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The Autumn 2010 issue of *Competition Policy International* included a grim portrait of anticartel enforcement painted by Professor John Connor.² He asserted that cartel recidivism is common and “appears to be increasing rapidly,” which he argues “is symptomatic of flaws in the structure of anti-cartel enforcement.”³ A high rate of recidivism would demonstrate the failure of specific (or special) deterrence, i.e., that many companies sanctioned for cartel offenses nonetheless were not deterred from engaging in future cartel activity. A conspicuous failure of specific deterrence also would suggest that cartel enforcement is failing to achieve its primary goal—general deterrence. However, the portrait Professor Connor painted does not resemble cartel enforcement in the United States today.

In ordinary usage, “recidivism” means “relapsing into crime,”⁴ and in the field of crime and punishment, the word is used precisely that way:

When recidivism is discussed in a correctional context, its meaning seems fairly clear. The word is derived from the Latin *recidere*, to fall back. A recidivist is one who, after release from custody for having committed a crime, is not rehabilitated. Instead, he or she falls back, or relapses, into former behavior patterns and commits more crimes.⁵

Criminal justice statistics measure recidivism in many ways, but all entail looking for a fact pattern indicative of relapsing into crime.⁶

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² John M. Connor, *Recidivism Revealed: Private International Cartels 1990–2009*, COMPETITION POL’Y INT’L, 101 (Autumn 2010).

³ *Id.* at 101, 103.

⁴ THE COMPACT OXFORD ENGLISH DICTIONARY 1525 (2d ed. 1991).

⁵ MICHAEL D. MALTZ, RECIDIVISM 54 (1984), available at <http://www.uic.edu/depts/lib/forr/pdf/crimjust/recidivism.pdf>.

⁶ The Bureau of Justice Statistics website observes: “There is no single definition of recidivism. However, all definitions share three common traits. Each has a starting event, such as release from custody, program completion, or placed on probation. Next, each has a measure of failure following the starting event, such as a subsequent arrest, a subsequent arrest for a violent crime, a conviction resulting from a subsequent arrest, or a new commitment resulting from a subsequent arrest. Finally, each has a recidivism window (e.g., 6 months, one year, two years, three years, etc.) beginning with the date of the starting event. Put together, an individual is said to have recidivated if the individual has a failure event within the recidivism window.” [Http://bjs.ojp.usdoj.gov/index.cfm?ty=datool&surl=/recidivism/index.cfm#](http://bjs.ojp.usdoj.gov/index.cfm?ty=datool&surl=/recidivism/index.cfm#). See MALTZ, *supra* note 4, at 54–67; Nicole Leeper Piquero, *Recidivism*, in 3 ENCYCLOPEDIA OF CRIMINOLOGY 1411, 1411–12 (Richard A. Wright & J. Mitchell Miller eds., 2005).

Professor Connor initially defined recidivism as offending “after having been sanctioned previously for” the same offense, but he immediately abandoned this definition by branding a company “as a recidivist . . . if it is convicted a second time for cartel conduct, no matter where or when the earlier violation took place.”⁷ While recognizing that “legal authorities may not consider a company that was engaged in contemporaneous cartels to be a recidivist because one illegal act did not precede the other,”⁸ Professor Connor elected not to investigate when a company participated in cartels relative to when it was convicted. Rather, he identified companies that had participated in more than one international cartel, anywhere in the world, at any time during 1990–2009.⁹

Professor Connor counted the total number of international cartels in which each multiple offender had participated during 1990–2009. For companies that merged during that time period, he attributed to the successor the sum of the cartel offenses attributed to the predecessors.¹⁰ A company that was the product of several mergers could have ended up with a double-digit cartel count even if the merged company itself had never engaged in cartel activity and even if none of its predecessor companies ever relapsed into cartel activity. This could help explain the extraordinarily high cartel counts: for 6 companies, the count was 20 or more cartels, and for 20 additional companies, the count was 10 or more cartels.¹¹

Professor Connor went back to 1990 in identifying recidivism, but much has changed since then to enhance the deterrent effect of cartel enforcement in the United States. Critically, the Antitrust Division’s leniency program was revamped in 1993,¹² and it became the Division’s most powerful tool for detecting cartels and securing the convictions of cartel participants. Prosecutions assisted by leniency applicants accounted for over 90 percent of the total commerce affected by all the cartels prosecuted by the Division since 1999. The sanctions imposed in U.S. cartel cases also ratcheted up in the 1990s. In 1996 a \$100 million fine for cartel activity was imposed for the first time, and a fine of at least that much has now been imposed 18 times. During fiscal years 1990–99, 27 individuals with a cartel conviction were sentenced to prison terms of at least one year, but during fiscal years 2000–09 that number nearly doubled to 50.

