

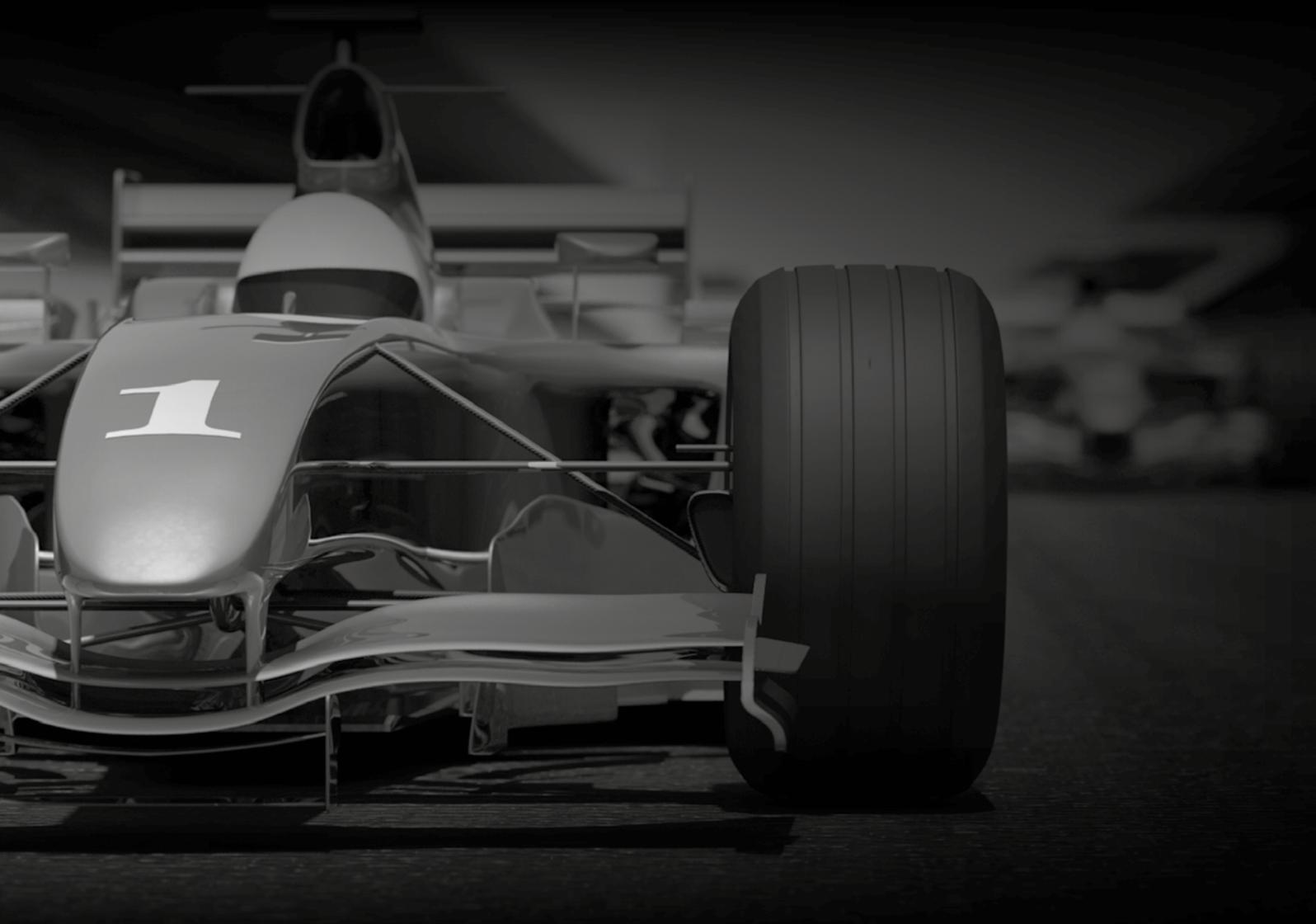
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Competition World

A global survey of recent competition and antitrust law developments with practical relevance

Quarter 2: 2016



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From the editor

Welcome to our Q2 2016 edition of *Competition World*. In this edition we focus on individuals and consider their role in antitrust and competition cartels and investigations. We are pleased to welcome two distinguished guest authors from academia to share insights from their research on individual behavior in an antitrust context.

We start this issue with Professor Andreas Stephan from the University of East Anglia, who asks “Why is it difficult to hold individual employees to account for wrongdoing?” and offers views on the need for firms to invest in compliance programmes which attach a greater stigma to deliberate misconduct.

Next, we examine the criminalization of cartels around the world and how, in recent years, more and more jurisdictions – in particular in Europe and Asia-Pacific – are criminalizing cartel behavior by individuals. We look at what this means for individuals and whether incarceration is a real possibility for those found guilty of the most harmful conduct.

Following this, we take a step back and consider the impact of antitrust investigations on individuals and offer practical tips for companies on how to manage internal investigations and ensure effective cooperation with antitrust authorities.

We consider the most recent attempt by the UK authority, the Competition and Markets Authority, to prosecute individuals for breach of the UK criminal cartel offence (under the old offence which included the requirement to prove “dishonesty”) and comment on how public attitudes can act as a bar to successful prosecutions with juries seemingly unconvinced that cartels merit criminal sanctions.

We then turn our attention to North America which led the way in criminalizing cartel conduct with three articles. First, we look at the renewed US focus on individual misconduct in corporate investigations with the publication of the “Yates Memo”. Second, we review how the risks of individuals facing jail time have increased significantly in Canada. Third, we examine what compliance clues there are for businesses from recent statements made by the US Justice Department.

We move from North America to shine the spotlight on the emerging regime of South Africa which introduced new criminal penalties for cartel conduct in 2016 and offer advice on what companies and directors should do to protect themselves against these increased risks.

Finally, we close with an article from the second of our guest authors, Professor Harry First from New York University School of Law who asks “Are cartel participants rogues?” and identifies the need for further research to identify more about the identities of individuals who participate in cartel behavior and why they engage in this behavior

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Martin Coleman
Editor
Global head of antitrust and competition
martin.coleman@nortonrosefulbright.com

Why is it difficult to hold individual employees to account for wrongdoing?

Business misbehavior usually attracts a corporate fine from authorities seeking to punish those responsible and deter future infringements of a similar nature. The corporate fine will punish the firm as a whole and may be most acutely felt by shareholders. Yet corporations (especially large ones) are by their nature rule-following bodies and the decision to commit wrongdoing is typically made by a group of employees (in some cases just one) acting outside the institutional framework of the firm. In the case of cartel infringements of competition law, this involves meeting and communicating in a clandestine manner so as to hide the activity from customers, the authorities and from others within the firm.

The challenge for businesses is how to best respond to the threat of corporate fines and, in particular, how to ensure employees are deterred from engaging in wrongdoing. Good corporate compliance can go a long way in meeting this challenge. It ensures employees understand the law, the firm's commitment to adhere to it and procedures for the internal reporting of suspected breaches. It is important not to underestimate the level of ignorance about the law. Recent surveys show that around half of British businesses and members of the UK public do not know that price fixing is illegal, for

example.¹ Tackling ignorance is made difficult by the expansive range of compliance training employees must now undertake, and the difficulty of ensuring all such training is engaging and successful. Businesses may also wish to set out disciplinary procedures for individuals engaged in wrongdoing. This could include dismissal or a penalty affecting salary or the value of an individual's pension.

We know empirically that the risk of wrongdoing varies between trading conditions. For example, individuals are far more likely to break the law where they fear losing their jobs because the market is experiencing a downturn, or where there is a danger of the business becoming insolvent. Firms should be particularly careful not to set unrealistic performance targets for employees as a condition of their continued employment, as this will have the same effect. Risk analysis, undertaken as part of a compliance programme, will help determine whether a business operates in a market that is susceptible to particular forms of wrongdoing. In the case of cartels, this might include markets where a homogenous product is being sold and where there is frequent communication between competitors through a trade association.

While the efforts identified above will reduce the risk of liability, there is always a danger of determined employees deliberately choosing to break the rules despite being aware of the law and its consequences. This is not helped by way firms are vicariously liable for their actions, or the fact that any corporate fine may come years after the conduct is perpetrated, by which time the individuals may have left the firm or retired. The arsenal of sanctions aimed at individuals is growing, with disqualification, debarment and other such penalties available in some industries and for some types of misconduct. For serious wrongdoing many believe that only a criminal offence with a credible threat of custodial sentences can have any deterrent effect. This is partly because anything short of a custodial sentence can be viewed in monetary terms and so may be overcome if the individual views the "reward" of engaging in wrongdoing as significant enough. The US experience would certainly suggest incarceration has some significant deterrent effect. In the UK and throughout Europe the number of white-collar criminal cases against individuals is comparably low and the numbers of successful convictions lower still. This is likely to embolden those thinking of engaging in white-collar crime as it suggests the prospect of getting caught and successfully punished is quite remote.

¹ A Stephan, "Survey of Public Attitudes to Price Fixing in the UK, Germany, Italy and the USA" (2015) CCP Working Paper 15-08. Available: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2642181; UK businesses' understanding of Competition Law, Report prepared for the CMA by IFF Research (March 26, 2015). Available: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/429876/UK_businesses_understanding_of_competition_law_-_report.pdf

The increasing use of leniency, settlement and deferred prosecution agreements may actually be compounding the problem of how to deal with employees determined to break the law. The most extreme example of these is in competition law. Firms in violation of Chapter I of the Competition Act 1998 or Article 101 of the Treaty on the Functioning of the European Union receive immunity if they are first through the door and discounts in fines of up to 50 per cent if they are not first but are still willing to cooperate. On top of these leniency discounts, firms can be awarded an additional discount if they opt for a shorter, streamlined enforcement process (essentially settlement). These procedures are becoming more common in business law and are intended to ensure cases are dealt with in a timely manner so that enforcement resources can be freed up and used elsewhere. A cynic might suggest they essentially punish firms for exercising the right to defend themselves and that they may have an incentive to cooperate and settle out of corporate pragmatism (for example to reduce uncertainty in capital markets), even though they have doubts about the extent of their alleged liability.

