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Are We Winning the Fight Against Cartels?

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I. INTRODUCTION

"In the last two decades, the world has seen the proliferation of effective leniency programs, ever-increasing sanctions for cartel offenses, and a growing global movement to hold individuals criminally accountable," a top antitrust official recently observed.[2] Statistics from several of the largest OECD economies do show dramatic growth in the fines imposed for corporate and (in some jurisdictions) individual cartel activity over the past twenty years. During the same time, prison sentences for cartel participants became more frequent and severe in the United States, while leniency programs and the criminalization of cartel violations spread to more countries. Yet cartels remain a serious and perhaps even a growing problem, as do recidivists.

These trends raise troubling questions. Competition enforcement agencies have been sending stronger and stronger messages to potential offenders for years. But is anyone receiving them? If they are, do they care?

In the past few years, a growing number of commentators have questioned the conventional wisdom that imposing ever-higher fines and stiffer prison sentences are the best ways to deter cartel activity. A controversy has also been brewing about whether competition authorities should reduce the fines levied on companies that had implemented genuine competition compliance programs but whose employees nevertheless participated in cartels. Wherever they stand on these issues, competition authorities will have to come to grips with the criticisms and either persuasively rebut them or adjust their approaches.

II. ARE THE MAIN APPROACHES TO FIGHTING CARTELS WORKING?

Depending on how certain data are interpreted, one might conclude that the policies that competition authorities currently use to promote compliance are not working very well, at least with respect to cartels. Despite striking growth in the average fines for cartel violations in the EU, U.S., and other jurisdictions over the past 20 years, the availability of imprisonment as a punishment for cartelists in more countries, more and lengthier prison sentences for violators in the United States, and the spread of leniency programs, there is evidence that cartels are bigger, more numerous, and more harmful than ever.

Alternatively, the inference that those more severe fines and jail terms are not working so well would be erroneous if a higher percentage of violations are detected now than in the past (perhaps due to the rise of leniency programs) but the total number of detected plus undetected cartels has decreased significantly. Because we cannot know how many cartels go undetected, it is

[1] Senior Expert in Competition Law, Organisation for Economic Co-Operation and Development. The views expressed in this article are the author's and do not necessarily reflect those of the OECD. This article is partially based on a longer forthcoming paper, prepared for the OECD's Competition Committee, soon to be available at www.oecd.org/competition/roundtables.

[2] Scott Hammond, *The Evolution of Criminal Antitrust Enforcement over the Last Two Decades*, Speech before the National Institute on White Collar Crime, p.1 (February 25, 2010).

impossible to be sure how to interpret data on the number of detected cartels. But we can make some interesting observations based on available information.

For example, the total number of detected international cartels rose by a factor of 5.2 from the period 1990-1995 to the period 2004-2007.[3] We might fairly expect that if conventional approaches to deterrence had been working well, the number of cartel cases should have dwindled by 2007.

Still, the number of detected international cartels might have grown not because the deterrents underperformed but because authorities have become so much better at uncovering cartels. The wider adoption of leniency programs, growth in the number of national competition authorities pursuing cartels and sharing information with each other, and a greater focus on international cartels than domestic ones might explain the uptick in detection. Then again, it is possible that the rate of cartel formation increased. Some commentators believe the last factor is at least partially responsible, and they have a good argument: Even if detection rates did increase, it is highly doubtful that they increased by a factor of more than 5. Therefore, cartel formation rates probably rose.

Even if the skeptics are correct, though, one could still choose to stick with the traditional approach by inferring that the problem is simply that fines remain too low, or that prison sentences are too short and not used widely enough. The suitability of fines, imprisonment, and a select few other tools (there are many more) as methods for promoting antitrust compliance are discussed in the following sections.

III. FINES

The European Commission and the U.S. DOJ's Antitrust Division are not the only enforcement agencies that have been imposing higher fines on corporate cartel participants. France's Autorité de la Concurrence, Germany's Bundeskartellamt, and Mexico's Comisión Federal de Competencia, for instance, have also imposed hefty fines for cartel violations in recent years. Should other competition authorities follow suit? And should those who have already increased their fines to very high levels continue to raise them? According to some scholars, higher monetary sanctions are needed to achieve deterrence even in the jurisdictions that have already had years of steeply increasing fines. They argue that the increases should continue until recidivism is greatly reduced.

But if fines are the best way to deter cartels, then we probably should have seen a noteworthy decrease in the number of cartel cases as fines increased. That did not happen. So for now, at least, there still is not any empirical evidence that raising fines even higher would deter cartels more effectively. That has led some commentators to highlight the shortcomings of fines as a means of discouraging cartels.

