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I. INTRODUCTION

International cartel enforcement is the centerpiece of the antitrust world today and is certainly a subject of concern and anxiety for corporate boards and executives throughout the world. While it seems that this very powerful enforcement program has long dominated antitrust practice, it has been active and effective for less than twenty years.

Twenty years ago, the European Commission and the Antitrust Division of the U.S. Department of Justice were aggressively pursuing national, regional, and local cartels within their own borders, but there was little effective action beyond those borders. There was virtually no cooperation or coordination among enforcement agencies. Indeed, there were blocking statutes to prevent such cooperation and a high degree of suspicion among enforcers.

In the United States, penalties were calculated and assessed, but the Antitrust Division seemed content with the $10 million statutory maximum, and little thought was given to invoking the relatively new "twice the gain, twice the loss" alternative fine statute, 18 U.S.C. § 3571(d). Some defendant executives faced short jail sentences, but many executives steered through the system successfully with probation or home detention sentences. In Europe, corporate fines were assessed regularly, but the fines were within the range that corporations could reasonably afford. Cartel cases in other countries were rare and very limited. Only a few visionaries—such as Eleanor Fox and John Shenefield—saw a major international movement to rid the world of multinational cartels that many thought did not exist at all.

Today, we live in an enforcement environment of coordinated multi-jurisdictional raids, interrelated leniency programs, and truly draconian corporate and individual penalties. The drama of the lysine and marine hose cartels, both caught on surveillance video, demonstrated the powerful tools at the command of the enforcers and the powerful images and words that were uttered at actual cartel meetings. The explosion of stiff sentences—both corporate and individual—has enhanced the deterrence calculation considerably; yet, at the same time, more and more cases continue to be uncovered and investigated.

This brief essay will attempt to answer two important questions that affect the current state of international cartel enforcement: (1) Are individual criminal penalties reaching the tipping point, i.e. the point where non-U.S. executives will not submit to U.S. jurisdiction and U.S. executives will take their chances at trial, thus changing the enforcement calculus considerably; and (2) Is U.S. case selection limited only to a few industries at a time, and does that affect deterrence?

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II. ARE INDIVIDUAL CRIMINAL PENALTIES REACHING THE TIPPING POINT?

Individual penalties, especially for non-U.S. citizens, have changed considerably in the past fifteen years. The United States is still virtually alone in punishing defendant executives with jail terms—including many who voluntarily surrender to U.S. jurisdiction. While a significant number of non-U.S. defendant executives enter into plea agreements and provide creditability for the criminal program, a percentage also decline to surrender and remain "international fugitives." As fugitives, they are listed on the INTERPOL Red Notice and are subject to apprehension at many borders around the world. These defendants must watch their travel plans closely and also worry about the prospect of extradition now or in the future. Among the U.S.-based defendant executives, few go to trial, and fewer still are found guilty at trial.

With the duration of sentences increasing year by year, we may be approaching the point where more non-U.S. executives will refuse to surrender to U.S. jurisdiction and more U.S. executives will go to trial. Fewer cooperating non-U.S. defendant executives—and more trials of U.S. defendant executives—will certainly impact the Antirust Division's resources and would drastically change the enforcement environment in the United States.

From my experience representing corporations and their executives in international cartel cases over many years, two things terrify these defendant executives—going to jail for even a week and losing their high level corporate positions (some are actually more terrified of losing their corporate positions than of going to jail.). In that environment, the Antitrust Division has been disciplined and systematic in building its sentencing policy around the Sentencing Guidelines Amendments that followed the enactment of the Antirust Criminal Penalty Enhancement and Reform Act of 2004, the statute that increased the maximum jail sentence to ten years. The Amendments clearly had the effect of increasing jail penalties for virtually all defendant executives.

Why has the Division been so successful so far in obtaining increasingly higher sentences? A little history is useful.[2] When the Antitrust Division lost the GE/DeBeers industrial diamond case in 1994, it realized that it needed evidence from non-U.S. witnesses to prove agreements in these international cases. At the same time, it could not give the non-U.S. executives immunity to testify against their U.S. co-conspirators, lest the jury properly question their credibility. The Division proposed that the non-U.S. executives plead guilty to a felony and pay a fine but not serve jail time. The non-U.S. executives saw that as a deal breaker because their felony conviction would likely bar their ability to travel to the U.S. again. Why plead guilty and pay a fine if you couldn't travel to the United States ever again—the executive could stay out of the United States on his own without the humiliation of a plea and fine.

The Antitrust Division countered this argument by arranging with the U.S. immigration authorities that a cooperating defendant have their travel status reinstated. This arrangement attracted many non-U.S. defendant executives to enter plea agreements that produced great results for the Division in lysine, citric acid, sorbates, graphite electrodes, and other early cases. The ability to travel freely to the United States was a powerful incentive to cooperate.

