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Criminalisation of cartels and bid rigging conspiracies – Note by the United States

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United States

1. Introduction

1. The United States Supreme Court has recognized cartel activity as "the supreme evil of antitrust."[1] To combat this uniquely pernicious activity, the Department of Justice's ("DOJ") Antitrust Division ("Division") prosecutes hard-core offenses criminally, against both corporations and individuals.
2. Section 1 of the Sherman Antitrust Act makes anticompetitive agreements among competitors, including cartel violations, illegal.[2] The Division may prosecute Section 1 offenses either criminally or civilly. Criminal prosecution dates back to the passage in 1890 of the Sherman Act, which originally made cartel violations misdemeanors (offenses carrying sentences of one year or less); today, these offenses are prosecuted as felonies (offenses that may result in prison sentences of more than one year).[3] To increase transparency and create certainty for businesses, the Division focuses its criminal enforcement efforts narrowly, on only *per se* conduct, or hardcore cartel activity: price fixing, bid rigging, and market or customer allocations.[4] U.S. courts have held that *per se* conduct is plainly anticompetitive and there is no need to inquire as to its actual effects.[5]
3. In addition to well-publicized corporate fines[6] and deterrent terms of imprisonment for individuals, other, less visible factors reinforce the criminalization of hardcore cartel activity as an effective deterrent of this conduct. Due to the Division's prosecutorial efforts, the Division has learned through its investigations that, in certain cases, members of cartels that operated internationally purposefully chose to *compete* in the United States due to fear of criminal prosecution.[7]
4. This submission provides an overview of key aspects of the United States' efforts to prosecute criminal violations of its antitrust laws, including several recent and notable developments in its criminal enforcement efforts.

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[1] *Verizon Communications v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004).

[2] 15 United States Code § 1, https://uscode.house.gov/browse/prelim@title15/chapter1&edition=prelim.

[3] *See* G.J. Werden, S*anctioning Cartel Activity: Let the Punishment Fit the Crime,* European Competition Journal, 5:1, 19-36 (2009), 10.5235/ecj.v5n1.19.

[4] Division policy is to pursue criminal sanctions in the case of most *per se* conduct. There can be situations, however, "where, although the conduct may appear to be a *per se* violation of law, criminal investigation or prosecution may not be appropriate. These situations may include cases in which (1) the case law is unsettled or uncertain; or (2) there are truly novel issues of law or fact presented." U.S. Dep't of Justice, Antitrust Division, *Antitrust Division Manual* at III.C.1 (5th ed. updated 2016), https://www.justice.gov/atr/file/761166/download.

[5] *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1958).

[6] *See* U.S. Dep't of Justice, Antitrust Division, *Sherman Act Violations Resulting in Criminal Fines & Penalties of $10 Million or More* (updated 2020), https://www.justice.gov/atr/sherman-act-violations-yielding-corporate-fine-10-million-or-more, list of Division criminal fines exceeding $10 million (USD).

[7] T.O. Barnett, *Criminal Enforcement of Antitrust Laws: The U.S. Model* (2006), https://www.justice.gov/atr/speech/criminal-enforcement-antitrust-laws-us-model.

2. Criminal Investigations

5. Within the United States, the Antitrust Division is the sole agency that can authorize criminal enforcement of the Sherman Antitrust Act. To conduct criminal investigations, the Division and its law enforcement partners, which include the Federal Bureau of Investigation ("FBI") and various agency-based inspectors general, can use the same range of powerful investigative tools and techniques that are available in all federal criminal cases. The use of all investigative tools and techniques are bound by the due process rights of the subjects of the investigation, which are guaranteed by the U.S. Constitution, federal statutes, a variety of procedural rules, and Division policy.[8]

6. Division attorneys typically investigate criminal cartel activity using the authority of a federal grand jury, a unique feature of the American criminal justice system. Grand juries are comprised of twenty-three residents from within a specific judicial district, who meet in secret to hear evidence of suspected criminal activity. The grand jury is "*an investigatory body charged with the responsibility of determining whether or not a crime has been committed. . . . The function of the grand jury is to inquire into all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred.*"[9]

7. The grand jury has the power to compel evidence in the form of documents, physical evidence, or testimony through a subpoena. Failure to comply with a grand jury subpoena may result in either civil or criminal contempt charges, or both, and providing false or misleading testimony before a grand jury may constitute independent crimes. Grand jury subpoenas, therefore, are powerful investigative tools. Division attorneys, acting in their capacity as advisors to the grand jury, issue subpoenas in the name of the grand jury to corporations and individuals to compel the production of evidence of suspected cartel violations.

