

A tension in the U.S. approach to international cartel enforcement: At what point does aggressive pursuit of individuals undercut the corporate leniency program?



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I. EXECUTIVE SUMMARY

As competition authorities around the world consider criminalizing cartel activity, they face important — and often highly divisive — questions about whether and what type of criminal sanctions are appropriate for individuals. Often they look to the United States enforcement program for guidance. In recent years, the U.S. has increased its pursuit of individual offenders, but this zealousness about individual punishment must be balanced against other enforcement goals to ensure that the perceived deterrent value of putting cartelists in prison is not outweighed by the potential chilling effect this weapon's hawkish or inconsistent use may have on cartel enforcement more generally.

This article briefly describes the recent U.S. approach to individual criminalization and explores whether there is a tipping point after which dogged pursuit of individuals may actually undercut effective enforcement. It then raises some questions and offers some thoughts on how increased transparency in the U.S. enforcers' process and a tempered and principled application of this aggression may better support the enforcers' overall goals, while at the same time leading to a more fair and consistent approach toward individuals.

II. THE U.S. APPROACH TO INTERNATIONAL CARTEL ENFORCEMENT

There is a global trend toward criminalizing cartel activity for corporations, and to a lesser extent for individuals. In practice, of the handful of jurisdictions that have instituted individual criminal sanctions, few have gone so far as to actually impose prison terms, and in many countries — even those with thriving competition enforcement agencies — the idea of incarcerating offenders for this type of activity remains anathema. The reasons for this are numerous and sometimes complex. Every jurisdiction weighing its options with respect to criminalization will have its own goals, assets, and impediments and it bears careful consideration whether the U.S. approach to individual criminalization is necessarily appropriate for others. It is also worth assessing at what point zealous pursuit of individuals becomes counterproductive, even in a mature cartel enforcement regime like the U.S.

A. A Brief U.S. History of Individual Penalties for Antitrust Offenders

From enactment of the Sherman Act in 1890 until 1974, antitrust violations were misdemeanors. During that long period, only a handful of offenders ever served jail time, and the sentences were very short.¹ Even after Congress made these offenses felonies, and in the decade after the enactment of the United States Sentencing Guidelines in the late 1980s, only 37 percent of antitrust defendants served jail time², and foreign executives generally received no-jail deals or served short prison sentences of up to three months.

After massive scandals like Enron undermined Americans' trust in their corporate leaders, harsher treatment of white collar offenders became more palatable, ultimately leading, among other things, to achievement of the Department of Justice (DOJ)'s goal of obtaining broader moral and legal support for increased penalties for individual cartelists. In 2004, Congress enacted The Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA),³ which, in addition to other changes, increased the statutory maximum term of imprisonment for individuals from three years to ten, and raised potential fine levels from a maximum of US\$350,000 to US\$1 million.

Following ACPERA's enactment, the Sentencing Guidelines were revised in 2005 to be more consistent with the increased statutory maximums: the base offense level for antitrust offenses was raised from 10 to 12 (leading to an almost 25 percent increase in the recommended prison term for individuals), and provisions were added for up to 16 additional offense levels for violations involving more than US\$1.5 billion.⁴ Interestingly, the Sentencing Commission also, without explanation, deleted a longstanding comment to the Guidelines that read, "the most effective method to deter individuals from committing this crime is through the imposition of short sentences coupled with large fines," substituting in its place: "prison sentences for these offenders should be much more common, and usually somewhat longer, than typical under pre-guidelines practice."⁵

B. The Early Years of the Modern Approach: Corporate Leniency / Detection and Prosecution

Anyone at all familiar with cartel enforcement knows that the DOJ has been at the forefront of pursuing and criminally prosecuting international cartels, and has been extremely successful at exporting many of the tenets of its program to competition enforcers around the globe. The first wave of international cartel enforcement in the mid-to-late 1990s was powered by an enriched and renewed corporate leniency policy that included amnesty, a tempting "amnesty plus" carrot,⁶ or a more lenient sentence for corporate defendants in exchange for cooperation with the DOJ's investigations. No-jail deals for cooperating individuals played a supporting role. The focus was primarily on securing what at the time seemed like astronomically large fines against the corporations involved. The clear aim of the leniency program was to identify and crack international cartels that — given their very nature — would otherwise be difficult or impossible to detect using standard investigation methods. As current Deputy Assistant Attorney General (DAAG) Scott Hammond has put it, leniency programs have "completely transformed the way competition authorities around the world detect, investigate, and deter cartels." Hammond credits leniency programs with "dismantling...the largest global cartels ever prosecuted."⁷

