Antitrust Chronicle

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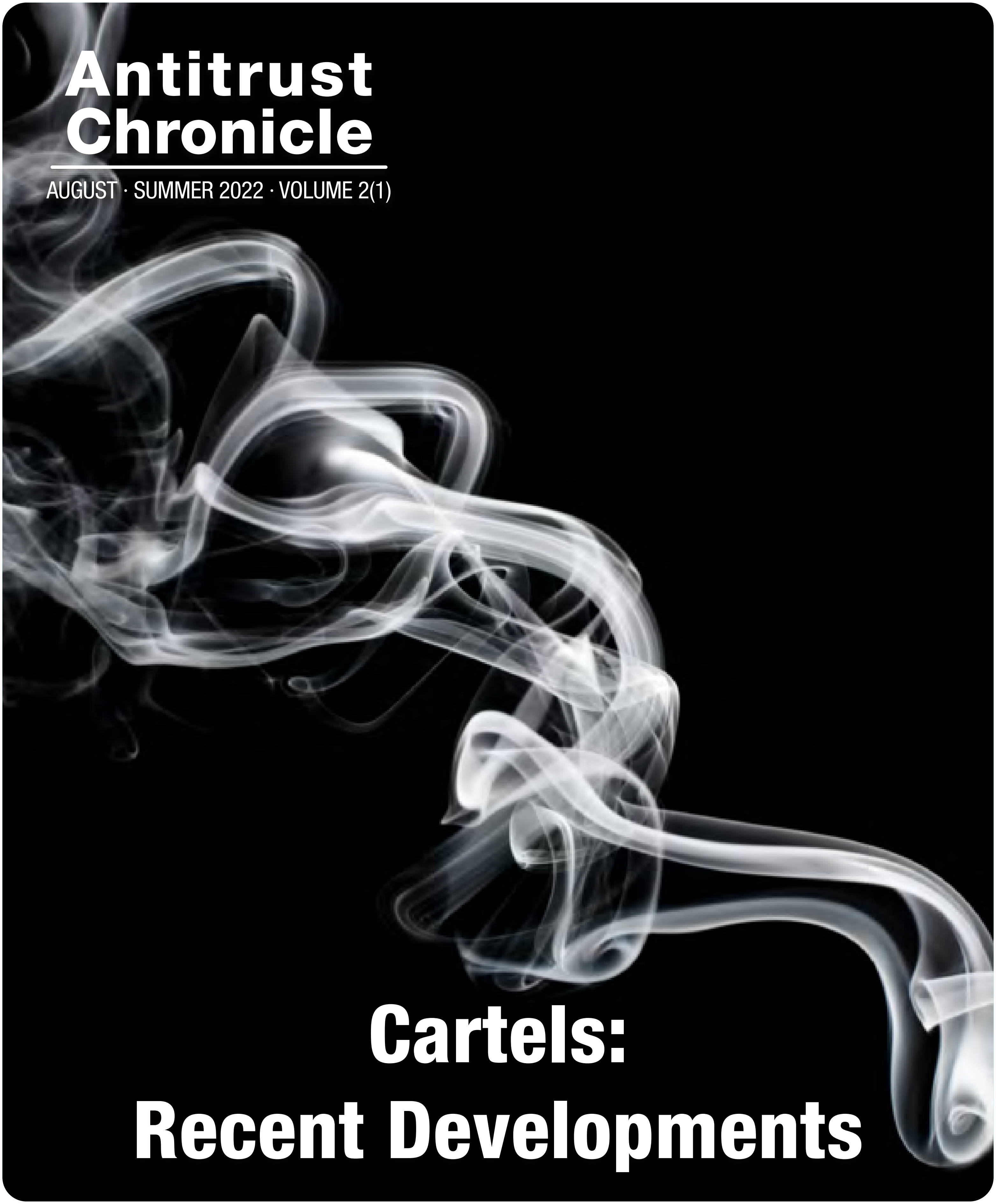

Cartels: Recent Developments

COMPETITION POLICY™ INTERNATIONAL

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LETTER FROM THE EDITOR

Dear Readers,

Cartels are the quintessential antitrust offence. Though more fashionable (or at least more visible) concerns may dominate the headlines, cartelization remains the cardinal antitrust sin.

Of course, cartelization can take many forms. There are classic horizontal price agreements between competitors. But cartelization can also take more sophisticated structures. And of course, cartelization takes on different complexions depending on the industry sector at hand, among other factors.

Enforcers (and litigants) maintain a vigilant eye on these variations in order to fulfil their mission of ensuring low prices for consumers. The pieces in this volume address the myriad policy issues raised by cartel enforcement as it progresses through its second century.

Marvin Price & Emma Burnham discuss the reforms enacted in April of this year by the Antitrust Division to its Corporate Leniency Policy as well as updates to that policy's FAQs. The changes to the policy were the first to be made since its inception in 1993. The new FAQs update previous FAQs issued in 2017 and include a number of FAQs addressing issues not previously discussed. A key goal of the changes was to enhance accessibility to the policy and FAQs for everyone, including members of the public, to ensure equal access to justice.

Chris Mayock discusses how cartel enforcement remains at the top of the European Commission's priorities, which is evident from the significant number of infringement decisions recently issued and the high level of fines imposed. However, while the fight against cartels continues unabated the battle lines are shifting: there has been a move away from classic cartels to less traditional forms of cartels; the pandemic has posed issues for all enforcers but even more so for the Commission given its multi-jurisdictional remit; the significant increase in damages claims following the introduction of the Damages Directive seems to have had a knock on effect on the level of leniency applications; and this in turn has led to the need for greater ex officio/own initiative investigations. These are challenges facing the Commission, which need to be addressed if strong and successful enforcement against cartels is to be maintained.

Joseph E. Harrington, Jr. focuses on the need to deter cartels. In spite of the many successes in the fight against cartels, enforcement is likely to be suboptimal because competition authorities systematically underdeter cartel formation. The reason is simple: convicted cartels are observed, deterred cartels are not. Consequently, many decisions by a competition authority will be driven by a desire to convict cartels – as that is an observable measure upon which to assess performance – which will be to the neglect of deterring cartels.

Juliette Enser, Georgina Laverack & Victoria Siguan-Cervera note how risks are increasing for those involved in cartel activity in the UK and in particular bid-rigging in public procurement. The UK Government has recently introduced to Parliament the Procurement Bill 2022, which includes a new exclusion from public procurement and debarment regime for cartelists. If enacted, the legislation will mean that companies that engage in price fixing or other cartel activities could face mandatory exclusion by a contracting authority from public procurements for up to 5 years.

Sonia Kuester Pfaffenroth & Brian Desmarais not discuss how the availability of big data and the increasing sophistication of algorithms and artificial intelligence has had an evolving impact on strategic decision-making across many sectors. Pricing algorithms can assist firms to optimize pricing on a near real-time basis in response to competitors' strategic moves through the rapid analysis of vast quantities of market data. They can also be used — as has been demonstrated by government enforcement actions — to facilitate sophisticated collusion between competitors.

Peter Whelan, while noting that the European Commission has an impressive track record with respect to anti-cartel enforcement, points out that a lacuna exists with respect to its enforcement powers: it cannot impose fines on natural persons who are responsible for their companies' cartel activity. This article argues that, in order to achieve the deterrence of cartel activity, the Commission should be given the power to impose individual administrative sanctions for violations of the EU-level cartel prohibition.

Finally, **Romina Polley** looks into German cartel enforcement trends based on statistics as well as recent cases. She also describes how the German Federal Cartel Office has reacted to the challenge of a decreased number of leniency applications over time that was exacerbated by the pandemic. The article also outlines the main procedural changes brought about by the new German Fining and Leniency Guidelines issued in the second half of 2021.

As always, many thanks to our great panel of authors.

Sincerely,

CPI Team

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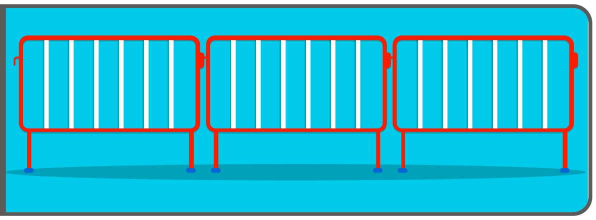

ANTITRUST DIVISION UPDATES: ENHANCING ACCESSIBILITY

By Marvin Price & Emma Burnham

In April of this year, the Antitrust Division announced changes to its Corporate Leniency Policy as well as updates to that policy's FAQs. The changes to the policy were the first to be made since its inception in 1993. The new FAQs update the FAQs previously issued in 2017 and include a number of FAQs addressing issues not previously discussed. A key goal of the changes was to enhance accessibility to the policy and FAQs for everyone, including members of the public, to ensure equal access to justice. To further this goal, the Leniency Policy and other important information concerning the Division's criminal practice were clearly and accurately reflected in writing, discussed in plain English, and added to the Department's Justice Manual, which is readily available on the internet. Key updates which are discussed include changes to both Type A and Type B of the policy with respect to reporting the illegal conduct, ensuring that any harm is remediated, and improving the company's compliance program. Changes to the way coverage of individuals is assessed under Type A and B is also discussed. Other topics include: coverage of individuals with respect to corporate resolutions, pre-indictment meetings, and sentencing.

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CARTEL ENFORCEMENT AND CHALLENGES IN EUROPE

By Chris Mayock

The European Commission has in recent times adopted a number of decisions and imposed significant fines against cartels. The landscape of cartel enforcement is, however, shifting due to a number of factors: classic cartels have given way to less traditional forms of cartels; the pandemic has disrupted cartel investigations and significantly changed companies' working methods; the increase in damages actions in Europe may have affected incentives of parties to approach the Commission for leniency; and cartel enforcers are seeking to increase their own initiative investigations in response to the decline in leniency applications. The article explores the current state of cartel enforcement in Europe, the challenges facing cartel enforcers and the approach of the European Commission in addressing them.

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DEVELOPING MORE VIGOROUS ANTI-CARTEL ENFORCEMENT BY PROMOTING DETERRENCE

By Joseph E. Harrington, Jr

In spite of the many successes in the fight against cartels, enforcement is likely to be suboptimal because competition authorities systematically underdeter cartel formation. The reason is simple: *convicted cartels are observed, deterred cartels are not*. Consequently, many decisions by a competition authority will be driven by a desire to convict cartels – as that is an observable measure upon which to assess performance – which will be to the neglect of deterring cartels. Underdeterrence manifests itself most heavily through underprosecution (some types of collusion cases are not pursued) and underpenalization (penalties are not set to deter future collusion). Some proposed policy changes are offered for enhancing deterrence.

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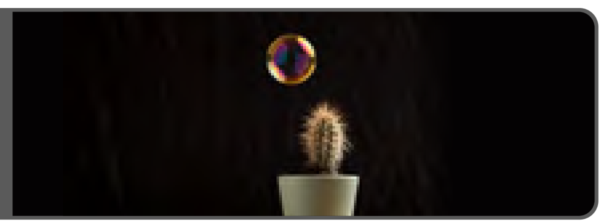

UK PUBLIC PROCUREMENT – INCREASING RISKS FOR CARTEL PARTICIPANTS

By Juliette Enser, Georgina Laverack & Victoria Siguan-Cervera

Risks are increasing for those involved in cartel activity in the UK and in particular bid-rigging in public procurement. The UK Government has recently introduced to Parliament the Procurement Bill 2022 which includes a new exclusion from public procurement and debarment regime for cartelists. If enacted, the legislation will mean that companies that engage in price fixing, market sharing, bid rigging or other cartel activities could face mandatory exclusion by a contracting authority from public procurements for up to 5 years. They are also at risk of being included on the central debarment register which would result in them automatically being excluded from all public procurement contracts for up to 5 years. This article outlines the proposed changes and how the Procurement Bill protects and enhances incentives to apply for leniency by providing protection against exclusion for those companies that are the first to report a cartel to the CMA under its leniency programme. The article also looks at other ways that risks for cartelists are increasing; both in terms of the risk of detection from the CMA's intelligence work and the tough sanctions (both corporate and individual) that the CMA can apply.

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By Sonia Kuester Pfaffenroth & Brian Desmarais

The availability of big data and increasing sophistication of algorithms and artificial intelligence has had an evolving impact on strategic decision-making across sectors. Pricing algorithms can assist firms to optimize pricing on a near real-time basis in response to competitors' strategic moves through the rapid analysis of vast quantities of market data. They can also be used — as has been demonstrated by government enforcement actions — to facilitate sophisticated collusion between competitors. And, for some time now, antitrust experts have debated a related question: when might these pricing algorithms become sufficiently sophisticated to cross the line from a tool used by businesses to execute strategies created by humans to AI that has the capacity to collude with other market participants without human intervention. As the technological and legal landscape evolves, compliance will become increasingly challenging. While the strategic benefits of technology are significant, it is important to keep a close eye on developments to ensure compliance measures keep pace with potential areas of risk.

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By Peter Whelan

Few would deny that the European Commission has an impressive track record with respect to anti-cartel enforcement. At present, however, a lacuna exists with respect to its enforcement powers: it cannot to impose fines on natural persons who are responsible for their companies' cartel activity. This article argues that, in order to achieve the deterrence of cartel activity, the Commission should be invested with the power to impose individual administrative sanctions for violations of the EU-level cartel prohibition. Although such sanctions have a drawback in terms of their vulnerability to indemnification, the stigmatization policy currently pursued by the Commission with respect to cartel activity provides considerable scope to prevent the issue of indemnification from undermining the potential deterrent effect of individual administrative sanctions.

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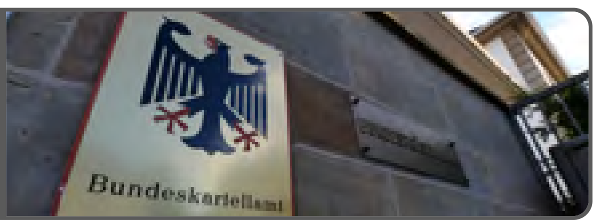


RECENT DEVELOPMENTS IN CARTEL ENFORCEMENT IN GERMANY — FEWER CASES BUT NEW GUIDELINES ON LENIENCY AND FINES

By Romina Polley

The article looks into German cartel enforcement trends based on case statistics as well as recent cases. It also describes how the German Federal Cartel Office reacts to the challenge of a decreased number of leniency applications over time that was exacerbated by the pandemic. Also, the main procedural changes brought about by the new German Fining and Leniency Guidelines issued in the second half of 2021 after entry into force of the 10th Amendment of the German Act against Restrictions of Competition that implemented the ECN+ Directive. While some changes are significant, e.g. the abolishment of the ringleader test in the new German Leniency Guidelines and the consideration of compliance efforts in the new Fining Guidelines, they do not solve the underlying issue of the decline in leniency applications.

WHAT'S NEXT?

For September 2022, we will feature an Antitrust Chronicle focused on issues related to (1) **Vertical Agreements**; and (2) **State Attorneys General**.

ANNOUNCEMENTS

CPI wants to hear from our subscribers. In 2022, we will be reaching out to members of our community for your feedback and ideas. Let us know what you want (or don't want) to see, at: antitrustchronicle@competitionpolicyinternational.com.

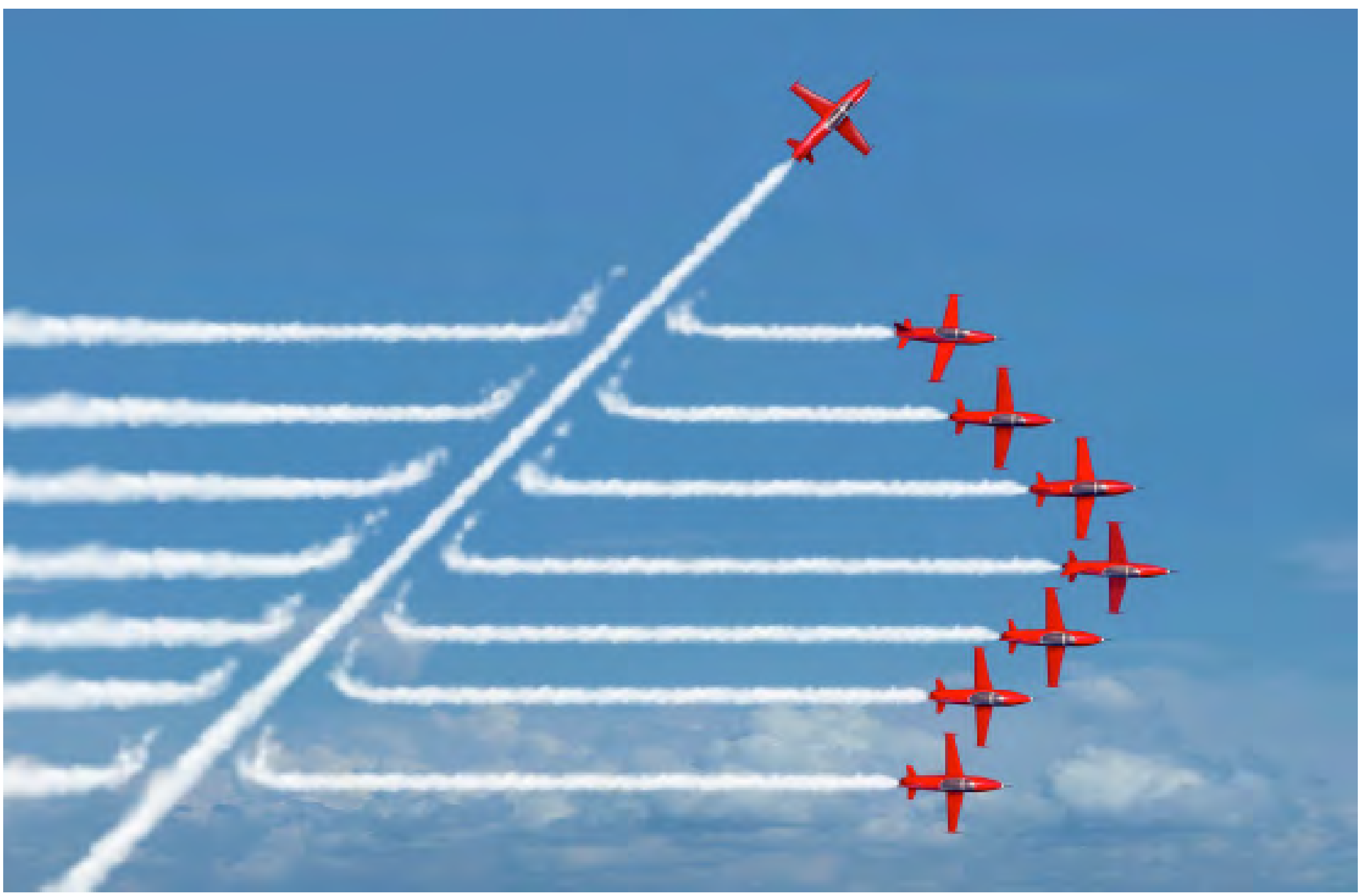
CPI ANTITRUST CHRONICLES October 2022

For October 2022, we will feature an Antitrust Chronicle focused on issues related to (1) **Private Equity**; and (2) **Merger Guidelines & Reforms**.

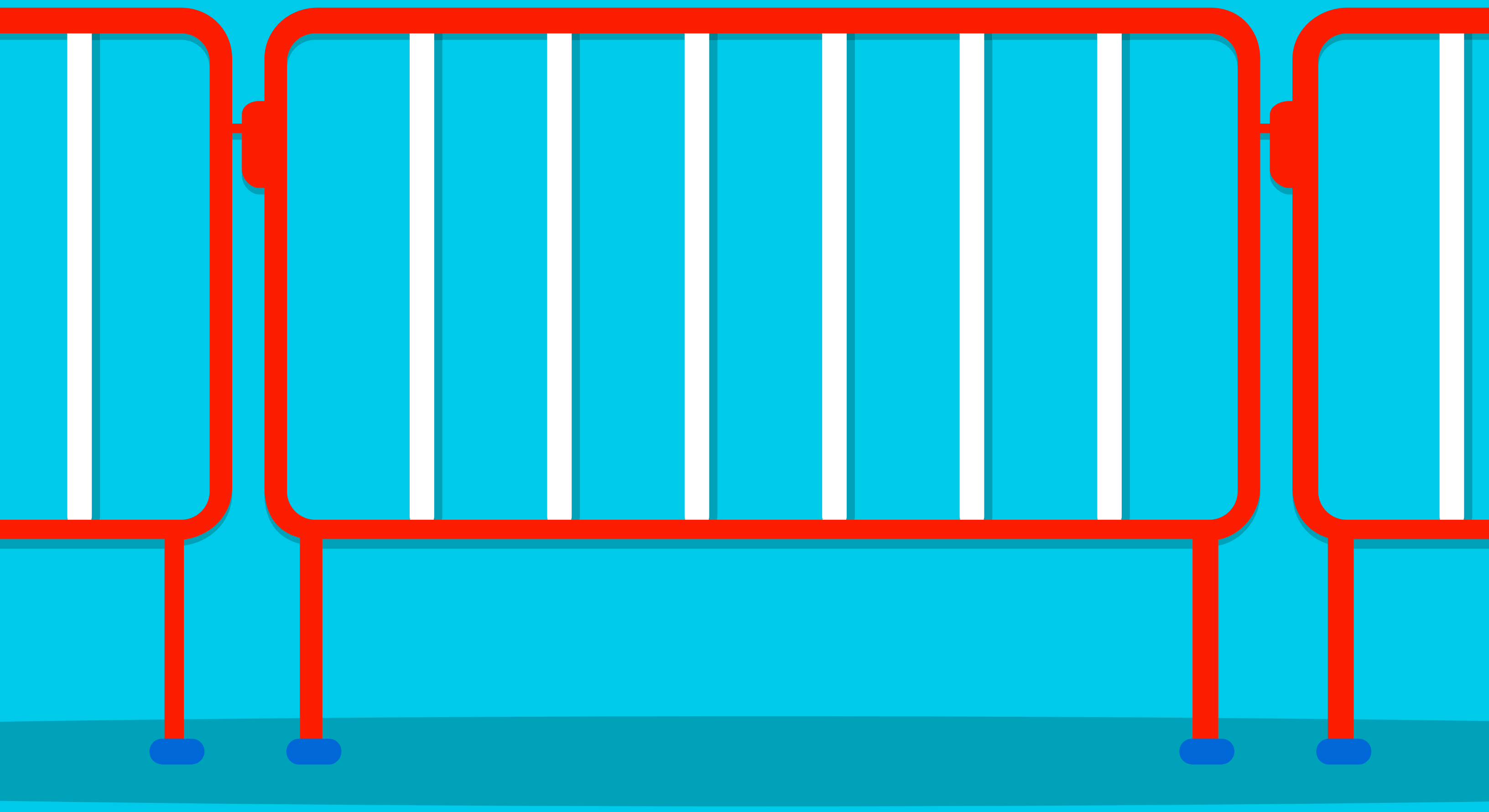
Contributions to the Antitrust Chronicle are about 2,500 – 4,000 words long. They should be lightly cited and not be written as long law-review articles with many in-depth footnotes. As with all CPI publications, articles for the CPI Antitrust Chronicle should be written clearly and with the reader always in mind.