These mechanisms require the complete and continued cooperation of the firm in return for a reduced or deferred penalty. The problem is that the information needed to ensure the firm benefits from this cooperation is usually held by the individual decision makers who were responsible for the wrongdoing in the first place (remember these actions do not generally occur within the institutional framework of the firm and so minutes from meetings, records of communications etc. are not kept). So where the firm would ideally like to discipline or dismiss those individuals, they might actually find themselves having to provide incentives for those individuals to help the firm reduce any corporate fine. They may even have to reward the individuals and pay for any legal costs associated with prosecutions and other action taken against them.

This problem suggests the law's focus on vicarious corporate liability needs to be more in balance with individual responsibility. In particular, more criminal prosecutions are needed where wrongdoing was caused by an identifiable group of employees who acted against the stated policies and procedures of their employer.

There is also a need for leniency and settlement type procedures to show some flexibility to firms wishing to discipline the individual employees responsible, where they hold the bulk of the relevant information, instead of rewarding them for their cooperation. In the meantime, firms should continue investing in compliance programmes as these help build a culture of compliance among employees and attach a greater stigma to deliberate wrongdoing. This is important because individuals are greatly influenced by the attitudes and views of their peer groups. Continued investment in compliance also makes it more likely a business will detect wrongdoing at an early stage and benefit more from any subsequent cooperation with the regulator.

For more information contact:

Andreas Stephan
Professor of Competition Law
 Law School and Centre for Competition
 Policy, University of East Anglia
a.stephan@uea.ac.uk

The criminal cartel offence around the world

Introduction

Cartels have been described as “theft by well-dressed thieves”.¹ This reference perhaps brings to mind images of police raids, individuals being escorted away in handcuffs and judges handing down jail time. Indeed, if cartels are clearly so harmful – and perpetrated by “thieves” – we would expect the punishment should fit the crime.

Looking at cartel enforcement, we have observed two trends across our global practice in recent years: first, the level of fines imposed on companies has increased continuously; second, more and more jurisdictions are criminalizing cartel behavior by individuals. This has implications not only for individuals – who face a real threat of incarceration and personal fines – but also for companies, both in terms of their options for responding to investigations and in ensuring their compliance policies are fit for purpose. In this article we focus on the second trend and show not only that the criminal cartel offence can now be found in all corners of the world, but also that prosecutors and competition authorities are increasingly prioritizing enforcement against individuals responsible for cartel conduct.

The gradual criminalization of cartel behavior

The modern proliferation of criminal cartel sanctions can be traced all the way back to the enactment of the Sherman Act in 1890 in the US. This made cartel activity a misdemeanor under section 1 (the prohibition against collusive conduct) punishable by up to a year in prison. Congress upgraded cartel activity to a felony² in 1974 and increased the maximum prison sentence from one to three years. In 2004, the Antitrust Criminal Penalty Enhancement and Reform Act increased the maximum individual fine from US\$350,000 to US\$1 million and the maximum term of imprisonment from three to ten years.³

In Canada, criminal antitrust law has existed even longer than in the US, since 1889. And on paper, Canada imposes the most severe cartel sanctions for individuals in the world. In 2010, the maximum penalties were increased so that conspiracy (i.e. engaging in fixing prices, allocating customers or markets, or restricting output) is now punishable by a fine of up to CA\$25 million, and/or imprisonment for a term of up to 14 years.⁴ Penalties for bid-rigging in Canada include a fine at the discretion

of the court and/or a prison sentence of up to 14 years.⁵

Outside of North America, cartel enforcement has generally been of an administrative and civil character – targeting the company alone. Criminal sanctions have crept into the antitrust enforcement regimes in other jurisdictions only gradually, in the last decade or two. In the UK, a criminal cartel offence became effective in 2003, which provided that where an individual had acted dishonestly by entering into or implementing a prohibited cartel agreement (direct or indirect price-fixing, limiting or preventing production or supply, sharing customers or markets or bid rigging), a prison sentence of up to five years could be imposed.⁶ In Brazil, price-fixing has been prosecutable as a criminal offence since the 1990s.⁷ Individual cartel offenders may be sentenced to prison for two to five years.

Denmark is the most recent European country to introduce a criminal cartel offence. Since 2013, engaging in a cartel is a personal criminal offence punishable by imprisonment if the individual’s participation in a cartel was deliberate and of a grievous nature based on its scale and adverse effects. The maximum sentence is 18 months;⁸ but this can extend to up to

¹ Scott D. Hammond, *The fly on the wall has been bugged – catching an international cartel in the act*, International Law Congress 2001, May 15, 2001.

² Under the US system “felonies” are the most serious types of crimes and are punishable by prison sentences of greater than one year, whereas “misdemeanors” are typically punishable by up to one year in prison.

³ Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, tit. II, 118 Stat. 661 (2004).

⁴ Competition Act, RSC 1985, c. C-34, section 45.

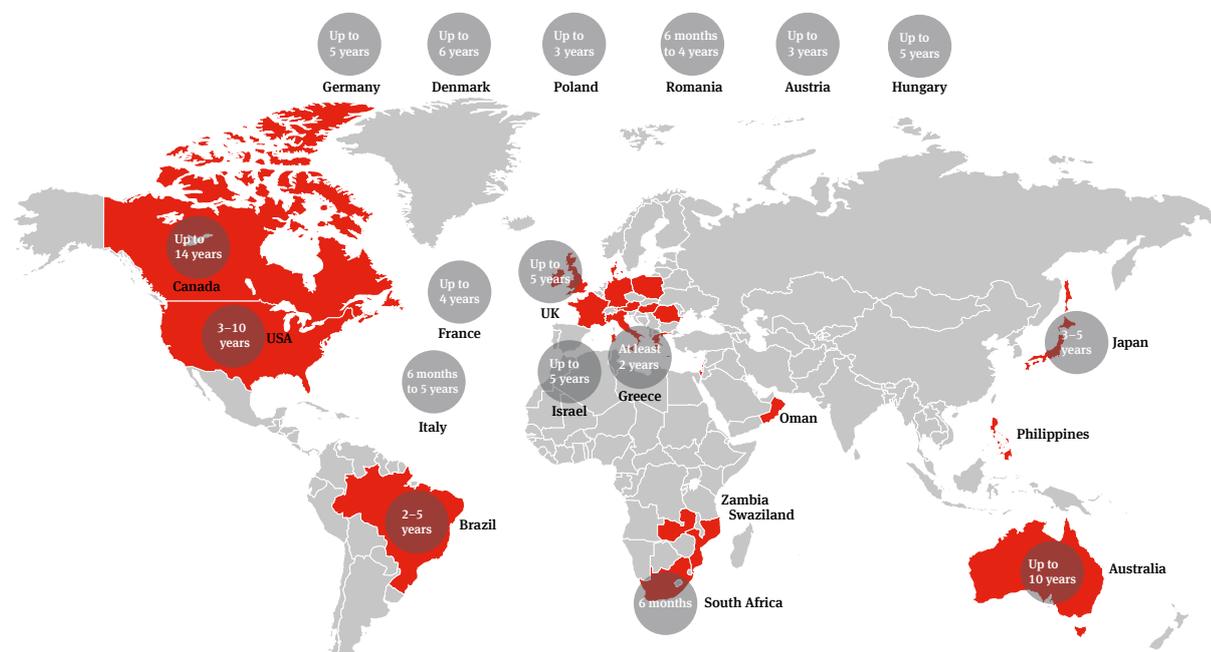
⁵ Competition Act, RSC 1985, c. C-34, section 47.

⁶ Enterprise Act 2002, section 188.

⁷ Brazil’s Economic Crimes Law (Law No. 8,137/90).

⁸ The Danish Competition Act (Consolidation Act No. 700 of June 18, 2013), section 22(3).

Custodial sanctions around the world



six years where there are aggravating circumstances.⁹

A number of other EU Member States have criminalized cartel conduct to a lesser extent. In France, Greece and Romania, it is possible for cartel behavior to be prosecuted under fraud offence provisions.¹⁰ In Germany, Austria, Italy, Poland and Hungary criminal sanctions only apply to bid-rigging.¹¹ Close to Europe, Israel criminalized cartel conduct in 1988 under the Restrictive Trade Practices of Law 1988. A maximum prison sentence of three years applies (or five years if there are aggravating circumstances).

Criminal sanctions are also found in the Asia-Pacific region. For example, in Japan criminal penalties apply

under the Antimonopoly Law, including a term of imprisonment for individuals. The maximum term of imprisonment was increased in 2009 from three to five years. In Korea, the Monopoly Regulation and Fair Trade Act was revised in 2013 to facilitate increased referrals for prosecutions of individuals by public prosecutors, where individuals are potentially liable for a fine and/or prison sentence of up to three years. Separate offences relating to bid rigging also apply under the criminal codes in Japan, for public employees, and more generally in Korea.¹² Australia introduced a cartel offence in 2009.¹³ The maximum criminal sanction for individuals is a prison sentence of ten years and/or a fine of A\$340,000. New Zealand has recently considered following suit, but

draft legislation has been shelved for the time being.¹⁴ South Africa is the latest country to introduce personal criminal liability for cartel conduct.¹⁵ Certain sections of the legislation came into effect from May 1, 2016, seven and a half years after being approved by Parliament. Under the new laws individuals who caused their company to participate in cartel conduct or “knowingly acquiesced” to that effect are criminally liable for a maximum fine of R2000 (approximately £86) and/or imprisonment, currently up to six months.¹⁶

There is also a list of countries where cartels have been criminalized from the more recent introduction of specific antitrust regimes along with civil penalties, for example the Philippines (2015), Oman (2014), Zambia (2010) and Swaziland (2008). There are a

⁹ The Danish Penal Code, section 299(c).