8. The DOJ combines the grand jury's investigative power with other investigative tools that are outside the scope of the grand jury. These include the judicially authorized seizure of evidence pursuant to search warrants (similar to dawn raids in other jurisdictions), the voluntary production of documents from corporations and individuals, covert (undercover) techniques such as wiretaps and conversations recorded consensually by cooperating co-conspirators, and voluntary witness statements.

9. In addition to the investigative tools used by all criminal investigators in the DOJ, the Leniency Program has proven to be one of the Division's most important investigative tools since it was adopted in its current form in 1993. The Division is solely responsible for the implementation of its leniency program and makes the final determination as to an applicant's eligibility for leniency. Both individuals and corporations are eligible for leniency.

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[8] A full discussion of due process protections is beyond the scope of this submission. The Division's manual is publicly available. U.S. Dep't of Justice, Antitrust Division, *Antitrust Division Manual* at Ch. III (5th ed. updated 2016), https://www.justice.gov/atr/file/761166/download; *see also* C.S. Yoo and H. Wendland, *Procedural Fairness in Antitrust Enforcement: The U.S. Perspective* (2019), Faculty Scholarship at Penn Law, 2049, https://scholarship.law.upenn.edu/faculty_scholarship/2049.

[9] *United States v. R. Enterprises*, 498 U.S. 292, 297 (1991). For an extended treatment of the historical origins of the grand jury, *see* 1 Sara Sun Beale et al., *Grand Jury Law and Practice* §§ 1:1 to 1:3 (rev. 2d ed. 2001). For a more comprehensive summary of the role, function, and rules surrounding federal grand juries, *see* C. Doyle, *The Federal Grand Jury* (2015), https://fas.org/sgp/crs/misc/95-1135.pdf.

10. The Corporate Leniency Policy, in particular, is a unique voluntary disclosure program under which the first qualifying corporation to self-report its participation in a criminal cartel, and then fully cooperate with the Division's investigation of its co-conspirators, will be granted non-prosecution protection. The policy creates powerful incentives for the company to self-report and cooperate with a criminal investigation.[10]

11. The Leniency Program is grounded on three indispensable cornerstones to ensure its efficacy: (a) the threat of severe and significant sanctions, (b) a heightened fear of detection, and (c) transparency and predictability regarding its application.[11] To that end, in light of the fear of detection by other investigative methods (discussed above) and the prospect of severe penalties once detected (discussed below), the Corporate Leniency Program offers tremendous incentives only to the first member of a cartel to self-report, thus creating a destabilizing effect within cartels.[12]

12. The Division strives to ensure full transparency and predictability regarding its leniency policy, including publishing an extensive set of Frequently Asked Questions ("FAQs") and model leniency letters. These materials are publicly available on the Division's website, so that industry members and the private defense bar can access and fully understand the leniency policy.[13] As the FAQs cannot anticipate every scenario that may be encountered, the Division also has provided clarification regarding application of the policy when unique facts require it.[14]

3. Sanctions for Antitrust Violations

13. The Division's position on criminal penalties has been constant for many years.

> *Penalties should reflect the fact that cartels inflict enormous consumer harm with no corresponding efficiency gains. Because cartelists are capable of making a cost/benefit decision that discounts a possible fine as merely a cost of doing business illegally, cartel penalties not only should be large enough to negate financial incentives to conspire, but also should include substantial jail time for responsible individuals. Nothing is a greater deterrent and nothing is a greater incentive for a cartelist, once exposed, to cooperate in the investigation of his co-conspirators than the threat of substantial incarceration in a U.S. prison.*[15]

14. Accordingly, the Division seeks to hold criminally accountable both the individuals responsible for carrying out cartel activity and the corporations that benefit from their

[10] B. Snyder, *Individual Accountability for Antitrust Crimes* (2016), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-brent-snyder-delivers-remarks-yale-global-antitrust.

[11] R. Powers, ***A Matter of Trust: Enduring Leniency Lessons for the Future of Cartel Enforcement*** (2020), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-richard-powers-delivers-remarks-13th-international.

[12] S. Hammond, *The Evolution of Criminal Antitrust Over the Last Two Decades* (2010), https://www.justice.gov/atr/file/518241/download.

[13] U.S. Dep't of Justice, Antitrust Division, *Frequently Asked Questions About the Antitrust Division Leniency Program* (updated 2017), https://www.justice.gov/atr/page/file/926521/download.

[14] R. Powers, ***A Matter of Trust: Enduring Leniency Lessons for the Future of Cartel Enforcement*** (2020), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-richard-powers-delivers-remarks-13th-international.

[15] T.O. Barnett, *Criminal Enforcement of Antitrust Laws: The U.S. Model* (2006), https://www.justice.gov/atr/speech/criminal-enforcement-antitrust-laws-us-model.

conduct with deterrent penalties, which are imposed in addition and parallel to other civil and administrative consequences.