In the 1990s international cartels became a central focus of the Antitrust Division. The Division had long viewed imprisonment of culpable individuals as critical to effective deterrence, but, for most of the 1990s, the Division had to give up on the possibility of prison sentences for non-U.S. citizens who participated in international cartels in order to secure admissions of guilt, cooperation, and submission to U.S. jurisdiction. That practice came to an end with the prosecution of the vitamins cartels. Six non-U.S. citizens were imprisoned within a year, with the first sentenced on July 23, 1999.¹³ From that date to the present, a total of 47 non-U.S. citizens

⁷ Connor, *supra* note 1, at 103.

⁸ *Id.* at 105.

⁹ *Id.* at 104–05. Without regard to where a cartel operated, Professor Connor termed it “international” if its participants were not all headquartered in the same country. He was less clear about what qualified as a cartel. He noted that he included conduct that only private damages plaintiffs alleged to have been cartel activity if they obtained a settlement. *Id.* at 126 n.48.

¹⁰ *Id.* at 104, 116.

¹¹ *Id.* at 116–17.

¹² ANTITRUST DIVISION, U.S. DEP’T OF JUSTICE, CORPORATE LENIENCY POLICY (Aug. 10, 1993), *available at* <http://www.justice.gov/atr/public/guidelines/0091.pdf>.

¹³ The first individual to be sentenced to prison in conjunction with the vitamins cartels was Dr. Kumo Sommer, a Swiss citizen and employee of F. Hoffman–La Roche Ltd. He entered into a plea agreement jointly

have been sentenced by U.S. courts to prison terms for cartel activity, with 9 receiving sentences of at least one year.¹⁴

The Antitrust Division has been able to secure prison sentences for culpable non-U.S. citizens because the leniency program and improved cooperation with competition and law enforcement agencies in other countries have substantially enhanced the Division's ability to access evidence outside the United States and secure jurisdiction over culpable individuals abroad. Our foreign counterparts began to cooperate and conduct parallel investigations resulting in sanctions.¹⁵ Changing attitudes toward cartels by authorities in other countries occurred gradually, but 1998 was a watershed year for Europe: The OECD for the first time formally supported aggressive cartel enforcement;¹⁶ the European Commission's Directorate General for Competition created a special unit to investigate cartels¹⁷ and decided its first cartel cases under its new leniency program;¹⁸ and the Commission issued its first fines guidelines.¹⁹

Using as the starting point the day on which the first prison sentence was imposed on a non-U.S. defendant in an international cartel prosecution,²⁰ we thoroughly reviewed the pertinent records. Although Professor Connor considered only international cartels, we imposed no similar restrictions. Nevertheless, we found not even a single instance of cartel recidivism within the United States. No company and no individual convicted in the United States of a cartel offense after July 23, 1999 subsequently joined a cartel prosecuted in the United States. Moreover, no company and no individual granted conditional leniency after July 23, 1999 subsequently joined a cartel prosecuted in the United States.

recommending a fine of \$100,000 and a prison sentence of four months, both of which were imposed by the court. Although Dr. Sommer was convicted of both engaging in cartel activity and making false statements to the government, the five other individuals were convicted only of cartel activity, and their sentences ranged from three to five months. These sentences began a new era for cartel enforcement. See Scott D. Hammond, Charting New Waters in International Criminal Prosecutions, Address at the National Institute on White Collar Crime 1–5 (Mar. 2, 2006), available at <http://www.justice.gov/atr/public/speeches/214861.pdf>.

¹⁴ Since July 23, 1999, 102 U.S. citizens have been sentenced by U.S. courts to prison terms for cartel activity, with 49 receiving sentences of at least one year.