Interested authors should send their contributions to Sam Sadden (ssadden@competitionpolicyinternational.com) with the subject line "Antitrust Chronicle," a short bio and picture(s) of the author(s).

The CPI Editorial Team will evaluate all submissions and will publish the best papers. Authors can submit papers on any topic related to competition and regulation, however, priority will be given to articles addressing the abovementioned topics. Co-authors are always welcome.



ANTITRUST DIVISION UPDATES: ENHANCING ACCESSIBILITY



BY MARVIN PRICE & EMMA BURNHAM[1]

1 Marvin Price is the Director of Criminal Enforcement, and Emma Burnham is Assistant Chief of the Washington Criminal I Section, of the U.S. Department of Justice Antitrust Division.

I. INTRODUCTION

Corporate crime is an age-old problem — and one that antitrust law was expressly designed to address. As long ago as 1776, Adam Smith observed that conversations among people in the same trade often end in "a conspiracy against the public, or in some contrivance to raise prices."[2] But it was not until 1890, well after the Industrial Revolution and at a time when markets had been fundamentally altered by the problems foreseen by Adam Smith, that Congress responded.

In enacting the Sherman Antitrust Act, Congress made it a crime to conspire to restrain trade and to monopolize markets.[3] And Congress expressly had corporate criminal liability in mind: the statute provides criminal penalties not only for individuals but also for the corporate entities through which individuals commit those crimes. The Sherman Act was enacted during the Gilded Age[4] to tackle the pressing problems of the day. But those fundamental problems — and resulting harm to the public — persist in today's Information Age, just with different markets and in different contexts. Executives who should be competing with each other for the sale of the same products or services still fix prices today, but often through the use of emails or texts without meeting or even speaking. And executives who conspire to fix prices have already been prosecuted for using algorithms as a tool for implementing their anticompetitive schemes, raising the specter that someday bots may collude on prices even without human intervention.[5]

As Adam Smith knew, protecting the public from conspiracies to manipulate markets is essential — and that important function is the core of the Antitrust Division's mandate. To protect American consumers and the benefits derived from free markets, the Antitrust Division looks both backward — to make sure we are learning the lessons of the past and using all the tools available to us — and forward, to make sure we are appropriately calibrating our criminal enforcement practices and priorities to reflect modern-day realities and best deter anticompetitive conduct.

One recent product of this self-reflection is the Antitrust Division's emphasis on equal access to justice. Just as a cathedral has only one true cornerstone — the first stone laid, with all other stones laid by reference, orienting the building in a specific direction — the Division's criminal enforcement program has one fundamental guiding principle: accessibility. To the extent the public does not, or cannot, understand our policies' incentive structures to invest in compliance to deter crime in the first instance and to reward self-disclosure when crime does occur, criminal antitrust enforcement inevitably suffers. Accessibility is the central guiding principal at the core of any successful enforcement regime, for without it, policies and procedures — however well meaning — will never be truly effective.

But over the years, conflicting public statements and divergent practices may have obscured our written policies and procedures. As a result, in April 2022 we announced a number of changes to the Leniency Policy, updated the accompanying FAQs, and made updates and clarifications to a variety of our criminal enforcement policies and procedures. Further, to increase accessibility and make it clear that these changes are enduring, the Leniency Policy — as well as a number of clarifications to other criminal antitrust policies and procedures — can now be found in the Department's Justice Manual.[6] The Justice Manual is a public-facing document that is the most accessible and reliable source for the policies and procedures that guide all of the Department's prosecutors, from Assistant United States Attorneys in 94 United States Attorney's Offices nationwide to Department components headquartered in Washington, DC.[7] The FAQs, because they will be more frequently revised than the policy, are readily available on the Division's website (Chapter 7 of the Justice Manual has a link to this location).[8]

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2 "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices." Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*.

3 15 U.S.C. § 1 and 2 state (as amended in 1974 to make violations a felony instead of a misdemeanor and in 2004 to further increase penalties): Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

4 The term "Gilded Age," coined by Mark Twain & Charles Dudley Warner in their 1873 book, *The Gilded Age: A Tale of Today* connoted the corruption beneath the glittering surface of prosperity in the robber baron era.

5 *United States v. Topkins*, cr-15-201 (N.D. Cal. 2015); Jill Priluck, *When Bots Collude*, The New Yorker (April 25, 2015).

6 Justice Manual 7-3.300, available at: https://www.justice.gov/jm/jm-7-3000-organization-division#7-3.300.

7 The Justice Manual provides internal guidance only and does not create enforceable rights.

8 Frequently Asked Questions About the Antitrust Division's Leniency Program (April 4, 2022), available at: https://www.justice.gov/atr/page/file/1490311/download.

II. LENIENCY POLICY

Since its creation in 1993, the Antitrust Division's Leniency Policy has been the subject of countless public remarks, published speeches, and articles, and over a quarter-century of enforcement. Public statements over many years created confusion as to how the written policy would be enforced — and our experiences with the policy in light of the changing enforcement landscape demonstrated that updates would improve our enforcement.

Our policies and procedures are now clearly and accurately reflected in writing, discussed in plain English, and easily accessible to all: attorneys who don't typically handle criminal antitrust matters, members of the business community, and interested members of the public, in addition to attorneys who specialize in criminal antitrust investigations and prosecutions. Before now, the only place the written policy could be found was buried in the Antitrust Division's website, making it difficult to find for non-antitrust specialists and certainly for non-lawyers. The more the policy is known to the public — and specifically to workers, executives, and businesses — the more it will be used.

The recent updates brought the written policy into line with how it is implemented — and the updated FAQs provide current, real-world guidance. There are now two definitive sources of information about leniency: the policy itself and the FAQs. The FAQs are a "living document" that the Division will examine regularly and update as needed to keep them in line with current practice and address real-world issues. As a result, it will no longer be necessary — or even advisable — to parse the words of Division officials' speeches to determine how the policy works.

The changes preserve and enhance the Leniency Program's core incentive structure, which means that a company seeking leniency in good faith is never made worse off. To ensure that result, the Division generally interprets the Leniency Policy in favor of the applicant. And out of the over 570 markers the Division has issued, it has subsequently prosecuted an applicant just once — which occurred only because the Division discovered that the applicant had continued its criminal activity instead of terminating it, as the applicant had claimed.

A. Key Corporate Leniency Updates

The Antitrust Division made two key changes to both Type A and Type B of the Corporate Leniency Policy. Type A is the part of the policy that applies when the Division has not yet received information about the illegal conduct; Type B is the part of the policy that applies after the Division has already obtained that information.

The first change concerns what an applicant must do upon discovery of the illegal conduct. While the prior policy had a requirement that the applicant "promptly and effectively terminate its involvement in the conspiracy," that requirement has been changed to require "promptly reporting the illegal conduct" to the Division upon its discovery.

FAQ 22 discusses this new requirement and explains that in determining what constitutes "promptly" reporting, the Division's prosecutors will consider all of the facts and circumstances of the illegal activity as well as the size and complexity of the applicant's operations. The FAQ makes clear that the Division understands that the applicant will need to conduct some due diligence to confirm that it has been involved in the commission of an antitrust crime. That's reasonable and understandable. However, what is not acceptable is for the company to confirm its involvement in the illegal activity and then decide not to self-report to the government, but instead wait for the government to make the first move by initiating an investigation. This approach — as FAQ 22 makes very clear — will not be tolerated and will result in the applicant being ineligible to obtain leniency, Type A or B.

The Division made this change for two reasons. First, sound public policy and good corporate citizenship require a company to self-disclose corporate crime promptly after it is discovered. Second, one of the Division's most effective investigative tools is the use of cooperating witnesses — including individuals cooperating pursuant to a grant of leniency — to record conspirators' communications. This tool is much more effective when the company does not terminate its involvement in the conspiracy, but instead reports that conduct promptly to the Division.[9]

Another change (which also applies equally to Type A and B) is the addition of a requirement that the company use its best efforts to remediate the harm caused by the conduct and to improve its compliance program. Since 1993, a corporate leniency applicant has been required to make restitution to the victims, and that is still a requirement. But over the years, the Division learned that restitution on its own may

9 Reporting criminal conduct to the law enforcement authorities clearly constitutes withdrawal from the conspiracy, so by self-reporting to the Division the applicant has also legally terminated its involvement in the illegal conduct. *United States v. Eppolito*, 543 F.3d 25, 41 (2008) ("By way of an example, a defendant may withdraw from the conspiracy by giving a timely warning to the proper law enforcement officials . . . .").

be insufficient — it can adequately address past harm but does not address possible future harm, and, importantly, does not reform corporate culture to prevent recidivism.[10]

Improving corporate compliance is an obvious step that — given the severe sanctions accompanying antitrust crimes and the benefits of winning the leniency race — all companies that discover their involvement in antitrust crimes should immediately take. The Division has made available the document that its prosecutors use to assess a company's compliance efforts, which can assist companies in evaluating the strength of their own compliance programs.[11] Including this requirement in the policy enshrines the expectation that companies will create a culture of compliance with effective corporate compliance programs.

The remediation requirement is also a critical improvement to the Leniency Policy. While restitution may address much of the harm already caused by a criminal antitrust violation, remediation may be necessary to address the risk of ongoing or future harm from the same violation. The type of remediation required will depend on the facts of the case, the nature of the violation, and the results of the company's analysis of the root causes of the illegal conduct.

B. Individual Coverage Under Type A and Type B

Another important change relates to how Division prosecutors will determine coverage for individuals — with respect to both Type A and B applications. For Type A leniency, the policy now makes clear that no current employees will be charged so long as they cooperate in the investigation — versus the prior version of the policy, which called for coverage only for employees who participated in the crime. The Division now guarantees coverage for all Type A cooperating employees — regardless of whether they were aware of or participated in the crime themselves. This provision eliminates any confusion applicants and their employees might have about whether they will be covered if they cooperate fully and truthfully but did not personally participate in the crime — and they will be covered even if they were not aware of the criminal conduct. Type A leniency is the only mechanism to obtain such exceptional coverage.

In contrast, the updated policy retains essentially the same language as in the 1993 version which clearly states that as to Type B: "If a corporation does not qualify for leniency under Part A, above, the directors, officers, and employees who come forward with the corporation will be considered for immunity from criminal prosecution on the same basis as if they had approached the Division individually." But over the years, the Division's public statements and its practice led the defense bar to believe that Type B was functionally no different from Type A in this regard, and that all cooperating employees should and would receive coverage.

As a result, although the language in the 2022 Leniency Policy with respect to this issue is substantially the same as in the 1993 policy, the new FAQs make clear that Division prosecutors will follow a procedure for Type B individuals consistent with the original policy's statement that they would be considered for immunity on the same basis as if they had approached the Division individually. This means that as a threshold matter to be eligible for non-prosecution protection with respect to a Type B leniency application, current directors, officers, and employees must: "admit their wrongdoing with candor and provide timely, truthful, continuing, and complete cooperation throughout the investigation (see FAQ 52).

Importantly, FAQ 52 discusses the specific procedure that Division prosecutors will follow with respect to an individualized assessment for Type B individuals. And that procedure is the same procedure that all Department prosecutors must follow in determining whether to grant an individual non-prosecution protection in exchange for cooperation. That process is clearly explained in the Justice Manual in Chapter 9, concerning criminal investigations and prosecutions, sections 27.600, 620, and 630. This involves an individualized assessment for each individual, considering the importance of the matter, the value of the individual's cooperation and timing, the individual's relative culpability and criminal history, and the interests of any victims.

FAQ 53 discusses the importance of timing with respect to the results of the individualized determination. In conducting the individualized assessment, the Division prosecutor must determine whether obtaining the individual's cooperation pursuant to a grant of non-prosecution protection is in the public interest. One of the determinants of whether the cooperation would be in the public interest is the timing of that cooperation. Early in the investigation, before subpoenas have been served, search warrants have been executed, or the investigation has otherwise become publicly known, it is more likely that the investigation will not yet have developed significant evidence of the illegal activity, likely making the individual's cooperation particularly valuable. However, as Division prosecutors utilize the various investigative tools at their disposal, the indi-

10 U.S.S.G.§8B1.2 (policy statement) ("The purposes of a remedial order are to remedy harm that has already occurred and to prevent future harm. A remedial order requiring corrective action by the organization may be necessary to prevent future injury from the instant offense . . . .").

11 The Antitrust Division's "Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations" is available at: https://www.justice.gov/atr/page/file/1182001/download.

vidual's cooperation may no longer be necessary to the public interest. The bottom line: as always, early self-reporting — and early cooperation — make leniency and non-prosecution protection more likely.

C. Additional FAQ Updates

Finally, the new FAQs are a valuable source of helpful information, including information that does not directly concern the operation of the Division's leniency program. For example, FAQs 38 through 46 concern ACPERA and contain a number of Division comments about its effective and efficient operation. FAQ 39 notes that the Division is willing to advise a court of the timeliness, nature, extent, and significance of the applicant's cooperation under the Leniency Policy, as well as its commitment to prospective cooperation with the Division's investigations and prosecutions, in response to a request to do so by the applicant or a court, so long as this disclosure does not compromise law enforcement activity.

III. CRIMINAL PRACTICE UPDATES

In addition to the changes to leniency, the Justice Manual updates to other criminal policies and procedures serve the same ultimate goal of accessibility. They bring our practices into line with the rest of the Department, ensure that our policies as written reflect our practices, guarantee individual accountability, and maximize transparency, predictability, and equal access to justice.

A. Individual Coverage in Corporate Resolutions

One important change is memorialized in section 7-3.430 of the Justice Manual. This section concerns individual releases of criminal liability in corporate resolutions. It emphasizes that other than as part of a leniency letter, the Division will include non-prosecution protections (so-called "carve-ins") as part of a corporate resolution only in extraordinary circumstances and only with written approval of the Division's Assistant Attorney General. This approach emphasizes the importance of prompt self-reporting so that a company can obtain the benefits of leniency, which for a Type A applicant includes non-prosecution protections for fully cooperating current directors, officers, and employees, and for a Type B applicant may include such non-prosecution protections for its current directors, officers, and employees, based on an individualized assessment.

As a result, decisions to provide non-prosecution protections for individuals will typically be made separately from the corporate resolution, on an individualized basis in accord with the Principles of Federal Prosecution (9-27.00), and under the standard for individual non-prosecution agreements (9-27.600) discussed previously with respect to non-prosecution protections for Type B individuals.

B. Pre-Indictment Meetings

Section 7-3.200 of the Justice Manual discusses the current procedures with respect to pre-indictment meetings. It notes that the Division follows the Department's practice of notifying targets — under certain circumstances — in a reasonable time before seeking indictment, although notifying targets is not appropriate in routine clear cases or when notification would be inconsistent with the ends of justice. The Division considers requests for meetings on a case-by-case basis, considering whether the meeting will assist the Division in effectively evaluating a putative defendant's evidentiary, legal, and policy arguments against prosecution. And the Justice Manual emphasizes that a meeting is not warranted "if the target and counsel have declined to engage with staff or it is otherwise apparent to the Division that further engagement will not be productive."

C. Sentencing

Finally, the Justice Manual discusses the Division's approach to sentencing. Most importantly, Division prosecutors should conduct an individualized assessment under the Principles of Federal Prosecution, 9-27.730, and any other applicable Department policies. Because of the importance of general deterrence in criminal antitrust cases and because these cases typically cause serious economic harm, an individualized assessment will typically result in a recommendation of incarceration for individual defendants. But as the United States Sentencing Guidelines note, in a very few number of cases the guidelines will not require that some confinement be imposed. In antitrust cases as in all other criminal cases, the ultimate goal of sentencing is to achieve a just result.

IV. CONCLUSION

In conclusion, the Division's changes discussed above have been part of a conscious effort, informed by experience, to achieve two objectives: ensure that our enforcement efforts are robust, comprehensive, and effective, while also ensuring that companies and individuals who self report reap the benefits of that decision. Fundamentally, our enforcement works only to the extent that our policies and procedures are truly accessible to everyone — which is why we see accessibility as the key cornerstone of the program and why the recent changes ensure that we continue to achieve those critical objectives.

CARTEL ENFORCEMENT AND CHALLENGES IN EUROPE

BY CHRIS MAYOCK[1]

1 Deputy-Head of Unit, Cartels Directorate, DG Competition, European Commission. The information and views set out in this article are those of the author and do not necessarily reflect the official position of the European Commission. The author would like to thank Maria Jaspers and Gerald Miersch, respectively Director and Head of Unit in the Cartels Directorate, for their comments and contributions.

I. INTRODUCTION

Cartel enforcement remains at the top of the European Commission's priorities, which is evident from the significant number of infringement decisions recently issued and the high level of fines imposed. However, while the fight against cartels continues unabated the battle lines are shifting: there has been a move away from classic cartels to less traditional forms of cartels; the pandemic has posed issues for all enforcers but even more so for the Commission given its multi-jurisdictional remit; the significant increase in damages claims following the introduction of the Damages Directive[2] seems to have had a knock on effect on the level of leniency applications; and this in turn has led to the need for greater *ex officio*/own initiative investigations.

These are challenges facing the Commission, which need to be addressed if strong and successful enforcement against cartels is to be maintained.

II. RECENT ENFORCEMENT

Last year, the Commission adopted 10 infringement decisions and imposed total fines[3] of EUR 1.7 billion[4] on over 30 corporate groups. These figures speak for themselves and send a clear message that cartel enforcement continues to be right at the top of the Commission's agenda. From these decisions a number of trends and policy directions are evident.

First, the Commission has a zero-tolerance policy towards all types of cartels.

Second, the Commission maintained a broad portfolio of cases across sectors by sanctioning cartels concerning rail cargo, food packaging, financial benchmarks, bond trading and car emissions. Such a portfolio sends a message of general deterrence to all undertakings not to engage in cartel conduct and sends a more focused message of specific deterrence to those undertakings involved or operating in the relevant sectors.

Third, in terms of how cases were resolved, roughly half were concluded under the settlement procedure[5] and half under the normal procedure. This shows that the Commission exercises its discretion to decide when the settlement procedure is most appropriate, which is based on a number of factors (e.g. number of parties, number of leniency applicants, strength of evidence and how the parties position themselves during the investigation). The Commission is also prepared to discontinue the settlement procedure if insufficient progress to resolve the case is achieved.

Finally, while the Commission continued to pursue classic cartels involving price fixing and market sharing (e.g. *Canned Vegetables*), there were a number of decisions involving less traditional forms of cartels, which warrant a more in-depth assessment.

III. LESS TRADITIONAL CARTELS

There is certainly a trend that enforcement is moving away from classic cartels towards less traditional cartels. It may be that strong enforcement in the EU and elsewhere has led to a situation where the stereotypical 'smoke filled room' cartels are less prevalent. Classic cartels have to a degree given way to more sophisticated arrangements and the Commission has had to adapt to this new environment.

A good example of this is the *Car Emissions* case, where the Commission took a decision against five car manufacturers – Daimler, BMW, as well as Volkswagen, Audi, and Porsche, which are part of the Volkswagen group - imposing a total fine of 875 million euros. The car manufacturers colluded to restrict technical development in the area of emission cleaning technology for diesel cars and with its decision the

2 Directive 2014/104/EU of the European Parliament and the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ L 349, 5.12.2014, p.1).

3 Under the Commission's administrative system, the only sanction available is to impose fines on undertakings.

4 Approximately USD 1.9 billion.

5 Under the settlement procedure, in return for admitting the infringement the parties receive a 10 percent reduction in the amount of the fine, enjoy a more streamlined procedure and are issued with a shortened decision. See Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases (OJ C 167, 2.7.2008, p.1).

Commission entered to some extent into new enforcement territory. It recognized that price is not the only relevant parameter of competition and that product characteristics can be just as important. Further, the case is also interesting as, together with the decision, the Commission issued a letter to the parties in which it clarified the aspects of their cooperation, which were considered unproblematic.

This is, of course, not an isolated case. The Commission has already issued a number of decisions concerning less traditional cartels e.g. benchmark manipulation in the financial sector (*Yen, Swiss, Franc and Euro Interest Rate Derivatives*), coordinating list prices rather than final prices (*Trucks*) and buyer cartels (*Car Battery Recycling, Ethylene*).

The difficulty with less traditional cartels is for parties to understand the dividing line between legitimate cooperation and illegal conduct. However, the Commission is building up a decisional practice, which should serve to guide parties over what constitutes a cartel infringement in such types of cases and as the *Car Emissions* example shows the Commission is prepared to provide clarification in appropriate cases.

IV. RESPONSES TO THE PANDEMIC

It is well-known that in times of crisis the temptation to enter into cartels increases. This applies equally to secret cartel arrangements as well open crisis cartel schemes designed to assist industries in distress. However, the Commission's line remained firm throughout that there would be no relaxation of cartel enforcement. Such circumvention of the cartel rules as a short term 'quick fix' would have only served to delay and jeopardize the recovery. Furthermore, the Commission intends to be equally vigilant to ensure any increased prices resulting from the crisis are not artificially maintained through collusion as we emerge from it.

Although cartel enforcement continued throughout the pandemic, the Commission was forced to curtail its activities on the investigative side. As a multi-jurisdictional enforcer it was impossible for the Commission to maintain its usual practice of simultaneously carrying out dawn raids at business premises in a number of EU countries. Raids were accordingly suspended for a period of almost two years but resumed in the second half of 2021 and the Commission has continued to be active on this front in the first part of 2022.

With respect to dawn raids conducted at private homes, in practice the Commission has so far exercised this power[6] in a limited fashion and generally only when there were strong indications that key evidence was located at domestic premises. However, the pandemic has brought a significant shift in working arrangements with many people working from home. Increased home working is likely to remain the case even as we emerge out of the pandemic. Therefore, evidence, relevant individuals and searchable hardware are now more often located at domestic premises. Equally, given the electronic nature of modern data, relevant information can be readily deleted from domestic premises.

To respond to this shifting nature of working and to secure the acquisition of relevant evidence, it is likely that the Commission will more frequently use its power to conduct inspections at domestic premises. This applies to both stand-alone domestic inspections and also those in conjunction with inspections at business premises. The Commission successfully made use of this power recently, which is the first instance in many years, where a search of domestic premises of (an) employee(s) was conducted in parallel with a search of the business premises of the employer.

One significant positive of the pandemic was the increased use of the Commission's e-leniency tool. E-Leniency is an online platform developed by the Commission that allows applicants to submit their leniency applications, including marker applications, through the e-Leniency tool. Using e-Leniency provides the same legal guarantees in terms of confidentiality and legal protection as the traditional procedure of oral statements (i.e. protected from disclosure in civil litigation). As it was impossible during the pandemic to come to the Commission premises to make oral statements in person, e-leniency has become the primary and preferred procedure for leniency submissions.