15. Most Division cases result in a plea agreement with the defendant, whether a corporation or individual.[16] Plea agreements are often the most efficient way to resolve criminal investigations, including antitrust cases, and they offer value both to the Division and the defendant. They frequently include a reduction in the severity of the penalty that the Division otherwise might seek in exchange for the defendant's commitment to cooperate with an ongoing investigation. Even for corporations and individuals that do not qualify for leniency, therefore, there remain powerful incentives to accept responsibility and cooperate with the Division. Plea agreements conserve governmental and judicial resources that are incurred by extended investigations and trials, and they offer pleading corporations or individuals greater certainty about the outcome of their case in addition to more lenient sanctions.

16. The plea agreement itself is an agreement between the Division and the defendant. Although the court is not a party, the court must accept a plea agreement for it to be operative. Before accepting a guilty plea, a federal judge must determine that the defendant fully understands the rights waived and potential consequences faced by entering into a plea agreement, that the defendant's plea is voluntary and not coerced, and that sufficient facts establish the defendant's guilt of the charged criminal offense.[17] The plea agreement constitutes an admission by the defendant and results in a judicial determination of guilt, which carries collateral consequences, particularly for corporations facing parallel civil litigation.

17. Some defendants, however, exercise their constitutional right to trial. In these litigated cases, the Division's evidence must be sufficient to convince a jury[18] of lay people beyond a reasonable doubt to vote unanimously to convict the defendant of the charged offense.

18. Once a defendant has been found guilty – whether by the court in the case of a plea agreement or a jury (or judge if the defendant decides to waive the right to a jury) in the case of a trial verdict – it is the court that imposes the criminal sanction on the defendant. The court imposes the sanction after assessing mandatory sentencing considerations[19] and advisory sentencing guidelines designed to ensure consistent sentencing across defendants regardless of the sentencing court.[20] This involves a separate sentencing phase, in which the Division and the defendant may advocate for and present additional evidence to inform

[16] The Division announced in July 2019 a corporate compliance policy that included in certain circumstances the use of a deferred prosecution agreement (DPA) to resolve criminal cartel cases against eligible corporations. DPAs are similar to plea agreements in that they are negotiated resolutions between the Division and a corporate defendant, but they do not require court acceptance. *See infra* at IV.e.

[17] Federal Rules of Criminal Procedure 11 (2019), https://uscode.house.gov/view.xhtml?path=/prelim@title18/title18a/node35&edition=prelim. Among other things, before acceptance of a defendant's guilty plea, pursuant to this rule, a court will advise the defendant of the rights waived by entering the plea agreement, including the right to a trial by jury, the right to plead not guilty, and the right to representation by counsel.

[18] Note that the jury at trial is not the same as a grand jury, as described above. A so-called *petit* jury is comprised of twelve jurors who meet in open court (although its deliberations are conducted in secret) and ultimately make a final determination regarding the facts at issue in a trial and pronounce a verdict regarding the guilt or innocence of a defendant.

[19] 18 U.S.C. § 3553(a), https://uscode.house.gov/browse/prelim@title18/part2&edition=prelim.

[20] *United States v. Booker,* 543 U.S. 220 (2005); United States Sentencing Commission, *Guidelines Manual* (2018), https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2018/GLMFull.pdf.

the court's decision regarding the appropriate sanction.[21] Even when the Division and the defendant jointly recommend a sanction to the court in a plea agreement, the court ultimately may reject that recommendation and impose another sanction.

3.1. Individuals

19. The Division has "long held the view that individual liability and criminal sanctions, including prison sentences for culpable executives and employees, are the most severe and significant sanctions available for cartel activity."[22] A cornerstone of the Division's enforcement efforts against cartel conduct, therefore, has been the prosecution of the most culpable individuals responsible for antitrust conspiracies. Indeed, the Division seeks prison sentences in nearly all cases, based on the view that it is individuals who "commit the crimes for which corporate offenders pay" and "[h]olding companies accountable and assessing large fines, alone, are not the only means, or even the most effective way, to accomplish our goal of deterring and ending cartels."[23] On average, about three individuals are charged criminally for every corporate co-conspirator.[24]

20. The statutory maximum sentence for an individual found guilty of a criminal violation of the Sherman Antitrust Act is ten years' imprisonment and a fine of up to $1 million (USD).[25] Individuals also may be sentenced to a period of supervised release (also known as probation) for up to three years, including after a term of imprisonment. The longest prison sentence imposed to date for a criminal antitrust[26] offense was 60 months for an executive convicted of fixing prices for ocean transportation services from the United States to Puerto Rico.[27] In the period 2010-2018, over 450 individuals were charged criminally with cartel violations, and the average prison sentence imposed on an individual upon conviction was 19 months.[28]

3.2. Corporations

21. Corporations can be held criminally liable for the conduct of individuals acting on behalf of the corporation in furtherance of cartel activity under the legal principle of *respondeat superior*, a doctrine that makes the employer responsible for the acts of its employees. Additionally, corporations face a range of other civil and administrative consequences as

[21] For a comprehensive overview of sentencing in the United States, *see* United States Sentencing Commission, *Federal Sentencing: The Basics* (2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/201811_fed-sentencing-basics.pdf.

