute creating the private monitoring mechanism would protect informants against retaliation by their employers by forbidding dismissal or similar forms of punishment for participating in the monitoring process. As discussed above, the most important inducement for an insider to inform is likely to be the prospect of obtaining a substantial award and not the assurance that the statute forbids retaliation.

Duration. The bounty system could be adopted as an experiment. The originating statute could authorize the monitoring system for, say, a ten-year period. The mechanism would sunset unless the national legislature chooses to extend it. A ten-year trial would provide a suitable time to assess the efficacy of the informing system in eliciting useful information about covert cartels.

Conclusion

Properly focused systems that pay bounties to informants have potential to defeat efforts by cartel members to conceal their misconduct. By facilitating efforts by public competition authorities to detect and prosecute cartels, bounty systems can make an important contribution to deterring the formation of illegal collusive schemes. The modern U.S. Civil False Claims Act provides a useful model for considering the design and operation of bounty systems for the enforcement of other public laws. In particular, experience with the CFCA since 1986 suggests how anti-cartel policies might benefit from providing financial rewards for private parties to participate in monitoring compliance with antitrust prohibitions upon cartels.