[2] For a more detailed analysis, *see* Donald C. Klawiter, *Antitrust Criminal Sanctions: The Evolution of Executive Punishment*, 6(2) COMPETITIVE POL'Y INT'L, 83 (Autumn 2010).

After a few years, it became clear that there was a great disparity in punishment—the "U.S. citizen penalty." The starkest example came in a case where the two alleged leaders of the cartel were treated very differently. The European executive pled guilty and paid a fine that the company bankrolled, and he traveled freely; his U.S. counterpart served more than a year in jail and paid his own substantial fine. Soon thereafter, the Division's policy changed to require non-U.S. defendant executives to serve a short jail term as part of any plea agreement.

Little by little, sentences of non-U.S. executives increased. The first breakthrough came in vitamins where the non-U.S. defendant executives received three and four month sentences. Over time these sentences increased to six and eight months and are now moving to one year—and even eighteen months

According to several non-U.S. defendant executives, the primary reason to take the deal remains the opportunity to travel to the United States and continue their international business careers. They also note the freedom from worry that some border official in Sri Lanka or Chile will arrest them under the INTERPOL notice.

As the Division has moved these sentences from three months to a year or more, the question inevitably moves to the "tipping point" at which most non-U.S. defendant executives will simply refuse to submit to U.S. jurisdiction and take their chances with INTERPOL checks at airports and threats of extradition. Many observers are surprised—even shocked—that the Antitrust Division has persuaded non-U.S. defendant executives to accept three-month sentences, much less one-year sentences, but many have done so.

We do not have available statistics showing how many non-U.S. targets have declined the Division's invitation to negotiate a plea agreement involving jail time. In a few instances, the Division has indicted non-U.S. citizens who thereafter remained fugitives. There are certainly a number of sealed indictments against non-U.S. defendant executives—but no one knows how many and when they might be unsealed.

In the meantime, the Antitrust Division continues to negotiate plea agreements from cooperating defendant executives from around the world. The Division's press releases bear close watching to determine whether we are approaching the tipping point. It is much more important from a deterrence perspective for the Division to bring strong cases with proportional sentences than to have a great harvest of sealed indictments that are unknown to the business world—and of no deterrent value at all.

III. IS U.S. CASE SELECTION LIMITED ONLY TO A FEW INDUSTRIES AND DOES THAT AFFECT DETERRENCE?

One direct consequence of the Antitrust Division's very successful Leniency Program is the concentration of investigations in very few industries. In the late 1990s, there was a concentration of investigations in the food and feed industry, followed by the vitamins industry, followed by the chemical industry. Not only were a few industries the subject of numerous investigations, there was also a heavy enforcement concentration on European companies and their executives, based on the cases that the Division brought during that period.

Today, the concentration is even more focused than it was in the 1990s. The "big three" industries over the past five years are the electronics/computer parts industry, the air cargo/passenger industry, and the automotive parts industry. The electronics and automobile

parts investigations have a very heavy emphasis on Asian companies and executives, based on the cases filed in recent times.

It is actually the Antitrust Division's Leniency Plus Program that is responsible for the concentration of investigations in particular industries. Leniency Plus arises where a company is the target of an antitrust investigation and discovers another cartel or several cartels in other product markets where the company does business. If the company is the first to report the other cartel or cartels, it will receive full leniency for that product or products *and* an additional discount on any fine it is negotiating on the first product. Companies under investigation of the first product understand that Division investigators will, undoubtedly, ask about other products that the company sells. These companies often seek Leniency Plus early in the investigation. The proliferation of Leniency Plus has shaped the Division's investigative agenda over the past decade.

The success of Leniency Plus, particularly in the past five years, has enabled the Antitrust Division to investigate industries product by product until it has literally exhausted the industry. This has been an efficient means of investigation, but it has also meant that the Division is employing its very limited resources on a relatively limited segment of the economy, and sometimes on some very small markets, leaving many other segments of the economy unchecked.

From a deterrence/detection perspective, the Antitrust Division can—and should—devote more resources to investigations of markets that it could evaluate through econometric screens and other scientific devices to check many markets well beyond its Leniency Plus targets. Such careful checks—especially with the use of screens—would capture conduct beyond the clearly predictable march through the Leniency Plus roadmap. This is not to say Leniency Plus should be cut back or ignored; it simply means that to have a greater threat of detection, the investigative targets need to be broader-based in the economy. Deterrence is limited if there appears to be little detection across the economy.

International cartel enforcement has been wildly successful for enforcers around the world. It will remain successful if the Division creates the right incentives for defendant executives to cooperate with it, and broadens the scope of the markets it will look at for new investigations. These modest ideas can enhance and improve what is already the most successful antitrust enforcement tool ever created.