[22] R. Powers, ***A Matter of Trust: Enduring Leniency Lessons for the Future of Cartel Enforcement*** **(2020),** https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-richard-powers-delivers-remarks-13th-international**.**

[23] B. Snyder, *Individual Accountability for Antitrust Crimes* (2016), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-brent-snyder-delivers-remarks-yale-global-antitrust.

[24] R. Powers, *Criminal Antitrust Enforcement: Recent Highlights, Policy Initiatives, and What's to Come* (2019), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-richard-powers-delivers-remarks-29th-annual-antitrust.

[25] 15 U.S.C. § 1, https://uscode.house.gov/browse/prelim@title18/part2&edition=prelim.

[26] The Division may also prosecute related criminal offenses, including various frauds or obstruction of justice.

[27] *See United States v. Frank Peake*, 804 F.3d 81 (1st Cir. 2015) (upholding conviction and sentence).

[28] *See* U.S. Dep't of Justice, Antitrust Division, *Criminal Enforcement Trends Chart* (updated 2019), https://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts.

collateral results of their criminal conduct. These consequences are in addition to, and do not preclude, criminal penalties.

3.2.1. Criminal Penalties

22. Once a corporate defendant is found guilty, it will be sanctioned in nearly all cases with a fine. The criminal fine amount is determined by applicable federal sentencing guidelines.[29] For cartel offenses, the maximum fine is the greater of $100 million (USD)[30] or an amount calculated as twice the pecuniary gain or loss resulting from the offense.[31] The fine is determined based on the total volume of commerce affected by the conspiracy.[32] The Division seeks to achieve several important objectives in imposing corporate fines for criminal antitrust violations. First, corporations should be divested of some of their ill-gotten gains from cartel activity. Second, fines should be severe enough to deter criminal conduct and not simply be viewed as a "cost of doing business." Finally, as discussed above, fines must be severe enough to incentivize the pursuit of leniency.[33]

23. The corporation also may be ordered to pay restitution to the victims of its offense in addition to any fine imposed, as part of its criminal sanction.

24. In addition to monetary penalties and restitution, corporate sentences also may include a period of corporate probation, in which the corporation may be subject to additional provisions, including reporting to the Division or the sentencing court and, in limited cases, the imposition of an independent corporate compliance monitor.[34]

3.2.2. Collateral Consequences of Corporate Criminal Convictions

Civil Liability

25. Civil plaintiffs (*i.e.*, private parties) with standing as victims of cartel offenses may bring civil lawsuits under the Sherman Antitrust Act.[35] In order to create the economic incentives needed for costly antitrust litigation, federal law authorizes these plaintiffs to seek treble,

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[29] *See generally* United States Sentencing Commission, *Guidelines Manual*, § 2R1.1 (antitrust-specific guideline) and Ch. 8 (Sentencing of Organizations) (2018), https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2018/GLMFull.pdf.

[30] 15 U.S.C. § 1, https://uscode.house.gov/browse/prelim@title18/part2&edition=prelim.

[31] 18 U.S.C. § 3571(d), https://uscode.house.gov/browse/prelim@title18/part2&edition=prelim.

[32] United States Sentencing Commission, *Guidelines Manual*, § 2R1.1 (antitrust-specific guideline) (2018), https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2018/GLMFull.pdf. The Antitrust Division considers only commerce affecting U.S. consumers. *See* B. Snyder, *Remarks at the Sixth Annual Chicago Forum on International Antitrust* (2016) ("Each jurisdiction can and should impose penalties that reflect the harm to its consumers"), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-brent-snyder-delivers-remarks-sixth-annual-chicago.

[33] R. Powers, ***A Matter of Trust: Enduring Leniency Lessons for the Future of Cartel Enforcement* (2020),** https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-richard-powers-delivers-remarks-13th-international**.**

[34] *See, e.g., United States v. Höegh Autoliners AS*, plea agreement (2017), https://www.justice.gov/atr/case/us-v-hoegh-autoliners; *see also* U.S. Dep't of Justice, Antitrust Division, *Antitrust Division Manual* at III.G.2.c.iii (5th ed. updated 2016), https://www.justice.gov/atr/file/761166/download.

