

Cartel Enforcement Today: The Perils of The Economic Downturn

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These are dangerous times for corporate executives. In times of economic downturn and financial dislocation, the temptation for corporate executives to embrace a short-term fix to raise prices and allocate markets is almost irresistible. An historical review of economic downturns provides powerful testimony that the major global cartels, ranging from lysine and citric acid to vitamins and graphite electrodes, had their origins at moments of economic stress when executives sought the easy—and illegal—solution to their financial woes.¹ Similarly, the more recent “fuel surcharge cartels” were the result of dramatic increases in the price of oil which drastically affected profitability for airlines and other shippers.² Agreements to raise or stabilize prices or eliminate discounts are the

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¹ See *United States v. Archer Daniels Midland Company*, Criminal Information, (N.D.I.L., Oct. 15, 1996), found at <http://www.usdoj.gov/atr/cases/f0900/0965.htm>; *United States v. F. Hoffman-LaRoche Ltd.*, Criminal Information, 3:99-CR. 184-R (N.D. Tx., May 20, 1999) found at <http://www.usdoj.gov/atr/cases/f2400/2452.htm>.

² See *United States v. British Airways PLC*, Plea Agreement, Cr. No. 07-183 JDB (D.D.C. Aug. 23, 2007) found at <http://www.usdoj.gov/atr/cases/f225500/225323.htm>; *United States v. Korean Air Lines Co.*

easiest and most convenient short-term solutions to reductions in demand and market slowdowns. They are usually “justified” in the executives’ minds both because of profitability drops that affect the executive’s performance and compensation and employment drops that affect the future of those who work for them. The executives believe that they only need to take drastic steps for a short time and that they are doing it for the greater good. They also believe fervently that their competitors will support them since it is not in anyone’s interest to “turn in” the cartel that is saving jobs and keeping the industry viable.

In earlier economic crises, corporate executives appeared less worried about the personal and corporate consequences of their illegal behavior. They saw it as a rational solution, believing that the worst that could happen would be a corporate slap on the wrist. Yet the global antitrust enforcement actions following the last major downturn in the early 1990s completely changed the dynamic—and the consequences for seeking such short-term solutions. Unfortunately, not all of today’s corporate executives know or understand the dramatic shifts in antitrust enforcement and how enforcement actions will affect them if they fall into the historical pattern of the quick fix. The corporate executives of today, weighing the short-term benefits of cartel behavior as a solution to the economic downturn, confront three developments that have dramatically transformed cartel enforcement.

First, cartel behavior today—even short-term behavior—is far more likely to be detected and prosecuted. This is primarily because of the development of the U.S.

Ltd., Plea Agreement, Cr No. 07-184 JDB (D.D.C. Aut. 23, 2007) found at <http://www.usdoj.gov/atr/cases/f225500/225524.htm>.

leniency program and those of jurisdictions around the globe. Leniency programs are the most successful vehicles for the detection and punishment of cartels ever devised by the enforcement community.

In the United States, the corporate leniency policies of 1978 and 1993 were intended to destabilize cartels by providing serious incentives for corporations and executives to report their illegal conduct. Under the U.S. policy, the first corporation to provide evidence of its wrongdoing where the U.S. Department of Justice (“DOJ”) does not already have evidence to make a credible case will not be charged criminally, will pay no fine, and will receive immunity for its cooperating executives. If the corporation cooperates with the civil plaintiffs, it may also receive the benefit of paying single damages rather than treble damages in civil damage cases. Interestingly, when it was first announced, the 1993 policy only had limited success and minimal appeal. It was only when the DOJ started to command substantial corporate fines that leniency seemed to become a serious consideration for corporations. Until 1996, the highest fine ever obtained was \$10 million, the statutory maximum at the time. When the DOJ obtained a \$100 million fine from ADM in 1996 and other companies began to agree to huge fines, the leniency dynamic changed and corporations began to flock in, increasing the number of international cartel cases dramatically. After the U.S. policy became successful, jurisdictions around the world began to imitate the U.S. policy and establish their own leniency programs. Canada, the European Commission, numerous European member states, Korea, Japan, Australia, Brazil, and many other jurisdictions implemented

leniency programs and have had great success in detecting and punishing national and international cartels.

The DOJ also initiated a complementary program called “amnesty plus.” That program encouraged corporations that were being investigated and prosecuted in one market to look at their other operations and report illegal conduct in other markets. In that situation, not only would the corporation receive full leniency for the additional product, it would also receive a break on its fine for the first product. Several corporations brought multiple cases to the DOJ’s attention under this program. Other jurisdictions have also adopted variations of “amnesty plus” in response to the great success of the program in the United States.

Detection today is far more likely because corporations around the world are seeking the benefits of leniency programs. The lesson to today's executive seeking a solution to his current market problem is that you cannot trust your competitors to keep the cartel secret. If competitors are confronted with inquiries from their compliance officers and outside counsel, they will undoubtedly give up others to save themselves. Executives need to understand that their competitors are not going to risk jail to save them. The leniency culture is predicated on saving yourself from high fines, jail, and hefty damages—and that means turning in your friends and competitors. While this culture did not exist during previous downturns when competitors stuck together, it certainly exists today.