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1 Scott D. Hammond, Deputy Assistant Atty Gen. U.S. Dep't of Justice Antitrust Div., Recent Developments, Trends and Milestones in the Antitrust Division's Criminal Enforcement Program (Mar. 26, 2008), *available at* <http://www.usdoj.gov/atr/public/speeches/232716.htm>.

2 *Id.*

3 The Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. 108-237 (2004), 118 Stat. 665 (2004).

4 U.S. Sentencing Guidelines Manual § 1R1.1 (2005).

5 *Id.*; U.S. Sentencing Guidelines and Policy Statements (Apr. 13, 1987), *reprinted in* 52 Fed. Reg. 18,046 (May 13, 1987).

6 "Amnesty Plus" refers to benefits the DOJ can offer to a cartel member who discloses previously undetected antitrust offenses involving a cartel different from the one that first brought that cartel to the prosecutors' attention.

The goal of Amnesty Plus is to induce companies already under investigation to clean house and report violations in which it may be involved in other markets.

7 Scott D. Hammond, Deputy Assistant Atty Gen. U.S. Dep't of Justice Antitrust Div., The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades, February 25, 2010, *available at* <http://www.justice.gov/atr/public/speeches/255515.htm>.

In recent years, with skyscraping corporate fines becoming commonplace, the DOJ has turned its focus toward efforts to dramatically increase the penalties for individual offenders and to pursue ever-greater numbers of individual targets in each case. The clear aim of this effort appears to be greater deterrence and harsher punishment of individual offenders.

C. Recent Years: Focus on Individuals / Deterrence and Punishment

Armed with the authority and the perceived mandate to more vigorously pursue and punish individuals, the DOJ has made prosecuting increasing numbers of individuals and threatening them with longer prison sentences the centerpiece of its current enforcement program. As DAAG Hammond has said in various ways at various times, the DOJ believes that “[i]t is indisputable that the most effective deterrent to cartel offenses is to impose jail sentences on the individuals who commit them,” and, “the most significant trend in the evolution of international anti-cartel enforcement since 1999 has been the more vigorous prosecution of foreign nationals who violate U.S. antitrust laws.”⁸

More Carve-Outs

One of the ways in which the DOJ has increased its pursuit of individuals is to insist on a greater numbers of carve-outs (individuals who are not protected by their cooperating employer’s plea agreement) for each successive company that agrees to cooperate with the DOJ in a particular investigation. In 2007, 87 percent of antitrust offenders sentenced served prison time,⁹ as contrasted with the 37 percent, noted above, in the 1990s. To many, it is not clear how this practice is consistent with fundamental fairness and the general criminal requirement in the U.S. that an individual’s guilt level be based on his or her particular mens rea. It is also unclear whether incarcerating more than twice the percentage of offenders is consistent with the Sentencing Guidelines’ goal of imposing sentences that are “sufficient, but not greater than necessary” to address the enforcement goals embodied in the governing law.¹⁰ Finally, there are no statistics that prove that longer prison sentences for cartel offenders meaningfully increase deterrence, or that demonstrate that the prospect of even a short period of jail time is insufficient to change behavior.

The DOJ’s stated policy is to carve out only the most culpable individuals from each company that participates in a cartel, but there is a tension between this stated policy and the practice of insisting on a greater number of carve-outs from each successive cooperating company. Assume in a widget investigation the second company to cooperate with the DOJ had three individual carve-outs, and the DOJ tells the third company seeking leniency they would be required to carve out four employees from its company plea deal. But what if the third company had only one individual at an appropriate level who was truly culpable, and one subordinate who was pressured to participate on threat of losing his job or who did not fully understand the nature or illegality of his conduct? Would the DOJ force the company to carve out two additional people who were not actively involved in the cartel, who were involved for a limited period or in a very limited way? And is it really appropriate to carve out the lower level employee when an employee at the second company with a similar role would not have been carved out? Or where the fourth company in had seven indisputably culpable participants? These examples are not merely hypothetical; the author is aware of cases where all of these kinds of arguments were made by defendants, and rejected by the DOJ.