[35] 15 U.S.C. § 15, https://uscode.house.gov/browse/prelim@title18/part2&edition=prelim. Private plaintiffs also may seek injunctive relief; 15 U.S.C. § 26, https://uscode.house.gov/browse/prelim@title18/part2&edition=prelim.

or triple,[36] the actual damages they incurred, as well as attorneys' fees.[37] The U.S. Supreme Court has called the "treble-damages provision wielded by the private litigant…a chief tool in the antitrust enforcement scheme," because the treble damage threat creates "a crucial deterrent to potential violators."[38]

26. These private actions, which typically follow Division criminal prosecutions, perform a complementary function to the Division's criminal enforcement by adding significant additional deterrence of cartel activity.[39] Despite their role in amplifying the Division's efforts to combat criminal cartel activity, however, the Division does not assist plaintiffs pursuing private damages actions. Nonetheless, the cartel convictions that the Division secures, including through guilty pleas, constitute "*prima facie* evidence" in private damages actions against convicted companies and individuals.[40] As a practical matter, then, civil liability is established by the Division's criminal enforcement efforts, and private plaintiffs usually need to prove only the fact of harm and the amount of damage in order to recover.

State Enforcement

27. The mission of state[41] antitrust enforcers is similar to that of the Division: protect the public from the harms flowing from anticompetitive conduct. State enforcers focus their efforts on the consumers in their respective states, but individual state enforcers often proceed jointly in multistate actions brought in federal courts. The state enforcers typically focus on securing monetary redress for their residents.[42] In the U.S. system, states have the same rights as private parties to sue for damages when they are the victims of cartels.[43] They therefore serve the same complementary role to the Division's criminal enforcement efforts as other private plaintiffs. In addition, a provision of federal competition law authorizes states to bring what are called *parens patriae* actions to recover damages on behalf of their

[36] Since 2004, successful corporate applicants to the Division's Leniency Program qualify for de-trebling of damages in civil plaintiffs' suits, creating an additional incentive to pursue leniency. Qualifying applicants must cooperate with the plaintiffs' attorneys in pursuing the civil action. Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (ACPERA), Pub. L. No. 108-237, §§ 201-214, 118 Stat. 666–67 (2004) (codified at 15 U.S.C. § 1 note, https://uscode.house.gov/browse/prelim@title18/part2&edition=prelim).

[37] 15 U.S.C. § 15, https://uscode.house.gov/browse/prelim@title18/part2&edition=prelim.

[38] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 635 (1985).

[39] Additionally, in large cartels with numerous victims, the Division frequently relies on the existence of these actions to address its obligations to ensure victim restitution.

[40] 15 U.S.C. § 16(a) (A conviction in a "criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto . . . ."), https://uscode.house.gov/browse/prelim@title18/part2&edition=prelim.

[41] We use the term "state" to refer to all 55 sub-federal units of government; all have competition laws. In addition to the 50 states, these include the District of Columbia, the Commonwealth of Puerto Rico, and the U.S. territories of Guam, the Northern Mariana Islands, and the Virgin Islands. Many states explicitly apply federal antitrust law.

[42] *See* H. First, *Delivering Remedies: The Role of the States in Antitrust Enforcement*, 69 Geo. Wash. L. Rev. 1004 (2001).

[43] *Hawaii v. Standard Oil Co.,* 405 U.S. 251, 262 (1972); 15 U.S.C. § 15, https://uscode.house.gov/browse/prelim@title18/part2&edition=prelim.

residents.[44] Finally, the antitrust laws of most states (*i.e.*, state-level, and not federal, antitrust laws) allow the imposition of civil penalties—essentially fines—rather than criminal prosecution.[45]

Suspension or Debarment

28. Corporations that have been found guilty of a criminal antitrust offense also may be administratively suspended or debarred from contracting with federal government agencies based on their participation in antitrust conspiracies. The purpose of suspension and debarment is to protect the government from waste, fraud, and abuse that may result from contracting with entities that have engaged in criminal conduct. Among other consequences, offers are not solicited from and contracts are not awarded to the suspended or debarred party by any agency in the executive branch of the federal government. Further, existing contracts will not be renewed or extended.[46]

29. Suspension and debarment decisions are made at the sole discretion of the contracting federal agency. The Division, however, may be required to report individual defendants qualifying for debarment.[47] Further, Division plea agreements may contain provisions under which the Division will advise another federal agency considering debarment of the fact, manner, and extent of a defendant's cooperation with the cartel investigation.[48] This creates an additional incentive for the acceptance of responsibility and cooperation with the Division's criminal investigation, as it makes more likely the prospect that a corporation will avoid suspension and debarment from any federal contracts.