One drawback to fines is that there are limits to what a corporation can pay and to what sound policy dictates that it should be made to pay. At some point, imposing higher and higher fines can become counterproductive. A very heavy fine might be beyond the ability of a company to pay and thus could cause it to exit the market permanently. The market might then be less competitive than it would have been if the company had been punished but allowed to survive.

[3] John Connor, *The United States Department of Justice Antitrust Division's Cartel Enforcement: Appraisal and Proposals*, American Antitrust Institute Working Paper No 08-02 at 1 (June 2008).

There might also be job losses as a result of the inability to pay. So it is possible for a fine to be optimal for the purpose of achieving deterrence, but sub-optimal for preserving competition or promoting other policy objectives such as employment.

Another drawback is that although there is some intuitive logical appeal to the idea of imposing "optimal" fines that are calculated to reduce the expected value of anticompetitive behavior to zero, doing that consistently in practice is all but impossible. Reliable case-by-case data on the risks of detection and conviction, as well as on the likely amount of the gain from the unlawful conduct, is not usually available.

Furthermore, practical considerations suggest that high corporate fines alone cannot provide sufficient deterrence. The interests of individuals in a company may not align perfectly with the best interests of the company. If executives or officers believe they can advance more rapidly, collect higher bonuses, or gain prestige by padding profits via cartel activity, they may be inclined to do so even though the company could eventually be fined as a result. By then, the responsible individuals may have moved on to another company.

In response to that point, proponents of relying heavily on corporate fines tend to reason that fines have the desired effect on individual behavior because when corporations are stung by optimal fines, they react by putting controls and incentives in place to prevent conduct that could lead to further fines. While that view may make sense for privately held corporations, some observers argue that it does not reflect the reality of how publicly traded corporations function. Directors oversee officers who oversee employees. The owners are shareholders, and most shareholders are merely passive investors who have little control over the corporation's conduct. They therefore cannot prevent price-fixing by the corporation's employees. Instead, they will simply make decisions about buying, holding, and selling their shares based on how the corporation's conduct is affecting profits, and thus the value of their shares, within a given time horizon. In fact, shareholders may benefit greatly from the corporation's participation in a cartel, and the same is true of the directors and officers, who may not only benefit from an increase in the value of their shares but from bonuses and greater prestige triggered by higher profits.

Of course, some agencies impose fines on individuals, as well. But there is not much faith in the deterrent value of individual fines because it is easy for corporations to provide compensation for monetary sanctions on individuals.

IV. IMPRISONMENT

One thing that corporations cannot give back to their executives, officers, and employees is time spent behind bars. Imprisonment, therefore, has the ability to realign individuals' incentives in a way that fines cannot. It is being adopted as a form of cartel deterrence in a growing number of jurisdictions. Seventeen OECD countries now have competition laws that authorize prison terms for cartel offences. The United States has the lion's share of experience with using imprisonment as a deterrent for cartel behavior and has long been an enthusiastic proponent of this approach. Prison sentences for cartelists in the United States have increased quite substantially since 1990, both in the aggregate and in terms of their average length.

Supporters argue that the threat of serving time in jail has unparalleled power to deter cartels. Among other things, they point to the results of a 2007 survey of U.K. businesses, which yielded results that attest to the deterrent power of imprisonment. When asked to rank the factors that motivate compliance with U.K. competition law, the companies rated criminal penalties higher than any other type of sanction. (Interestingly, fines were rated fourth out of five.)

Intuitively, it should not be surprising that prison is a strong deterrent to people who are in a position to form a cartel. U.S. officials cite instances in which their investigations revealed that the threat of imprisonment deterred global cartels from expanding to the United States even though the individual cartel members already operated there.

There are additional reasons for using imprisonment as a sanction for price-fixing. One is that effective deterrence via corporate sanctions alone might require impossibly high fines. The threat of prison helps to shrink any deterrence deficit left by sub-optimal corporate fines. Another advantage is that fining corporations does not necessarily ensure that responsible individuals will have proper incentives to comply with competition laws. It is consumers and shareholders, not abstract corporations, who are hurt most by corporate sanctions. But it is the officers and directors who violated the law or might have prevented the violation. Therefore it is the officers and directors who should typically feel the heat of deterrence, and imprisonment definitely provides that heat.

It is interesting to contrast that view with one expressed by the Deputy Director General for Antitrust of DG COMP, who said in a recent speech that "[i]t is the companies that pocket the extra profits resulting from the cartel and they must therefore bear responsibility for their actions. We believe that such sanctions are able to ensure a high degree of deterrence and that criminal sanctions are not warranted in our enforcement system."[4]

An additional point in favor of imprisonment is that it motivates both individuals and corporations to use leniency programs and cooperate with investigators (at least with respect to leniency programs that offer immunity from jail sentences). Knowing that, in order to avoid prison, employees may expose a company's involvement in cartel activity, that company's board and executives are more likely to apply for corporate leniency when they discover cartel activity and to avoid cartel schemes in the first place whenever possible.

