



CPI Antitrust Chronicle

October 2011 (1)

A Good Carrot? U.S. Travel Restrictions in Cartel Enforcement

J. Mark Gidley & Patrick Evers
White & Case LLP

A Good Carrot? U.S. Travel Restrictions in Cartel Enforcement

J. Mark Gidley & Patrick Evers¹

I. INTRODUCTION

Based on an obscure memorandum, foreign executives accused of price-fixing in the United States face a Hobson's Choice: plead guilty and serve time in a U.S. prison, or refuse to plead guilty and incur criminal jeopardy, plus restricted travel to the United States. For executives in the early or middle stages of successful careers in which regular business travel to the United States is essential, the prospect of serving a reduced sentence in a low-security U.S. prison might appear initially as a better option than refusing to plead and risking conviction and a career-ruining ban on travel to the United States.

The Antitrust Division of the U.S. Department of Justice ("DOJ"), recognizing the substantial leverage it possesses as gatekeeper to the world's largest economy, has seized upon this dynamic in negotiating an ever-increasing number of guilty pleas from foreign executives in antitrust investigations. Scott Hammond, Deputy Assistant Attorney General for criminal enforcement at DOJ, recently characterized DOJ's immigration leverage as "a good carrot."²

Disturbingly, the immigration consequences which DOJ brings to bear on plea negotiations in antitrust cases derive from an obscure (and questionable) 1996 Memorandum of Understanding ("MoU") between two U.S. government departments: the Antitrust Division and the Immigration and Naturalization Service ("INS").³ Today, the INS is now the Immigration and Customs Enforcement Division of the Department of Justice ("ICE"). The 1996 MoU states that the INS "considers" criminal antitrust offenses to be "crimes involving moral turpitude," thereby rendering convicted price-fixing offenders inadmissible into the United States for a 15-year period under 18 U.S.C. §1182. The untested memorandum of the U.S. government notwithstanding, no court in the United States has *ever* held an antitrust offense to be a crime of moral turpitude.

That antiquated expression, crime involving moral turpitude ("CIMT"), is typically reserved for "inherently base, vile or depraved" crimes, such as bank robbery and attempted murder. As such, there appears to be no legal basis whatsoever to ban antitrust offenders from the United States for such lengthy periods, or to threaten them with such in the course of plea negotiations under the CIMT rubric. Until the legality of characterizing antitrust offenses as CIMTs is challenged, however, DOJ is likely to continue to convince foreign executives to submit to U.S. prisons regardless of the strength of the government's case against them.

¹ J. Mark Gidley is Partner & Chair of the Global Antitrust/Competition Practice at White & Case LLP, and Member of the NY and DC bars. Patrick Evers is an associate of White & Case LLP, and a Member of the NY bar. The views expressed in this article are solely those of the authors and are not necessarily those of White & Case LLP or of any client.

² See, *U.S. Accused of Unfair Antitrust Tactic*, FINANCIAL TIMES (September 20, 2011).

³ See, Grannon, E., *DOJ Leverages Immigration Laws In Antitrust Criminal Cases*, Washington Legal Foundation, May 21, 2010, available at <http://www.wlf.org/Upload/legalstudies/counselsadvisory/5-21-10Grannon_CounselsAdvisory.pdf> (last viewed October 11, 2011).

II. DOJ'S PURSUIT OF FOREIGN EXECUTIVES

The primary goal of the U.S. antitrust enforcement system is the detection, prosecution, and deterrence of criminal cartels. In an increasingly globalized business environment, cartels frequently operate on an international level, with effects reaching many national and international markets. In order to detect and prosecute international cartel conduct affecting U.S. consumers, DOJ has focused, over the past decade in particular, on prosecuting individuals beyond its borders.

During the 1990s, recognizing its jurisdictional and investigative limits, the Antitrust Division routinely offered “no jail” sentencing recommendations to secure admissions of guilt and encourage foreign executives to submit to U.S. jurisdiction. In fact, up until May 1999, not a single foreign executive had served time in a U.S. prison for contravening the Sherman Act.