4. Recent Developments in U.S. Criminal Antitrust Enforcement

30. Several notable recent developments reflect the many ways in which the Division prioritizes and seeks to enhance its criminal enforcement efforts. These include the successful use of traditional enforcement measures and tools, such as criminal litigation and extradition to bring to justice international fugitives charged with criminal antitrust offenses, as well as recent policy and program innovations. Three developments from the latter category are of note: (1) the employment of available, but rarely used, civil recovery statutes when the government itself is a victim of a criminal antitrust conspiracy; (2) the creation of an interagency effort specifically targeting cartel offenses affecting public procurement; and (3) enhanced incentives for corporations to improve compliance programs addressed specifically to the prevention of cartel offenses.

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[44] 15 U.S.C. § 15c, https://uscode.house.gov/browse/prelim@title18/part2&edition=prelim.

[45] *See generally* American Bar Association, Section of Antitrust Law, *State Antitrust Enforcement Handbook* (3rd ed. 2018).

[46] *See generally* U.S. General Services Administration (GSA), *Frequently Asked Questions: Suspension & Debarment* (2019), https://www.gsa.gov/about-us/organization/office-of-governmentwide-policy/office-of-acquisition-policy/gsa-acq-policy-integrity-workforce/suspension-debarment-division/suspension-debarment/frequently-asked-questions-suspension-debarment#Q1.

[47] U.S. Dep't of Justice, Antitrust Division, *Antitrust Division Manual* at II.7 (5th ed. Updated 2016), https://www.justice.gov/atr/file/761166/download.

[48] *See* U.S. Dep't of Justice, Antitrust Division, *Annotated Model Corporate Plea Agreement* (2016), https://www.justice.gov/atr/file/889021/download.

4.1. Criminal Litigation

31. When necessary, the Division's commitment to prosecute criminal cartel offenses to the fullest extent extends to litigation in federal courts. Both corporate and individual defendants may exercise their rights to a jury trial in which their guilt must be proven beyond a reasonable doubt by Division prosecutors to secure a conviction, as determined by a unanimous jury verdict. These trials often come at the end of investigations and involve the defendants who refused to accept responsibility for their roles in cartel activity. Criminal trials are characterized by vigorous defenses, rigorous cross-examination of the government's witnesses, and aggressive pre- and post-trial defense tactics. Trials, therefore, require an enormous commitment of time and resources by the Division.

32. Two recent trials are indicative of the Division's commitment to pursuing the prosecution of criminal cartel matters. Both resulted in guilty verdicts from juries in prominent and long-running Division investigations. In November 2019, a federal jury in the Southern District of New York found a former emerging market global foreign currency exchange trader from a major multinational bank guilty of price fixing and bid rigging.[49] Shortly after this conviction, in early December 2019, a federal jury in the Northern District of California found the former CEO and president of a multinational corporation guilty of fixing prices for canned tuna.[50]

33. As the Division's Deputy Assistant Attorney General for Criminal Enforcement noted, "both trials demonstrate [Division] prosecutors' perseverance and commitment to accountability, however long it may take to untangle complex conspiracies, litigate, and bring those responsible to justice."[51]

4.2. Extraditions

34. The Division has a longstanding commitment to use Interpol's Red Notice list and other tools, including seeking extradition, to bring foreign nationals accused of criminal antitrust violations to the United States to face charges. Two recent examples of individuals extradited to the United States underscore this commitment.

35. The first individual was a Dutch national and former senior vice president of a cargo airline; she was indicted in 2010 for fixing prices of international air cargo shipments. After nearly ten years as a fugitive from these charges, she was apprehended in Italy in 2019. She opposed her extradition in litigation before Italian courts, but the Division prevailed, and she was extradited to the United States in 2020. After pleading guilty, she was sentenced by a U.S. court to fourteen months' imprisonment, the longest sentence imposed in the Division's air cargo investigation.[52]

36. The second individual, a South Korean national, was charged with bid rigging and market allocation from 2008 to 2012 as part of DOJ's long-running investigation into antitrust

[49] *See* U.S. Dep't of Justice, Antitrust Division, *Former Trader for Major Multinational Bank Convicted for Price Fixing and Bid Rigging in FX Market* (2019), https://www.justice.gov/opa/pr/former-trader-major-multinational-bank-convicted-price-fixing-and-bid-rigging-fx-market.

[50] *See* U.S. Dep't of Justice, Antitrust Division, *Former CEO Convicted of Fixing Prices For Canned Tuna* (2019), https://www.justice.gov/opa/pr/former-ceo-convicted-fixing-prices-canned-tuna.

[51] R. Powers, *The State of Criminal Antitrust Enforcement in 2020* (2020), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-richard-powers-delivers-remarks-state-criminal.