If the answer is that people are carved out who are not actually prosecuted, doesn’t that undercut what has been one of the strongest components of the leniency program: a measure of certainty of results? If individuals are carved out in a fashion that appears arbitrary and sometimes unfair to the outside world, seemingly over time this will decrease the number of both companies and individuals who choose to cooperate. This in turn will harm the DOJ’s overall success rate because more cases will be dragged out, more will proceed to trial, and substantially more resources will be spent, yet with less impressive results.

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8 Scott D. Hammond, Deputy Assistant Atty Gen. U.S. Dep’t of Justice Antitrust Div., *Charting New Waters in International Cartel Prosecutions*, pp. 1.13, *available at* <http://www.justice.gov/atr/public/speeches/speech-hammond.html>.

9 Scott D. Hammond, Deputy Assistant Atty Gen. U.S. Dep’t of Justice Antitrust Div., *Recent Developments, Trends and Milestones in the Antitrust Division’s Criminal Enforcement Program at 2* (Mar. 26, 2008), *available at* <http://www.usdoj.gov/atr/public/speeches/232716.htm>.

10 18 U.S.C. Section 3553(a).

Longer Prison Sentences

Recent cartel cases have seen sentences as long as four years incarceration for U.S. defendants and 18 months for foreign defendants.¹¹ The chief architect of the focus on individuals has himself admitted that much higher sentences could force more cases to trial and alter the careful balance that has made U.S. cartel enforcement a resounding success.¹² The question then becomes how high is too high? Do higher sentences actually increase deterrence, and at what point do they have the opposite of the intended effect by making it less likely that companies or individuals will cooperate? More cases will become unprovable without the assistance of these critical cooperating witnesses, resulting in fewer prosecutions, or at least fewer wins for the DOJ. Longer periods of incarceration for offenders may achieve a deterrent effect, but at what cost? It is inappropriate to trade sentences for current offenders that are “greater than necessary” in their particular circumstances for potential future deterrence.

III. THE TENSION IN THE U.S. APPROACH

Many have argued that more and longer prison sentences are not the answer to enhanced deterrence of cartels. Many of these arguments are based on economic analysis that says increasing corporate fines is actually a more effective deterrent than individual sanctions. This article is not aimed at rehashing that economic debate, but rather at questioning both the fundamental fairness of the formula used to target individuals, and the potential for doing unintended harm to the overall system of enforcement. Imposing heavy penalties on an increasing number of individuals is not obviously the best way to enforce the antitrust laws. Is the DOJ’s process with respect to individuals fair, consistent, transparent, and understandable? Have the U.S. enforcers gone too far? At some point will the strongest weapon in the DOJ’s arsenal — the corporate leniency policy — be undercut by erratic or overzealous hunting of individual offenders, and have we reached that point? Answering these already difficult questions definitively is made almost impossible by the lack of truly helpful data in this area, so assumptions and conclusions are inevitably mostly anecdotal, but worthy of analysis.

This year the General Accounting Office (GAO) reported that applications to the corporate leniency program were roughly the same in the six years before and after ACPERA’s enactment.¹³ But the GAO acknowledged that “factors other than ACPERA, including the increase of leniency programs in other countries may also have affected the number and types of leniency applications submitted.”¹⁴ Is one of those factors the increased pursuit of individuals, and which way has this factor cut? Is it surprising or expected that leniency applications did not increase along with corporate and individual penalties?

Among those of us who practice in this area, almost everyone known to the author has been in the situation where a corporate client — either foreign or domestic — has decided not to seek leniency in the U.S. (or has seriously considered not doing so) in large part because it was concerned about the treatment its employees would receive at the hands of the DOJ: how many individuals would be carved out? Who would they be? Would they all be truly culpable? Of those carved out, how many would be prosecuted? What length of prison sentences would the enforcers argue was appropriate in each case? Even for potential amnesty applicants these considerations weigh heavily: after all, what if the company isn’t first in?