¹⁰ French Commercial Code, Article L420-6; Greek Law 3959/2011, Article 44; and Romanian Competition Law no 21/1996, Article 63.

¹¹ German Criminal Code, section 298; Austrian Criminal Code (*Strafgesetzbuch*), section 168b; Italian Criminal Code, Article 353; Polish Penal Code (Act of June 6, 1997), Article 305; and Hungarian Criminal Code (Act IV of 1978), Article 296/B – see Keith Jones and Farin Harrison *Criminal Sanctions: An overview of EU and national case law*, e-Competitions Bulletin Criminal sanctions, Art. N° 64713, March 25, 2014.

¹² In Japan under Article 8 of the Act on Elimination and prevention of Involvement of Government Officials in Bid Rigging, etc. and Punishments of Government Officials that Harm Fairness of Tendering (Law No. 101 of 2002, amended by Law No. 51 of 2009): http://www.jftc.go.jp/en/legislation_gls/aepibr.files/aepibr.pdf; and in Korea under Article 315 of the Korean Criminal Code: https://elaw.klri.re.kr/eng_service/lawView.do?hseq=28627&lang=ENG.

¹³ Division 1 of Part IV of the Competition and Consumer Act 2010, formerly the Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009.

¹⁴ <http://www.mbie.govt.nz/info-services/business/competition-policy/cartel-criminalisation>.

¹⁵ Government Gazette Proclamation, 39952, April 22, 2016.

¹⁶ A provision in the Amendment Act that provides for a maximum sanction of a fine of R500,000 (approximately £24,000) and/or ten years imprisonment has not yet been brought into effect, http://discover.sabinet.co.za/webx/access/netlaw/89_1998_competition_act.htm.

number of other countries where amendments to the competition law are currently pending which will introduce criminal sanctions.

Paper tigers and setbacks

Despite the gradual proliferation of the criminal cartel offence around the world, the reality is that custodial sentences have been imposed only rarely outside the US. Even in the US itself prison sentences only became a regular occurrence in the early 1970s. In many respects, this reflected judicial and public attitudes: courts (and juries) have been reluctant to penalise individuals for a crime that ultimately benefits the company and shareholders. They are more willing to impose hefty fines on the company. Authorities in many jurisdictions have been hesitant to bring criminal charges because of concern that a jury will not view individual cartel conduct as sufficiently reprehensible to warrant the stigma of a conviction – and this will be a more obvious concern where competition law is a recent phenomenon.

A lack of prosecutions or established civil competition enforcement tradition also inevitably means the authorities in some countries lack experience and to some extent still face hurdles (for example, in their institutional design or because of potential adverse implications of a leniency programme). Setbacks in prosecuting individual cartel offenders in recent years clearly have not helped. A prominent example is the prosecution in the UK in the BA/Virgin fuel surcharge case, where the prosecution against four BA executives collapsed spectacularly due to evidence management problems. The Office of Fair Trading (now the Competition and Markets Authority (CMA)) and the Serious Fraud Office – which were

responsible for cartel investigations – argued that the reason for the lack of successful prosecutions was due to the difficulty faced in convincing a jury that an individual had acted “dishonestly”, which was one of the requirements for proving the criminal cartel offence in the UK prior to its amendment in 2013.¹⁷

In Canada, since at least 1996 no cartel offender has spent any time in prison.¹⁸ Several executives have been sentenced to prison but their sentences were commuted to community service or home detention. In 2015, a number of individuals charged with 60 counts of bid-rigging for federal government contracts were found not guilty or acquitted.¹⁹ The track records in Brazil and Japan do not fare much better; in both countries prison sentences imposed against cartel offenders have either been suspended or overturned on appeal (for example, the Brazilian air cargo cartel decision of 2014 and the Japanese bearing manufacturers cartel decision of 2015).

As of today, actual imprisonment outside the US has only been imposed in the UK and Israel. In Israel, most custodial sentences imposed were suspended and the few actual prison sentences have not exceeded nine months.²⁰ In the UK, the only successful criminal prosecution that resulted in prison sentences was in the Marine Hose case.²¹ However, the circumstances in that prosecution were unusual given that the individuals involved in the cartel pleaded guilty to

the offence as part of a plea bargaining arrangement already agreed in the US.

Renewed focus on individuals: cartel offence 2.0

Despite the patchy record of imprisonment, authorities are demonstrating an increased determination to send cartel offenders to prison.

The UK is a good example. The Enterprise and Regulatory Reform Act 2013 amended the offence to remove the dishonesty test for conduct that takes place on or after April 1, 2014. On paper, this should make it easier for the CMA to prove its case against individuals. In this respect it is important to note that the acquittals in the *Galvanised Steel Tanks* case in 2015²² – the CMA’s most recent prosecution – involved an offence that occurred before April 1, 2014 and therefore was still subject to the old test. It is likely that the CMA will fare better in prosecutions based on the new test but in the meantime the CMA continues to seek prosecution of individuals under the old dishonesty standard.

Recently Canada has also taken steps to strengthen its enforcement.²³ The Safe Streets and Communities Act 2012 restricted the availability of conditional sentences (i.e. preferring community service sentences for individuals) for all offences for which the maximum term of imprisonment is 14 years or life and for specified offences, prosecuted by way of indictment, for which the maximum term of imprisonment is ten years. As a result, jail time for

¹⁷ <http://webarchive.nationalarchives.gov.uk/20140402142426/www.offt.gov.uk/news-and-updates/press/2010/47-10>.

¹⁸ Jacques Perreault was sentenced to one year in jail in 1996 after being convicted on charges that included conspiracy to fix prices, engaging in price maintenance, predatory pricing and regional predatory pricing based on conduct that dated back to 1987: *R v Perreault*, [1996] RJQ 2565 (WL Can) (QC Sup Ct).

¹⁹ *R v Durward*, 2015 ONSC 1562 (CanLII).

²⁰ (Criminal Case (Jerusalem) 366/04 *The State of Israel v Ehud Svirsky et al*, Court’s decision of February 21, 2002, publication No. 3013673).

²¹ *R v Whittle (Peter)* [2008] EWCA Crim 2560.

²² <https://www.gov.uk/government/news/cma-statement-following-completion-of-criminal-cartel-prosecution>.

²³ Amendments to the Competition Act in 2009 and 2010 not only significantly increase the penalties (see above) but also made hard core cartel agreements subject to a *per se* standard.

competition law infringements is inevitable.

Similar steps have been taken in Australia, where the Australian Competition and Consumer Commission has recently created a serious cartel conduct unit which works closely with the Director of Public Prosecutions in circumstances where criminal action may be appropriate.²⁴ In February this year both the Canadian and Australian competition authorities announced that they expect criminal cartel prosecutions to be initiated later in 2016.²⁵

In the US there has been a steady rise in the average prison sentence for defendants prosecuted under Federal antitrust law, which has increased from eight months in the 1990s to 24 months for fiscal years 2010 to 2015. However, the most notable recent trend has been the substantial increase in fines. Criminal fines and monetary penalties in 2015 almost tripled compared to the previous fiscal year's record high of US\$1.3 billion.²⁶ Nonetheless, the Department of Justice (DOJ) has refuted criticism that it is merely "drunk on fines" and affirmed its longstanding belief that individual criminal liability is the most potent deterrent.²⁷ In September 2015, Deputy Attorney General Sally Q. Yates issued a memorandum (now known as the "Yates Memo"),²⁸ which is intended to provide policy guidance on DOJ prosecutions. The Yates Memo among other things sets out that the DOJ's investigation should concentrate on individual offenders from the very beginning. The anticipated effect of

this new approach is that individuals will be under increased pressure to apply for leniency to reveal on-going anti-competitive conduct and more leniency applications. The DOJ has also warned that more extraditions of foreign national defendants would follow in the near future, after successfully completing extraditions of two individuals for antitrust crimes in 2014.²⁹

In Australia, the ACCC now looks to identify individuals at an early stage in investigations for referral to the Commonwealth Director of Public Prosecutions for possible prosecution before the Federal Court and has a number of such cases in the pipeline.³⁰

Conclusion

The designation of cartel conduct as a criminal offence is now reflected in statute books in every region of the world. This proliferation will only increase. Of course, the effectiveness of criminal sanctions as a deterrent to breaches of antitrust rules depends on the frequency and effectiveness of enforcement just as much as – if not more than – the existence of the offence on the statute books in the first place. For authorities this is a learning process or, perhaps as in the case of the UK, a process of trial and error. But the evolution of criminal enforcement in other countries will certainly not take as long as in the US. At the same time, recent developments in enforcement policy in the US and the UK show that individuals can expect to face prosecution in those jurisdictions as the rule rather than the exception.

The message for individuals and companies as their employers is clear:

- Where a personal criminal offence applies, the relevant authority is likely to investigate and prioritize a prosecution of individuals responsible for anti-competitive conduct in parallel with the civil procedure against the company – companies need to anticipate how they would respond to an investigation where individuals are also prosecuted.
- Internal procedures need to anticipate the risk that individuals may look to avail themselves of whistleblowing opportunities to secure immunity from prosecution under leniency programmes without prior knowledge of the company.
- Companies may need to review their antitrust compliance policies and training programmes to ensure that they cover individual sanctions that may apply in all of the jurisdictions in which the business operates and to ensure that employees and directors are fully apprised of their responsibilities and the sanctions that can apply to them personally.