V. LENIENCY

A significant challenge facing the Commission is that it, like many other agencies around the world, has witnessed a downturn in leniency applications in recent years.

The downturn in leniency could be due to many factors: the possibility that there are fewer cartels to report due to the deterrent effect of strong enforcement and greater compliance; the proliferation of leniency regimes across the globe and the burden of applying in a multitude

6 Article 21 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p.1) consolidated version amended by Council Regulation No 1419/2006 (OJ L 269, 28.9.2006, p.1).

of jurisdictions; or uncertainty about whether less traditional forms of cartel fall within the Leniency Notice[7] and benefit from its provisions.

It is clear that the landscape in which the Commission's leniency policy operates has changed and the emergence of follow-on damages actions following the implementation of the Damages Directive is important in that respect. For example, the wave of damages claims in Europe following the adoption of the Trucks decision is unprecedented. However, it is important to underline that this was the goal of the Damages Directive: to facilitate cartels victims to claim compensation.

A parallel goal of the Damages Directive was to protect public enforcement. Accordingly, protections were built into the Damages Directive for immunity and leniency applicants. First, a key exception to the normal disclosure obligations is that leniency corporate statements are never disclosable.[8] Given the self-incriminatory nature of the statements, which have been specifically created for the purpose of the Commission's investigation, complete protection was necessary to avoid any chilling effect on the leniency program, which is very much at the core of public enforcement. A second point is that the Directive further safeguards the attractiveness of applying for leniency by providing that the immunity applicant is only liable for damages to its own customers.[9] This derogates from the usual position that co-infringers are jointly and severally liable for the entire harm caused by an anti-trust infringement and provides an added incentive for parties to apply for immunity. However, as these protections are only just beginning to kick in it is difficult to gauge how effective they may be.

In Europe, the issue has been raised as to whether further protections should be given, such as shielding the immunity applicant from civil liability. On the one hand, this may serve to promote public enforcement. It would remove a significant disincentive for immunity applicants to come forward and may have a major impact on the level of applications. It could also have a knock-on effect on settlements as parties cooperating under leniency also tend to settle cases. On the other hand, it poses fairness issues, legal issues, and practical issues. The fairness issues are that the immunity applicant would get away without paying a fine or damages and because of the EU requirement that victims must receive full compensation the co-cartelists would likely have to pay the immunity applicant's share. Legally, it would need to be assessed if this is compatible with the tort law systems of the Member States. Practically, it would require legislative change and could therefore only be a long-term solution.

To address the current situation the Commission has been reviewing its leniency policy to look at reasons for the decline and to identify ways to maintain incentives to apply. An integral part of this process has been to engage with stakeholders, particularly the private bar who have a unique insight into the drivers that dictate whether companies will apply for leniency. The Commission has also engaged with other enforcers on a bilateral basis to see what lessons we can learn from each other. There have also been discussions at a multilateral level, notably within the European Competition Network and the International Competition Network where agencies can exchange ideas on how to collectively improve the situation.

However, it is crucially important not to see leniency in isolation. A number of policies or practices have an impact on it and can make it more attractive. First, leniency is dependent on strong enforcement and significant sanctions, so companies are aware of the cost of entering into cartels and not reporting them. Second, it is important to link leniency to other legislation. For example, by providing immunity from criminal prosecution to employees of immunity applicants[10] or granting successful leniency applicants an exemption from exclusion from public procurement procedures following a cartel infringement.[11] Third, it is crucial to have an effective ex officio/own initiative policy to generate cases outside of leniency. This is important not only because it generates cases in its own right but because by increasing the risk of being caught by an own initiative investigation it increases the incentive of parties to come forward under leniency.

VI. *EX OFFICIO* STRATEGY

The Commission has strengthened its *ex officio* program in recent times. It has put in place the following elements.

7 Commission Notice on immunity from fines and reduction of fines in cartel cases (OJ C 298, 8.12.2006, p.17), as last amended (OJ C 256, 5.8.2015, p.1).

8 Article 6(6)(a) of the Damages Directive.

9 Article 11(4) of the Damages Directive.

10 Article 23 of the ECN+ Directive - Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349 of 5.12.2014, p. 1-19.

11 Articles 57 (4) (d), 57 (6) and 57 (7) of Directive 2014/24/EU of the European Parliament and the Council of 26 February 2014 on public procurement. Directives 2014/23/EU and 2014/25/EU, on sector procurements and concession contracts respectively, include identical provisions. The EU Financial Regulation (2018/1046) also includes similar provisions in view of the protection of the EU budget.

First, the setting up of a dedicated unit within DG Competition staffed by professionals specialized in digital investigation techniques, which allow enhanced intelligence gathering and data analysis. Second, the creation and the management of a centralized intelligence network from multiple information channels - other Commission DGs, other EU institutions and other non-competition national enforcers. Third, the launching of the anonymous whistle-blower tool in 2017, which encourages informants to come forward safe in the knowledge their identity will be protected.

The whistle-blower tool has received a significant amount of interest. As well as guaranteeing anonymity, it allows the Commission to have fully protected two-way communication with informants. This means the Commission can react to the reported lead and ask for clarifications and further information from the informant while at all times respecting their anonymity. In terms of figures, the whistle-blower tool generates over a hundred leads per year and the Commission has current cases based on such leads within its portfolio. The Commission also shares whistle-blower leads with other agencies within the European Competition Network.[12] Notably, the Spanish NCA when adopting its recent infringement decision imposing a EUR 24 million sanction against a number of steelmakers revealed publicly that the investigation had been triggered by a lead passed on to it by the Commission.

The whistle-blower tool also provides an interesting link with leniency policy. For those engaging in cartel conduct the traditional risk has been that one of their co-cartelists would report the illegal arrangements to the Commission under the leniency program. However, with the advent of the whistle-blower tool there is the possibility that one of their own employees may blow the whistle and inform the Commission. This opens up another front in the risk assessment that companies have to make in the leniency context.

VII. CONCLUSION

To maintain strong enforcement in Europe the Commission must operate in a shifting environment of cartel practice. The days of ‘bread and butter’ price fixing or market sharing cartels in traditional sectors that result from an immunity application and are sanctioned exclusively under the normal procedure are now the exception rather than the norm.

The ‘new normal’ is that it will be necessary to generate more cases through ex officio means, to take measures to address the decline in leniency applications, to expand investigative measures such as raids on domestic premises, to continue to tackle less traditional cartels, to bring cases across different sectors and to adopt decisions under both the settlement and normal procedures.

12 Consisting of the European Commission and the National Competition Authorities of the Member States of the European Union.

DEVELOPING MORE VIGOROUS ANTI-CARTEL ENFORCEMENT BY PROMOTING DETERRENCE

BY JOSEPH E. HARRINGTON, JR.[1]

1 Patrick T. Harker Professor, Department of Business Economics & Public Policy, The Wharton School, University of Pennsylvania, Philadelphia, PA 19104 U.S.A. harrij@wharton.upenn.edu.

"No modern development in antitrust law is more striking than the global acceptance of a norm that condemns cartels as the market's most dangerous competitive vice [but] is modern cartel enforcement attaining its deterrence goals?" William Kovacic (OECD Conference, October 2013), former Chair of the U.S. Federal Trade Commission.

I. INTRODUCTION

The President of Bumble Bee Foods is sentenced to 40 months in prison and StarKist is levied a $100 million fine by the U.S. Department of Justice for agreeing to reduce the size of a can of tuna and raise prices. Six major truck manufacturers are fined approximately $4 billion dollars by the European Commission for privately meeting to exchange and agree on list prices. These cases, and many others, illustrate that major corporations continue to collude and even in jurisdictions with a record of aggressive enforcement.

Of course, continued cartel formation does not imply enforcement is suboptimal. Taking into account enforcement and error costs (i.e. direct and indirect costs from wrongful prosecutions), the existence of some cartels is socially optimal and to be expected. Nevertheless, I contend that enforcement is likely to be suboptimal because enforcers – both public and private – systematically underdeter cartel formation. In exploring this issue, this paper addresses three questions: 1) why would there be underdeterrence?; 2) how does underdeterrence manifest itself?; and 3) what can be done to enhance deterrence? While the discussion pertains to any competition authority ("CA"), our analysis will largely be conducted from the perspective of the Antitrust Division of the U.S. Department of Justice ("DOJ").

II. WHY WOULD THERE BE UNDERDETERRENCE?

There are three facets to cartel enforcement: detection, prosecution, and penalization. Let us consider how the decisions of a CA impacts each of them.

Many of a CA's cases are either brought to them (such as through a customer complaint), accidently found (such as during a merger review), or sourced from other enforcers (specifically, private litigants and other competition authorities). A CA has two general strategies should it want to be more proactive in building its caseload. The first is to adopt programs that incentivizes others to report suspected cartel episodes, such as leniency programs and whistleblower rewards.[2] The second approach is for the CA itself to actively look for collusion in the marketplace.

Given a suspected cartel has been identified, a CA next decides whether to pursue an investigation and ultimately whether to prosecute. Not all suspected cartels are investigated as evidenced by the many credible cases that the DOJ leaves to private litigants.[3] If a CA does choose to prosecute and obtains a conviction, it then decides the penalty to seek to impose. The associated calculus involves weighing off the benefit from going after a larger penalty against the cost and risk of additional litigation. A CA is often faced with the choice between a penalty that will induce defendants to settle and a harsher penalty that may require taking the case to trial.

In making these decisions that affect detection, prosecution, and penalization, it would be desirable for a CA to do what is best for society; that is, maximize social (or consumer) welfare while taking account of the cost to taxpayers. However, such an expectation is unrealistic and unfair. Those employed at a CA are as much flesh and blood as the rest of us. While they may take account of social goals, they also have personal aspirations. Entering their calculus could be the "warm glow" from putting a price fixer behind bars or the desire to exert less effort and take on less risk from settling a case rather than going to trial. They may pursue cases to contribute to the reputation and resources of the agency. Or a CA official may consider career concerns as they act to improve their performance as viewed by those who might promote them or hire them in the private sector.

Rather than speculate about the incentives of those who work at a CA, let me make two fairly indisputable points. First, the interests of a CA do not fully align with the interests of society or the goal of competition law. To some degree, the personal considerations of a CA's employees are relevant to their decisions. Second, a CA strives to enhance its measurable performance because, generally, rewards are tied to what is observed. Some observable metrics include the conviction rate (that is, fraction of investigations that lead to a conviction or guilty plea), number of convicted cartels, and amount of penalties as measured by days in jail and fines collected.

2 Leniency programs provide reduced penalties to cartel participants coming forward, while whistleblower rewards provide monetary payment to non-participants from reporting a cartel.

3 In a study of 60 large private antitrust suits, 40 percent of them were initiated by plaintiffs. Robert H. Lande & Joshua P. Davis, "Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases," *University of San Francisco Law Review*, 42 (2011), 879-918.

We have now arrived at the challenge when it comes to deterrence: *convicted cartels are observed, deterred cartels are not* (or at least not easily). Consequently, we expect many decisions by a CA to be driven by a desire to convict cartels – as that is an observable measure upon which a CA's employees can be rewarded – which will be to the neglect of deterring of cartels. Private enforcers are even less incentivized to value deterrence. Plaintiffs and law firms are motivated to collect damages from existing cartels (as well as shut them down), and not to deter the formation of future cartels. Indeed, fewer cartels means fewer cases so law firms have little interest in promoting deterrence.

The central claim of this paper is that anti-cartel enforcement is suboptimal because the system is designed for public and private enforcers to insufficiently care about deterrence.

III. HOW DOES UNDERDETERRENCE MANIFEST ITSELF?

Having explained in the abstract why a CA has inadequate incentives to deter collusion, let me be concrete in how it might manifest itself in a CA's actions. But before doing so, two caveats are warranted. What may appear to be suboptimal conduct from the perspective of deterrence could reflect conduct that is optimal in light of scarce resources. For example, some detection activities may not be performed and some cases not pursued because of a lack of resources, not because of insufficient incentives to deter. However, I don't think a shortage of resources is the full story for, as I will describe, there are some low-cost actions not being taken. The second caveat is that some apparently suboptimal conduct by public enforcers could be optimal when taking into account the presence of private enforcers. For example, a CA may leave some cases for harmed customers to litigate or seek a less severe penalty because of customer damages. As is explained below, I do not believe this is sufficient to rationalize the conduct I am about to describe.

Starting with a CA's actions relevant to detection, it is not immediately clear that a CA's incentives are weak when it comes to discovering cartels. Given the number of convicted cartels is an observable metric, a CA could choose to be very active in finding cases. But a CA may instead be focused on the conviction rate which could lead them to be less active in detection given that fewer cases allow more resources to be brought to bear on each case. Focusing on the DOJ, its leniency program has surely been effective in inducing the self-reporting of cartels though concerns have been expressed of excessive reliance on it for discovering cases.[4] Putting aside leniency applications, the DOJ has generally not engaged in the enterprise of discovering cartels. Notably, the DOJ has chosen not to perform a potentially productive detection activity: cartel screening.[5]

Cartel screening is the examination of market data for collusion. Any investigation begins with some piece of evidence supporting the hypothesis that a market harbors a cartel and screening can deliver that evidence. As some examples, screening has discovered cartels in markets for cement (South Africa), subway construction (Korea), and retail gasoline (Brazil).[6] Studies have shown that bidding rings can be detected from bid data using algorithms based on supervised machine learning.[7] To my knowledge, the DOJ has shown little interest in screening (though the Procurement Strike Force appears to be a recent departure), while many other CAs have engaged in it to varying degrees.[8] One possible reason for why screening may be underutilized is that it may not identify the easiest cases to prosecute for it starts with economic evidence. However, it is worth noting that screening is complementary to a leniency program. An investigation initiated by screening can induce firms to apply for leniency, as occurred with the cement cartel in South Africa.[9]

Of greater concern than underdetection is underprosecution. In their case selection, CAs may be focusing on winning cases and shutting down existing cartels, while avoiding those cases that would do more to deter future collusion. On this issue, three points will be made. First, the

4 "I am worried that the success of the Leniency Program combined with budget constraints that your Division faces will in effect give you incentives to pursue only the companies that come forward. . . . [A]s I know from personal experience, some of the most egregious and harmful of the cartels may have nobody coming forward." Senator Bill Blumenthal, US Senate, Committee on the Judiciary, Cartel Prosecution: Stopping Price Fixers and Protecting Consumers. Hearing before the Subcommittee on Antitrust, Competition Policy, and Consumer Rights, 113th Cong., November 14, 2013.

5 The DOJ has also chosen not to offer whistleblower rewards though space prevents me from critically examining the purported rationale.

6 These cases can be found in Ulrich Laitenberger & Kai Hüschelrath, "The Adoption of Screening Tools by Competition Authorities," *CPI Antitrust Chronicle*, 2 (September 2011).

7 Martin Huber & David Imhof, "Machine Learning with Screens for Detecting Bid-Rigging Cartels," *International Journal of Industrial Organization*, 65 (2019), 277-301; and Manuel J. García Rodríguez et al, "Collusion Detection in Public Procurement Auctions with Machine Learning Algorithms," *Automation in Construction*, 133 (2022), 10407.

8 At the 2016 ICN Chief/Senior Economist Workshop, 27 competition authorities in attendance were surveyed and 15 reported they were doing some screening. Report on 2016 ICN Chief/Senior Economists Workshop, prepared by Nigel Caesar, Renée Duplantis, & Thomas Ross, April 25, 2017.

9 The case for private actors engaging in cartel screening is put forth in Joseph E. Harrington, Jr. "Cartel Screening is for Companies, Law Firms, and Economic Consultancies, not just Competition Authorities," *Centro Competencia*, 3 November 2021 https://centrocompetencia.com/harrington-cartel-screening-is-for-companies-law-firms-and-economic-consultancies/.

DOJ has largely focused on cases involving explicit collusion. Second, the DOJ has not been prosecuting attempts to explicitly collude. Third, the use of consent decrees may be a frugal method for shutting down a cartel but they do not necessarily serve the goal of deterrence.

Perhaps it is due to the leniency program delivering an ample supply of explicit collusion cases but it is rare for the DOJ to take on cases of tacit collusion.[10] For example, there have been numerous episodes in which firms colluded through public announcements such as earnings calls. The DOJ has declined to prosecute, as they are left to private litigants to pursue.[11] Recognizing there is a resource constraint, so not all cases can be pursued, if the goal is solely to shut down cartels then avoiding these challenging tacit collusion cases and focusing on explicit collusion cases may make sense. However, the goal of deterrence can justify prosecuting tacit collusion. If firms know certain practices are not prosecuted by a CA, it gives them license to pursue those practices. This means the conviction of one case of tacit collusion could deter many future episodes involving similar practices. This concern about case selection is magnified by the success of the leniency program in detecting and prosecuting explicit collusion for it may be causing some firms to instead pursue tacit collusion. If tacit collusion is becoming more prevalent in practice, underdeterrence due to underprosecution is then an increasing concern.

An "invitation to collude" case involves a firm proposing to a competitor that they form an agreement to restrain trade but where the agreement is not consummated; typically, because the competitor declined the offer. It has been almost 40 years since the DOJ last prosecuted an "invitation to collude" case under Section 2 of the Sherman Act. In that case against American Airlines, the Fifth Circuit Court held that "an agreement is not an absolute prerequisite for the offense of attempted joint monopolization."[12] Subsequently, invitation to collude cases have been exclusively handled by the Federal Trade Commission as an unfair practice under Section 5.[13] Some of those FTC cases have been quite egregious. For example, a supplier of barcodes sent a series of emails to two competitors expressing a plan to coordinate price increases.[14]

The problem with leaving the FTC to prosecute these cases is that they do not have an arsenal of penalties to draw upon. The cost of being caught by the FTC for inviting a conspiracy is basically legal fees. The Sherman Act's Section 2 has greater deterrent potential with its threat of criminal penalties and corporate and individual fines. It would seem appropriate and should be uncontroversial for firms to be severely punished for attempting to form an agreement to restrain trade. That the other firms did not oblige to go along should not get a firm and their executives off the hook.

Finally, underprosecution could be reflected in cases ending with a consent decree rather than a judicial opinion. From the perspective of stopping a particular instance of a harmful practice, a consent decree is eminently sensible when compared to going to trial and possibly losing. However, from the perspective of deterrence, a successful judicial ruling could deter multiple future cartels. As a case in point, *Container* was important for precedent for it established the rule of reason for a class of information exchanges.[15] That would not have happened if the DOJ had issued a consent decree. In contrast, a consent decree with several airlines in 1994 has left us 28 years later still not knowing when advance price announcements are a violation of Section 1.[16] Returning to the absence of public announcement cases by the DOJ, there has been no jurisprudence providing guidance as to the public communications that a firm should avoid.

As commented by legal scholar and judge Frank Easterbrook: "Deterrence is … the first, and probably the only goal of antitrust penalties."[17] Accordingly, a competition authority should foremost consider deterrence when deciding on the appropriate penalty. As incarceration must be abhorrent for corporate executives, the DOJ is certainly enhancing deterrence when it pursues criminal investigations and exacts prison

10 By "tacit collusion," I mean firms have an agreement to restrain competition which was achieved through means that, while indirect, involve distinct identifiable acts of communication. The distinction being made is between cases that "involve direct, readily observable proof that the defendants have exchanged assurances that they will pursue a common course of action" (explicit collusion) and those "in which the plaintiff invokes 'indirect' or 'circumstantial' evidence to establish the fact of the agreement." (tacit collusion). William E. Kovacic, "The Identification and Proof of Horizontal Agreements under the Antitrust Laws," *Antitrust Bulletin*, 38 (1993), 5-81; pp. 19-20.

11 These cases can be found in Joseph E. Harrington, Jr., "Collusion in Plain Sight: Firms' Use of Public Announcements to Restrain Competition," working paper, November 2021 (*Antitrust Law Journal,* forthcoming).

12 *United States v. American Airlines, Inc.*, 743 F.2d 1114, 1122 (5th Cir. 1984).

13 For some cases, see Larry Fullerton, "FTC Challenges to 'Invitations to Collude'," *Antitrust,* 25 (Spring 2011), 30-35.

14 One email sent by Jacob Alifraghis of InstantUPCCodes.com stated: "All 3 of us - US, YOU and [Competitor A] need to match the price that [Competitor B] has. ... I'd say that 48 hours would be an acceptable amount of time to get these price [increases] completed for all 3 of us. The thing is though, we all need to agree to do this or it won't work." In the Matter of Jacob J. Alifraghis, Complaint, FTC Docket Number C-448, August 29, 2014; p. 3.

15 *United States v. Container Corp. of Am.*, 393 U.S. 333 (1969)

16 For a discussion of the case, see Severin Borenstein, "Rapid Price Communication and Coordination: The Airline Tariff Publishing Case (1994)," in *The Antitrust Revolution*, John E. Kwoka, Jr. & Lawrence J. White, eds., 2004.

17 Frank H. Easterbrook, "Predatory Strategies and Counterstrategies," *University of Chicago Law Review*, 48 (1981), 263-337; p. 318.

sentences. At the same time, corporate fines (even when combined with customer damages) could be insufficient for collusion to be ex post unprofitable much less ex ante unprofitable. The vitamins case is illustrative of this concern. Hoffman LaRoche received a fine of $500 million which at the time was the highest fine in the DOJ's history.

However, by the DOJ's own guidelines, the recommended fine was in the range of $1.3 billion to $2.6 billion, which meant the $500 million fine was 40 percent of the minimum recommended fine. Nor did damages sufficiently increase the financial penalty. It is estimated that members of the vitamins cartel incurred U.S. fines and damages that were only 86 percent of U.S. overcharges[18] (which is a reasonable approximation of the incremental profits from collusion). In practice, customer damages have generally proven inadequate to deliver cartel-deterring financial penalties. A recent study found for the median case that customers recovered only 52 percent of damages and in only 20 percent of cases were at least single damages obtained.[19] Given a plausible probability that executives attach to being caught and convicted, the best evidence suggests that it remains highly profitable to form a cartel.

The profitability of collusion also means that boards of directors and senior managers will not be incentivized to encourage their employees to comply with antitrust laws. That a company has adopted a compliance program need not reflect a genuine desire to dissuade employees from colluding. The real test is whether it has in place the same monitoring practices for preventing and detecting collusion as they do with regards to accounting fraud, embezzlement, and other financial crimes.[20] There is no evidence that is the case. The problem of underdeterrence is exacerbated when boards of directors and senior managers do not see collusion as a problem for shareholders and thus do not take adequate action to prevent it.