¹⁵ See Simon J. Evenett, Margaret C. Levenstein & Valerie Y. Suslow, *International Cartel Enforcement: Lessons from the 1990s*, 24 THE WORLD ECONOMY 1221, 1237–38 (2001) (“The 1990s saw a sea change in official attitudes toward cartel enforcement. At the start of the decade, only one industrial nation—the United States—was taking aggressive action against international cartels, and these actions were criticised by other governments as an improper extraterritorial application of domestic antitrust law. By decade’s end, several high profile enforcement actions have convinced policymakers in other industrial countries that stronger measures against international cartels ought to be taken.”); Hammond, *supra* note 12, at 6–12.

¹⁶ Organization for Economic Co-Operation and Development (OECD), Recommendation of the Council Concerning Effective Action Against Hard Core Cartels (adopted Mar. 25, 1998), reprinted in OECD, HARD CORE CARTELS 57–60 (2000).

¹⁷ See Commission strengthens the fight against the cartels, Commission Press Release IP98/1060.

¹⁸ See Olivier Guersent, *The Fight against Secret Horizontal Agreement in the EC Competition Policy*, in 2003 FORDHAM CORPORATE LAW INSTITUTE 43, App-6 (Barry Hawk ed., 2004).

¹⁹ Guidelines on the method of setting fines imposed pursuant to Article 15 (2) of Regulation No 17 and Article 65 (5) of the ECSC Treaty, 1998 OJ (C9) 3.

²⁰ Going back roughly ten years parallels the treatment of prior history in the Sentencing Guidelines which are applicable in all criminal cases in the U.S. federal courts. The Guidelines add to a company's “culpability score” if it committed the same offense in the prior ten years. See 1 U.S. SENTENCING COMM’N, FEDERAL SENTENCING GUIDELINES MANUAL § 8C2.5 (2010).

Judge Ginsburg & Professor Wright observe that, over just the past few decades, several companies were convicted more than once in the United States for engaging in cartel activity, and they opine that this “tends to suggest there is a problem with recidivism.”²¹ But a close examination of the charges reveals that no company with multiple convictions after July 23, 1999 relapsed into cartel activity.

Bayer affiliates were convicted three times in 2004 and 2005, but their participation in the three cartels had terminated by the end of 2002.²² Ajinomoto was convicted in 2000 and 2002 for its simultaneous participation in two separate international cartels, but its role in both had ended by the time it was charged in conjunction with either cartel.²³ Degussa affiliates were convicted in 2002 and again in 2004, but their participation in both cartels had ended in 1998.²⁴ Akzo Nobel is the only remaining company convicted of multiple cartel offenses in the United States since July 23, 1999.²⁵ Akzo Nobel affiliates were convicted in 2001 and 2006, and the latter conviction was for cartel participation that ended after the prior conviction; however, Akzo Nobel joined the later cartel years before the earlier conviction.²⁶ Thus, none of these companies relapsed into cartel activity after being convicted.

²¹ Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Sanctions*, COMPETITION POL'Y INT'L, Autumn 2010, at 3, 15.

²² See Information, United States v. Bayer AG, No. CR 04-0331 (N.D. Cal. Oct. 13, 2004) (charging participation in a cartel involving acrylonitrile-butadiene rubber from May 14, 2002 to Dec. 31, 2002), *available at* <http://www.justice.gov/atr/cases/f205900/205904.pdf> (sentenced Dec. 8, 2004); Information, United States v. Bayer Corp., No. CR 04-0318 (N.D. Cal. Sept. 30, 2004) (charging participation in a cartel involving aliphatic polyester polyols from Feb. 1998 to Dec. 2002), *available at* <http://www.justice.gov/atr/cases/f206100/206198.pdf> (sentenced May 24, 2005); Information, United States v. Bayer AG, No. CR 04-0235 (N.D. Cal. July 14, 2004) (charging participation in a cartel involving certain rubber chemicals from July 1995 to Dec. 2001), *available at* <http://www.justice.gov/atr/cases/f204800/204899.pdf> (sentenced Dec. 9, 2004).