For more information contact:



Mark Simpson
Partner, London
mark.simpson@nortonrosefulbright.com

²⁴ <https://www.accc.gov.au/speech/priorities-2015>.
²⁵ <http://globalcompetitionreview.com/news/article/40458/australia-canada-await-jail-cartelists>.
<http://www.accc.gov.au/speech/accc-compliance-and-enforcement-priorities-for-2016>.
²⁶ <https://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts>.
²⁷ <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-brent-snyder-delivers-remarks-yale-global-antitrust>.
²⁸ <https://www.justice.gov/dag/file/769036/download>.

²⁹ <https://www.justice.gov/archive/atr/public/testimony/313877.pdf>.
³⁰ <http://globalcompetitionreview.com/news/article/40458/australia-canada-await-jail-cartelists>.

Antitrust investigations – the impact on individuals

When discussing the role of individuals in an antitrust context, companies and their advisors often focus heavily on the most serious end of the spectrum – the consequences, potentially in terms of personal criminal liability, for an individual that becomes involved in a price-fixing cartel or similar hardcore competition infringement.

These are, of course, the most sensitive cases in terms of the legal position of the individuals concerned. In particular, where an individual is implicated in the infringement and their interests and those of the company may diverge, the legal team must be alive to the potential need for separate representation for individuals.

In any event, working with individuals can raise challenges. While employees have a duty to co-operate with reasonable instructions from their employer, antitrust investigations are typically vast, time-consuming, and procedurally complex. Being drawn into their scope can be daunting for non-lawyers unaccustomed to dealing with regulatory processes, and in practice many business people who may have useful information relevant to an antitrust investigation fall into this category – often they are relatively junior staff involved in the sales side of the business.

There is a balance to be struck in supporting these individuals through the process: on the one hand, the individuals involved need to understand the serious nature of an antitrust investigation and its implications, both in terms of the company and potentially their own personal position (particularly if their conduct may be such as to warrant disciplinary action). However, it is important that they are not unnecessarily alarmed, especially if this might lead to them withdrawing their co-operation from the investigation team. It is also important to be aware that an inexperienced individual's first instinct is often to speak to friends who may also be involved, whether internally or at other companies. This could simultaneously breach confidentiality obligations owed to the regulator where an investigation has commenced and constitute interference with evidence.

For all of these reasons, it is important that management of individuals is planned from the earliest stages of an antitrust issue coming to a company's attention. We set out below two aspects of an investigation where the relationships with the individuals involved will require particularly careful planning by the company's in-house and external legal teams. Whilst this article is prepared by representatives of Norton Rose Fulbright from the UK and Australia,

its themes are relevant in most jurisdictions and indeed, in other legal contexts beyond antitrust.

Internal investigations before a leniency application

At the very earliest stage of identifying and assessing a possible antitrust issue, gathering relevant evidence and forming an accurate picture of what has taken place is crucial. This assessment will then inform the company's decision about whether it might be appropriate to seek leniency from the competition authorities.

In the UK, the Competition and Markets Authority (CMA) gives detailed guidance to companies on how to approach an internal investigation before making a leniency application.¹ The CMA's primary concern is for the company to avoid any action that could have the effect of "tipping off" a party to the infringement, especially if this might lead to the destruction of evidence. As a result, the CMA asks potential leniency applicants to keep their internal investigations to the minimum necessary to establish the grounds for a leniency marker to be awarded by the CMA (noting that this is a low evidential threshold).

¹ See OFT 1495: Applications for leniency and no-action in cartel cases, especially Annex C.

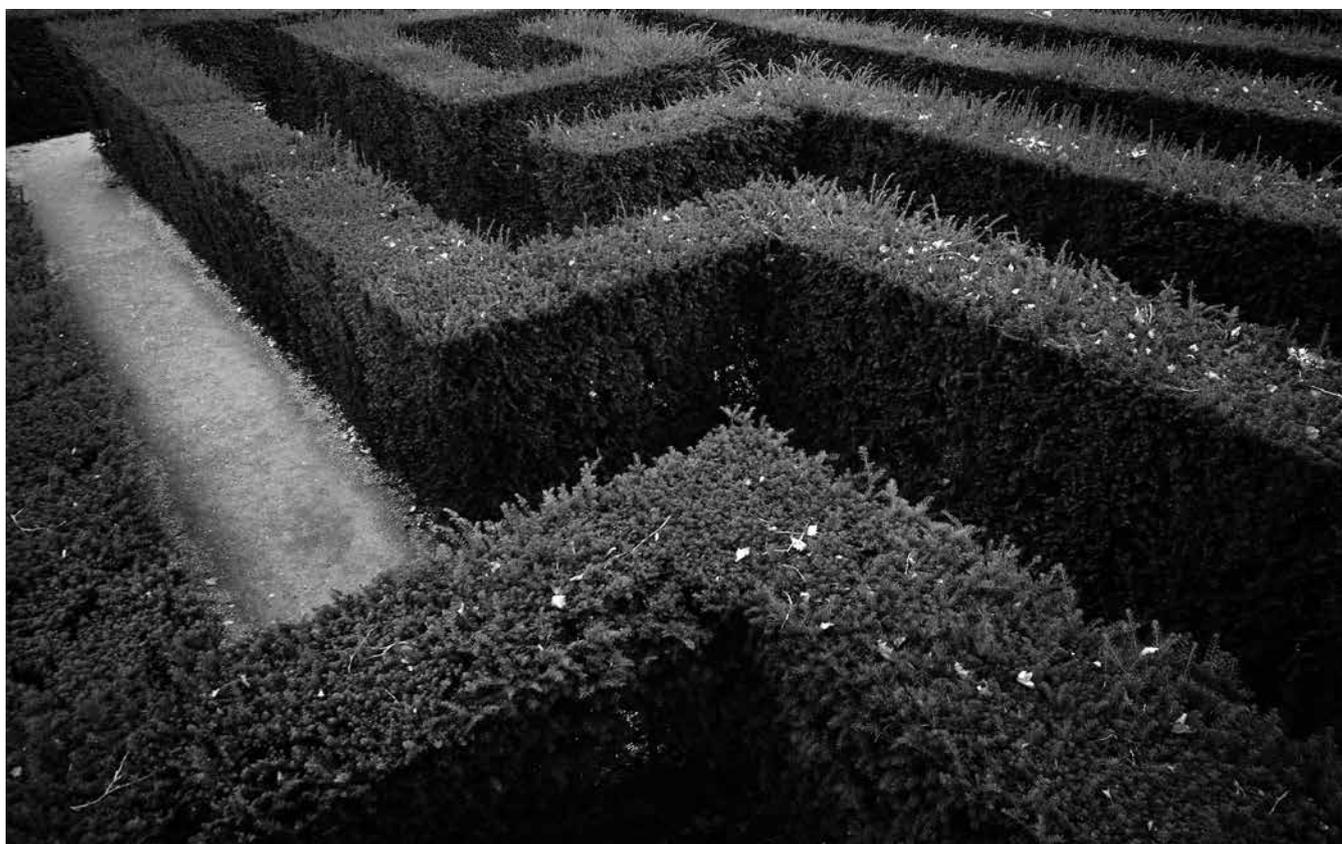
In terms of dealing with individuals, the CMA recommends that former employees are not approached at the pre-leniency stage, other than in exceptional circumstances. For current employees, the CMA recommends a careful approach, including using covert investigation methods (such as reviewing emails) where possible to establish the necessary evidence if possible – although data protection considerations may need to be taken into account in designing any such covert review. If an individual needs to be interviewed, the CMA suggests that companies consider keeping the approach “low key” with a view to establishing the facts, rather than briefing the individual on the full leniency context. Care will need to be taken in respect of how this is presented, particularly if the individual might be subject to disciplinary action at a later

stage (and thus the employer may need to ensure they have run a fair disciplinary process). In addition, the legal team will need to avoid “contaminating” the witness’s evidence by, for example, showing them documents that they would not have had access to or allowing witnesses to discuss the investigation between themselves.

This guidance is helpful but still leaves companies with a tricky balance to achieve. While the evidential standard for a leniency marker is generally low in many jurisdictions, in practice companies will want as much clarity as possible on the existence, nature and potential extent of any infringement before seeking leniency. Given the considerable legal costs, management time and potential business disruption involved in making a leniency application, no company wants to start on this path

only to find out that there was an innocent explanation for the relevant conduct or material. It is also important that the company understands the full extent of the potential infringement, as this could affect, for example, which competition authorities the company decides to approach.

Overall, therefore, the investigation needs to be sufficiently thorough to give the company confidence that a leniency application is worthwhile and a good understanding of its overall position, without going so far as to open the company to later criticism from the authorities for unnecessary disclosure of the existence of a possible infringement. Speaking to relevant current employees is often a necessary part of this initial investigation, and the basis on which this approach is made



will need to be planned carefully. We offer some practical tips below.

While co-operating with an authority

Part of the ongoing obligation of co-operation undertaken by a company that is seeking immunity or leniency (or, in the UK, has entered into a settlement agreement) is making available officers and employees within the business to augment the regulator's understanding of the factual context. These interviews, while relatively routine from the regulator's point of view, can be particularly daunting for the individuals involved: they are typically attended by a number of representatives of the regulator; the proceedings are often recorded; and there are lengthy legal warnings given at the start – including to the effect that misleading the regulator is a criminal offence.

The specific concern here is that not only may the experience be onerous for the employee, but also that under the pressure of the situation they may provide inaccurate information, or refuse to provide any information at all – in other words they may panic or clam up. This could have serious consequences for the company in terms of its entitlement to leniency if the regulator feels that the company has not provided adequate co-operation. It could also have significant ramifications for the individual by exposing them to liability for misleading the regulator or contempt (or equivalent), and undermining the employee's willingness to assist the company further if they feel unsupported.