IV. WHAT CAN BE DONE TO PROMOTE DETERRENCE?

A response to the problem of underdeterrence has two layers. First, what actions can be taken to enhance deterrence? Second, how can a CA be incentivized to take those actions? From our preceding discussion, much of the answer to the first (and easier) question is transparent. A CA can increase deterrence by engaging in cartel screening and thereby making it more likely a cartel will be detected. Screening is a relatively low-cost activity; requiring a few economists and some research assistants to collect and analyze data.[21]

In the area of prosecution, the DOJ can take on cases other than explicit collusion. It has long been recognized that a Section 1 violation does not require an express agreement. A judiciously chosen case could aid in deterring cartels and more clearly defining the boundaries of illegal conduct. In particular, a case involving public announcements could aid in deterring such activities and provide guidance to firms as to what they should not say publicly. The DOJ could also aggressively pursue invitation to collude cases under Section 2 and penalize firms for attempting to form an illegal agreement.

While incarceration has effectively punished individuals, more needs to be done to penalize shareholders. Within the limits allowed by the law, fines should be set with the goal of making cartel formation a regretful act which means making it credibly ex ante unprofitable. A necessary condition for that to be so is that fines and damages are several times the incremental profit from collusion. CAs can also be encouraged to consider the use of structural remedies where appropriate. A structural remedy has cartel members sell productive assets, such as capacity, to other firms in order to make future collusion less likely. Compared to existing corporate penalties of government fines and customer damages, divestiture is more of a deterrent under certain conditions, more effective at compensating those consumers harmed, and corrective in reducing the likelihood of recidivism and preventing post-cartel tacit collusion.[22]

Of course, if the problem is one of incentives, identifying deterrence-enhancing actions is pointless if a CA is not motivated to take them. Offering a solution to address that challenge will require an analysis that is beyond the scope of this paper. However, one practical suggestion is for the DOJ to make "deterrence" an explicit consideration in their decisions. When deciding how to allocate resources (do we assign an economist to screening?), whether to prosecute a cartel (should we take on a case involving public announcements?), and the penalty to pursue (how high to make the corporate fine?), it can consider the implications for future cartel formation.

18 John M. Connor, "The Great Global Vitamins Conspiracy: Sanctions and Deterrence," working paper, Purdue University, February 2006.

19 John M. Connor & Robert H. Lande, "Not Treble Damages: Cartel Recoveries Are Mostly Less Than Single Damages," *Iowa Law Review*, 100 (2015), 1997-2023.

20 For example, a company could use screening to look for collusion by its employees.

21 For an overview of cartel screening, see Joseph E. Harrington, Jr. & David Imhof, "Cartel Screening and Machine Learning," working paper, February 2022.

22 These points are argued in Joseph E. Harrington, Jr., "A Proposal for a Structural Remedy for Illegal Collusion," *Antitrust Law Journal*, 82 (2018), 335-359.

V. CONCLUDING REMARKS

The DOJ is an aggressive and effective actor in the fight against cartels, as are the competition authorities in many other jurisdictions. It has a long list of accomplishments including the leniency program and obtaining multi-year prison sentences. More recently, it has taken on buyer cartels in labor markets and created the Procurement Collusion Strike Force. The DOJ has an exceptional record in prosecuting explicit collusion with the aid of leniency recipients. However, its record is less impressive in detecting cartels (outside of leniency applications), prosecuting tacit collusion, developing precedents to define the boundary of lawful and unlawful conduct, designing new penalties, and, more broadly, deterring cartel formation. My hope is that this paper may offer some constructive suggestions for the DOJ and other competition authorities to develop more effective anti-cartel enforcement with the specific objective of deterring collusion.

UK PUBLIC PROCUREMENT – INCREASING RISKS FOR CARTEL PARTICIPANTS

BY JULIETTE ENSER, GEORGINA LAVERACK & VICTORIA SIGUAN-CERVERA[1]



1 Competition and Markets Authority.

I. INTRODUCTION

The stakes are getting higher for those involved in cartel activity in the UK and in particular bid-rigging in public procurement. In this article we will outline the Government's proposed new public procurement exclusion and debarment regime and why it will provide a further incentive to comply with competition law and also to apply for leniency. We will also touch on the other ways that risks for cartelists are increasing; both in terms of the risk of detection from the Competition and Markets Authority ("CMA")'s intelligence work and the tough sanctions (both corporate and individual) that the CMA can apply.

I. NEW GOVERNMENT PUBLIC PROCUREMENT EXCLUSION AND DEBARMENT PROPOSALS

A. Proposed Changes to the Exclusion Regime in the Procurement Bill

On May 11, the UK Government introduced to Parliament a Bill which, if enacted, will create a new UK framework for public procurement. [2] The Procurement Bill 2022[3] includes provisions to strengthen the exclusion regime. The proposed changes include a new mandatory exclusion ground for participants in cartel activity (which may be a supplier or "connected person"[4]) and the introduction of a central debarment register.[5]

As a result of these proposals, companies that engage in price fixing, market sharing (including bid rigging) or other cartel activities and their directors risk facing mandatory exclusion by a contracting authority from public procurements for up to 5 years. They are also at risk of being included on the central debarment register which would result in them automatically being excluded from all public procurement contracts for up to 5 years. However, cartelists that assist in the detection of wrongdoing by being the first to bring a cartel to the attention of the CMA under its leniency policy will be protected from exclusion.[6]

The CMA welcomes these proposed changes as they will provide an additional incentive for companies to comply with competition law, as well as protecting contracting authorities from companies that fail to take competition compliance seriously. With the background of increasing concerns about the cost of living following the economic shocks caused by the global coronavirus (COVID-19) pandemic and the war in Ukraine, it is more crucial than ever that consumers get the benefits of competition, and that innovative, hard-working businesses can compete on a level playing field.

The new regime would also maintain – and indeed enhance – incentives for cartel members to apply for leniency. Not only will successful immunity applicants continue to receive the current benefits for Type A immunity[7] but, in addition, they will also fall outside the new exclusion and debarment regime.

2 In December 2021 the Government published Transforming Public Procurement - Government response to consultation setting out details of its proposals. See https://www.gov.uk/government/consultations/green-paper-transforming-public-procurement/outcome/transforming-public-procurement-government-response-to-consultation.

3 The Procurement Bill was formally introduced to the House of Lords on 11 May 2022. See https://bills.parliament.uk/bills/3159. See also the Explanatory Notes. See https://bills.parliament.uk/bills/3159/publications.

4 Schedule 6 of the Procurement Bill (paragraph 43) defines "connected person" as follows: includes a person with 'significant control' over the supplier; a director or shadow director of the supplier; a parent undertaking or a subsidy undertaking of the supplier; a predecessor company; any other person who it can reasonably be considered stands in an equivalent position in relation to the supplier as any of these persons; any person with the right to exercise or who actually exercises significant influence or control over the supplier; or any person over which the supplier has the right to exercise or actually exercises significant influence or control.

5 The central debarment register is a published list of suppliers which the Government considers may be unfit to bid for public contracts, because they meet either a mandatory or discretionary ground for exclusion and have failed to take sufficient action to ensure the circumstances giving rise to the misconduct will not happen again.

6 This is subject to the confirmation that the cartelist has met all conditions for leniency and can benefit from leniency. There conditions are set out in paragraph 2.7 of the CMA's guidance (Applications for leniency and no action in cartel cases, OFT1495). See Leniency and no-action applications in cartel cases: OFT1495 - GOV.UK (www.gov.uk) (www.gov.uk).

7 Successful Type A immunity applicants receive guaranteed corporate immunity from fines, guaranteed immunity from criminal prosecution for all cooperating current and former employees and directors of the applicant and protection from director disqualification for all cooperating directors.

B. The Current Exclusion from Public Procurement Regime – Discretionary Exclusion for "Distorting Competition" Unless There Is Sufficient Evidence of "Self-Cleaning"

Under current public procurement rules,[8] which were based on the applicable EU regime,[9] a supplier may be subject to mandatory or discretionary exclusion from future tenders by a contracting authority unless it provides sufficient evidence of "self-cleaning."[10]

A mandatory exclusion applies where a supplier has been convicted of one of the specified criminal convictions (including, for example, for bribery, corruption, money-laundering, or drug trafficking).[11]

However, under the current regime anti-competitive activity is not a ground for mandatory exclusion. Rather, a supplier may be excluded where there are "sufficiently plausible indications"[12] that a supplier has entered into agreements with other economic operators aimed at "distorting competition" (for example, including price fixing, collusive tendering, or market sharing).[13] Before excluding a supplier, a contracting authority must also consider whether it has provided sufficient evidence of "self-cleaning."

Under the current regime, the decision whether to exclude a supplier involved in "distorting competition" is left to the discretion of the individual contracting authority. We are not aware of any supplier having been debarred by a contracting authority in the UK for 'distorting competition' to date.

C. New Mandatory Exclusion Ground for Cartel Infringements

Under the legislation now before Parliament, the exclusion regime would be strengthened by adding new mandatory exclusion grounds[14] including where the CMA has made a decision that:

a) the prohibition on anti-competitive agreements in Chapter I of the UK Competition Act has been infringed by an agreement or concerted practice to which the supplier or connected person[15] was party; and
b) which was a cartel.[16]

The mandatory exclusion also applies where a similar infringement decision has been taken either by a concurrent regulator in the UK (such as the Financial Conduct Authority)[17] or an overseas regulator.[18]

The mandatory exclusion will apply if the contracting authority considers that the circumstances giving rise to the application of the exclusion ground are likely to occur again.[19] The Procurement Bill sets out matters that may be taken into account by a contracting authority when considering whether "the circumstances giving rise to the application of the exclusion ground are likely to occur again," namely:

8 The Public Contracts Regulations 2015, regulation 57.

9 The Public Contracts Regulations 2015 implement the Public Sector Procurement Directive (2014/24/EU) which provides rules for the procurement of goods, services and works above certain thresholds by public authorities. These Regulations also re-enact the relevant provisions of the Remedies Directives (Directive 89/665/EEC as amended by Directive 2007/66/EC), on remedies and review procedures for public procurement, as implemented by the UK in the Public Contracts Regulations 2009.

10 The Public Contracts Regulations 2015, regulations 57 (1), 57(8) and 57(13).

11 The Public Contracts Regulations 2015, regulation 57(1)(a) to (n).

12 The FAQs provided with the Procurement Policy Note 'PPN' 04/21 states the following as regards the use of the term "sufficiently plausible indications": "(…) the use of this term indicates that definitive evidence of collusion is not required for the exclusion to apply. For example, depending on the circumstances, a decision by the Competitions and Markets Authority (CMA) finding a company to have restricted, distorted or prevented competition may amount to a "sufficiently plausible indication.

13 The Public Contracts Regulations 2015, regulation 57(8)(d).

14 The Procurement Bill, clause 54(1)(a)(i) and (5). The Procurement Bill, Schedule 6, paragraph 39(1).

15 *Supra* note 4.

16 Paragraph 4(1) of Schedule 8A of the Competition Act 1998 defines cartel as "an agreement or concerted practice between two or more competitors aimed at coordinating their competitive behaviour in a market, or otherwise influencing competition in a market."

17 The Procurement Bill, Schedule 6, paragraph 39(3).

18 The Procurement Bill, Schedule 6, paragraph 40. Paragraph 762 of the Explanatory Notes.

19 The Procurement Bill, clause 54(1)(a)(ii).

a) evidence that the supplier, associated supplier or connected person has taken the circumstances seriously, for example by paying compensation;
b) steps that the supplier, associated supplier or connected person has taken to prevent the circumstances occurring again, for example by changing staff or management, or putting procedures and training in place;
c) commitments that such steps will be taken, or to provide information or access to allow verification or monitoring of such steps;
d) the time that has elapsed since the circumstances last occurred; and
e) any other evidence, explanation, or factor that the authority considers appropriate. [20]

Conduct which constitutes a breach of competition law which falls short of being a ground for mandatory exclusion, including cartel or other infringing conduct which has not been the subject of an infringement decision, will continue to be a ground for discretionary exclusion.

The new exclusion and debarment regime will apply to all public bodies in England, Wales, and Northern Ireland. The Procurement Bill does not make provision for all public procurement in Scotland but does apply to contracting authorities in Scotland which are either cross-border bodies or exercise wholly reserved functions with some exceptions.[21]

The Procurement Bill is unlikely to come into force before the end of 2023. However, the mandatory competition grounds have been designated as converted mandatory grounds which means that retrospective application of the mandatory competition grounds will be possible[22] for up to 3 years prior to the Procurement Bill coming into force.[23] As a result, a cartel infringement decision made by the CMA or concurrent regulators from now or going back as far as 3 years before the Procurement Bill comes into force could lead to the mandatory exclusion of a supplier once the Procurement Bill comes into force.

Further details of the proposed regime are set out in the Procurement Bill 2022 and Explanatory Notes[24] and it is intended will be explained in published guidance.

D. Protection for Type A Immunity Recipients

The Procurement Bill provides protection against exclusion for those companies that are the first to report a cartel to the CMA under its leniency programme, thus protecting and enhancing incentives to apply for leniency.[25]

Under the Procurement Bill, "Type A"[26] immunity recipients (and individuals with immunity from prosecution for cartel offences)[27] would be exempt from exclusion, whether mandatory or discretionary, in relation to the reported cartel conduct.[28] A company may receive Type A immunity if it is the first to report a cartel that the CMA is not already investigating and provided it cooperates with the CMA's investigation. It is the Government's intention that similar protections from exclusion will apply to successful immunity recipients under a leniency regime in another jurisdiction.

20 The Procurement Bill, clause 55(1).

21 Paragraph 40 of the Explanatory Notes, available at https://bills.parliament.uk/publications/46458/documents/1787.

22 The Procurement Bill, Schedule 6, paragraphs 42(1) and (4).

23 The Procurement Bill, Schedule 6, paragraph 42(4)(i).

24 *Supra* note 3.

25 See Cartels: come forward and apply for leniency - GOV.UK (www.gov.uk).

26 The Procurement Bill, Schedule 6, paragraph 39(2)(a). This is available to the first applicant to report and provide evidence of a cartel in circumstances where the CMA does not already have a pre-existing investigation and does not otherwise have sufficient information to establish the existence of the reported cartel activity. Type A immunity provides guaranteed corporate immunity from financial penalties and guaranteed individual immunity from criminal prosecution for all cooperating current and former employees and directors of the undertaking and protection from director disqualification proceedings for all directors of the undertaking (Application for leniency and no action in cartel cases. OFT's detailed guidance on the principles and process. OFT1495).

27 The Procurement Bill, Schedule 6, paragraph 39(2)(b).

28 The Procurement Bill, Schedule 7, paragraph 8(2).

E. Creation of Central Debarment List[29]

The Procurement Bill also establishes a central debarment regime for relevant mandatory and discretionary exclusion grounds,[30] including the competition law infringement ground, and creates a "debarment list."[31] The Procurement Bill provides the legal framework for central government to oversee the debarment list.

The debarment list will cover both mandatory and discretionary exclusion grounds, and both UK and overseas suppliers may be included on it.

Contracting authorities must exclude suppliers on the debarment list to which a mandatory exclusion ground applies (unless there are exceptional circumstances in which an overriding public interest applies) for the period that the suppliers remain on the debarment list. But contracting authorities will retain their discretion in respect of suppliers to which a discretionary ground applies.[32] Contracting authorities will continue to be able to exclude suppliers not on the debarment list on a case-by-case basis.

The Government has stated that it envisages that the central debarment regime will have the following features:[33]

a) suppliers will be considered for debarment when they are excluded by a contracting authority during a procurement;
b) certain categories of authorities, likely initially to be central government contracting authorities, will additionally be able to refer suppliers they want the Cabinet Office to consider to be added to the debarment list, without having excluded them;
c) a new Procurement Review Unit will be responsible for considering cases, investigating evidence of misconduct and self-cleaning by suppliers, and making recommendations to the Minister;
d) suppliers will be entitled to apply for early removal from the debarment list before the end of the 5-year period of exclusion, if they can show they have self-cleaned; and
e) suppliers will be entitled to appeal a decision to put them on the debarment list to the court.

II. OTHER INCREASING RISKS FOR THOSE INVOLVED IN CARTELS

In addition to the proposed new exclusion and debarment regime, there are other ways that the CMA has been increasing the risk of significant sanctions and personal consequences for cartel participants.

A. Intelligence-Led Cases

The CMA's leniency policy continues to play an extremely important role in the detection and investigation of cartels in the UK.[34] Indeed, the existence of an active leniency programme can, in and of itself, destabilize a cartel since each cartel participant is aware that the other party has an incentive to be "first through the door" for immunity.

However, the CMA does not rely exclusively on leniency as a means of cartel detection. Approximately half of CMA cartel cases are intelligence-led, by which we mean the investigation did not result from a report by a business participating in the cartel under our leniency policy. The concept of intelligence-led is quite a broad one and would cover, for example, information being mailed to us anonymously, market intelligence from our other functions, use of data 'screening' tools and information from other intelligence agencies. We are assisted in conducting intelligence-led investigations by our powers to investigate covertly, including carrying out surveillance and requiring production of communications data.

29 The Procurement Bill, clauses 59 to 61.

30 The Procurement Bill, clause 56 (1).

31 The Procurement Bill, clause 59.

32 The Procurement Bill, clauses 54(1)(a) and 54(2)(a).

33 *Supra* note 2: Consultation response under heading Q21.

34 See https://www.gov.uk/government/publications/leniency-and-no-action-applications-in-cartel-cases.

A key source of information leading to the uncovering of cartels is whistle-blowers (individuals – who are frequently current or former employees of industry participants – who get in touch with us, for example using our Cartels Hotline).[35] Individuals who provide us with information that leads to the detection and investigation of a cartel can receive a financial reward, currently of up to £100,000.[36] We have stringent processes in place to protect those who come forward as whistle-blowers.[37]

Cartel victims can also be a source of intelligence-led cases. Recently, the CMA has been working closely with public procurers and fraud teams across local and central government to increase the risk of detection and reporting of cartel activity in public procurement. The CMA has been supporting public procurers by providing training on the risks of bid rigging, how to spot 'red flags' and how to report any suspicions to the CMA (including a CMA e-learning training module for public procurers on how to reduce the risk of bid rigging,[38] how to spot bid rigging "red flags" and how to report any suspicions to the CMA). This is supported by existing CMA bid rigging advice for public sector procurers.[39] These materials are part of a wider education and business compliance programme housed on the CMA's 'Cheating or Competing' campaign page.[40]

The CMA's active engagement with public procurers aims to encourage the reporting of suspect supplier conduct while also deterring anti-competitive supplier behaviour, therefore increasing the risk of detection.

B. CMA Enforcement Action Leading to Increased Corporate Sanctions and Consequences for Individuals

Of course, corporate sanctions remain a very important tool in deterring cartel behaviour and the CMA routinely imposes significant fines on infringing businesses. For example in the construction sector alone, of which the public sector is a significant client, we have fined businesses £67 million across 5 cartel cases in recent years.[41]

Last year the CMA issued revised penalties guidance[42] following consultation earlier in the year. This is the guidance that we have regard to when calculating an appropriate penalty. In doing so, the CMA has been particularly mindful of the need to ensure that the level of penalty ensures effective deterrence especially in cases involving large, often global, businesses.

This is particularly relevant as, following Brexit, the CMA can examine global cartels and cross-border anti-competitive practices affecting the UK market. The CMA will do so where we consider it is necessary to act to protect UK customers or businesses from the practice causing concern. For example, we have recently looked at data practices by Meta (formerly Facebook)[43] and at Apple's mobile payment systems[44] under the UK's Competition Act prohibitions. We expect to open other similar cases in the coming months and years, across a wide range of sectors.

At the same time the CMA has been increasing the use of our director disqualification powers,[45] which ensures individual directors' accountability for a company's involvement in anti-competitive practices. In our view, individual directors are far less likely to cause or permit their companies to break the law if they know they may be held directly responsible for it. Under this regime, directors of infringing companies can be disqualified from acting as a director for a period of up to 15 years if by reason of the infringement they are found to be unfit to act as directors. Directors may be subject to disqualification not only if they were directly involved in the conduct but also where they did not know but ought to have known that the conduct constituted a breach or had reasonable grounds to suspect that the conduct constituted a breach and took

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35 Cartels Hotline:020 3738 6888 or a whistle-blower can fill out the CMA online reporting form or email: cartelshotline@cma.gov.uk. See https://cma-553899.workflowcloud.com/forms/c35b9608-b73d-464c-bbfa-0b3ccda758b2.

36 See https://www.gov.uk/government/publications/cartels-informant-rewards-policy.

37 See https://www.gov.uk/government/publications/whistleblowers-at-the-cma.

38 See https://cheatingorcompeting.campaign.gov.uk/#advice_for_public_procurers.

39 See https://www.gov.uk/government/publications/bid-rigging-advice-for-public-sector-procurers.

40 See https://cheatingorcompeting.campaign.gov.uk.

41 This included the CMA fining three suppliers of pre-cast concrete drainage products £36 million for having infringed competition law by agreeing to fix or coordinate prices, share the market and exchanging information fining two of the UK's largest suppliers of rolled lead £9 million for breaking competition law.

42 CMA's Guidance as to the appropriate amount of a penalty: CMA73, updated December 16, 2021. See https://www.gov.uk/government/publications/appropriate-ca98-penalty-calculation.

43 See https://www.gov.uk/cma-cases/investigation-into-facebooks-use-of-data.

44 See https://www.gov.uk/cma-cases/investigation-into-apple-appstore.

45 Company Directors Disqualification Act 1986 (c.46) and CMA's Guidance on Disqualification Orders (CMA102) of 6 February 2019.

no steps to prevent it. The director disqualification regime therefore places responsibility for competition law compliance squarely with those at the top of an organization.

The risk of disqualification is high: we now routinely consider director disqualifications in all cartel cases. To date, the CMA has disqualified 25 directors for competition law breaches and we continue actively to pursue others. In one of the more recent disqualification orders agreed,[46] directors were banned from their roles for 12 and 11 years – the longest periods to date.

The CMA has published advice and information to help directors and their advisers understand their responsibilities in relation to competition law, including: a quick guide on how to avoid disqualification[47] and a checklist[48] on how to comply with competition law.

III. CONCLUSION

The CMA is prepared to come down hard on those businesses who cheat and we will continue to seek out and enforce against cartel activity. Indeed, the current economic circumstances have given a new urgency to this work. Consumers now more than ever deserve the benefits of competitive prices and honest, hardworking businesses deserve a level playing field to compete, innovate and succeed.

In this context, the UK Government's new proposals to strengthen the public procurement exclusion and debarment regime provide a welcome further incentive for companies that do business in the UK to comply with competition law. It also provides a further incentive for those companies that do find themselves implicated in a cartel to apply for immunity.

46 See https://www.gov.uk/government/news/directors-disqualified-over-illegal-construction-cartel.

47 See https://www.gov.uk/government/publications/advice-for-company-directors-on-avoiding-cartel-infringements/avoiding-disqualification-advice-for-company-directors.