Since then, however, DOJ has increasingly emphasized that the most effective way to deter and punish cartel conduct is to send the executives responsible to prison. Since 1999, 49 foreign executives have served (or are currently serving) prison sentences for antitrust violations.⁴ The average prison sentence for a foreign national in 2010 was 10 months, more than three times the average sentence from 2000 to 2005.⁵ In large part, this staggering uptick in guilty pleas and substantial prison terms for foreign executives can be attributed to a little known and legally untested 5-page memorandum.

III. THE 1996 MOU

The 1996 MoU recognizes in its preamble that the successful prosecution of international cartel activity “requires the cooperation of aliens.” The MoU sets out that INS “considers” criminal Sherman Act violations to be “crimes involving moral turpitude” which may subject the offender to “exclusion or deportation from the United States.” Faced with such a possibility, foreign executives may be more willing to enter pleas and provide assistance to the DOJ.

The MoU observes that the “chief inducement” for a foreign executive to plead guilty to a criminal antitrust offense in the United States is “to resume travel for business activities in the United States.” Accordingly, the MoU establishes a protocol whereby DOJ may apply to INS (now ICE) requesting that a “cooperating alien” be granted a deferral of deportation or a waiver of inadmissibility to the United States. The deferral or waiver in turn precludes the application of 8 U.S.C. §1182, which provides that any individual convicted of a crime of moral turpitude may be deported and is thereafter excludable from United States for a 15-year period.⁶ There is no authority, however, to suggest that antitrust offenses are CIMTs implicating 8 U.S.C. 1182.

IV. MORAL TURPITUDE

The term “moral turpitude” has been part of the legal lexicon for centuries but has never been clearly defined in the United States. American courts have recognized that the term refers to moral rather than legal standards, and therefore “[t]he borderline of ‘moral turpitude’ is not

⁴ See, U.S. DOJ, ANTITRUST DIVISION UPDATE, (Spring 2011), *available at* <<http://www.justice.gov/atr/public/division-update/2011/criminal-program.html>> (last viewed October 11, 2011).

⁵ *Id.*

⁶ See, 8 U.S.C. §1182(a)(2)(A)(i)(I); §1182(h)(I)(A)(i).

an easy one to locate.”⁷ Because moral standards change over time, so too does society’s view of what is morally unacceptable. Indeed, certain conduct which was once considered morally reprehensible is now commonplace. For example, as one court has noted, abortion was once unacceptable and is now not only accepted, but is considered a constitutional right.⁸

While “moral turpitude” lacks any clear definition under U.S. law, a crime involving moral turpitude generally must: (1) be “inherently base, vile or depraved;” and (2) violate societal moral standards.⁹ Courts have considered a wide range of offenses to be CIMTs, including attempted robbery, narcotics possession, embezzlement, assault, and attempted murder. No U.S. court, however, has considered an antitrust offense to belong among this list of predominantly violent or fraud-related crimes. The Board of Immigration Appeals (“BIA”) has not held a Sherman Act offense to be a CIMT. Moreover, BIA deportation orders have been overturned for failure to prove that the alleged deportable offense was a CIMT.¹⁰

Importantly, courts have held that where an act is only *statutorily* prohibited, rather than inherently wrong, it will not involve moral turpitude.¹¹ U.S. Sherman Act offenses, of course, are entirely statutory in nature and therefore cannot be considered crimes of moral turpitude. While antitrust offenses certainly violate economic principles entrenched in U.S. law and can cause substantial financial injuries, the offenses cannot be “inherently evil.”

In fact, the same section and language of the U.S. Sherman Act which courts have held to involve *per se* offenses appropriate for criminal prosecution (15 U.S.C. §1), also is the same section of U.S. law held to govern conduct which is judged only under a civil “rule of reason” which may involve perfectly legal and legitimate forms of cooperation among competitors, such as joint ventures, trade association activities, or buy-sell contracts. The statutory prohibition in the Sherman Act simply makes “restraints of trade” illegal.¹² In fact, the U.S. Supreme Court has made it clear that the majority of restraints of trade under this “restraint of trade” statutory language are to be viewed through the deferential “rule of reason” and are not illegal *per se*.¹³ Many are surprised to learn that U.S. statutory law does not even make “price-fixing” illegal in so many words; the term “price-fixing” does not appear in the Sherman Act itself.