To avoid this, as well as to minimise the stress of the interview process more generally, it is worth ensuring the employee is thoroughly prepared and supported, especially if they have little experience of similar procedures. A face-to-face meeting where they can be fully briefed on what to expect is the best starting point. It may also be helpful to refresh their memory by giving them a chance to review relevant documentation that is likely to be discussed – although, as noted above, this should be limited to documentation that they would have had access to at the relevant time to avoid contaminating their evidence. Ideally, the lawyer giving the briefing would also become the single point of contact through the whole process for the employee.² They can then help the individual prepare, offer reassurance, deal with any questions they may have, and accompany them on the day of the interview. Providing moral support and reassurance can in some ways be just as important to the employee's overall experience as technical legal advice.

Internal disciplinary procedures also need to be considered. The best outcome, in terms of the antitrust investigation, is for the employee to feel free to give a full and frank account of the relevant matters, since this is the best way to protect – and even maximise – the benefit of leniency/settlement for the company. While it is helpful to be able to reassure the individual that they will not face any negative consequences for any information they disclose in this context, the legal team will need to ensure that they do not give any

² Note that in this situation external counsel will technically be representing the company rather than the employee. This is unlikely to cause any issues since the interests of the company and the employee will usually be aligned in this context. However, the lawyer will need to be aware that in event that the company and employee's interests diverge, they may need to consider separate representation for the employee. In-house counsel in the UK should have regard to the SRA Handbook/Practice Framework Rules 2011 for guidance on their role.

reassurance that goes beyond their control or certain knowledge, whether in terms of the employee's position within the company or as to how the regulator may act in future.

Practical tips

In light of the above, we have developed some high level considerations and tips when dealing with individuals.

At the outset of an internal or external investigation, individuals who are to take part should be briefed as follows:

- Explain the general subject matter of the investigation – approach it “low key” with a view to establishing the facts, rather than briefing the individual on the full leniency context.
- Reassuring the individual about their position can be helpful if this is appropriate, but bear in mind potential future disciplinary action as well as action by the regulator when explaining the individual's personal situation and potential liability.
- Explain to the individual that they must cooperate with internal or external requests for information and documents.
- Explain to the individual that they must not destroy documents or evidence and that they should deactivate any automatic destruction functions in their inboxes etc.
- Explain to the individual that they should keep the fact of the investigation confidential and not discuss it with others inside or outside of the organization.

- Give the individual a clear point of contact for questions and concerns.

When an individual is interviewed internally:

- It is preferable that this occur in the presence of external legal counsel to maximise the chances that discussions are under the veil of legal professional privilege.
- In any case, the individual must be informed that counsel represents only the company and not the individual. This known as an “Upjohn warning”. It originates from a case in the United States and helps to manage what could, in the future, otherwise result in conflict of interest issues.
- It is also advisable to consult with and/or engage the company’s human resources department to ensure that any internal or employment-specific protocols are adhered to.

Where an individual is to be interviewed by the regulator, make sure they are fully briefed and that they have had an opportunity to review the materials that the regulator is likely to ask them about.

Consider separate representation for the individual where they might be incriminating themselves in a contravention and/or there is a formal regulatory investigation process that necessitates separate representation because it raises a conflict for the company’s own legal counsel.

Generally a company will pay for an individual’s separate representation, at least in the initial stages and subject to reasonable limitations in terms of cost and level of co-operation expected. This is particularly advisable if the company needs to make all reasonable efforts to secure the cooperation of employees to obtain leniency. However, there are laws against indemnification of officers and employees in certain jurisdictions. In Australia, for example, the company commits an offence if it indemnifies another person for any penalty ultimately payable and legal costs incurred by the person. Accordingly, if a person is ultimately found individually liable for an antitrust violation, the company would need a mechanism to claw back from the individual any separate representation fees paid. This can generally be achieved by the company setting specifying at the outset the terms upon which it agrees to pay for the individual’s separate legal representation.

For more information contact:



Andrew Riordan
Partner, Melbourne
andrew.riordan@nortonrosefulbright.com



Catrina Smith
Partner, London
catrina.smith@nortonrosefulbright.com



Claire Forster
Special counsel, Sydney
claire.forster@nortonrosefulbright.com



Caroline Thomas
Of counsel, London
caroline.thomas@nortonrosefulbright.com

Criminal cartel offence in UK: public attitudes

The acquittal in June 2015 of two directors prosecuted under Section 188 of the Enterprise Act 2002 (the “cartel offence”) in connection with a cartel concerning the supply of galvanized steel water tanks for water storage might be seen as an embarrassment for the Competition and Markets Authority (CMA). In the face of an admitted cartel, a jury declined to find dishonesty, and therefore guilt. As we explain in this article, these acquittals mark a point of inflection. The change to the cartel offence which removed the requirement to prove dishonesty in relation to conduct taking place after April 1, 2014 was designed to make successful prosecutions more likely. In light of the change, business managers and directors are now more likely to face personal sanctions for breaches of competition law, even though the juries may remain unconvinced that cartels merit criminal condemnation.

The acquittals

The galvanized steel water tanks case was the first criminal prosecution brought by the CMA. Its predecessor, the Office of Fair Trading (OFT), had not had much success prosecuting the cartel offence. Although Section 188 has been in force since 2003 and a number of “hard-core” cartels to which the offence could have applied were uncovered by the OFT during this period, this was only the third cartel offence case to proceed to trial in the UK.

Clive Dean (of Kondea Water Supplies) and Nicholas Stringer (of Galglass), directors at rival suppliers of galvanized steel water tanks, were prosecuted under the cartel offence and accused of dishonestly agreeing to engage in bid rigging. Two other directors of companies involved in the arrangements were not tried: Peter Snee (of Franklin Hodge Industries) pleaded guilty, and a director from a fourth company secured immunity from prosecution when his company successfully applied for leniency.

The facts of the case were not materially disputed. In brief, there had been arrangements to allow the suppliers to win bids at certain prices, thus allocating customers between competitors and inflating prices. Dean and Stringer’s defences were that this was not dishonest. For conduct that took place prior to April 1, 2014, the prosecution must prove that a defendant acted dishonestly in their participation in an anti-competitive arrangement. The applicable dishonesty standard is the standard criminal test from *R v Ghosh* ([1982] QB 1053), by which a defendant will only be guilty if his or her conduct is dishonest by the ordinary standards of reasonable and honest people and he or she realizes, at the time, that reasonable and honest people would regard the conduct as dishonest.

In this case, greed – as a motivator for dishonesty – became the key issue. Defence counsel argued that the

defendants were not being greedy: their conduct was designed to save their businesses and the jobs of employees, not to feather their own nests. Some of the language used in closing argument went directly to this point, in typically theatrical style. Not every untruth, the jury was told, is criminal: Father Christmas, the Tooth Fairy, and compliments to one’s mother-in-law may not be true, but are not criminal. Jurors would not expect businesses always to be open and honest with their customers: “Do you know what is in a chicken nugget? Do you want to?”. The jurors were told that the men on trial worked hard and lived unflashy lives, driving second hand cars and paying off mortgages. The “evil” underpinning dishonesty – greed – was not present.

Clearly, dishonesty is not the same as greed. There are plenty of cases of theft and fraud where the amounts taken are small, and are not stolen to furnish an extravagant lifestyle. Indeed, the Court of Appeal in *Ghosh* explained that Robin Hood would fail the dishonesty test, on the basis that when he stole from the rich, he knew that ordinary people would consider his actions dishonest. This is not to say that greed cannot be a factor in applying the *Ghosh* test. Juries are allowed to decide what is dishonest according to the ordinary standards of reasonable people, and so, it is open to a jury to decide that cartel behavior is only dishonest where the cartelist is greedy.

Given the factors which apparently motivated the conspirators in the galvanized steel water tanks case – with the emphasis firmly a drive to survive a tough economic climate – the jury took a mere two and a half hours to unanimously acquit Dean and Stringer.

Public attitudes

In the Hammond/Penrose report that formed the policy decisions preceding the Enterprise Act 2002, it was anticipated that there would be six to ten prosecutions under the criminal cartel offence per year. The steel tank acquittals are the latest disappointment in an underwhelming enforcement regime – two trials, returning zero convictions.

But perhaps this is outcome is less surprising when viewed through the prism of what we know of public attitudes to competition law. In May 2015, the CMA published research which showed that the majority of individuals with senior management positions in business did not know it was illegal to discuss prospective bids in a tender process with competing bidders, or to agree to allocate customers. Only one fifth of respondents were aware that imprisonment was a possible penalty for competition law infringements. There is no reason to believe the public at large would have any better understanding of the law. The jury in the steel tanks case was clearly prepared to believe that cartel conduct is not, or at least not always, dishonest.

This may be considered a failure of the OFT and CMA's wider public advocacy to date, that even after twelve years since the introduction of the cartel offence, the public do not readily understand cartels to be harmful. Defence counsel in the steel tanks case was able to position competition

authorities as “pedantic” regulators concerned with obscure economic policy, a stark contrast to competition policy rhetoric. Cartels are prohibited in multiple jurisdictions worldwide and the UK is by no means alone in criminalizing cartelists. American courts, for example, have described cartels as the “supreme evil” of competition law.¹

That public attitudes and authorities' positions appear to be so out of step with each other naturally makes prosecutions more difficult. As a result largely of the OFT's concerns about the difficulties in prosecuting the offence, the Government consulted on amending the cartel offence. Consequently, the Enterprise and Regulatory Reform Act 2013 removed the UK dishonesty requirement for conduct that takes place on or after April 1, 2014 and introduced a strict liability test with a complicated set of exclusions and defences. The conduct of Dean and Stringer in the galvanized steel tanks case predated this, which is why the jury was asked to consider the old test.