Finally, making a violation punishable by a prison sentence communicates the idea that the activity is not just undesirable, but immoral. That will matter to executives and managers who feel some moral responsibility (or at any rate a moral responsibility to follow the law).

In spite of all those strengths and the incorporation of prison as a sanction for cartel conduct in 17 OECD countries, however, jail sentences are rarely imposed on price-fixers outside Canada and the United States. Clearly, some enforcers and courts are not entirely persuaded by the arguments for imprisonment, and there are detractors among the commentators, as well.

The latter assert, just as they do with respect to escalating fines, that the idea that imprisonment is a highly effective deterrent to cartel activity is under-scrutinized and unproven. In spite of record-level numbers of convictions and sentence lengths for cartel participants in the United States, the available evidence shows that the number, size, and harm to consumers of discovered cartels are all increasing. The detractors also contend that other empirical work provides little support for the idea that jail is a strong deterrent to cartel activity. A 2005 report by the OECD's Competition Committee found that "there is no systematic empirical evidence available to prove the deterrent effects of criminal sanctions or, more importantly, to assess

[4] Cecilio Madero Villarejo, *Introductory Remarks*, Speech before IBA/KBA Competition Law Conference Seoul, (April 28, 2011).

whether the marginal benefit of introducing sanctions against individuals . . . exceeds the additional costs that a system of criminal sanctions entails[.]"[5]

Critics have also emphasized that the choice to comply or not to comply with a law is influenced by the degree to which society accepts the idea that the illegal behavior should be illegal and that, if it is punishable with criminal sanctions, it should be treated as a crime. There needs to be a general consensus, in other words, that the conduct is very harmful and that criminal sanctions are appropriate. In this regard, it appears that at least two competition authorities have some advocacy work to do. A review of hundreds of U.S. newspapers, magazines, and trade publications over the period 1990-2009 by Daniel Sokol shows that accounting fraud cases received far more attention in the press than cartel cases, despite the fact that global cartel overcharges in some cases have been more significant than the biggest accounting frauds of the last decade.[6] Similarly, Florian Wagner-von Papp recently criticized the lack of publicity in Germany of the Bundeskartellamt's criminal convictions.[7]

The implications are that cartels do not matter much outside the insular world of antitrust practitioners and companies that have already been caught, and that competition authorities have been inattentive in allowing that to happen. That needs to change so that the full compliance benefits of a pro-competition society can be achieved.

V. REPUTATIONAL EFFECTS

One potential alternative or complement to fines and jail is to use reputational effects as a deterrent. Both corporations and individuals suffer reputational damage when they are prosecuted for competition law violations. That damage can be leveraged to discourage potential cartelists. For example, one way to do that is simply to publicize findings of infringements. Most competition agencies issue a press release when a defendant is found to have violated the law. Brazil's CADE can go farther, though, by requiring competition law violators to publish (at their own expense) an acknowledgement of their infringement in newspapers. Similarly, France's Autorité de la Concurrence can order violators to pay for an infringement announcement in newspapers or to disclose the infringement in the company's own annual report. Those are good ideas that should be implemented in more jurisdictions.

Another approach is debarment, also known as disqualification. Like imprisonment, debarment is a sanction aimed at individuals. Rather than taking away all of the defendant's liberties, though, debarment only removes the offender from his or her position as a company's director, officer, or manager and prevents him or her from serving in a similar capacity in any company for some period. Both prison and debarment tarnish the defendant's reputation, prevent recidivism by individuals, and, when imposed on directors or executives, virtually guarantee that the way a company does business will change. That is something that fines do not necessarily do. But debarment is much less expensive to society than incarceration.

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[5] OECD, *Hard Core Cartels: Third Report on the Implementation of the 1998 Council Recommendation* 27 (2005), *available at* www.oecd.org/dataoecd/58/1/35863307.pdf .

[6] D. Daniel Sokol, *Cartels, Corporate Compliance and What Practitioners Really Think About Enforcement*, 78 ANTITRUST L.J. __ (2012) (forthcoming).

[7] Florian Wagner-von Papp, *Criminal Antitrust Law Enforcement in Germany*, CRIMINALISING CARTELS (Caron Beaton-Wells & Ariel Ezrachi, eds. 2011).

Debarment seems to be a potent sanction. A 2010 survey of U.K. corporations commissioned by the Office of Fair Trading ("OFT")_found that debarment is the second most powerful deterrent (behind criminal penalties) of competition law violations. In the United Kingdom, regulators may seek court orders debarring directors from serving again as directors or participating in the management of any U.K. company for up to 15 years.