The DOJ’s overall enforcement record is impressive, but by all accounts (including its own) that record is based in large part on the overwhelming success of the corporate leniency program. The DOJ’s record against defendants who do not cooperate is spottier. There are a variety of reasons for this, many of them to be expected. International cartels often involve people, events, and documents all over the world, which means significant evidentiary, cultural, and language difficulties. These are complex cases, and generally the defendants are represented by the best law firms from around the globe with greater resources at their disposal than those possessed by the DOJ. The DOJ also continues to fight an uphill battle convincing some judges and jurors that these cases should be taken seriously. Because its witnesses will mostly be cooperating defendants, the DOJ has to overcome the bias that these witnesses are not credible. Bottom line, the more often the DOJ is put to the test, the more often it will lose at trial, expending large amounts of its limited resources in the process — resources that might be better spent investigating additional cartels.

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¹¹ U.S. Dep’t of Justice Antitrust Division Spring Update 2011.

¹² Scott D. Hammond, Deputy Assistant Att’y Gen. for Criminal Enforcement, U.S. Dep’t of Justice Antitrust Div., Testimony Before the U.S. Sentencing Comm’n (Apr. 12, 2005), *available at* <http://www.usdoj.gov/atr/public/testimony/208546.pdf>.

¹³ GAO Report on Criminal Cartel Enforcement (GAO-11-619) 2011

¹⁴ *Id.* at 1.

While it is true — as the DOJ is quick to point out¹⁵ — that its aggressive stance toward individuals has altered conduct in some areas (e.g., cartel groups meeting outside of or in some cases even explicitly not targeting the U.S. in their activities), it is also true that cartel activity will continue to exist, especially in these difficult economic times.¹⁶ In fact, there is evidence that in many of the cartels currently being investigated by the DOJ the cartel activity specifically targeted U.S. businesses and continued right up to the day the investigation surfaced.

Particularly for foreign individual defendants, as the penalties become stiffer and the process less transparent, the incentive to refuse to submit to U.S. jurisdiction and cooperate with the DOJ becomes more and more tempting, until at some point it simply becomes unlikely that the cooperation that the system is built on will continue to fuel the enforcement program in the same way that it has for the past 15 years.

IV. MORE QUESTIONS AND A SUGGESTION OR TWO

A. Increase Transparency and Consistency in the U.S.

The author is not aware of any DOJ guidance on the proper number of carve-outs or appropriate length of prison sentences for cartel offenders. Understandably the answers will vary somewhat based on the size, scope, and duration of the conspiracy, the volumes of commerce affected and other idiosyncrasies of each case, but companies and individuals faced with the need to make decisions about amnesty or leniency applications need better insight into the DOJ's decision-making process if they are to make educated choices about their difficult options. Establishing guidelines for individual prosecutions will also improve the consistency of the DOJ's approach.

B. Should Others Adopt Criminal Sanctions for Individual Cartel Offenders?

A good case can be made that individual penalties for cartellists are an important piece of the deterrence portion of an enforcement program. Recall, however, that it took Americans 100 years of antitrust enforcement and a major crisis in confidence after a series of massive corporate scandals before we collectively began to view white collar offenders as potentially deserving of long prison sentences, and there remains no consensus about whether those involved in antitrust violations should face extended imprisonment. Jurisdictions with different histories, enforcement regimes, social and legal norms, and available resources may reasonably determine that criminalizing individual conduct — especially if significant prison terms are part of the equation — is not appropriate for them, or that individual sanctions might undermine other goals of their enforcement program such as detection and successful prosecution.

Finally, the future of global enforcement will be complicated substantially if multiple jurisdictions adopt criminal penalties that are inconsistent with one another, or if in some jurisdictions offenders could be punished for the same offense for which they had already been prosecuted elsewhere. Who will decide how criminal sanctions should be meted out in these scenarios?

Admittedly this brief look at the U.S. enforcers' aggressive criminal pursuit of individual cartel offenders raises more questions than it answers, but in the author's humble opinion, these questions are ripe for discussion, both in the U.S. and in developing programs around the world.

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¹⁵ See, e.g., Scott D. Hammond, Deputy Assistant Atty Gen. U.S. Dep't of Justice Antitrust Div., *Charting New Waters in International Cartel Prosecutions*, p.7, available at <http://www.justice.gov/atr/public/speeches/speech-hammond.html>.

¹⁶ Janet McDavid and Megan Dixon, *Avoiding Risks of Cartel Prosecutions*, *National Law Journal*, May 25, 2009.

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