The change in the law

The consequences of the new test, for post April 1, 2014 cartel conduct, is a simpler job for the CMA – one which does not require the CMA to prove any element of belief on the part of the individual in question. Now, provided the involvement of a defendant in the cartel can be established, the defendant will be guilty unless he or she can point to one of the new statutory exclusions (customers of the cartelists were informed of the conduct; or the agreement was made pursuant to a legal requirement) or an applicable defence (the defendant did not intend

for the conduct to be concealed from customers; the defendant did not intend for the conduct to be concealed from the CMA; or the defendant took reasonable steps to disclose the agreement to professional legal advisers for the purposes of obtaining legal advice).

These changes caused significant debate in their development. The debate centred on the two-part rationale for the abolition of the dishonesty test put forward by the Government and the OFT: that dishonesty in relation to cartel conduct was difficult to prove to a jury, and the resultant dearth of successful prosecutions would mean the deterrent effect of the criminal offence would be weakened. In these regards, the steel tanks case supports the OFT's argument for a change in the law.

The change must increase the likelihood of successful conviction for post April 1, 2014 conduct, as juries will no longer be required to find dishonesty. It would therefore be wrong for executives, managers and directors to take comfort from the CMA's loss in the galvanized steel tanks case. Rather, individuals should understand that the personal risks they face in being non-compliant are increasing, and compliance teams should seek to ensure their boards and executives understand how competition law applies to their business and how to identify risks. Further, as successful prosecutions become more likely, the appeal of immunity through leniency and no-action agreements with the CMA will be ever more attractive; which in turn leads to a greater likelihood that cartel conduct will be uncovered.

However, at the policy level, the new law raises a serious question about whether it is appropriate that cartel conduct be criminalized absent any finding of dishonest intent. Theft and

¹ *Verizon Communications v Law Office of Curtis v Trinko* (2004) 540 US 398 at 408.

fraud require the defendant to have behaved dishonestly; a business person can now be found guilty by virtue of his or her agreeing or implementing a cartel or bid rigging agreement, even if a jury is prepared to accept the conduct had respectable motivations such that it was not dishonest. There is a question about the legitimacy of criminalization where public opinion (reflected through jurors' opinions) does not see the criminalized conduct as morally reprehensible. And we would expect that the CMA would want to focus criminal enforcement efforts on the most egregious cases, so it may be that in essence, the application of a dishonesty test has moved from the courtroom to the prosecutor.

In any event, the removal of the dishonesty requirement does not strengthen the CMA's position as regards historic behavior, i.e. any conduct that pre-dates April 1, 2014 (where there is still a requirement to prove dishonesty). This leaves the CMA in a difficult position. This is not just a case of "once bitten, twice shy". In deciding whether to prosecute, the CMA must apply the "full code test": and only prosecute where there is a "realistic prospect" of conviction, and it is in the public interest to prosecute. If it is the case that juries are reluctant to find cartellists dishonest, a proper application of the full code test might suggest that in cases similar to galvanized steel tanks there can be no realistic prospect of conviction under the old law.

Competition disqualification orders (CDOs)

These challenges to a successful criminal prosecution are not to say that the CMA will not pursue individuals for historic conduct. Where prosecution is not feasible, we expect the CMA will be quicker to use its separate power to

disqualify directors, for a period of up to 15 years. They have had this power since 2003 but so far have used it only rarely.

In order to impose a CDO on an individual, the CMA must persuade a court that:

- There has been a competition law infringement by a business that the individual is a director of
- The individual's conduct as a director makes him unfit to be concerned in the management of the company

Critically, this conduct element does not require (and has never required) a finding of dishonesty. Moreover, a CDO can be imposed where a director ought to have known that the relevant conduct was a breach of competition law. The Guidance suggests that the CMA has high expectations of directors in this regard and as a matter of policy will seek disqualification for directors that turned a blind eye or stuck their heads in the sand². Given the relatively low bar required to impose a CDO, compared to the difficulty of proving the old criminal offence, directors may find the CMA begins to favour the CDO route for conduct prior to April 1, 2014.

Sui generis

The cartel offence continues to sit uncomfortably in the canon of criminal offences, and within the UK competition law regime. Here is an offence that to date has led to only three (uncontested) convictions but the reform of which is of sufficient concern to business that it attracted written submissions from 49 interested parties. It is unusual in that it is a wrong predominantly committed in the name

of the company; but the company itself cannot be criminally liable. And as this article shows, while the Government is at pains to point out that it is a "serious" offence, and it is one that carries a possible sanction of five years' imprisonment, it has no requirement that the defendant be blameworthy, and the public does not readily accept cartel behavior as criminal.

For more information contact:



Mark Simpson
Partner, London
mark.simpson@nortonrosefulbright.com



Peter Scott
Partner, London
peter.scott@nortonrosefulbright.com



Neil O'May
Partner, London
neil.o'may@nortonrosefulbright.com



Jamie Cooke
Associate, London
jamie.cooke@nortonrosefulbright.com

² https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/324978/oft510.pdf

The Yates Memo – a renewed US focus on individual misconduct in corporate investigations

“One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing.” With these words, the United States Department of Justice (DOJ) last September announced a renewed focus on individual misconduct in corporate investigations. The “Yates Memo” – so named for its author, Deputy Attorney General Sally Q. Yates – provides guidance to attorneys across the Department’s many regions and divisions including the United States Attorneys in 94 judicial districts.

The Yates Memo¹ sets about this task by outlining six policies

- 1 Companies must divulge the identities of every wrongdoer, along with every reasonably ascertainable fact about the misconduct, to qualify for any cooperation credit.
- 2 Government investigations (both criminal and civil) should focus on individuals from the outset.
- 3 Criminal prosecutors and civil attorneys should communicate regularly to ensure the full force of US law is brought to bear on any illegal behavior.
- 4 Resolution of a corporate matter will not “provide protection ... for any

individuals ... absent extraordinary circumstances or approved departmental policy such as the DOJ Antitrust Division’s Corporate Leniency Policy.”

- 5 The Government will not ordinarily resolve cases against corporations “without a clear plan to resolve related individual cases.” A Government attorney must receive permission from the US Attorney or Assistant Attorney General to decline further pursuit of implicated individuals.
- 6 Government civil attorneys should evaluate whether to pursue an individual “based on considerations beyond that individual’s ability to pay.”

The extent to which these items represent policy changes, rather than mere clarifications of existing policy, is the subject of some debate. But whatever else might be said about the Yates Memo, the Memo’s aggressive language and ambitious rhetoric combine to send a clear signal: individuals are in the crosshairs.

What is the likely outcome for criminal antitrust enforcement?

Although the Memo’s attitude could hardly be clearer, its effects are difficult to predict. This is especially true for antitrust enforcement. The Memo explicitly leaves undisturbed the Antitrust Division’s Corporate Leniency Policy (sometimes called its amnesty program), under which the United States grants immunity to all employees of the first company to fully disclose its participation in an illegal cartel. It is likely that little will change for participants in this program.

But not every company applies for leniency, for reasons malicious and benign. Before the Yates Memo, disclosure about individuals was one factor among many in the DOJ’s sentencing decisions. Now, taking the Memo at face value, corporations will earn no goodwill even for turning over a trove of incriminating information about their co-conspirators if they do not also turn out every individual within their own company. It remains to be seen how this radical shift in incentives will affect the behavior of would-be collaborators. Deputy Attorney General Yates herself acknowledged this possibility in a speech shortly after she distributed her Memo, but she minimized the hazard. Former Deputy Attorney General James Cole, however, predicts that the

¹ <https://www.justice.gov/dag/file/769036/download>.



Government will retreat from the Yates Memo for this very reason.

One specific way the Memo might affect enforcement behavior concerns the Antitrust Division's practice of entering plea agreements with non-amnesty companies. These deals typically confer immunity on most corporate employees but "carve out" certain employees that the Department retains the right to prosecute. Although sections 4 and 5 of the Memo would appear to spell the end of this practice, the leniency program expressly contemplates those carve-outs, so it is unlikely the practice

will altogether cease. The Memo may incentivize DOJ supervisors to push to carve more people out of corporate plea agreements to increase overall individual exposure. But those carved out individuals are now more likely to face prosecution, where previously the Department often decided not to pursue carved-out employees. Government lawyers thus may be more discriminating in selecting the carve-outs because the value of the employee's (even marginal) cooperation may be worth more than the risk of failing to convict – or worse, even to indict.

The DOJ has telegraphed little about its implementation of the Yates Memo. Deputy Assistant Attorney General Brent Snyder responding to criticism that the Department is "drunk on fines," defended the Department's policy as a continuation rather than a revolution. Speaking at Yale University in February 2016, Snyder revealed that the Antitrust Division has indeed begun "systematically" identifying individual candidates for prosecution.² Government lawyers "are also undertaking a more

² <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-brent-snyder-delivers-remarks-yale-global-antitrust>.

comprehensive review of the organizational structure of culpable companies” to better identify “all senior executives who potentially condoned, directed, or participated in the criminal conduct.”³ These remarks conform to expectations about the implementation of the Yates Memo.

How will the Memo impact civil enforcement?

Potentially more watershed is the Memo’s effect on civil enforcement. Although the Government’s burden of proof is reduced in a civil case, many civil violations are not per se illegal; a company is liable only if its behavior is, on balance, more harmful than beneficial to competition. It is possible that the nature of civil antitrust violations means that the Government will pursue only intentional and knowing anticompetitive individual behavior. But it is certain that Government lawyers will be looking for creative ways to impose liability on individuals, given that even in civil matters the Yates Memo promotes looking for ways of “holding responsible the individuals who adopt a policy that is in violation of the antitrust laws.”⁴

How to respond

Companies should not wait for federal prosecutors to come knocking. Proactive compliance can prevent annoyance and expense – or jail time – later.