Debarment is also a possible penalty for price-fixers in Australia, Canada, Slovenia, Spain, and Sweden. In the United States, there is some precedent for the use of debarment, but not directly in the antitrust context. The FTC has signed consent decrees that have the same effect as debarments, but only in consumer protection matters.

To the extent that the fear of reputational damage has a strong influence on behavior, it raises the possibility that being prosecuted is more important than the severity of fines or imprisonment, at least to some potential offenders. In fact, Christine Parker states, "[e]mpirical deterrence research persistently finds that the factors that make the most difference to compliance behaviour are the perceived likelihood[s] of detection and enforcement, rather than the objective severity and subjective fearsomeness of the sanctions imposed."[8] That suggests Gary Becker was wrong when he theorized that the probability of detection and the magnitude of sanctions are equally important and can be used interchangeably by enforcement agencies. Competition authorities might deter more violations by raising the probability of detection than by continuing to ratchet up the consequences of detection.

VI. COMPETITION COMPLIANCE PROGRAMS

Another way to deter cartel activity is to encourage corporations to implement effective competition compliance programs. There is no international consensus on whether companies that have antitrust compliance programs ("CPs") but nevertheless violate competition laws should receive lighter sanctions. In the United Kingdom, for example, the OFT may reduce a defendant's fine by up to ten percent if it has a CP. Some other authorities, such as the U.S. DOJ and the European Commission, are neutral toward CPs, neither awarding reductions nor enhancing fines if a defendant has a CP in place.

An interesting debate has been taking place in speeches and in the literature. Those who say CPs should be ignored tend to ask why any credit should be given for a program that did not work. They also argue that giving a discount for CPs will actually encourage cartels by making them cheaper. Those in favor of awarding credit for CPs usually reply that if the program is genuine, one or two bad apples should not represent the whole barrel and the program might be doing a lot of good by preventing other cartels from forming. Proponents also tend to argue that the way to handle companies who would view the discounts as a means of making cartel activity cheaper is to penalize them for having sham programs.

But, say the opponents, any good that the CP does is its own reward. After all, it keeps the company out of trouble and thereby saves money by avoiding fines. So why pile on reductions when cartels are formed in spite of the CP? Yes, the proponents respond, but it is not only the company itself that benefits when it stays out of cartel trouble. Consumers benefit, too, as do the competition authority and the courts, which will save resources and be able to devote them to

[8] Christine Parker, *Criminal Cartel Sanctions and Compliance: The Gap between Rhetoric and Reality*, THE REFORM OF EC COMPETITION LAW: NEW CHALLENGES (Ioannis Lianos & Ioannis Kokkoris, eds. 2010) 250.

other matters. To better reflect the total level of benefits from CPs, then, a reduction should be granted for having a good one.

In any case, if a reduction is going to be awarded, something more than simply creating a CP and then ignoring it should be required. Otherwise, companies will have incentives merely to implement low-cost, low-maintenance, superficial CPs. Canada's Competition Bureau deals with this problem by requiring defendants to demonstrate that their CP was reasonably designed, implemented, and enforced in the circumstances of the case before granting any reduction in recognition of the CP.

Finally, and regardless of an enforcement agency's position on whether fines should be reduced for violators that have genuine CPs in place, it ought to be routine for violators lacking a genuine CP to be required to implement one as a condition of any settlement. But it is not routine. Consider what happened recently in the case of Bridgestone Corporation, which was prosecuted by the U.S. DOJ for both antitrust and Foreign Corrupt Practices Act violations. The Corporate Compliance Program attached to the plea agreement required Bridgestone to implement, maintain, or improve various internal compliance measures. All of these related to the FCPA. Compliance with the antitrust laws was not even mentioned.[9] It is peculiar that the Department seems to be suggesting that compliance with the FCPA is more important than compliance with the antitrust laws.

VII. CONCLUSION

Because the number of detected international cartels has grown considerably despite the broader and stronger use of fines and imprisonment to deter them, it is not clear that those methods are performing sufficiently. Competition authorities should reconsider their approaches in light of the criticisms that have been appearing in the literature. Companies and individuals may respond to more than just the fear of greater sanctions. The fear of simply getting caught and the ensuing reputational damage may also be powerful deterrents. Raising the probability of detection for cartels in general rather than focusing only on a relatively small number of major ones, doing a better job of publicizing legal victories against cartelists, and convincing the public that participation in a hard-core cartel deserves to be treated as a crime, can only help to reduce the rate of cartel formation.

[9] The plea agreement is *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/bridgestone/10-05-11bridgestone-plea.pdf .