[52] *Id.*

violations in the auto parts industry. German authorities apprehended him in September 2019, and he was extradited to the United States in February 2020. Once in the United States, he pleaded guilty to the criminal charge against him, and a federal judge sentenced him to nine months' imprisonment and a fine of $130,000 (USD).[53]

37. The resources invested in obtaining these results were significant. Through these extraditions, the Division's Assistant Attorney General ("AAG") reaffirmed the DOJ's commitment to use all available means to apprehend international fugitives fleeing criminal antitrust charges, noting that "neither time nor distance provide refuge for executives who conspire to cheat American consumers."[54]

4.3. Civil Recovery Under Clayton Act 4A

38. In addition to imposing criminal fines on corporations for antitrust violations, the federal government of the United States may seek treble civil damages from the conspirators under Section 4A of the Clayton Act in cases where the government itself is a victim of the conspiracy.[55] While this provision of U.S. antitrust laws historically has been underutilized, in 2018 and 2019, the DOJ successfully obtained both criminal fines and civil recoveries under Section 4A in its investigation and prosecution of five South Korean petroleum and refinery companies. These were the first Section 4A recoveries in many years and the largest recoveries under Section 4A in the Division's history.[56]

39. The bid rigging involved the companies' supply of fuel to American military bases in South Korea. Because of the significance of the harm inflicted on the United States by this criminal conduct, the dual sanction of civil penalties and criminal fines was important to reinforce the Division's key mission of detecting, prosecuting, and deterring criminal bid-rigging offenses. To that end, the Division also commenced a separate and parallel civil investigation, in conjunction with another DOJ division, to pursue claims based on the companies' false statements to the United States government in connection with the conspiracy.

40. The Division ultimately imposed criminal fines on the five companies totalling $150 million (USD). In separate civil settlements with the DOJ, the same companies also agreed to resolve parallel civil antitrust and False Claims Act[57] violations and pay more than $200 million in damages to the United States.

41. These Section 4A recoveries demonstrate the DOJ's commitment to prosecuting cartel conduct to the fullest extent possible, using all available tools. As the Division's AAG said in announcing the initial settlements arising from the investigation, the charged companies "cheated the Military and American taxpayers out of precious limited resources," resulting in the United States Department of Defense paying substantially more for mission-critical

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[53] *See* U.S. Dep't of Justice, Antitrust Division, *Extradited Former Automotive Parts Executive Pleads Guilty to Antitrust Charge* (2020), https://www.justice.gov/opa/pr/extradited-former-automotive-parts-executive-pleads-guilty-antitrust-charge.

[54] *Id.*

[55] 15 U.S.C. § 15a, https://uscode.house.gov/browse/prelim@title18/part2&edition=prelim.

[56] *See* U.S. Dep't of Justice, Antitrust Division, *Safeguarding Taxpayer Dollars: The Antitrust Division Announces Criminal Charges and Civil Settlements for Bid Rigging and Fraud Targeting U.S. Military Bases in South Korea* (2019), https://www.justice.gov/atr/division-operations/division-update-spring-2019/safeguarding-taxpayer-dollars. The Division also criminally charged seven individuals for their role in the cartel conduct.

[57] 31 U.S.C. §§ 3729-3733, https://uscode.house.gov/browse/prelim@title18/part2&edition=prelim.

fuel supply services.[58] "These settlements serve as an important reminder that the [DOJ] and its law enforcement partners will investigate aggressively and prosecute without hesitation companies who cheat the United States government and the American taxpayer."[59] The Division is committed to seeking Section 4A remedies in future cases when they may be appropriate because of their importance in enhancing criminal cartel enforcement: as the Division's AAG noted, "[t]he bottom line is that the Division's enforcement of Section 4A will *increase* the incentive for co-conspirators in cartel cases to come forward."[60]

4.4. Cartel Offenses Affecting Public Procurement: Procurement Collusion Strike Force

42. In November 2019, the DOJ launched a new initiative focused on detecting and prosecuting cartel offenses, particularly bid rigging, that impact public procurement. The Procurement Collusion Strike Force ("PCSF") is an interagency partnership among the Division, thirteen United States Attorneys' Offices ("USAOs"), investigators from the FBI, and four federal Offices of Inspectors General. The PCSF seeks to leverage the investigative resources of its members to better deter, detect, and prosecute criminally cartels in the public procurement space.