Perhaps most importantly, companies should revise corporate antitrust compliance policies to reflect these changes. Officers and managers, in consultation with counsel, should develop policies that minimize

opportunities for antitrust violations. Management must also ensure that employees are aware both of the law’s requirements and the Government’s commitment to pursuing individuals. The Yates Memo provides an opportunity to review corporate compliance programs.

Further, the Yates Memo may create an unnecessary adversarial climate between the business and its employees. To be sure, even now employees and companies sometimes have reason to be wary of one another. But natural loyalties and common experiences often align them. Under the Yates Memo’s regime, with Government lawyers aggressively pursuing individual misconduct, employees are more likely to retain their own counsel before responding even to requests for basic information. The total outlay for legal services will be much higher.

In light of this, companies should review risk mitigation measures, including liability insurance policies, to ensure they accurately reflect the likely proliferation of separate legal counsel. All employees, but especially directors and officers, should understand the scope of the company’s obligation to provide independent legal services to subjects of antitrust investigations. These concerns may loom large for many individuals in light of the Yates Memo’s final point that investigators should proceed regardless of “ability to pay.”

If, despite diligent attempts to ensure compliance, the company finds itself the subject of an investigation, it should undertake its own investigation and root out any behavior that the government could characterize as anti-competitive. If the investigation turns up a rogue employee or officer who has likely violated the antitrust laws,

the company should consider steps to renounce the behavior (if nothing else to avoid ratification). Corporate officers should take care to maintain the attorney-client privilege that normally attends in-house investigations: the Government or private plaintiffs may argue that an investigation conducted with an eye toward furnishing information to the Government is not privileged. Every company has a strong interest in stamping out misconduct within its ranks, and the subject of an investigation should always vigorously pursue its defenses. Company records should reflect these primary goals.

For more information contact:



Anne Rodgers
Partner, Houston
 anne.rodgers@nortonrosefulbright.com

³ *Ibid.*
⁴ <https://www.justice.gov/dag/file/769036/download>.

Taking punishment to the max?: individual liability for competition offences post-Maxzone

We have long been told that money cannot buy happiness. Now, it seems, money also cannot buy freedom – at least not freedom from jail for cartelists in Canada. Traditionally, criminal convictions or plea agreements for Canadian competition offences have involved monetary fines and, for individuals, house arrest or conditional sentences instead of actual jail time. However, both enforcement efforts and penalties sought for competition offences against individuals may be on the rise in Canada as a result of a deliberate strategy on the part of the Competition Bureau (the “Bureau”) to eradicate these harmful practices. Canada’s Federal Court also recently touted the benefits of jail time as a deterrent for competition offences and compared price fixing agreements and other “hard core” cartel agreements to fraud and theft. These “tough on (competition) crime” attitudes mirror those expressed by enforcers south of the border: individuals in the United States are also facing more jail time for cartel offences.

This article explores the principles of individual liability for competition offences in Canada in Section 1. Section 2 discusses the recent focus on enforcement against individuals, including the push for jail time. Section 3 explains the impact of the Safe Streets and Communities Act (SSCA), and Section 4 discusses the Bureau’s Immunity and Leniency Programs.

General Principles of Individual Liability

Individual liability exists for many offences under Canada’s Competition Act (the “Act”). The most widely publicized and enforced of these are cartel offences under section 45, and bid-rigging offences under section 47.

Cartel offences

Section 45 of the Act makes it an offence to conspire, agree or arrange with a competitor to fix, maintain, increase or control the price for the supply of a product; to allocate sales territories, customers, or markets for the production or supply of a product; or to fix, maintain, control, prevent, lessen or eliminate the production or supply of a product. The maximum penalty for these crimes is among the highest in the world: imprisonment for up to fourteen years and/or a fine of up to CA\$25 million.

The Commissioner of Competition, John Pecman, stated in 2015 that the Bureau will vigorously enforce these provisions, including against individuals, and will prioritize cracking down on cartels. He has also quoted the US Supreme Court in stating that cartels are the “the supreme evil of antitrust”.

Bid rigging offences

Section 47 of the Act prohibits bidders, in response to a call for bids or tenders,

from agreeing to not submit a bid or to submit a bid that is the product of an agreement, when such an agreement is not disclosed to the person calling for the bids. It is an indictable offence for which the sentence is a fine, in an amount at the court’s discretion and/or imprisonment for up to 14 years. Collusion in the bidding process, the decision to not submit bids, bid rotation, and bid sharing among bidders rank among the most widespread forms of bid-rigging.

Other Competition Act offences/reviewable conduct

Individuals also face liability under other sections of the Act, as well as under the Criminal Code. For instance, engaging in deceptive marketing practices under Part VII.1 subjects individuals to administrative penalties of up to CA\$750,000 (or CA\$1 million for any subsequent contraventions). Making a false or misleading representation, when done knowingly or recklessly, is also an offence pursuant to section 52 of the Act punishable by up to 14 years imprisonment or a fine in an amount determined by the court.

The Act also extends liability for certain offences committed by corporations onto directors and officers where they are in a position to direct or influence the policies of the corporation. For instance, subsection 52.1(8) of the Act establishes the liability of officers and

directors of corporations who have committed telemarketing offences and subsection 53(5) creates liability for officers and directors for the offence of deceptive prize notification.

Increased focus on individuals and imprisonment

Traditionally in Canada, criminal convictions or plea agreements for competition offences have involved corporate defendants being subject to fines and, where individuals have been convicted, they have been subject to fines but only house arrest or conditional sentences instead of imprisonment. However, changes to the Act in 2009 and 2010 strengthened the Bureau's enforcement capacity by making hard core cartel agreements subject to a per se standard and increasing maximum fines and prison terms for cartel and bid rigging offences. These changes have given the Bureau a renewed mandate to pursue these offences and enforcers are now increasingly focused on individuals.

This new enforcement focus was reflected in the 2012 case *Canada v Maxzone Auto Parts (Canada) Corp.* (*Maxzone*). Maxzone Autoparts Canada Corp. (Maxzone Corp.) was charged under section 46 of the Act for its involvement in an aftermarket auto parts cartel. Section 46 makes it an offence for a corporation that carries on business in Canada to implement in Canada any kind of directive intended to give effect to a conspiracy, combination, agreement or arrangement outside of Canada that would have contravened section 45 of the Act had it occurred on Canadian soil.

Maxzone Corp. pleaded guilty and the Bureau sought a fine but no jail time against any individuals. Chief Justice Crampton ultimately accepted the

parties' very brief (two paragraphs) joint sentencing submission and imposed a fine of CA\$1.5 million, which was calculated pursuant to the Bureau's guidance regarding leniency applicants such as Maxzone Corp. However, he did so reluctantly and criticized the Bureau for not pressing harder for imprisonment.

In his reasons, Chief Justice Crampton called into question whether courts will continue to enforce joint recommendations as to sentencing and demanded more information from the Bureau about the harm that competition crimes cause in order to support sentencing. Going forward, where no term of imprisonment is provided for in a joint sentencing submission, a court may require the parties to submit more detailed evidentiary records and submissions to satisfy the court that the proposed sentence is appropriate.

In his sentencing reasons, the judge also compared price fixing agreements and other "hard core" cartel agreements to fraud and theft¹ and indicated that the threat of serving time in prison is a necessary deterrent. He stated:

In the absence of a serious and very realistic threat of at least some imprisonment in a penal institution, directors, officers and employees who may otherwise contemplate participating in an agreement proscribed by section 45 of the Act, or who may have been directed to implement such an agreement in Canada in contravention of section 46 of the Act, are unlikely to be sufficiently deterred from entering into or implementing such agreements by mere fines. In brief, achieving effective general and specific deterrence requires that individuals face a very real

prospect of serving time in prison if they are convicted for having engaged in such conduct ...²

Chief Justice Crampton's critique was based in part on the weak history of imprisoning people in Canada for competition offences.³ From 2008 to the present, no individuals have been jailed in Canada for cartel or bid rigging offences. Indeed, it appears that the 1996 case *R v Perreault*, the first ever jury trial for a Competition Act offence in Canadian history, in which an individual was sentenced to one year in prison for conspiring to fix driving school prices, attempting to oust competitors from the market by offering unreasonably low prices, and plotting to raise prices by making threats to competitors, is one of the few modern examples of individuals being imprisoned for cartel or bid-rigging offences.⁴ By contrast, those convicted of telemarketing offences have served jail time.⁵

The tide does seem to be turning. With the enhanced penalties added in 2010, as well as the move to a per se standard for hard core cartel offences, the Commissioner has signalled he is optimistic that convictions will be forthcoming. Indeed, Commissioner Pecman is so keen to see individuals jailed that he reportedly made a bet in 2014 with Gary Spratling, former Deputy Assistant Attorney General of the US Department of Justice Antitrust Division, regarding whether Canada would put any cartelists behind bars by the time of the next International Cartel Conference in 2016. Commissioner Pecman lost that bet.

² *Ibid* at para 80.

³ See Government of Canada, Competition Bureau, *Penalties Imposed – International Cartels*.

⁴ *R v Perreault*, [1996] RJQ 2565 (WL Can) (QC Sup Ct). See also Jennifer A Quaid, "Making Sense of the Shift in Paradigm on Cartel Enforcement: The Case for Applying a Desert Perspective" (2012) 58:1 McGill LJ 149.

⁵ See Government of Canada, Competition Bureau, *Court Decisions*.

¹ *Canada v Maxzone Auto Parts (Canada) Corp.*, 2012 FC 1117, at para 54.