48 See https://www.gov.uk/government/publications/competing-fairly-in-business-at-a-glance-guide-to-competition-law.

ARTIFICIAL INTELLIGENCE TEACHES ITSELF TO COLLUDE? WHAT INCREASINGLY SOPHISTICATED AI COULD MEAN FOR ANTITRUST COMPLIANCE

BY SONIA KUESTER PFAFFENROTH & BRIAN DESMARAIS[1]

1 *Sonia Kuester Pfaffenroth* is a Partner in Arnold & Porter's Antitrust/Competition practice. She formerly served in the Antitrust Division of the US Department of Justice (DOJ) as Deputy Assistant Attorney General for Civil and Criminal Operations. *Brian Desmarais* is a Senior Associate in Arnold & Porter's Antitrust/Competition practice. Mr. Desmarais previously served an Assistant Vice President/Associate General Counsel at L'Oreal USA, Inc. where he advised the company on a range of antitrust compliance matters.

I. INTRODUCTION

The availability of big data and the increasing sophistication of algorithms and artificial intelligence has had an evolving impact on strategic decision-making across sectors ranging from airline pricing to ride sharing to e-commerce. Pricing algorithms can assist firms to optimize pricing on a near real-time basis in response to competitors' strategic moves through the rapid analysis of vast quantities of market data. They can also be used — as has been demonstrated by government enforcement actions — to facilitate sophisticated collusion between competitors.

The use of algorithms in pricing, and their associated risks, is by no means a new concept. Each new technological advance can provide not only benefits to businesses and consumers, but also the potential for another tool that can be used to facilitate unlawful conduct and pose barriers to detection. Third parties developing and marketing pricing tools may, inadvertently, increase antitrust risk for their customers by marketing the same products to competitors, creating the opportunity for the perception of collusion.

The discussion of the use of AI in pricing has also led to broader questions about other antitrust risks artificial intelligence and algorithms may pose, particularly in the context of a single business's strategic decisions. Enforcers and academics are questioning whether the use of algorithms can facilitate price discrimination or monopoly maintenance. Legislators are in turn considering more broadly whether new tools are necessary to provide antitrust enforcers with the ability address the potential for competitive harm.

And, for some time now, antitrust experts have debated a related question: when might these pricing algorithms become sufficiently sophisticated to cross the line from a tool used by businesses to execute strategies created by humans to AI that has the capacity to collude with other market participants without human intervention. Government enforcers, academics and legislators have expressed divergent views on both whether we have already crossed that line and whether current antitrust tools are sufficient to address any anticompetitive conduct stemming from the use of technology.

The only aspect of the competitive implications of AI that is not subject to debate is that this will continue to be an evolving - and highly scrutinized - area. As the technological and legal landscape evolves, compliance will become increasingly challenging as companies seek to reduce risk and avoid exposure to government investigations or to costly and burdensome litigation. While the strategic benefits of technology are significant, it is important to keep a close eye on developments to ensure compliance measures keep pace with potential areas of risk.

II. THE FTC AND DOJ CONSIDER ALGORITHMS, ARTIFICIAL INTELLIGENCE, AND ANTITRUST

The Federal Trade Commission and the Antitrust Division of the US Department of Justice (Antitrust Division) have been considering the potential issues stemming from pricing algorithms for years.

During the Trump administration, there was general consensus at the FTC and DOJ that although algorithms might enable parallel pricing or support new ways of engaging in collusive arrangements, traditional antitrust analysis could be applied to new forms of AI-based conduct.

For example, in a 2017 joint submission to the Organisation for Economic Cooperation and Development ("OECD"), the FTC and DOJ discussed the analytical frameworks for assessing concerted action under US antitrust laws in the context of computerized pricing tools.[2] The agencies emphasized that US antitrust laws focus on challenging anticompetitive behavior rather than market outcomes. The agencies concluded that, "[w]ithout proof of collusion or evidence that the knowing parallel adoption of pricing formulas narrowed the range of prices over time, parallel pricing conduct may be outside the reach of the antitrust laws."[3] Therefore, to the extent pricing algorithms still reflect unilateral pricing conduct by a single firm that would not otherwise constitute a violation of the antitrust laws, it would not be unlawful to use AI to set prices even when doing so contributes to supra-competitive prices.[4]

2 OECD Roundtable: Algorithms and Collusion (Paris, June 21-23, 2017) (information and documents), *available at* https://www.oecd.org/daf/competition/algorithms-and-collusion.htm.

3 Algorithms and Collusion — Note by the United States (May 26, 2017) (official submission to the OECD Roundtable), *available at* https://www.oecd.org/daf/competition/algorithms-and-collusion.htm.

4 OECD Roundtable: Algorithms and Collusion (Paris, June 21-23, 2017) (information and documents), *available at* https://www.oecd.org/daf/competition/algorithms-and-collusion.htm.

In subsequent public statements, antitrust agency leaders struck a similar tone, emphasizing that antitrust analysis of pricing algorithms should stick to traditional frameworks. In a 2018 speech addressing pricing algorithms, then-Deputy Assistant Attorney General Barry Nigro noted that one should "take out" the fact that an algorithm was used when considering whether pricing conduct constitutes collusion. Proof of an agreement still remains the touchstone for illegality, and while Nigro recognized that agreements to collude can be inferred from circumstantial evidence, he was skeptical that an agreement could be inferred based simply on the fact that the "spokes" all use the same price-setting mechanism (i.e., an algorithm).[5] When discussing the enforcement actions DOJ had taken regarding pricing algorithms and collusion, then-Acting Assistant Attorney General Andrew Finch similarly emphasized that proof of an agreement was key in determining whether parallel conduct amounts to an antitrust violation under US law.[6]

In late 2018, highlighting the importance of the topic, the Federal Trade Commission devoted two days of its series of public Hearings on Competition and Consumer Protection in the 21st Century to the topic of "competition and consumer protection issues associated with the use of algorithms, artificial intelligence, and predictive analytics in business decisions and conduct." The Federal Trade Commission solicited public comments on questions relating to AI, including whether "the use of algorithms, artificial intelligence, and predictive analytics currently raise particular antitrust concerns (including, but not limited to, concerns about algorithmic collusion)." At the hearing itself, speakers from the government, academia, private practice, economic consulting and industry offered a variety of viewpoints in sessions ranging from the real world application of algorithms and AI, ethical considerations, issues relating to innovation and market structure and algorithmic collusion. With respect to algorithmic collusion, as has been raised in other contexts, the hypothetical was posed as to how to address a future state where AI might have the capacity to collude without a clear agreement to do so among human market participants.[7] Bruce Hoffman, the then-Director of the Federal Trade Commission's Bureau of Competition introduced the topic by posing the question "is it possible that machine intelligence, artificial intelligence, could actually collude by itself . . . in the sense of explicitly agreeing on price, output, customer allocation, market allocation?"[8]

Current antitrust agency leaders have generally struck a consistent tone in discussing collusion. At the 2020 International Competition Network's Cartel Working Group Plenary, Deputy Assistant Attorney General Richard Powers said the agency "expect[s] to see the use of algorithmic collusion with increasing frequency."[9] However, "while algorithms — similar to other technological developments — may present new challenges as we enforce a statute written in 1890, so far at least, we feel equipped to confront such challenges without major changes in our enforcement."[10] DAAG Powers stated clearly that in situations where a programmer or a platform, or another intermediary, serves as the coordinator for an agreement between competitors to use a single pricing algorithm for unlawful purposes, both the competitors and the intermediary would be subject to prosecution.[11]

At the same time, current DOJ leadership acknowledges that the anticompetitive risks around AI are evolving, and this evolution may at some point require different investigation and prosecution tools. Most recently, Assistant Attorney General for Antitrust Jonathan Kanter suggested that proactive compliance may be necessary to address collusion risks. In AAG Kanter's estimate, "[w]e are not far off, if at all, from a world in which AI can learn to price fix," and it may soon become "necessary to start training your AI like you train your employees" not to engage in anticompetitive conduct.[12] AAG Kanter also highlighted that potential anticompetitive harm is not limited to collusion. "More often than not . . .

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5 Barry Nigro, Remarks at GCR Live 7th Antitrust Annual Law Leaders Forum (Miami, Feb. 3, 2018); *see* Pallavi Guniganti, *US DOJ Deputy: Algorithmic Cartel Requires Agreement*, GCR (Feb. 5, 2018), *available at* https://globalcompetitionreview.com/us-doj-deputy-algorithmic-cartel-requires-agreement.

6 Andrew Finch, Keynote Address at Annual Conference on International Antitrust Law and Policy (New York Sept. 14, 2017), *available at* https://www.justice.gov/opa/speech/acting-assistant-attorney-general-andrew-finch-delivers-keynote-address-annual-conference.

7 FTC Hearing #7: The Competition and Consumer Protection Issues of Algorithms, Artificial Intelligence, and Predictive Analytics, Hearings on Competition and Consumer Protection in the 21st Century (Nov. 13-14, 2018), *available at* https://www.ftc.gov/news-events/events/2018/11/ftc-hearing-7-competition-consumer-protection-issues-algorithms-artificial-intelligence-predictive.

8 Bruce Hoffman, *Welcome and Introductory Remarks*, FTC Hearing #7: The Competition and Consumer Protection Issues of Algorithms, Artificial Intelligence, and Predictive Analytics, Hearings on Competition and Consumer Protection in the 21st Century (Nov. 14, 2018) *available at* http://www.ftc.gov/system/files/documents/public_events/1418693/ftc_hearings_session_7_transcript_day_2_11-14-18_0.pdf.

9 Richard A. Powers, Remarks at Cartel Working Group Plenary: Big Data and Cartelization, 2020 International Competition Network Annual Conference (Washington DC (Virtual) Sept. 17, 2020), *available at* https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-richard-powers-delivers-remarks-cartel-working-group.

10 *Id.*

11 *Id.*

12 Jonathan Kanter, Remarks at 21st Annual International Competition Network Conference (Berlin May 5, 2022); *see* Alex Wilts, *Kanter: Antitrust Division Investing in Technological Expertise to Address AI Collusion*, GCR (May 5, 2022), *available at* https://globalcompetitionreview.com/gcr-usa/article/kanter-antitrust-division-investing-in-technological-expertise-address-collusion-in-ai.

monopolies are interested in building moats" to protect themselves from competition. Kanter reiterated that "these kinds of market realities often spurred by technology are just as relevant" in criminal enforcement as in civil enforcement.[13]

III. LITIGATION DEVELOPMENTS

To date, there have been relatively few litigated actions resolving allegations of anticompetitive harm due to the use of algorithms and no examples of liability predicated on an agreement reached solely between independent AI without human involvement.

In 2015, the DOJ successfully prosecuted David Topkins, who pleaded guilty to participating in a conspiracy to adopt specific pricing algorithms to coordinate prices for wall posters he and coconspirators sold through the Amazon Marketplace. The DOJ's information charging Topkins specifically included reference to conversations between Topkins and co-conspirators regarding price, an agreement between the participants in the conspiracy to adopt "specific pricing algorithms for the agreed-upon posters with the goal of coordinating changes to their respective prices," and allegations that Topkins wrote computer code that instructed algorithm-based software to avoid price competition between the conspiring sellers.[14]

Also in 2015, private litigants sued Uber alleging that the pricing and payments mechanism underpinning the Uber ride-share app constituted an anticompetitive agreement in violation of Section 1. The plaintiffs alleged that the Uber app's design supported a hub-and-spoke conspiracy, where each driver charged prices determined centrally by the algorithm, knowing that other drivers would not be undercutting that price. The court found the allegations in the complaint sufficient to withstand a motion to dismiss.[15] But in 2020, after the case moved to arbitration, the arbitrator found that plaintiff-claimant failed to establish a hub-and-spoke conspiracy because there were "no spokes in the traditional sense but merely numerous vertical and individual contractual relationships between Uber and its many drivers."[16]

In January 2022, the Washington State Attorney General simultaneously filed suit and entered into a consent decree with Amazon relating to allegations that the company's "Sold by Amazon" program, violated Washington's Consumer Protection Act. The complaint alleged that several hundred "Sold by Amazon" contracts entered into between Amazon and third-party sellers on amazon.com that were competing with Amazon's own online consumer sales unreasonably restrained trade. According to the Washington Attorney General, Amazon invited participants into the "Sold by Amazon" program on an invitation-only basis. The participants were third-party sellers with whom Amazon had previously competed for online consumer sales on its online marketplace.

The Washington Attorney General alleged that Amazon offered these selected third-party sellers a guaranteed minimum payment if they would refrain from competing on price with Amazon, with proceeds exceeding the minimum price shared between the seller and Amazon. The Washington Attorney General alleged that this program resulted in a reduction of competition because Amazon programmed its pricing algorithm to match the prices that certain other retailers offered to consumers and set the third-party seller's pre-enrollment price as the minimum price.

As prices of enrolled products increased, sales of enrolled products with whom Amazon had previously competed for online sales declined. Faced with price increases, some consumers opted to buy Amazon Retail's products, particularly its private label products. The Washington Attorney General also alleged participating sellers had "limited, if any, ability to lower the price of their products without withdrawing the product's enrollment in the Sold by Amazon program."[17] Under the consent decree, Amazon agreed to end the Sold by Amazon program, provide annual antitrust compliance updates to the Attorney General's office, and pay $2.25 million to the Attorney General's office.[18]

And, just last month, a class action complaint was filed against Uber and Lyft on behalf of certain drivers in California asserting claims under California's Cartwright Act and Unfair Competition Law. Among other assertions, Plaintiffs claim that the defendants' business models

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13 *Id.*

14 *United States v. Topkins*, No. CR 15-00201 (N.D. Cal. 2015) (Information and Plea Agreement *available at* https://www.justice.gov/atr/case/us-v-david-topkins).

15 *Meyer v. Kalanick*, 174 F. Supp. 3d 817 (S.D.N.Y. 2016).

16 Arbitration Award at 9, *Meyer v. Uber Technologies, Inc.*, No. 01-18-0002-1956 (AAA Feb. 22, 2020), *available at* ECF No. 182-16, *Meyer v. Kalanick*, No. 1:15-cv-09796-JSR (S.D.N.Y. May 22, 2020)

17 Complaint at ¶¶ 22-28, *Washington v. Amazon.com, Inc.*, No. 22-2-01281-1 SEA (Wash. Sup. Ct. Jan. 26, 2022).

18 Press Release, AG Ferguson Investigation Shuts Down Amazon Price-Fixing Program Nationwide (Jan. 26, 2022), https://www.atg.wa.gov/news/news-releases/ag-ferguson-investigation-shuts-down-amazon-price-fixing-program-nationwide#:~:text=AG%20Ferguson%20investigation%20shuts%20down%20Amazon%20price%2Dfixing%20program%20nationwide,-FOR%20IMMEDIATE%20RELEASE&text=SEATTLE%20%E2%80%94%20Attorney%20General%20Bob%20Ferguson,Sold%20by%20Amazon%E2%80%9D%20program%20nationwide.

constitute "vertical price-fixing" because the companies use "hidden" and "secret" algorithms that determine the price charged and then require drivers to charge that amount to the customer. Plaintiffs claim that there is resultant harm "in both the labor market as well as the consumer market."[19] There have been no substantive rulings in the case to date.

IV. CONCLUSION

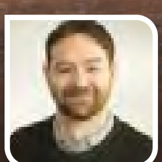
The landscape and legal risks relating to algorithms and artificial intelligence continues to evolve, posing compliance challenges and necessitating nimble compliance protocols that can be adapted as new risks become apparent. Recent statements by antitrust enforcers suggest that they will be focused not just on the use of AI to facilitate collusion, but also the use of AI more broadly as part of an anticompetitive exclusionary strategy. It is reasonable to assume private plaintiffs increasingly will be bringing competition cases based on AI-based theories of harm.

Firms should target compliance training for employees responsible for implementing and programming algorithms and AI related to pricing and other competitive activities — just as they already provide targeted training to employees that interface with competitors as a part of their job responsibilities — to ensure that they understand the most up-to-date antitrust risks and rules of the road. This is particularly important as enforcers and private plaintiffs scrutinize AI-facilitated collusion and unilateral anticompetitive conduct by firms with significant market positions. Businesses must ensure that their compliance programs are equal to the task of identifying and mitigating potential risk in this rapidly changing environment.

19 Complaint, *Gill v. Uber Techs., Inc.*, No. CGC-22-600284 (Super. Ct. Cal., S.F. Cnty. June 20, 2022).

REFORMING THE EUROPEAN COMMISSION'S ENFORCEMENT OF CARTEL LAW: THE CASE FOR INDIVIDUAL ADMINISTRATIVE SANCTIONS

BY PETER WHELAN[1]



1 Professor of Law and Director of the Centre for Business Law and Practice, School of Law, University of Leeds.

I. INTRODUCTION

The European Commission ("the Commission") is widely considered to be one of the most robust and influential of antitrust regulators globally. It regularly imposes significant fines upon companies that are deemed responsible for violations of EU competition law. Its enforcement record regarding price-fixing cartels is especially indicative of the commitment it demonstrates in this context. From 1990 to December 2021, for example, in relation to cartel activity alone the Commission imposed fines (adjusted due to Court judgments) totaling almost 30 billion euros.[2] In that same period, it adopted 152 cartel infringement decisions (addressed to 906 infringing undertakings), with 30 of those decisions being adopted since 2017.[3] The average size of the fine imposed upon an undertaking has been measured at 17 million euros (for the period 2001–2005), 47 million (for the period 2006-2010) and 42 million (for the period 2011–2015).[4] An examination of the figures reveals that the last ten years or so display a sizeable increase in the magnitude of the cartel fines being imposed.[5]

The Commission's current record on anti-cartel enforcement is undeniably impressive and should be welcomed by those who wish to see cartel activity minimized within Europe. That is not to say, however, that potential reform to the Commission's cartel toolkit should be overlooked. Indeed, at present, there is a noticeable, significant lacuna in the powers of the Commission with respect to anti-cartel enforcement: it does not have the ability to impose administrative sanctions upon individuals who are responsible for the cartel activity of their companies, to the detriment of the objective of deterring such activity. This article argues that reform should occur to full this lacuna and that, accordingly, the Commission should be granted the power to impose individual administrative sanctions for cartel activity.

II. THE CONCEPT OF AN INDIVIDUAL ADMINISTRATIVE SANCTION

Individual (or personal) administrative sanctions are sanctions that are imposed solely upon natural persons following an administrative proceeding, that is a proceeding that is conducted in front of an administrative body (rather than a formally-designated judicial body or criminal court), following administrative procedures, and adhering to administrative standards of proof and administrative rules of evidence.[6] With the "pure" form of such sanctions, the courts only get involved in the sanctioning process with respect to the judicial review of the acts of the administrative body at issue, i.e. their infringement decisions.[7] Despite its imposition outside of a traditional "criminal" setting, a sanction in the administrative context is not necessarily devoid of societal stigma,[8] and particularly so at EU level,[9] where there is a tendency to rely upon administrative sanctions with a penal nature.[10] An individual administrative sanction can take many different forms,[11] including the loss of specific rights (e.g., the right to apply for public tenders or grants), a prohibition on engaging in a particular profession, and the requirement to pay money as a punishment,[12] and depending on the circumstances their consequences in practice can of course be extremely harsh for the person subjected to them.[13]

2 See European Commission, "Statistics on Cartel Cases," December 10, 2021, https://ec.europa.eu/competition-policy/cartels/statistics_en, 2.

3 *Ibid.* 4-5.

4 See e.g. M. Hellwig and K. Hüschelrath, "Cartel Cases and the Cartel Enforcement Process in the European Union 2001–2015: A Quantitative Assessment" (2017) 62(2) Antitrust Bulletin 400, 433.

5 See European Commission, *op. cit.*, 2.

6 P. Cacaud, M. Kuruc & M. Spreij, *Administrative Sanctions in Fisheries Law*, Food and Agriculture Organization of the United Nations, Rome, 2003, 2-3.

7 See e.g. R. Brown, "Administrative and Criminal Penalties in the Enforcement of Occupational Health and Safety Legislation" (1992) 30(3) Osgoode Hall Law Journal 691, 692-693.

8 See e.g. R. Galbiati and N. Garoupa, "Keeping Stigma Out of Administrative Law: An Explanation of Consistent Beliefs" (2007) 15 Supreme Court Economic Review 273.

9 Cf.: J. Öberg, "The Definition of Criminal Sanctions in the EU" (2014) 3(3) European Criminal Law Review 273, 286-287 and 291-292; and K. Ligeti, "European Criminal Law: Administrative and Criminal Sanctions as Means of Enforcing Community Law" (2000) 41(3-4) Acta Juridica Hungarica 199, 206.

10 L. Besselink, "Sovereignty, Criminal Law and the New European Context," in P. Alldridge and C. Brants (eds), *Personal Autonomy, the Private Sphere and Criminal Law: A Comparative Study*, Hart Publishing, Oxford, 2001, 103.

11 R. McKay, "Sanctions in Motion: The Administrative Process" (1964) 49(2) Iowa Law Review 441, 443.

12 A. Weyembergh & N. Joncheray, "Punitive Administrative Sanctions and Procedural Safeguards: A Blurred Picture that Needs to be Addressed" (2016) 7(2) New Journal of Criminal Law 190, 194.

13 W. Gellhorn, "Administrative Prescription and Imposition of Penalties" [1970] 3 Washington University Law Quarterly 265, 271.