43. Public procurement is an enormous expense for the United States government. For instance, in 2018, over $550 billion (USD)—approximately forty percent of all federal discretionary spending in the United States—was spent on the public procurement of goods and services. An additional $79 billion (USD) was included in the federal budget as grants to state and local governments to fund physical capital improvements. As the Division's AAG noted in announcing the creation of the PCSF, "[g]iven the large sums of federal money involved in public procurement, it's easy to see how any amount of overcharge caused by illegal bid rigging or other anticompetitive criminal conduct inflicts significant economic harm on the government and the taxpayers."[61]

44. The PCSF's initial focus is in the districts of its thirteen member USAOs. Each USAO is the chief federal prosecutor within its designated geographical district, with deep experience litigating in that district's court. The Division, in conjunction with agents from the FBI and other law enforcement partners, provides significant expertise in criminal cartel enforcement. The PCSF is focused on the most significant government agencies and federal contractors within each of the thirteen districts, as well as where the most federal dollars are spent and may be impacted by bid rigging or other cartel conduct.

45. The DOJ has already announced the inception of several new grand jury investigations as a result of the PCSF's efforts, and during a three-week span between late April and May, the PCSF virtually trained over 2,000 criminal investigators, data scientists, and

[58] M. Delrahim, ***"November Rain": Antitrust Enforcement on Behalf of American Consumers and Taxpayers*** (2018), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-remarks-american-bar-association-antitrust.

[59] *Id*.

[60] *Id*.

[61] M. Delrahim, *Remarks at the Procurement Collusion Strike Force Press Conference* (2019), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-procurement-collusion-strike.

procurement officials.[62] It is anticipated that the PCSF also will play an integral role in efforts to combat any procurement fraud related to the COVID-19 pandemic.

4.5. Corporate Compliance Policy

46. In July 2019, the Division announced a new policy under which it will consider and potentially award corporate antitrust compliance programs at both the charging and sentencing phases of Division criminal investigations, based on the Division's assessment of the program's design, application, and efficacy.[63] The policy is aimed at preventing criminal cartel activity in the first instance.

> *The goal of the policy change is to incentivize corporate compliance and good corporate citizenship. Corporate compliance efforts are the first line of defense to antitrust crimes, and part of our effort to both deter and detect violations. Ideally, robust antitrust compliance programs deter wrongdoing altogether, preventing the harm from anticompetitive conduct before it occurs.*[64]

47. At the charging stage, for corporations recognized to have committed criminal violations despite having exceptional antitrust compliance programs, the Division now will consider an alternative to a corporate plea agreement, known as a Deferred Prosecution Agreement ("DPA"), that potentially carries less severe collateral consequences for corporations. DPAs are recognized by the DOJ as "an important middle ground" between corporate conviction and declining to prosecute,[65] and they preserve the DOJ's ability to pursue a conviction should the corporation breach its DPA. At the sentencing stage, an effective compliance program may lead to a more favorable calculation of a corporation's fine under the United States Sentencing Guidelines,[66] and it also may factor into the DOJ's recommendation whether to impose corporate probation.

48. The Division will look at nine separate factors in evaluating corporate compliance programs for these purposes: (1) the design and comprehensiveness of the program; (2) the culture of compliance within the company; (3) responsibility for, and resources dedicated to, antitrust compliance; (4) antitrust risk assessment techniques; (5) compliance training and communication to employees; (6) monitoring and auditing techniques, including continued review, evaluation, and revision of the antitrust compliance program; (7) reporting mechanisms; (8) compliance incentives and discipline; and (9) remediation

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[62] R. Powers, *A Matter of Trust: Enduring Leniency Lessons for the Future of Cartel Enforcement* (2020), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-richard-powers-delivers-remarks-13th-international.

[63] U.S. Dep't. of Justice, Antitrust Division, *Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations* (2019), https://www.justice.gov/atr/page/file/1182001/download.

[64] R. Powers, *Criminal Antitrust Enforcement: Recent Highlights, Policy Initiatives, and What's to Come* (2019), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-richard-powers-delivers-remarks-29th-annual-antitrust.

[65] U.S. Dep't of Justice, Antitrust Division, *Antitrust Division Manual* at 9-28.200 (5th ed. updated 2016), https://www.justice.gov/atr/file/761166/download.

[66] United States Sentencing Commission, *Guidelines Manual* at §§ 8B2.1, 8C2.5 and 8D1.4(b)(1) (2018), https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2018/GLMFull.pdf.

methods. Extensive guidance regarding this policy was made public on the Division's website.[67]

5. Conclusion

49. The Division has a long history of aggressively prosecuting hardcore cartel offenses as criminal violations. The decision to pursue hardcore cartel behavior criminally and the Division's approach to criminal investigations have led to significant deterrence of these activities for many years. This success is driven by the Division's unwavering commitment to ensuring predictability and transparency in its criminal antitrust enforcement efforts, using all the tools available to maximize the detection of cartel activity, and seeking severe sanctions for both corporations and individuals after guilt is established. The Division will continue to evaluate and strengthen its criminal enforcement program in furtherance of these important efforts.

[67] U.S. Dep't of Justice, Antitrust Division, *Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations* (2019), https://www.justice.gov/atr/page/file/1182001/download.