²³ See Information, United States v. Ajinomoto Co., Inc., No. 301-CR-279 (N.D. Tex. Aug. 27, 2001) (charging participation in a cartel involving nucleotides from July 1992 to Aug. 1996), *available at* <http://www.justice.gov/atr/cases/f9300/9301.pdf> (sentenced Jan. 10, 2002); Information, United States v. Ajinomoto Co., Inc., No. 96-CR-520 (N.D. Ill. Aug. 27, 1996) (charging participation in a cartel involving lysine from June 1992 to June 27, 1995), *available at* <http://www.justice.gov/atr/cases/f0900/0918.pdf> (sentenced Mar. 8, 2000).

²⁴ See Information, United States v. Degussa U.K. Holdings Ltd., No. CR 04-0300 (N.D. Cal. Sept. 20, 2004) (charging participation in a cartel involving organic peroxides from Aug. 1997 to Mar. 1998), *available at* <http://www.justice.gov/atr/cases/f205600/205610.pdf> (sentenced Oct. 21, 2004); Information, United States v. Degussa-Hüls AG, No. 3:00-CR-187 (N.D. Tex. May 5, 2000) (charging participation in a cartel involving niacin and niacinamide from Jan. 1992 to Mar. 1998), *available at* <http://www.justice.gov/atr/cases/f4600/4687.pdf> (sentenced July 26, 2002).

²⁵ Had the starting date been a few weeks earlier, Hoechst also would have made the list. It was convicted in 1999 and 2003, but its participation in both cartels had ended by 1997. See Information, United States v. Hoechst Aktiengesellschaft, No. CR 03-0035 (N.D. Cal. Feb. 6, 2003) (charging participation in a cartel involving monochloroacetic acid and sodium monochloroacetate from Sept. 1995 to June 1997), *available at* <http://www.justice.gov/atr/cases/f200900/200902.pdf> (sentenced Mar. 7, 2003); Information, United States v. Hoechst Aktiengesellschaft, No. CR 99-0144 (N.D. Cal. May 5, 1999) (charging participation in a cartel involving sorbates from Jan. 1979 to Dec. 1996), *available at* <http://www.justice.gov/atr/cases/f273300/273396.pdf> (sentenced June 18, 1999).

²⁶ See Information, United States v. Akzo Nobel Chemicals International BV, No. CR 06-0160 (N.D. Cal. Mar. 14, 2006) (charging participation in a cartel involving hydrogen peroxide from July 1, 1998 to Dec. 1, 2001), *available at* <http://www.justice.gov/atr/cases/f215000/215060.pdf> (sentenced May 17, 2006); Information, United States v. Akzo Nobel Chemicals BV, No. CR 01-0242 (N.D. Cal. June 27, 2001) (charging participation in a cartel involving

Professor Connor did not identify any instances in which a company joined a cartel affecting the United States after having been sanctioned for cartel activity in the United States, so he did not substantiate his recidivism claims. We searched U.S. enforcement records for instances of cartel recidivism since July 23, 1999 and found none. Meaningful prison terms for both U.S. and non-U.S. citizens eliminated cartel recidivism within the United States. The claim of Professor Connor, and also of Judge Ginsburg & Professor Wright,²⁷ that current cartel sanctions have proved inadequate, therefore, is not supported by the existence of recidivism in the United States.²⁸

We have not investigated cartel recidivism outside of the United States, but we have observed how the presence and absence of individual accountability, with the threat of a prison sentence, have influenced international cartels. On numerous occasions, the Antitrust Division has interviewed members of international cartels who provided first-hand accounts of their participation in cartels that spanned the globe but stopped at the U.S. border because the participants feared going to jail. This eyewitness testimony is compelling evidence that enforcement in the United States is deterring cartel activity.

monochloroacetic acid and sodium monochloroacetate from Sept. 1995 to Aug. 1999), *available at* <http://www.justice.gov/atr/cases/18500/8508.pdf> (sentenced July 20, 2001).

²⁷ Ginsburg & Wright, *supra* note 20, at 14–16, 18.

²⁸ Someone tempted to conclude that the existence of multiple offenses by some companies casts doubt on the adequacy of cartel deterrence should note that only one such offense in the United States involved joining a cartel after the first non-U.S. citizen was sentenced to prison for international cartel activity.