Although for some commentators an administrative sanction in fact implies something distinct to a monetary sanction, such as the forced closure of an establishment or the loss of a business license,[14] it is the financial form of the sanction (i.e. the negative economic impact inherent in its coerced relocation of financial resources[15]) that constitutes the relevant definition adopted in this article. Consequently, for present purposes, individual administrative sanctions can be understood solely as fines that are imposed upon natural persons in the context of an administrative proceeding. Such fines can pursue a number of different objectives including deterrence, compensation, and punishment.[16]

III. EU-LEVEL ANTI-CARTEL ENFORCEMENT AND THE SCOPE FOR EMPLOYING INDIVIDUAL SANCTIONS

Under Regulation 1/2003, the Commission currently has the power to impose administrative sanctions (fines) upon undertakings that have intentionally or negligently violated the EU competition law provisions, including its cartel prohibition.[17] The Commission does not have the power to impose fines upon natural persons for their infringements of the EU cartel prohibition, except that is in the very infrequent circumstance where the natural person at issue constitutes an undertaking in their own right (i.e. an independent entity offering goods or services on a market), rather than a constituent person of a larger undertaking.[18]

Moreover, from a close reading of that Regulation, one can clearly see that the fining powers of the Commission are designed with *businesses* rather than *individuals* in mind: Article 23(2) provides that fines will be calculated with reference to "total turnover in the preceding business year."[19] As a result, it is completely understandable that the Commission's Fining Guidelines omit any reference to the fining of infringing individuals,[20] and it is certainly not surprising to discover that, as Cauffman notes, to date there has not been a single case where the Commission has imposed a fine upon an individual employee as a component part of an undertaking that has infringed the EU competition law rules.[21] Consequently, and despite the lack of an express, legally-binding statement prohibiting individual antitrust sanctions at EU level, we can say with some confidence that the directors, managers or employees of an infringing company cannot at present be targets for the potential imputation of that company's cartel infringement.[22]

It is true that EU competition law is not only enforced by the Commission but also by National Competition Authorities ("NCAs") in the EU Member States.[23] When the national enforcement of EU competition law occurs, the NCA in question may well be able to sanction directly (or seek the imposition of sanction upon) natural persons within the infringing undertaking. As Article 5 of Regulation 1/2003 provides, in enforcing EU competition law, the NCAs may impose "fines, periodic penalty payments or any other penalty provided for in their national law." In national enforcement, the existence or otherwise of an imputation process focusing on natural persons depends therefore on the specifics of national law, which of course need to adhere to the EU principles of effectiveness and equivalence when EU competition law is being enforced at national level.[24] There are in fact a number of jurisdictions within the EU that enforce EU competition law through, *inter alia*, an imputation process that focuses on natural persons. In Denmark, for example, criminal sanctions can be imposed upon natural persons within an infringing undertaking,

14 C. Adam, S. Hurka & C. Knill, "Conceptualizing and Measuring Styles of Moral Regulation," in C. Knill, C. Adam and S. Hurka (eds), *On the Road to Permissiveness?: Change and Convergence of Moral Regulation in Europe*, Oxford University Press, 2015, 22.

15 A. Freiberg, "Reconceptualizing Sanctions" (1987) 25(2) Criminology 223, 235.

16 See e.g. C. Diver, "The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies" (1979) 79(8) Columbia Law Review 1435, 1456.

17 See *Council Regulation (EC) No 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty*, [2003] OJ L1/1 (hereafter "Regulation 1/2003"), Article 23(2).

18 See W. Wils, *Principles of European Antitrust Enforcement*, Hart Publishing, Oxford, 2005, 93.

19 C. Koenig, "The Imposition of "Follow-On Penalties" on Managers and Employees" (2018) 13(2) Competition Law Review 139, 142.

20 *Ibid.*

21 C. Cauffman, "Civil Law Liability of Parent Companies for Infringements of EU Competition Law by Their Subsidiaries," February 8, 2019, https://ssrn.com/abstract=3331083, 5.

22 *Cp.*: R. Alexander, "Systematically Flogging the Wrong: EU Corporate Fines Violate the Fundamental Rights of Shareholders – The European Commission as Revenant of the Persian Great King Xerxes" (2021) 32(4) European Business Law Review 681, 689; A. Riley, "The Modernisation of EU Anti-Cartel Enforcement: Will the Commission Grasp the Opportunity?" (2010) 31(5) European Competition Law Review 191, 205; and S. Germont & O. Andresen, "Public Enforcement by the Commission: A Strategic Perspective," in G. Amato and C.D. Ehlermann (eds), *EC Competition Law: A Critical Assessment*, Hart Publishing, Oxford, 2007, 705.

23 See Regulation 1/2003, Recital 8 and Article 3.

24 On these principles and their application in this context, see M. Frese, *Sanctions in EU Competition Law: Principles and Practice*, Hart Publishing, Oxford, 2014, 98-103.

where those persons have violated Article 101(1) of the Treaty on the Functioning of the European Union ("TFEU") "by entering into a cartel agreement";[25] specifically, such natural persons face "imprisonment for up to one year and six months if the breach is intentional and of a grave nature, especially due to the extent of the infringement or its potentially damaging effects."[26] The imputation of an undertaking's antitrust infringement to a natural person does not only occur in the criminal setting, however.[27] In Portugal, for example, it occurs in the context of an administrative proceeding, where certain individuals within an infringing undertaking can be subjected to non-criminal fines of up to 10 percent of the annual remuneration that they receive from the infringing undertaking.[28] Such examples of *individual*-focused imputation processes, of course, stand in clear distinction to the approach of the Commission in enforcing EU competition law.

It is submitted that the Commission could legally be granted the power to impose administrative cartel sanctions upon natural persons without having to amend the current Treaty framework.[29] Article 103(1) TFEU provides that "[t]he appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 shall be laid down by the Council, on a proposal from the Commission and after consulting the European Parliament." These Regulations or Directives can be designed in order, *inter alia*, "to ensure compliance with the prohibitions laid down in Article 101(1) and in Article 102 [TFEU] by making provision for fines and periodic penalty payments": Article 103(2)(a) TFEU. Given the deterrence potential of individual administrative sanctions (detailed below in Section IV), as well as the inherent link between deterrence and compliance, it is reasonable to conclude that these provisions of EU law provide a solid basis for the introduction (through a Regulation) of individual administrative cartel sanctions at EU level.

The situation is different with respect to criminal sanctions (i.e. the imposition of custodial sentences). The employment of criminal sanctions for cartel activity raises very difficult issues to do with their relative efficiency,[30] as well as with their appropriateness.[31] Legally and practically, such sanctions also raise a plethora of difficult challenges, including, for example, issues to do with the appropriate definition of offences,[32] their interaction with administrative leniency,[33] the issue of parallel or concurrent administrative and criminal antitrust proceedings,[34] the strengthening of procedural guarantees when one moves from an administrative regime to a criminal one,[35] and effective international enforcement cooperation.[36] In European practice the effectiveness of criminal cartel sanctions can certainly be questioned,[37] if not doubted altogether.[38]

The European efforts to date to make such a sanction an effective deterrent against cartel activity have in fact been subjected to severe criticism in the literature,[39] with some commentators arguing that, notwithstanding the US example, cartel criminalization does not really have a

25 The Danish Competition Act, Consolidation Act No. 869 of 8 July 2015, Section 23(3).

26 *Ibid.*

27 See e.g. T. Tóth, "International Report," in P. Këllezi, B. Kilpatrick & P. Kobel (eds), *Liability for Antitrust Law Infringements & Protection of IP Rights in Distribution*, Springer, Cham, Switzerland, 2019, 18-19.

28 See Portuguese Competition Act, Law 19/2012, Articles 69(4), 73(1) and 73(6). On the growing importance of such individual-focused antitrust enforcement in Portugal, see J. Vieira Peres & C. Vieira Peres de Fraipont, "Non-Compete Clauses and Fines on Natural Persons: The Blueotter and EGEO Case (Portugal)" (2022) Journal of European Competition Law & Practice, forthcoming, emphasizing Case PRC/2019/3, *Blueotter/EGEO*, Decision of the Portuguese Competition Authority, June 30, 2021.

29 *Cp.* M. Wise, "Competition Law and Policy in the European Union" (2007) 9(1) OECD Journal of Competition Law and Policy 7, 73.

30 See e.g. S. Shapiro, "The Road Not Taken: The Elusive Path to Criminal Prosecution for White-Collar Offenders" (1985) 19(2) Law & Society Review 179, 206.

31 See e.g. P. Whelan, "Morality and Its Restraining Influence on European Antitrust Criminalisation" (2009) 12(1) Trinity College Law Review 40.

32 See e.g. A. MacCulloch, "Honesty, Morality and the Cartel Offence" (2007) 28(6) European Competition Law Review 355.

33 See e.g. C. Beaton-Wells, "Criminal Sanctions for Cartel Conduct: The Leniency Conundrum" (2017) 13(1) Journal of Competition Law & Economics 125.

34 See e.g. P. Whelan, "Cartel Criminalisation and Due Process: The Challenge of Imposing Criminal Sanctions Alongside Administrative Sanctions within the EU" (2013) 64(2) Northern Ireland Legal Quarterly 143.

35 See e.g. P. Whelan, "Criminal Cartel Enforcement in the European Union: Avoiding a Human Rights Trade-Off," in C. Beaton-Wells and A. Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement,* Hart Publishing, Oxford, 2011.

36 See e.g. A. Stephan, "Four Key Challenges to the Successful Criminalization of Cartel Laws" (2014) 2(2) Journal of Antitrust Enforcement 333, 352-359.

37 See e.g. A. Jones & R. Williams, "The UK Response to the Global Effort Against Cartels: Is Criminalization Really the Solution?" (2014) 2(1) Journal of Antitrust Enforcement 100.

38 See e.g. E. Morgan, "Criminal Cartel Sanctions Under the UK Enterprise Act: An Assessment" (2010) 17(1) International Journal of the Economics of Business 67.

39 See e.g. M. Furse, *The Criminal Law of Competition in the UK and in the US: Failure and Success*, Edward Elgar, Cheltenham, 2012, Chapter 4 (focusing on the UK) and Chapter 5 (focusing on Ireland).

place within this context.[40] Nonetheless, it is arguable that under the current Treaty framework no amendment is required in order to mandate through EU law the imposition of criminal sanctions in the *EU Member States* for violations of EU competition law.[41] The actual imposition of criminal sanctions by *the Commission itself* would not be possible, however, without a change in the Treaties as well as in the EU-level institutional setup.[42] This is because such action would require the adoption of a Regulation (as opposed to a Directive) and there is simply no basis under the current criminal law competence of the EU institutions for such a legal development.[43] In any case, politically, it would be incredibly difficult to "sell" such EU-level action to European citizens and to implement effectively and legitimately.[44]

IV. JUSTIFYING THE IMPOSITION OF INDIVIDUAL ADMINISTRATIVE CARTEL SANCTIONS BY THE COMMISSION

This article contends that individual sanctions should be imposed in order to help the Commission to secure the deterrence of cartel activity within the EU. Admittedly, this position would not be universally accepted by informed scholars. Indeed, it has been argued in the law and economics literature (most notably by Posner) that, in order to secure deterrence, there is no need for sanctions to be imposed upon *individuals* (as opposed to corporate entities) in the context of corporate wrongdoing.[45]

The general argument presented in this context is founded upon an important feature of (optimal) corporate fines: that they create incentives for the company to scrutinize, discover and avert any unlawful conduct of those individuals who are acting within the scope of their employment.[46] The point is that, if sanctions are imposed upon the infringing companies themselves, those companies will be incentivized to monitor actively their agents and to sanction them appropriately (e.g., through demotion or sacking[47]) when they are involved in prohibited cartel activity, thereby ensuring that those agents are deterred from lawbreaking.[48] As stated by Posner himself:

> it is unimportant whether the individual corporate employees are joined as defendants in antitrust cases. A corporation has effective methods of preventing its employees from committing acts that impose huge liabilities on it. A sales manager whose unauthorized participation in a paltry price-fixing scheme resulted in the imposition of a $1 million fine on his employer would thereafter … have great difficulty finding responsible employment, and this prospect should be sufficient to deter.[49]

Clearly, then, the idea of imposing individual administrative sanctions for cartel activity runs counter to that particular argument.

A solid argument in favor of employing personal sanctions to deter cartel activity would thus address Posner's argument head on. The first point to be emphasized here is that Posner's argument is very vulnerable to attack on the basis of at least two clear limitations facing a corporation that wishes to punish internally its infringing employees: (a) the ability of a company to discipline its employees is limited to the impact of dismissal (itself undermined by the existence of alternative employment prospects), as well as to the value of the personal assets of

40 See e.g. K. Ost, "From Regulation 1 to Regulation 2: National Enforcement of EU Cartel Prohibition and the Need for Further Convergence" (2014) 5(3) Journal of European Competition Law & Policy 125, 134.

41 See e.g. P. Günsberg, "Exploring the Case for Criminalisation of Business Cartels in Europe," in J.B. Banach-Gutierrez & C. Harding (eds), *EU Criminal Law and Policy: Values, Principles and Methods*, Routledge, Abingdon, 2017, 216-217.

42 See G. Hakopian, "Criminalisation of EU Competition Law Enforcement – A Possibility after Lisbon?" (2010) 7(1) Competition Law Review 157, 171-172.

43 See in particular Article 83 TFEU.

44 See e.g. L. Danagher, "The Criminalisation of Cartels: A European and Trans-Atlantic Perspective" (2012) 33(11) European Competition Law Review 522, 523.

45 See K. Dau-Schmidt, "Preference Shaping by the Law," in P. Newman (ed.), *The New Palgrave Dictionary of Economics and the Law: Volume 3*, Macmillan Reference Ltd, London, 1998, 87.

46 B. Kobayashi, "Antitrust, Agency, and Amnesty: An Economic Analysis of the Criminal Enforcement of the Antitrust Laws Against Corporations" (2001) 69(5-6) George Washington Law Review 715, 736.

47 A measure of caution is probably warranted here though, depending on the circumstances; see e.g. J. Paha, "Antitrust Compliance: Managerial Incentives and Collusive Behavior" (2017) 38(7) Managerial and Decision Economics 992, 1001.

48 See W. Page, "Optimal Antitrust Remedies: A Synthesis," in R. Blair & D.D. Sokol (eds), *The Oxford Handbook of International Antitrust Economics: Volume 1*, Oxford University Press, 2015, 264.

49 R. Posner, *Antitrust Law*, 2nd Edition, University of Chicago Press, 2001, 271.

the employee in question;[50] and (b) the infringing employee may be aware that she will have left the firm by the time the infraction is likely to be discovered.[51]

The second point to be made is that it may be too simplistic to assume that, in large (M-form) corporations in particular, where there may be attenuated relationships between senior executives and the managers and employees operating at the multitude of different levels in the corporate hierarchy, the existence of the antitrust fine will be swiftly and efficiently brought to bear to subordinates, with the result that such fines may not fully manage to change the organizational behavior at issue.[52] The third point that one should make is that, even when they face potential antitrust fines, companies may hesitate to punish their transgressing employees when they are discovered, as: (i) they may fear that firing employees too readily may create difficulties in terms of future recruitment; and (ii) in future they may need to rely upon the cooperation of those employees in order to secure antitrust leniency from the authorities.[53] The fourth and final point to note is that to expect the company to want to discipline effectively its infringing employees when they get caught ignores the fact that the interests of the individual infringers and their company may well be fully aligned with respect to the phenomenon of antitrust lawbreaking (which may occur when corporate cartel fines are sub-optimal in nature).[54] The Secretariat of the OECD Competition Committee, in its detailed analysis of the place for individual sanctions in cartel law enforcement, readily accepted this point, in positing that

> [s]ince corporate fines rarely reach a level that would maximize their deterrent effect, they also provide insufficient incentives for a corporation to effectively monitor its agents to prevent them from acting unlawfully and from putting the corporation at the risk of being fined for participating in an unlawful cartel.[55]

In short, then, and irrespective of the potential force of Posner's argument for other types of corporate wrongdoing, *when the cartel sanctions to b*e imposed upon companies are sub-optimal,[56] the targeting of infringing individuals who work for the company may become an attractive idea in terms of securing deterrence.[57] After all, one must remember that it is the

> individual officers and agents who in the final analysis must make the antitrust laws work by reflecting in their day to day business decisions respect for and adherence to the underlying principles expressed in the antitrust laws.[58]

On the (realistic) assumption that the individual administrative fines that are imposed are actually sought to be collected by the competition authority, such sanctions therefore have potential to plug any deterrence gap that may be engendered by relying solely upon corporate sanctions: by targeting directly the individual who is responsible for taking the decision to engage in cartel activity,[59] they can impact upon that particular

50 A.M. Polinsky & S. Shavell, "Should Employees Be Subject to Fines and Imprisonment Given the Existence of Corporate Liability?" (1993) 13(3) International Review of Law and Economics 239, 255-256. See also J. Ellison, "Individual Deterrence and Competition Disqualification Orders" (2011) 10(1) Competition Law Journal 65, 67.

51 See, e.g.: S. Calkins, "Corporate Compliance and the Antitrust Agencies' Bi-Modal Penalties" (1997) 60(3) Law and Contemporary Problems 127, 142; and A. Ezrachi & J. Kindl, "Criminalization of Cartel Activity – A Desirable Goal for India's Competition Regime?" (2011) 23(1) National Law School of India Review 9, 13.

52 H. Amoroso, "Organizational Ethos and Corporate Criminal Liability" (1995) 17(1) Campbell Law Review 47, 58.

53 F. Wagner-von Papp, "Compliance and Individual Sanctions in the Enforcement of Competition Law," in J. Paha (ed.), *Competition Law Compliance Programmes: An Interdisciplinary Approach*, Springer, Cham, Switzerland, 2016, 139. See also B. Fisse, "Penal Designs and Corporate Conduct: Test Results from Fault and Sanctions in Australian Cartel Law" (2019) 40(1) Adelaide Law Review 285, 294.

54 In fact, it is not difficult to find examples of situations where individuals were promoted (or at the very least not sanctioned) within their companies after having been found to have engaged in competition law violations, itself a phenomenon that lends some credence to the claim concerning the alignment of the respective individual and corporate interests; see e.g. A. Stephan, "See No Evil: Cartels and the Limits of Antitrust Compliance Programs" (2010) 31(8) Company Lawyer 231, 237. This particular phenomenon has even been observed in the US when it started to rely more heavily upon individual *criminal* sanctions to enforce their competition laws; see e.g. M. Wheeler, "Antitrust Treble-Damage Actions: Do They Work?" (1973) 61(6) California Law Review 1319, 1337. For empirical work in support of the existence of this phenomenon in more recent times, see J. Connor & R. Lande, "Cartels as Rational Business Strategy: Crime Pays" (2012) 34(2) Cardozo Law Review 427, 440-442.

55 OECD Competition Committee, *Cartels: Sanctions Against Individuals*, DAF/COMP(2004)39, January 10, 2005, 7.

56 For a solid empirical analysis that concludes that current EU-level cartel fines are indeed sub-optimal, see e.g. F. Smuda, "Cartel Overcharges and the Deterrent Effect of EU Competition Law" (2014) 10(1) Journal of Competition Law and Economics 63. See also F. Smuda, "Cartels and Fines," in P. Whelan (ed.), *Research Handbook on Cartels*, Edward Elgar, Cheltenham, forthcoming.

57 *Cp.* R. Kraakman, "Corporate Liability Strategies and the Cost of Legal Controls" (1984) 93(5) Yale Law Journal 857.

58 T. Vickery, "Representing Individual Corporate Officers and Agents in Criminal Antitrust Proceedings" (1975) 26(3) Mercer Law Review 935, 950.

59 R. Blair, "A Suggestion for Improved Antitrust Enforcement" (1985) 30(2) Antitrust Bulletin 433, 452.

individual's cost/benefit analysis,[60] with the aim of moving her towards antitrust compliance with respect to her company's activities.[61] In other words, by targeting employees directly one can try to ensure that those employees' incentives are not distorted and that they are in fact incentivized to adhere to the dictates of the cartel prohibition.[62]

For some commentators on antitrust enforcement, this is a crucial point, with Markham, for example, arguing that "imposing a fine of any size, however large, will not deter violations unless the fine is imposed on the decision maker [i.e. the individual] who opts to violate the law."[63] Moreover, with the existence of personal sanctions, individuals will also be invested with a "weapon" which they can use to attempt to resist any pressure that may be placed upon them by their superiors to cause them to engage in anticompetitive behavior,[64] a situation that is naturally more likely to arise when corporate sanctions are indeed sub-optimal. Personal sanctions can therefore be seen as a useful mechanism to resist any process of deindividualization that may otherwise occur in a corporate setting.[65] In relative terms, individual fines can be far cheaper to administer than other types of personal sanctions (notably custodial sentences).[66] Their introduction also engenders less of an institutional burden, in that they can rely upon existing procedures and agency competences.[67] Given these points, it is thus rather understandable why the European Parliament, in resolutions adopted concerning the European Commission's Annual Report on Competition Policy, has in two recent consecutive years advocated in favor of introducing individual administrative cartel sanctions to complement those that already exist with respect to legal persons.[68]

Whilst not without their own controversy as a method of enforcing competition law provisions,[69] individual administrative sanctions present a significant potential advantage over corporate liability in terms of their ability to achieve deterrence: their success does not depend upon the extent to which a corporate entity is able to pay a (huge) optimal antitrust fine. Instead, the focus is placed on the *individual*'s expected cost/benefit analysis. The optimal individual administrative fine would focus on the expected personal benefit that the employee expects to gain from engaging in anticompetitive behavior. That benefit will of course be very indirect and nowhere near the expected benefit of the infringing company, with the result that it would be reasonable to accept that a cap of a multiple of an employee's annual benefits (as has been proposed by Riley[70]) would not undermine deterrence-focused efforts of the enforcer. The profit from the unlawful activity accrues after all to the infringing company.

Indeed, anticompetitive activity can be easily conceptualized as a form of what is known as "unethical pro-organizational behavior,"[71] in other words illegal or unacceptable behavior that is "neither specified in formal job descriptions nor ordered by superiors, yet is carried out to benefit or help the organization."[72] Most likely, if an employee engages in anticompetitive activity for any particular personal gain,[73] that individual's own expected benefit will be founded on the (possibly marginal) contribution that the anticompetitive behavior makes to the employee's

60 See e.g. D. Baker, "The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging" (2001) 69(5-6) George Washington Law Review 693, 713.

61 S. Souam, "Optimal Antitrust Policy under Different Regimes of Fines" (2001) 19 International Journal of Industrial Organization 1, 3.

62 M. Huffman, "Incentives to Comply with Competition Law" (2018) 30(2) Loyola Consumer Law Review 108, 120.

63 J. Markham, "The Failure of Corporate Governance Standards and Antitrust Compliance" (2013) 58(3) South Dakota Law Review 499, 507.

64 M. Crane, "Commentary: The Due Process Considerations in the Imposition of Corporate Liability" (1980) 1(1) Northern Illinois University Law Review 39, 45 (making this point with respect to criminal sanctions).

65 See e.g. P. Schultz, "The Morally Accountable Corporation: A Postmodern Approach to Organizational Responsibility" (1996) 33(2) Journal of Business Communication 165, 173.

66 See e.g. S.B. Farmer, "Real Crime: Criminal Competition Law" (2013) 9(3) European Competition Journal 599, 610.

67 See e.g. S. Hillsman, B. Mahoney, G. Cole & B. Auchter, "Fines as Criminal Sanctions," US Department of Justice, National Institute of Justice, Washington DC, September 1987, 2.

68 See: European Parliament, *European Parliament Resolution of 19 January 2016 on the Annual Report on EU Competition Policy (2015/2140(INI)*), [2018] OJ C11/2, [29]; and European Parliament, *European Parliament Resolution of 14 February 2017 on the Annual Report on EU Competition Policy (2016/2100(INI))*, [2018] OJ C252/78, [60].