Second, individual executives face a high likelihood of serving jail time if they

participate in cartel conduct. The clear policy trend in the U.S. and in other jurisdictions has been to increase individual accountability and create greater deterrence by prosecuting executives and sending them to jail. This is especially the case for non-U.S. executives. The recent marine hose investigation is the most prominent example. The DOJ became aware of the cartel through a leniency applicant and secretly videotaped a prearranged meeting of competitors at an industry convention in Houston. The next morning, eight executives—all from outside the U.S.—were arrested in their hotel rooms and held pending disposition of their cases in the U.S. Thus far, the cooperating executives have been sentenced to jail terms of 14 to 30 months in the U.S. and up to 36 months in the U.K.

Similarly, today's corporate plea agreements routinely “carve out” a number of senior executives of the pleading company who remain subject to prosecution and jail sentences, despite their cooperation. In some recent plea agreements, the number of “carve outs” has ranged as high as ten executives from one corporation. This is a substantial shift from a time when one individual from a corporate defendant would be selected to serve a very short prison sentence. Many of the executives who are being prosecuted today are those at the top of the corporation, including CEOs. As a consequence, the number of senior officials who lose their jobs and their benefits has increased dramatically, both because they are convicted of a felony and because of dramatic shifts in corporate accountability following the scandals of the late 1990s.

Finally, the DOJ is making aggressive use of efforts to bring international

executives within the jurisdiction of the United States for trial. The DOJ has initiated extradition proceedings, registered defendants on the INTERPOL Red Notice, and set up border watches into the U.S. to stop and detain executives they seek to prosecute. This is a very different dynamic than executives experienced in earlier downturns when they knew that they could simply stay out of the United States and be safe from apprehension and prosecution. Executives considering short-term cartels to solve their financial problems need to be aware of these new and effective tools.

Third, international cartel behavior today is likely to be investigated and prosecuted by multiple jurisdictions that are cooperating closely with each other. The fuel surcharge investigations of the airline industry, which followed the substantial increases in oil pricing, were initiated on a single day in February, 2006. Several jurisdictions coordinated their resources and began their enforcement actions in sequence, initiating investigations one after the other from Asia to Europe to North America. Similarly, in the marine hose investigation, the DOJ engineered a covert investigation, in conjunction with enforcement agencies around the world, which resulted in a videotaped meeting and the arrest of eight non-U.S citizens in the U.S. The United States, the European Commission, the United Kingdom, Japan, Australia, and Brazil have all initiated investigations of the marine hose market. Cartel investigations have become truly global enterprises and those who participate in cartel conduct today should anticipate multiple investigations and penalties from enforcers far beyond their national borders. This was unimaginable at the time of earlier economic downturns.

Although short-term solutions relating to price and market share are a great temptation for corporate executives trying to achieve profitability and stability for their corporations, engaging in even a short-term cartel is enormously more dangerous than it was in the 1990s. The likelihood of detection because of leniency programs, the virtual certainty that individuals will be charged criminally, jailed, and fired from their positions and the fact that multiple investigations will be initiated and multiple penalties will be assessed in jurisdictions around the world are staggering considerations for any corporation in the U.S. or around the globe. This is a time, therefore, for corporations to enhance their antitrust compliance programs by making certain that executives understand how dangerous the cartel option is for the company's long-term future and for their careers—short- and long-term. Compliance today means candid explanations of how an executive should conduct himself—how he can be pulled into illegal behavior and how he can get himself out. Today's cartel cases are no longer just overt agreements to set a specific price, they are much more sophisticated and nuanced arrangements affecting market shares, discounts, and other sales arrangements.

Compliance training should advise the executive of the power of leniency and why the executive cannot trust his competitor. Whether an executive is prosecuted will often depend on his interaction with the person who will become the leniency applicant and how that individual interprets their conversations or action. If an executive does not affirmatively tell his competitor that he will not discuss prices or discounts, the competitor can easily assume agreement—and disclose that as part of a leniency

application. Executives need to be vigilant in ways they would not have imagined in earlier downturns—and compliance training must be very sophisticated and interactive. The executive also needs to know the consequences of his conduct—he needs to be aware that his career will end abruptly if he is caught violating the antitrust laws, but if he reports improper conduct he could be spared such treatment.³ Compliance training needs to focus on today’s conditions so the executive understands how dangerous it is to even think about the quick fix with the competitors.⁴ Because human nature is ever hopeful for the quick, short-term solution, the best time for rigorous antitrust compliance training is when corporate executives feel the world is collapsing around them. Sophisticated compliance training today is a way for corporations and their executives to avoid repeating the mistakes of the past—and the severe penalties and consequences of current enforcement.

³ For a discussion of a corporate policy to encourage executives to report their improper conduct, see Donald C. Klawiter and Jennifer M. Driscoll, *A New Approach to Compliance: True Corporate Learning for Executives*, ANTITRUST 77 (Summer 2008).

⁴ For a description of how to present compliance training to senior executives, see Donald C. Klawiter and Jennifer M. Driscoll, *Antitrust Compliance in the Age of Multi-Jurisdictional Leniency: New Ideas and New Challenges*, 2009 ANTITRUST REVIEW OF THE AMERICAS, 21.