When applied to foreign executives based in jurisdictions where antitrust violations are not even criminalized (such as Europe), or where cultural factors create a more horizontally collaborative business environment (such as certain Asian countries), the U.S. government’s

⁷ See, *Portaluppi v. Shell Oil Company*, 684 F.Supp 900, 903 (E.D.Va. 1988) (quoting *Quilodran-Brau v. Holland*, 232 F.2d 183, 184 (3d Cir. 1956)).

⁸ See, *Portaluppi*, 684 F.Supp at 904, citing *Roe v. Wade*, 410 U.S. 113 (1973).

⁹ See, *Morales v. Gonzales*, 478 F.3d 972, 978 (9th Cir. 2007).

¹⁰ See, *Hamdan v. INS*, 98 F.3d 183 (5th Cir. 1996) (holding that INS had not proven the offense of simple kidnapping was a CIMT).

¹¹ See, *Quintero-Salazar v. Keisler*, 506 F.3d 688, 693 (9th Cir. 2007) (holding that statutory rape is *not* a CIMT); see also *Hamdan*, 98 F.3d at 186 (“it is the nature of the act itself and not the statutory prohibition of it which renders a crime one of moral turpitude.”) (internal citations omitted).

¹² §1 of the Sherman Act literally prohibits “[e]very contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States.” “While §1 could be interpreted to proscribe all contracts, the Court has never ‘taken a literal approach to [its] language.’” *Leegin Creative Leather Prods. Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007) (citations omitted).

¹³ See, *Texaco, Inc. v. Dagher*, 547 U.S. 1, 5 (2006) (“this Court presumptively applies rule of reason analysis, under which antitrust plaintiffs must demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive before it will be found unlawful.”).

position that antitrust offenses are CIMTs sufficient to subject a non-U.S. citizen to a lengthy immigration ban or deportation is neither fair nor appropriate. The European Commission does not criminally prosecute price-fixing. Even the United Kingdom, which unlike most of Europe has recently made price-fixing a crime (in 2003), has done so only through legislation. The U.K. Law Lords have expressly rejected U.S. Sherman Act price-fixing as being equivalent to fraud, in considering the question of dual criminality between the United Kingdom and the United States, prior to the enactment of the U.K. statute.¹⁴

V. CONCLUSION

The stated aim of DOJ's criminal enforcement actions against foreign executives is "proportionality"; that is, "treating similarly situated foreign cartel members no differently than their U.S. co-conspirators."¹⁵ But DOJ's immigration policy with respect to antitrust enforcement is anything but proportional—it is targeted purely at foreign antitrust violators who must travel to the United States to do business.

A U.S. citizen under investigation for an antitrust offense may still travel freely within the United States and abroad to conduct business while his counsel negotiates with DOJ and tests the strength of DOJ's case against them. A foreign executive accused of the same offense, however, may find himself on a U.S. border watch and, if indicted, an Interpol "Red Notice" list preventing travel to the United States, and creating the risk of extradition from any of Interpol's 188 member countries. Moreover, the foreign executive may be threatened with the possibility of conviction, a lengthy prison sentence and a 15-year travel ban to the United States.

Using this leverage, the Division has convinced 49 foreign executives in 12 years to plead guilty to U.S. antitrust violations. Given DOJ's success in leveraging immigration laws as a negotiating tool in antitrust investigations, DOJ's public characterization of its policy as "a good carrot" is understandable. That the carrot has no basis in law should be a cause for concern for all.

¹⁴ See, *Norris (Appellant) v. Government of the United States (Respondent)*, [2008] UKHL 16 (describing §1 of the U.S. Sherman Act as "a statutory offence of strict liability. It does not require proof of fraud, deception or dishonesty.").

¹⁵ See, *Foreign Execs Feel Antitrust Crackdown*, 30(9) NAT'L L.J., (October 2007).