69 F. Wagner-von Papp, "Introduction" [2016] 2 Concurrences 14, 17.

70 See Riley, *op. cit.*, 205.

71 A. Paruzel *et al.*, "Psychological Contributions to Competition Law Compliance," in Paha, *op. cit.*, 217.

72 E. Umphress, J. Bingham & M. Mitchell, "Unethical Behavior in the Name of the Company: The Moderating Effect of Organizational Identification and Positive Reciprocity Beliefs on Unethical Pro-Organizational Behavior" (2010) 95(4) Journal of Applied Psychology 769, 770.

73 On this assumption, see, e.g.: A. Beckenstein & H. Landis Gabel, "Antitrust Compliance: Results of a Survey of Legal Opinion" (1982) 51(4) Antitrust Law Journal 459, 465; and E. Combe & C. Monnier, "Why Managers Engage in Price Fixing? An Analytical Framework" (2020) 43(1) World Competition 35, 35.

career progression or to a specific performance bonus,[74] a benefit that could well be rather modest in absolute terms.[75] The payment of an optimal fine constructed on the basis of (a multiple of) such a contribution is likely – one could reasonably assume – to be within the ability to pay of the infringing employee, who let us not forget is probably wealthier than the average delinquent.[76] Indeed, with cartel activity in particular, it seems that it is the senior managers (which presumably implies rather well paid managers) who are more often than not involved in their company's respective infringements.[77]

In any case, an individual is arguably less likely to risk personal bankruptcy on the simple basis of a cost/benefit analysis than a corporate entity would its liquidation (i.e. as a result of potential risk aversion when personal stakes are very high, the rationality assumption is arguably more realistic or stronger with respect to a company than a natural person with, e.g., a family to support[78]). Furthermore, the authorities, in proceeding to the imposition of a fine outside of an individual's means, would not be engendering the sort of insupportable market-related negative externalities that would result from a corporate liquidation. Individual managers cannot therefore be confident that the competition authority will be lenient with them (i.e. that, in such circumstances, it will actually impose a sub-optimal fine) if they argue that the imposition of an optimal fine will be ruinous for them. These points taken together, then, allow one to posit that, unlike with corporate liability perhaps, the issue of inability to pay would not be overly concerning with respect to individual personal sanctions.[79]

An additional potential advantage of personal administrative cartel sanctions at EU level concerns their positive impact on the effective operation of administrative leniency: if the Commission not only is granted the power to impose such individual sanctions but also is allowed to operate – and does operate – an individual leniency program alongside them,[80] then it can theoretically improve the rate of detection for cartels, to the benefit of deterrence of anticompetitive behavior.[81] The point here is that by threatening the individuals, as well as their companies, with potential cartels fines, the Commission may be able to strengthen its reliance upon the "prisoner's dilemma" in enforcing its cartel prohibition; it can, in other words, build further distrust within a cartel arrangement leading either to its more rapid disintegration in practice or, failing that, to more likely self-reporting when the arrangement has fallen apart organically.[82] As has been stressed in the literature on antitrust criminalization, this effect can occur in two distinct ways: (a) there will be additional runners in a potential "race to the regulator," as individuals as well as legal persons are exposed and can therefore be incentivized to report the cartel to the authorities; and (b) the companies will therefore have an additional source of informing or whistle-blowing to worry about (i.e. their own infringing employees or those within the other companies participating in the cartel), with the result that they themselves may face a larger incentive to get in first to secure a fine discount.[83]

Of course, individual administrative sanctions are not without their own limitations. They thus should not be viewed as a panacea to the issue of cartel activity. The main drawback to individual administrative sanctions is they are open to the possibility of indemnification by the undertaking at issue,[84] with the result that their deterrent effect depends upon whether the legal system at issue can manage to prevent the

74 See Baker, *op. cit.*, 698. It is also possible that the individual infringer's intended benefit is the mere satisfaction of having contributed to their firm's profitability (Paruzel *et al., op. cit.*, 216) or simply the enjoyment of the "quite life" that results from not having to engage in aggressive competition (E. Morgan, "Controlling Cartels – Implications of the EU Policy Reforms" (2009) 27(1) European Management Journal 1, 11).

75 See, e.g.: P. Curran, "Antitrust Sentencing – The Defense Lawyer's View" (1979) 47(3) Antitrust Law Journal 707, 710; and A. Morrison, "Sentencing in Criminal Antitrust Cases" (1977) 46(2) Antitrust Law Journal 528, 529.

76 Posner, *op. cit.*, 271.

77 See e.g. D.D. Sokol, "Antitrust Compliance," in M. Hitt *et al.* (eds), *The Oxford Handbook of Strategy Implementation*, Oxford University Press, 2017, 162.

78 See Posner, R., "The Rights of Creditors of Affiliated Corporations" (1976) 43(3) University of California Law Review 499, 502. *Cf.* J. Macey, "Agency Theory and the Criminal Liability of Organizations" (1991) 71(2) Boston University Law Review 315, 334.

79 *Cf.*: W. Wils, "Panel 4: Criminal Sanctions: Working Paper 1," in C.D. Ehlermann & I. Atanasiu (eds), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law*, Hart Publishing, Oxford, 2003, 438; and T. Calvani & T.H. Calvani, "Custodial Sanctions for Cartel Offences: An Appropriate Sanction in Australia?" (2009) 17 Competition and Consumer Law Journal 119, 131.

80 Hong Kong is a recent example of an antitrust regime that imposes individual sanctions whilst also operating an individual leniency policy alongside a corporate (i.e. undertaking-focused) one; see Hong Kong Competition Commission, *Leniency Policy for Undertakings Engaged in Cartel Conduct*, April 16, 2020, https://www.compcomm.hk/en/legislation_guidance/policy_doc/files/Leniency_Policy_Individuals_E.pdf.

81 See P. Mändmaa, "Assessing the Effectiveness of Competition Law Enforcement Policy in Relation to Cartels" (2014) 3(11) Journal of Arts & Humanities 33, 45.

82 On the importance of distrust to a successful working of the mechanism of leniency, see e.g. C. Leslie, "Trust, Distrust, and Antitrust" (2004) 82(3) Texas Law Review 517, 640-641.

83 See F. Ducci, "Cartel Criminalization in Europe: Addressing Deterrence and Institutional Challenges" (2018) 51(1) Vanderbilt Journal of Transnational Law 1, 21.

84 See e.g. D. Rubinfeld, "Improving Antitrust Sanctions," in D. Ginsburg & J. Wright (eds), Global Antitrust Economics – Current Issues in Antitrust and Law & Economics, Institute of Competition Law, New York, 2016, 99.

company from paying the antitrust fine on behalf of the responsible individual.[85] Full indemnification occurs in this context when the company in effect pays the antitrust fine officially imposed by the competition authority upon its employee, as well as the legal fees encountered by that natural person in the administrative procedure, so that the employee does not actually face a financial detriment from antitrust enforcement: through indemnification the individual sanction can become a de facto corporate one.[86] While, perhaps surprisingly,[87] the indemnification by companies of the fines and/or the legal expenses of their employees can be legally acceptable in certain jurisdictions,[88] there is no denying the potential of the phenomenon of indemnification to undermine the objective of the legal sanction in question, even when it is only partial in nature.[89] In practice, with respect to competition law, indemnification can achieve its (anti-deterrence) aim in a variety of ways; as Zimmer explains,

> [t]he preventive effect of fines on natural persons is … doubtful when these can be sure to receive a corresponding compensation from their employers. Such compensation can be paid ex ante as well as *ex post*, for instance when a higher salary or an additional bonus is agreed upon before an authority discovers the cartel [or, for our purposes, any unlawful anticompetitive conduct], or when the employee is reimbursed in the amount of the fine after a regulatory offence proceeding is conducted.[90]

In the absence of any real stigma associated with the imposition of individual administrative sanctions, successful indemnification thus ensures that the employee's cost/benefit analysis does not include consideration of such sanctions, with the result that they become ineffective in pushing the employee towards compliance.[91] Naturally, the problem of potential indemnification is not an easy one to resolve in practice,[92] not least due to due to difficulty of ensuring detection of indemnification.[93] The first thing to do would of course be to prohibit a company from paying an individual administrative antitrust fine,[94] as has been done, for example, in New Zealand.[95] That prohibition also needs to be effectively enforced with sanctions for the infringing company.

As intimated above, key too is the issue of stigma. The crucial point here is that, if being sanctioned officially by the Commission is viewed as stigmatic by the individual concerned, then the *mere process* of sanctioning can act as a deterrent, irrespective of whether indemnification of the fine by the company later occurs. Indeed, as Grasmick & Appleton have noted, "[u]ndoubtedly, the avoidance of stigma is a motive in human behavior, and, consequently, the threat of stigma if exposed as a law violator probably is a deterrent."[96] Fortunately, the Commission has been quite active – and arguably rather successful – in pursuing a policy of stigmatization with respect to cartel activity. Such activity is expressly acknowledged in Commission statements as involving "wrongdoing" on behalf of the infringing undertaking.[97]

This morality-laden term is even employed in speeches commenting on situations where infringing undertakings benefit from a reduction in their cartel fine as a result of their formally admitting their respective infringements: when settling with the Commission via its official

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85 G. Lusty, "Refining the Anti-Cartel Toolkit: Complements to Corporate Fines" (2010) 9(3) Competition Law Journal 338, 349.

86 W. Mullin & C. Snyder, "Should Firms be Allowed to Indemnify their Employees for Sanctions?" (2010) 26(1) Journal of Law, Economics, and Organization 30, 31.

87 See, however, P. Bowal, "Expensive Day at the Office: Can Corporations Indemnify Their Agents Who Suffer Personal Liability for Regulatory Offences?" (1995) 45(3) University of Toronto Law Journal 247, 276.

88 See e.g. P. Bucy, "Indemnification of Corporate Executives Who Have Been Convicted of Crimes: An Assessment and Proposal" (1991) 24(2) Indiana Law Review 279.

89 See e.g. R. Mikos, "Indemnification as an Alternative to Nullification" (2015) 76(1) Montana Law Review 57, 73.

90 D. Zimmer, "Individual Sanctions in German Competition Law: The Case for a Criminalisation of Antitrust Offences" [2016] 2 Concurrences 28, 31. See also T. Wein, "Cartel Behaviour and Efficient Sanctioning by Criminal Sentences" (2021) 17(2) European Competition Journal 309, 311.

91 *Cp.* Anonymous, "Indemnification of the Corporate Official for Fines and Expenses Resulting from Criminal Antitrust Litigation" (1962) 50(3) Georgetown Law Journal 566, 576.

92 P. Wirz, "Imprisonment for Hard Core Cartel Participation: A Sanction with Considerable Potential" (2016) 28(2) Bond Law Review 89, 106.

93 See, e.g.: Department of Trade and Industry, "A World Class Competition Regime," CM 5233, London, July 2001, [7.17]; A. Boberg, "Fixing the Price at Liberty: The Case for Imprisoning Price-Fixers in New Zealand" (2010) 16 Auckland University Law Review 81, 91; and D. King, "Criminalisation of Cartel Behaviour," Ministry of Economic Development Occasional Paper 10/01, Wellington, New Zealand, January 2010, 17.

94 See e.g. D. Bein, "Payment of a Fine by a Person Other than the Defendant – Law and Policy" (1974) 9(3) Israel Law Review 325, 343.

95 See Section 80A of the Commerce Act 1986, as amended.

96 H. Grasmick & L. Appleton, "Legal Punishment and Social Stigma: A Comparison of Two Deterrence Models" (1977) 58(1) Social Science Quarterly 15, 20.

97 See e.g. European Commission, "Statement by Commissioner Vestager on Decision to Fine Truck Producers €2.93 Billion for Participating in a Cartel," STATEMENT/16/2585, Brussels, July 19, 2016, 2.

settlement policy, cartelists in effect acknowledge their own "wrongdoing."[98] Cartel activity in particular is officially viewed in the same light as "taking steroids at the Olympics."[99] It is unequivocally perceived as being "bad for everybody" (except, of course, the participants), causing customers in particular to be "outraged."[100] As conduct that is "strictly forbidden to companies doing business in Europe,"[101] cartel activity is "serious malpractice" for which no tolerance is warranted.[102] Those who engage in it are quite simply "robber barons" who deserve punishment,[103] and the Commission "will not hesitate to take firm action" against such conduct.[104] Given this context, it is not an exaggeration to state – as Harding does – that, at EU level, cartel activity has been subjected to "official vilification."[105] At times, the language employed by Commission officials when detailing the wrongfulness inherent in cartel activity can be very similar indeed to that used by Department of Justice officials when commenting on their criminal enforcement activities against individual executives, who face up to ten years of imprisonment as a maximum sentence if convicted.[106]

On at least three occasions, the Commission has even gone as far as stating that price-fixing is "one of the cardinal sins of EU antitrust enforcement,"[107] a moralistic phrase which echoes the words of the U.S. Supreme Court when it held that cartels are "the supreme evil of antitrust."[108] The analogy with sin – with it the implication that some form of "penance" is required – is compounded with Commission statements that acknowledge the "strong temptation" that the unlawful profits from cartels can engender in potential and actual offenders.[109] The current Commissioner for Competition has gone as far as stating that, with antitrust offenses, "what is at stake is as old as Adam and Eve," in that "it all comes down to greed."[110]

The EU Courts have themselves formally acknowledged the stigmatic aspect of EU-level antitrust fines. In her Opinion in *Schenker*, for example, AG Kokott emphasized that there is a "condemnation ("stigma") associated with the imposition of cartel … penalties against the [infringing] undertaking."[111] For AG Sharpston, in the *KME Germany* case, cartel activity in particular "involves engaging in conduct which is generally regarded as underhand, to the detriment of the public at large, a feature which it shares with criminal offences in general and which entails *a clear stigma*."[112] In terms of judgments, the General Court is the body that has, in recent times, routinely emphasized the stigmatic nature of

98 See J. Almunia, "Introductory Remarks on Bearings Cartel," SPEECH/14/233, Brussels, March 19, 2014, 1.

99 N. Kroes, "Antitrust and State Aid Control – The Lessons Learned," SPEECH/09/408, New York, September 24, 2009, 3.

100 J. Almunia, "Taking Stock and Looking Forward: A Year at the Helm of EU Competition," SPEECH/11/96, Paris, February 11, 2011, 2

101 European Commission, "Antitrust: Commission Fines Producers of TV and Computer Monitor Tubes €1.47 Billion for Two Decade-Long Cartels," Press Release, IP/12/1317, Brussels, December 5, 2012, 1.

102 European Commission, "Antitrust: Commission Fines Marine Hose Producers €131 Million for Market Sharing and Price-Fixing Cartel," Press Statement, IP/09/137 Brussels, January 28, 2009, 1. See also: European Commission, "Antitrust: Commission Fines Eight Producers of Capacitors €254 Million for Participating in Cartel," Press Release, IP/18/2281, Brussels, March 21, 2018, 1; and European Commission, "Antitrust: Commission Fines Investment Banks €371 Million for Participating in a European Governments Bonds Trading Cartel," Press Release, IP/21/2565, Brussels, May 20, 2021, 1.

103 P. Lowe, "Cartels, Fines, and Due Process" [June 2009] Global Competition Policy 1, 7.

104 European Commission, "Statement by Executive Vice-President Vestager on the Commission Decision to Fine Car Manufacturers €875 Million for Restricting Competition in Emission Cleaning for New Diesel Passenger Cars," STATEMENT/21/3583, Brussels, July 8, 2021, 2.

105 C. Harding, "Forging the European Cartel Offence: The Supranational Regulation of Business Conspiracy" (2004) 12(4) European Journal of Crime, Criminal Law and Criminal Justice 275, 276.

106 For example, Kroes's & Lowe's above-noted remarks that cartel activity is akin to stealing and fraud or robbery distinctly reflects the comments of the US antitrust enforcer Klein, who famously claimed that price-fixing was merely "theft by well-dressed thieves": J. Klein, "The War against International Cartels: Lessons from the Battlefront," 26th Annual Conference on International Antitrust Law and Policy, Fordham Corporate Law Institute, New York, October 14, 1999, 3. *Cp.* A. Italianer, "Fighting Cartels in Europe and the US: Different Systems, Common Goals," Speech, Annual Conference of the International Bar Association, Boston, October 9, 2013, 2.

107 See: European Commission, "Commission Ends Cartel Proceedings against Dutch Bank SNS After It Changed Its Tariffs for Exchanging Euro-Zone Currencies," Press Release, IP/01/554, Brussels, April 11, 2001, 1; European Commission, "Commission Ends Cartel Proceedings against Bayerische Landesbank Girozentrale After It Changed Its Tariffs for Exchanging Euro-Zone Currencies," Press Release, IP/01/BAY634, Brussels, May 3, 2001, 1; European Commission, "Commission Ends Proceedings against Ulster Bank After It Changed Its Tariffs for Exchanging Euro-Zone Currencies," Press Release, IP/01/635, Brussels, May 3, 2001, 1.

108 *Verizon Communications v. Law Offices of Curtis V. Trinko* (2004) 540 US 398, 408. See also M. Vestager, "A New Era of Cartel Enforcement," Speech, Italian Antitrust Association Annual Conference, October 22, 2021.

109 See e.g. J. Almunia, "Compliance and Competition Policy," SPEECH/10/586, Brussels, October 25, 2010, 2.

110 M. Vestager, "Luther and the Modern World," Speech, Copenhagen, November 14, 2016.

111 Case C-681/11, *Bundeswettbewerbsbehörde and Bundeskartellanwalt v. Schenker & Co. AG and others,* ECLI:EU:C:2013:126, February 28, 2013, Opinion of AG Kokott, [59].

112 Case C-272/09 P, *KME Germany and others v. Commission* [2011] ECR I-12789, Opinion of AG Sharpston, [64] (emphasis added).

EU-level antitrust enforcement. To take a representative example, in *Servier v. Commission* the General Court expressly acknowledged that there is a "*non-negligible stigma* attached to a finding of involvement in an infringement of the competition rules for a natural or legal person."[113]

To take another, in *Martinair Holland NV v. Commission*, it stated that an infringement of Article 101(1) TFEU "involves engaging in conduct which is generally regarded as *underhand*, to the detriment of the public at large, and which *entails a clear stigma*."[114] In fact, an online search of the Courts' official database of judgments reveals that there are over thirty judgments from the General Court that expressly acknowledge the stigmatic nature of EU-level antitrust enforcement.[115] If the Courts are indeed correct that stigma does attach to violations of the EU-level cartel prohibition, then the issue of indemnification should not become an impossible one for those who support the imposition of individual cartel sanctions by the Commission: the enforcement process should still contain a "bite" for the sanctioned individual, to the benefit of cartel deterrence.

V. CONCLUSION

The Commission has an impressive track record with respect to anti-cartel enforcement. There is, however, a lacuna in its enforcement powers: it does not have the ability to impose fines on natural persons when they are they responsible for their companies' cartel activity. This article argued that, for reasons of deterrence, the Commission should be invested with the power to impose individual administrative sanctions for violations of the EU-level cartel prohibition. Admittedly, such sanctions have a drawback in terms of their vulnerability to indemnification. Fortunately, the stigmatization policy currently pursued by the Commission with respect to cartel activity provides considerable scope to prevent the issue of indemnification from undermining the potential deterrent effect of individual administrative sanctions.

113 Case T-691/14, *Servier SAS v. Commission*, ECLI:EU:T:2018:922, December 12, 2018, [792] (emphasis added). See also Case T677/14, *Biogaran v. Commission*, ECLI:EU:T:2018:910, December 12, 2018, [130].

114 Case T67/11, *Martinair Holland NV v. Commission*, ECLI:EU:T:2015:984, December 16, 2015, [29] (emphasis added). See also Case T48/11, *British Airways plc. v. Commission*, ECLI:EU:T:2015:988, December 16, 2015, [34].

115 See http://curia.europa.eu/juris/recherche.jsf?language=en (using the term "stigma" in the text box, searching in the "competition" subject-matter box, and confining the search to closed cases and to the General Court and the Court of Justice).

RECENT DEVELOPMENTS IN CARTEL ENFORCEMENT IN GERMANY — FEWER CASES BUT NEW GUIDELINES ON LENIENCY AND FINES

BY ROMINA POLLEY[1]

1 Cleary Gottlieb Steen & Hamilton LLP, Cologne. With great thanks to my Cologne colleague Laurène Bernot for her support in the research and finalization of the manuscript..

I. INTRODUCTION AND SUMMARY

Cartel enforcement in Germany reached a further low in 2021 compared to 2020 and 2019. The threat of private damages actions continues to discourage whistleblowers from approaching the Federal Cartel Office ("FCO") with immunity applications, which are the main starting point for the opening of new investigations. This trend has prompted a discussion of how cartel enforcement can be reinvigorated that goes well beyond Germany.[2] Due to the COVID-19 pandemic, the trend of fewer cases will likely continue for some time, because there were hardly any inspections in the last two years, resulting in a thin pipeline of new cases.

However, the FCO signaled increased enforcement efforts by conducting a large inspection at several cable manufacturers in January 2022 for alleged price fixing. Nevertheless, the main development in cartel enforcement in Germany last year are the new fining and leniency guidelines that were issued in the second half of 2021. The overhaul of the two sets of guidelines was prompted by the entry into force of the 10th Amendment of the Act against Restrictions of Competition ("ARC") in January 2021 that implemented the requirements of the ECN+-Directive.[3] While some important changes have been introduced in the revised guidelines, these will not resolve the underlying dilemma of reconciling public and private enforcement.

II. RECENT CARTEL ENFORCEMENT IN GERMANY

Statistics. The latest German case statistics confirm the continued downward trend in cartel proceedings in Germany.

Cartel Prosecution 2015-2021 in Figures[4]

Year	2015	2016	2017	2018	2019	2020	2021
Fines in total (in EUR million)	208	124,6	66,4	376	848	349	105
Leniency applications	76	59	37	25	16	13	9[5]
Inspections	18	17	10	7	5	2	2
New Procedures (total)	**71**	**40**	**39**	**40**	**30**	**48**[6]	
Closed proceedings	**78**	**60**	**48**	**52**	**32**	**33**	
Fine decisions	7	4	7	**4**	**5**	**4**	
Horizontal hardcore cartels	6	2	6	4	4	3	
Vertical Cases	1	2	1	0	1	1	3[7]
Referral to different competition authority	0	0	0	0	0	1	

According to the latest 2021 figures, the downward trend of recent years in cartel enforcement continues.

After a peak in total fines in 2019 with a total of EUR 848 million (of which EUR 646 million related to quarto steel plate proceedings[8] alone), 2020 and 2021 saw a rapid decline to fines of EUR 349 million in 2020 and even EUR 105 million in 2021. Only in 2017 had the total level of fines imposed been lower.

2 See Heike Anger, *Warum Kartellamtschef Mundt das Kronzeugenprogramm ausweiten will*, Handelsblatt of January 10, 2022.

3 See Ritz/Weber, *A Game Changer for Germany's Competition Practice*, CPI EU News, February 8, 2021, on the procedural changes brought about by the 10th ARC Amendment.

4 FCO Report on Activities 2015-2016 p. 146-147; FCO Annual Report 2015, p. 39; Annual Report 2016, p. 40; Report on Activities 2017-2018 p. 135-136; Annual Report 2017, p. 39; Annual Report 2018 p. 39; Report on Activities 2019-2020 p. 157-158; Annual Report 2019, p. 34; Annual Report 2020/2021, p. 34; Press Release Review of 2021 of December 22, 2021; Press Release Review of 2021 of December 22, 2021.

5 10 according to: Heike Anger, *Warum Kartellamtschef Mundt das Kronzeugenprogramm ausweiten* will, Handelsblatt of January 10, 2022.

6 This increase in new procedures (48) in 2021 is predominantly attributable to the surge in horizontal co-operations triggered by the COVID-19-pandemic, which the FCO has been monitoring, see FCO Report on Activities 2019-2020 p. 40 and 157-158. The minority appear to be hardcore cartel cases.

7 This number reflects only certain cases published yet. In one case, fines were imposed against first group of companies already in 2020.

8 Case B-12/25/16, Press Release of December 12, 2019, available in English at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/12_12_2019_Quartobleche.html; Case Summary available in English at https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2020/B12-25-16.html.

This strong fall is also noticeable in the number of leniency applications. From 37 in 2017 to 16 in 2019, the number has dropped even further since: In 2020 13 leniency applications were filed, compared to only 9 in 2021. Since 2017, there has been a continued reduction from still 76 applications in 2017.

The number of inspections is also steadily decreasing. While there were 10 inspections in 2017, there were only 5 in 2019, and 2 each in 2020 and 2021. This sharp decline cannot only be explained by the COVID-19 pandemic, but rather fits into a long-term trend, which can be attributed to private damages actions which make leniency applications unattractive.

A similar downward trend can be observed in the decrease of completed cartel proceedings. While there were 52 concluded cartel proceedings in 2018, the numbers dropped to 32 in 2019 and 33 proceedings in 2020. The number of concluded proceedings in which fines were imposed stagnated during this period at a low level of 4 or 5 proceedings per year, which shows that without a flourishing leniency regime public cartel enforcement is less effective.

Horizontal hardcore cartels. Only three horizontal hardcore cartel cases were brought to a close since the end of 2020. In July 2021, the FCO fined the remaining stainless long steel companies after a first round of fines against other participants in the cartel already back in 2018. In total, it imposed fines of EUR 355 million on ten stainless steel manufacturers, two trade associations and 17 individuals.[9] The cartel members had colluded between 2002 and 2016 on steel surcharges, price calculation and exchanged competitively sensitive information. The cartel served to preserve market conditions after expiry of the EU Treaty on Coal and Steel in 2002. The investigation was triggered by a leniency application from Voestalpine. Some companies cooperated with the FCO and/or agreed to a settlement. Only two companies went on appeal against the fine.

The second fine for a horizontal hardcore cartel in 2021 concerned three steel mills.[10] The FCO imposed fines totaling EUR 35 million. The investigation was triggered by a leniency application from a fourth steel mill, which was awarded immunity from fines. The steel mills had been exchanging competitively sensitive information during working group meetings as well as in the context of bilateral and multilateral contracts in order to pass on any changes in cost in full to their customers. All companies cooperated with the FCO and agreed to a settlement, resulting in fine reductions.

The third case related to price fixing and market allocation in street sewer pouring products in December 2020.[11] Fines of EUR 6 million were imposed against two suppliers for fixing prices and rebates in 2018. One of the suppliers got a discount for cooperation and settlement and was awarded partial immunity regarding the coordination of two bids. The other supplier only received a settlement bonus. The case was based on an anonymous hint under the FCO's whistleblower hotline.

At the beginning of 2022, the FCO fined the only two suppliers of bridge expansion joints that had engaged in a quota cartel between 2014 and 2019.[12] Fines of EUR 7.7 million were imposed and parallel penal proceedings are still pending. For once, a hint from the market prompted the investigation. Both companies cooperated and settled.

These cases confirm the general perception in Germany that also cooperation after the inspection is worthwhile because it is rewarded by significant fine discounts. The fact that most cases are settled suggests that companies are skeptic about winning an appeal at Düsseldorf Court of Appeals that in the past had little sympathy for cartel offenders.

Vertical infringements. Enforcement of vertical hardcore cases continues to be a priority for the FCO, even though fines are normally somewhat lower than in horizontal cases. Fines were imposed in three cases since the beginning of 2021.

9 Case B12-22/15 and B12-21/17, Press Release of January 13, 2020, available in English at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2020/13_01_2020_Pflanzenschutzmittel.pdf, Case Summary available in English at https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2021/B12-22-15_B12-21-17.pdf.

10 Case B12-22/17, FCO Press Release of February 4, 2021, available in English at https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/04_02_2021_Stahlschmieden.html, Case Summary only available in German at https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Kartellverbot/2021/B12-22-17.html.

11 Case B11-8/18, GCO Case Summary, available in English at https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2021/B11-8-18.html.

12 FCO Press Release of February 10, 2022, available in English at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2022/10_02_2022_Brueckendehnfugen.pdf.

In 2020 and 2021, the FCO imposed fines totaling EUR 21 million against three manufacturers and two specialized retailers of musical instruments for resale price maintenance for several years.[13] Proceedings had started in 2018 with an inspection. Fines against retailers are rare. However, in this case the retailers were instrumental in keeping the price discipline and even colluded horizontally between each other on price increases.

After an inspection in January 2019, the FCO fined a school bag manufacturer approx. EUR 2 million on July 16, 2021 for fixing and monitoring the resale price for school backpacks, and restricting online sales since 2010.[14] Dealers who undercut prices were sanctioned. The supplier got a fine reduction for cooperation and settlement. Procedures against dealers participating in the resale price maintenance scheme were closed. The case had been prompted by a request for cooperation from the Austrian competition authority that did a parallel inspection in Austria in 2019.

Most recently, on November 11, 2021, the FCO imposed a fine of approx. EUR 7 million for resale price maintenance between 2015 and 2018 regarding loudspeakers and headsets against consumer electronics manufacturer Bose.[15] While the German leniency regime does not extend to vertical infringements, the FCO nonetheless awarded fine discounts to Bose for cooperation and settlement, which is standard practice.

III. NEW FINING GUIDELINES

On October 11, 2021, the FCO published new *Guidelines for the Setting of Fines in Cartel Offence Proceedings* ("2021 Fining Guidelines"). They apply to all cartel proceedings not completed on the day of publication. Major changes compared to the 2013 Fining Guidelines arise with regard to the methodology of fine calculation and the impact of compliance programs on the level of fines.

A. New Fining Methodology

The reform of the 2013 Fining Guidelines was prompted by the 10th Amendment to the ARC that entered into force earlier in 2021. The ARC's amendment implemented the ECN+ Directive that brought about a number of changes to German cartel enforcement. *Inter alia* it revised the statutory provisions on the imposition of fines and, in particular, provides for the first time for a catalogue of relevant criteria for the calculation of the fine.

In addition to the adjustments prompted by the ECN+ Directive, the 2021 Fining Guidelines aim to "*take greater account [...] of the practice of the German courts.*"[16] In the past, significant differences emerged between the FCO's calculation methods that focused more on revenues affected by the infringement, and the German courts' approach that focused more on overall size of the company's corporate group. The German fine calculation methodology differed already from the EC's approach under the 2013 Fining Guidelines, and this will continue to be the case also under the new framework.

1. <u>Step 1: Determination of the Basic Amount</u>

The 2021 Fining Guidelines have brought about several methodological changes in fine calculation, in particular the calculation of a so-called basic amount, whereas the 2013 Fining Guidelines focused only on the maximum amount.

Under the 2013 Guidelines, the FCO first determined a "*profit and damage potential*" based on 10 percent of the companies' German turnover affected by the infringement. This "potential" was multiplied by a factor ranging between 2 and 6, depending on the total turnover of the

13 Cases B11-33/19 and B11-31/19, FCO Press Release of August 5, 2021, available in English at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2021/05_08_2021_Musikinstrumente.html; Case summary, only available in German at https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Kartellverbot/2021/B11-31-19_B11-33-19.pdf.

14 Case B10-26/20, FCO Press Release of August 17, 2021 available in English at https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/17_08_2021_Schulranzen.html; Case Summary only available in German https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Kartellverbot/2021/B10-26-20.pdf.

15 Case B10-23/20, FCO Press release of December 2, 2021, available in English at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2021/02_12_2021_Bose.pdf,Case summary available in English at https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2021/B10-23-20.pdf.

16 FCO Press Release of October 11, 2021, available in English at https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/11_10_2021_Guidelines_Liniency.html.

company's corporate group with a view to calculate a maximum amount of the fine. If the maximum amount for the fine so calculated exceeded the statutory 10 percent global revenue maximum, the profit and damage potential was replaced by the statutory 10 percent worldwide group revenues ceiling as maximum amount of the fine.

The 2021 Fining Guidelines provide for a new methodology. Instead of calculating the maximum amount, they determine first a basic amount based on a percentage of the corporate group's German turnover achieved from the infringement. The percentage of the affected turnover used to calculate the basic amount depends on the size of the relevant company's corporate group. The minimum of 10-15 percent of turnover affected by the infringement applies to groups with total revenues below EUR 100 million, whereas 25-30 percent apply to a group with revenues between EUR 10 -100 billion.

The minimum turnover to be taken into account in calculating the basic amount is 12 months, even if the conduct lasted for shorter. The possibility of estimating the domestic impact in an international market-sharing cartel has been added to the new guidelines.[17]

The basic amount of the fine can at maximum amount to up to half of the statutory maximum (10 percent worldwide group turnover). If the basic amount calculated based on the turnover affected by the infringement according to the above methodology exceeds 50 percent of the statutory maximum, instead 5 percent of global total revenues are taken into account as basic amount.

2. <u>Step 2: Overall Appraisal</u>

In a second step, the FCO will adjust the basic amount taking into account mitigating and aggravating circumstances. This can lead to a fine below the basic amount or up to double the basic amount (either based on the turnover affected by the infringement or in case of application of the 5 percent total global turnover the 10 percent maximum).

On the one hand, the FCO takes into account offence related criteria (e.g. nature, gravity and extent of the cartel) and on the other offender related criteria (e.g. the company's role in the cartel, previous infringements, degree of intent or negligence, compliance measures taken).

These factors mirror the new section 81d of the ARC, that was introduced implementing the ECN+ Directive, as the point of reference on fine calculation. Before there was no statutory guidance on fine calculation other than a reference to gravity and duration. In case of hardcore horizontal restraints of competition such as price fixing and, quota, sales area and customer allocation agreements, the fine will, as a rule, be higher than the basic amount. The maximum statutory fine of 10 percent global turnover is however reserved for very serious infringements.

As stated above, the adjustment of the basic amount differs from the approach under the 2013 Fining Guidelines where only the maximum amount of the fine was calculated. Between EUR 0 and the maximum fine (either the 10 percent statutory cap or the multiplied profit and damage potential) the FCO engaged in an individual appraisal on the level of the fine. In hardcore cases the fine would usually range above 5 percent of the group's global revenues.

Following the overall appraisal of the relevant circumstances of the infringement, further adjustments to the fine calculated based on the adjusted basic amount can be made under the new guidelines, if the company's economic viability is threatened, if it has filed a leniency application (which can lead to rebates of up to 50 percent based on timing and value add of the application) or if it agreed to a settlement (10 percent discount).

3. <u>Effect on the Amount of Fines</u>

While the fine calculation method has been changed significantly, the FCO's president, Andreas Mundt, tried to assure the business community that the fines imposed should remain essentially at the same level.[18] A significant downside arises from the fact that also the new guidelines are not binding on the German courts.[19] Since the courts will likely continue to use a different method of calculation and have in practice in some cases increased fines on appeal, the cartel offender's incentive to file an appeal remains limited.

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17 Para 12, 2021 Fining Guidelines.

18 *Mundt* in FCO Press Release of October 11, 2021, available in English at https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/11_10_2021_Guidelines_Liniency.html.

19 See German Federal Court of Justice (*Bundesgerichtshof*), Judgment of February 26, 2013, KRB 20/12 – *Grauzementkartell*, para 57 regarding the non-binding character of the previous guidelines.

B. Possible Impact of Compliance Programs

For the first time, the 2021 Fining Guidelines explicitly take into account compliance systems as mitigating factor in fine calculation. According to the new section 81d of the ARC, companies can now invoke two forms of compliance defenses. Compliance measures taken before and after the offence can lead to a fine reduction.

1. <u>Pre-offence Compliance Measures</u>

Under the new ARC "*adequate and effective precautions taken [by the company] prior to the infringement to prevent and detect infringements*" constitute a mitigating factor.[20] The FCO specifies its requirements for the adequacy and effectiveness of precautions in its 2021 Fining Guidelines.

However, there is still no practical guidance on what constitutes appropriate compliance measures. In its guidelines, the FCO only states that

> *"the nature and extent of the requisite precautionary measures are dependent on the individual case and, in particular, on the type of the undertaking, its size and organizational structure, the provisions to be complied with and the risk of them being infringed."*

From the FCO's point of view, the effectiveness of pre-offence compliance is demonstrated if the measures taken have led to the discovery and prompt reporting of the infringement.[21] In any case, the pre-compliance defense is excluded if the company's management level was involved. The Guidelines further explain that the compliance defense is not per se excluded, if the acting individual has disregarded the company's compliance code to an extraordinary extent and with deliberate deception of his or her superiors in order to achieve personal advantages in the infringement. This high threshold raises the question whether pre-offence compliance will ever be recognized by the FCO. In contrast, section 81d ARC does not speak about the need for self-reporting by the company. The open question on what constitutes sufficient pre-offence compliance will likely need to be resolved in litigation.

2. <u>Post-offence Compliance Measures</u>

According to section 81d (1) no. 5 of the ARC *"precautions taken after the infringement to prevent and uncover infringements"*[22] can mitigate the fine imposed on an infringer. This clarifies that post-offence compliance measures can be taken into account as positive post offence behavior in the assessment of the fine. According to the 2021 Fining Guidelines, a mitigation applies in particular

> *"if the company convincingly demonstrates the precautions taken to effectively prevent future similar breaches and a commitment to act in a legally compliant manner is clearly evident."*

The FCO thus tries to distinguish genuine from sham compliance. In the FCO's view, indications for genuine compliance efforts are the active cooperation of a company in the investigation of the offence as well as the effort to make amends for the damage. Here, too, ambiguities may arise in practice, e.g. from the questions whether making amends requires claims for damages to be paid immediately, or whether willingness to negotiate and provisions in the balance sheet are sufficient.[23] In any event, it will be difficult to distinguish genuine from sham compliance. Nonetheless, the fact that pre- and post-offence compliance can now be taken into account in fine calculation in Germany is a big step forward.

IV. NEW GERMAN LENIENCY GUIDELINES

With the 10th ARC Amendment enacted earlier in 2021, the previous FCO's leniency program from 2006 ("2006 Leniency Program") had found its way into the statute (sections 81h-81n ARC) to increase legal security.

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20 Section 81d (1) sentence 2 ARC.

21 Para 14, comment 3, 2021 Fining Guidelines.

22 Para 14 2021 Fining Guidelines.

23 Von Schreiter/Wünschmann, *Same same but different*, NZKart 2022, 4, 7-8.

On August 23, 2021, the FCO published new leniency guidelines ("2021 Leniency Guidelines").[24] They apply retroactively for all leniency applications filed after January 19, 2021. For older applications, the 2006 Leniency Program will be applied unless the new Leniency Guidelines are more favorable.

Apart from the anchoring in the ARC and further details and clarifications in the new guidelines, the leniency regime in Germany remains largely unchanged in terms of content. It offers cartel members full or partial immunity from fines if they cooperate with the FCO and help to uncover the cartel from the inside. Only the first cartel member applying for leniency (and continuously and fully cooperating with the FCO) can benefit from full immunity from antitrust fines. Immunity after the inspection is possible, but the requirement of the applicant enabling the authority to prove the infringement is in practice very difficult to meet after the inspection. Applicants after the inspection normally benefit from fine reductions of up to 50 percent. The percentage of the reduction is dependent on the rank and value add of the application. In practice, the FCO is quite generous with discounts. Leniency is still not available for vertical infringements also under the new guidelines, which can in combined infringements that involve horizontal and vertical conduct deter potential applicants from making an application. In practice, the FCO provides significant fine discounts also for cooperation in vertical cases, however normally no immunity from fines.

A. Changes Compared to 2006 Leniency Program

A noteworthy change in the 2021 Leniency Guidelines is that the ringleader disqualification of the immunity applicant has been replaced by the "coercer test" applicable under EC's 2006 Leniency Notice. While immunity from fines could be denied to so-called "*ring leader*" of a cartel under the FCO's 2006 program[25], under the 2021 Leniency Guidelines immunity can only be denied, if the cartel participant has taken steps to "*force*" other cartel participants to participate or remain in the cartel.[26] As a result, a ring leader can now receive complete immunity from fines like in Brussels, unless it coerced other companies into participation into the cartel. The vague "*ringleader*" criterion had in the past often been criticized as being a deterrent from filing for leniency, because companies had to fear to be disqualified from immunity, e.g. because they were the market leader or because they had organized meetings between competitors.[27] For the coercive cartel member, however, a reduction of the fine pursuant to section 81l of the ARC remains possible. The burden of proof for the (attempted) coercion is on the FCO. So far, this ground for denial has not been applied in practice.[28]

A further new feature of the 2021 Leniency Guidelines is the confirmation of the concept of partial immunity. Companies providing the FCO with additional facts on a distinct part of the infringement (e.g. new infringement periods or new geographical areas) can profit from partial immunity even if they are not the original immunity applicant.[29] The FCO will not use such additional facts against the providing company when setting its fine. This concept had been applied by the FCO in the past, e.g. in the dishwashing liquid cartel. However, the clarification in the 2021 Leniency Guidelines enhances legal security.

The 2021 Leniency Guidelines also clarify that the leniency applicant must not destroy, manipulate, or withhold any relevant evidence.[30] This obligation already applies at the time a company is considering a leniency application. While the FCO would likely have taken the same view interpreting the applicant's duty to cooperate, this clarification enhances legal security.

While the 2006 Leniency Program provided that an applicant has to stop participation in the infringement on request from the FCO, the 2021 Leniency Guidelines make the termination of the infringement at the time of the application a direct requirement unless the FCO permits certain conduct to secure the integrity of the investigation.[31]

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24 Notice no. 14/2001 on General Administrative Principles relating to the Exercise of Discretionary Powers in the Conduct of the Procedure for an Application of the Leniency Regime in accordance with Sections 81 h to 81 n of the Act against Restraint of Competition, available in English at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitlinien/Leniency_Guidelines_08_2021.html.

25 Para 3, no. 3, 2006 Bonus Program.

26 Section 81k (3) ARC, para 6 no. 3 2021 Leniency Guidelines, art. 17 (3) ECN+ Directive.

27 Schroeder, *Die neue Bonusregelung des Bundeskartellamts – ein großer Schritt in die richtige Richtung*, WuW 2006, 575; Panizza, *Ausgewählte Probleme der Bonusregelung des Bundeskartellamts vom 7. März 2006*, ZWeR 2008, 58, 84.

28 The same is true at EC level, see Kamann/Ohlhoff/Völcker, *Kartellverfahren und Kartellprozess, § 7 Verfahrenseinleitung*, para. 39.

29 Section 81l (3) ARC, and para 10, 2021 Leniency Guidelines.

30 Section 81j (1) no. 3 d), no. 4 a) ARC.

31 Para 7, 2006 Bonus Program; para 12 no 2 2021 Leniency Guidelines.

The deadlines for finalized leniency applications after a marker application have been softened. While the previous bonus program provided for a fixed maximum period of 8 weeks between the receipt of the marker und submission of a finalized leniency application, the period mentioned in the new Guidelines is now only a standard period which applies "*as a rule*" which is a welcome development.[32]

The 2021 Leniency Guidelines emphasize the importance of personal statements, which should generally accompany leniency applications.[33] They were not mentioned in the 2006 program.

Also the process regarding marker, leniency and summary applications that protect applicants against a loss of their status in case of change of jurisdiction in ongoing proceedings is explained in further detail in the new guidelines.

However, they no longer include the possibility to contact the FCO anonymously through a lawyer to check whether immunity is still available in a given industry. Instead, the new guidelines now explicitly exclude anonymous contacting. [34] While this change could discourage some companies from filing a leniency application, the FCO is likely concerned about abuse or anonymous requests that aim to find out whether an investigation is already under preparation in a given industry.

B. FCO's Initiative to Incentivize Leniency Applications

To achieve a turnaround in the number of leniency applications, the FCO's president has recently recommended to exempt the immunity applicant from damages claims.[35] However, this proposal conflicts with current German law implementing the EU Damages Directive according to which the immunity applicant is only liable to its own customers and exempt from joint and several liability unless the other cartel members cannot fully compensate the victims (see section 33e ARC). In addition, the immunity applicant is protected against the disclosure of his leniency statements and settlement submissions for the purpose of actions for damages under section 33g (4) ARC. Nonetheless, pre-existing documents accompanying leniency applications are not protected, which can be as valuable for plaintiffs in follow on damage cases as the application itself. Enlarging the protection for pre-existing evidence submitted by the applicant could further incentivize applicants, but also this change would be in practice difficult to achieve, because the European Court of Justice created the distinction between leniency applications and pre-existing documents in the Pfleiderer preliminary ruling case.[36]

Since further protection of immunity applicants is not possible without significant legislative changes at EU and German level, the FCO should consider stepping up its own detection capabilities, e.g. through screening markets, taking up complaints from market participants and cooperating with other competition authorities in the ECN.

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32 Para 12, 2006 Bonus Program; para 17 and 25 2021 Leniency Guidelines.

33 Para 19, 2021 Leniency Guidelines.

34 Para 13, 2021 Leniency Guidelines.

35 *Mundt* in FCO Press Release of October 11, 2021, *supra* note 18; WuW Nr. 07-08 06.08.2021, 418, 420; Reinhard Kowalewsky, „*Schier uneinholbareWettbewerbsvorteile*": *Kartellamt vermutet Absprachen zwischen Apple und Amazon*, Rheinische Post Online, of January 2, 2022 14:00; Heike Anger, *Warum Kartellamtschef Mundt das Kronzeugenprogramm ausweiten will*, Handelsblatt of January 10, 2022; FCO Press Release of December 29, 2020, available in English at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2020/29_12_2020_Jahresr%C3%BCckblick.pdf.

36 ECJ, Judgment of June 14, 2011, *Pfleiderer AG v Bundeskartellamt*, Case C-360/09, ECLI:EU:C:2011:389; 2011 I-05161.

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