Impact of the Safe Streets and Communities Act

Another key driver behind the greater likelihood that cartel offenders will be jailed is the passage of the SSCA⁶ in 2012. The law included relatively well-publicized amendments in Canada to a number of criminal statutes, including the Youth Criminal Justice Act and the Criminal Code. However, the law will also have an important effect on Canadians (and non-Canadians) convicted of violating the conspiracy and bid-rigging provisions of the Act.

Removes sentencing flexibility

On the issue of imprisonment, the SSCA removes the ability to sentence an individual to community service, also known as a conditional sentence. As sections 45 and 47 are indictable offences for which the maximum term

of imprisonment is 14 years, courts can no longer order a sentence of less than two years to be served in the community. This means any prison sentence as a result of a section 45 or 47 conviction would result in the sentence having to be served in prison. As noted, previously many competition-related sentences were carried out in the community. For instance, six individuals were sentenced to terms of imprisonment of a combined 54 months in relation to price fixing in the retail gasoline markets in Victoriaville, Thetford Mines, Sherbrooke, and Magog, Québec. However, all six individuals served their terms in the community.

In the past, where immunity was no longer available, corporations and individuals often plead guilty to conspiracy offences after reaching an agreement with the Bureau and the Director of Public Prosecutions (DPP) as to a recommended sentence

pursuant to the Bureau's Leniency Program (see below). By constraining the ability of the Bureau to agree to recommend sentences involving terms of imprisonment to be served in the community, the SSCA may result in accused individuals contesting more cases.⁷

Delays ability to travel abroad

Under the SSCA, individuals convicted under sections 45 or 47 of the Act must also wait 10 years, instead of the previous five years, to apply for a pardon after their sentences have expired (to be called a "record suspension"). This will in turn affect these individuals' ability to resume business activities after they have served their sentences. Of particular

⁶ SC 2012, c 1.

⁷ The Commissioner rebuffed such concerns in a 2015 speech, suggesting that there are a variety of reasons, beyond sentencing, that would lead an accused to settle rather than litigate; John Pecman, "Cutting through the Noise" (delivered December 8, 2015).

note is that a record of conviction affects the ability to travel to certain countries, particularly the United States, which bars entry to persons convicted of a criminal offence who have not received a pardon.

Treatment of individuals under the Bureau’s Immunity and Leniency Programs

As recognized in Maxzone, the potential for imprisonment is meant to act as a powerful incentive for offenders to come forward under the Bureau’s Immunity and Leniency Programs. The Bureau views its Immunity Program as one of the most effective tools in its detection and enforcement arsenal. Under this Program, the first party to disclose an offence to the Bureau or to provide evidence that leads to the filing of charges is eligible to receive immunity from prosecution, assuming the party meets the other Program requirements, such as full cooperation with the Bureau’s investigations. Under the Leniency Program, other parties who are not the first to come forward and therefore are not eligible for immunity may nonetheless be eligible for lenient sentencing treatment if they cooperate with the Bureau and agree to plead guilty.

The Immunity and Leniency Programs apply to individuals as well as corporations. According to the Immunity Program Guidelines, where a company comes forward and qualifies for immunity, “all current directors, officers and employees who admit their involvement in the illegal anti-competitive activity as part of the corporate admission, and who provide complete, timely and ongoing co-operation, also qualify for the same

recommendation for immunity”. In addition, former directors, officers and employees may qualify for immunity if they offer to co-operate with the Bureau’s investigation. Under the Leniency Program Guidelines, the directors, officers or employees of the first company to apply for leniency are not typically charged separately. However, directors, officers and employees of subsequent leniency applicants may be charged depending on the situation.

Leniency applicants should, however, be aware of the effects of Chief Justice Crampton’s decision in Maxzone, which, as noted above, called into question whether courts will continue to accept lenient joint sentencing submissions that do not include jail time, particularly in the absence of adequate information to assess the seriousness of the crime.

Conclusion

Canadian businesses should prepare or enhance corporate compliance plans and training for executives and employees to limit corporate and personal exposure under the Act, particularly for breaches of sections 45 and 47. Companies that are first to report suspected violations and meet the criteria of the Bureau’s Immunity and Leniency Programs can obtain some legal protection for individual employees. However, greater vigilance is warranted as a result of the decision in Maxzone and the impact of the SSCA, as well as statements from Commissioner Pecman that the Bureau will “vigorously enforce” the criminal cartel provisions, including against

individuals,⁸ and indications that the Commissioner is frustrated about the lack of jail time imposed for cartel offences in Canada.⁹

This combination of an enhanced enforcement climate and a tough on competition crime mentality at the Bureau and in the courts means images of executives in handcuffs could be coming to Canada very soon. After all, Mr. Pecman would not want to lose another bet.

For more information contact:



Kevin Ackhurst
Partner, Toronto
kevin.ackhurst@nortonrosefulbright.com



Stephen Natrass
Associate, Ottawa
stephen.natrass@nortonrosefulbright.com



Erin Brown
Associate, Ottawa
erin.brown@nortonrosefulbright.com

⁸ John Pecman, “The Competition Bureau: A Year of Internal Reform and Accomplishments” (delivered June 9, 2015).
⁹ Pallavi Guniganti, “Australia and Canada still await jail for cartelists” (February 5, 2016).

Compliance clues in DOJ antitrust official's remarks

Law360, New York (February 29, 2016, 11:14 AM ET) – Antitrust enforcement around the world has been on the rise against corporations in recent years.¹ Nowhere has that trend been more pronounced than in the United States. Just this past year, fines in antitrust cases brought by the US Department of Justice reached a record high of US\$3.6 billion.²

At the same time, the Justice Department more broadly has recently expressed a renewed focus on enforcement against the individual executives and officers that carry out corporate acts. Deputy Attorney General Sally Yates released a much-publicized memo on September 9, 2015, titled “Individual Accountability for Corporate Wrongdoing,” which called for “six key steps” to be followed at DOJ that would “strengthen [its] pursuit of individual corporate wrongdoing.”³ These steps are all directed toward putting an early and substantial focus on individuals during any corporate investigation and ensuring that pleas or settlements with corporations do not as readily absolve individual officers or directors of wrongdoing as they might have in the past.

In recent remarks at the Yale Global Antitrust Enforcement Conference, Deputy Assistant Attorney General Brent Snyder of the Antitrust Division said that the division is “embracing the Deputy Attorney General’s directive to do even better.”⁴ While noting one recent panelist’s cutting remark that competition authorities have lately been “drunk on fines,” Snyder put the focus on the Antitrust Division’s past work in the individual enforcement area while outlining new initiatives the division would be undertaking.⁵

Reading between the lines, Snyder’s remarks were fundamentally anchored on two key messages:

- 1 The division hopes to foster cooperation between prosecutors and antitrust offenders by strengthening and emphasizing the division’s carrot and stick enforcement approach.
- 2 The division seeks to further incentivize the development of strong compliance cultures at firms.

Snyder disclaimed that he was breaking new ground with his remarks.⁶ Instead, Snyder’s comments indicate a continuity with the division’s recently intensifying enforcement efforts, as

well as its focus on cooperation with authorities. With this message in mind, corporations and the executives and officers who act on their behalf, now more than ever, should heed the call to establish strong compliance programs.

Past actions against individuals by the Antitrust Division

For much of his address, Snyder touted the Antitrust Division’s past “emphasis on individual accountability.” While defending the division’s liberal employment of corporate fines and demurring on the charge of intoxication by the panelist, Snyder noted that the “division has long touted prison time for individuals as the single most effective deterrent to the ‘temptation to cheat the system and profit from collusion.’”⁷ Along this line, Snyder indicated that critics of the Division have created a false “either/or proposition” between corporate and individual enforcement. Instead, he noted “[t]hey go hand-in-hand.”⁸

Snyder spent a substantial portion of his remarks recounting statistics and anecdotes about the division’s past prosecutions of individuals for antitrust offenses. These statistics indicate, just as the growth in corporate

¹ Carlos R. Rainer & Jim Powers, *Far Beyond Double Jeopardy: Global Antitrust Enforcement, Duplicative Punishments, and the Need for Effective Compliance*, 110 *ATR* 62 (Jan. 15, 2016).

² *Id.*

³ Memorandum from Sally Q. Yates, Deputy Att’y General, Dep’t of Justice, *Individual Accountability for Corporate Wrongdoing at 2-3* (September 9, 2015), <http://www.justice.gov/dag/file/769036/download>.

⁴ Brent Snyder, Deputy Assistant Att’y General, Antitrust Div., Dep’t of Justice, *Individual Accountability for Antitrust Crimes at 4* (Feb. 19, 2016), <http://www.justice.gov/opa/file/826721/download>.

⁵ *Id.* at 1.

⁶ *Id.* at 15.

⁷ *Id.* at 3.

⁸ *Id.* at 5.

finer does,⁹ the explosion in antitrust enforcement efforts. For example, from 2000-2009, the Antitrust Division prosecuted 220 corporations and 453 individuals, more than twice the number of corporations.¹⁰ The disparity grew in the past five years with nearly three times as many individuals facing prosecution as corporations, 352 to 123.¹¹ Although the disparity between corporate and individual prosecutions is not surprising because one can assume that multiple persons at any given firm may have culpability for the firm's offenses, the sheer growth of individual enforcement is undeniable.

Snyder reinforced the deterrence rationale underlying this growth by asserting the division's commitment to prosecuting high-level executives. He specifically pointed to the division's pursuit of numerous C-suite office holders, including presidents, chairmen/CEOs, and a chief financial officer,¹² not to mention the dozens of individuals prosecuted at the vice president, managing director, division director and general manager levels.

In keeping with the globalization of both our economy and of competition enforcement, Snyder also reaffirmed that individual prosecutions do not stop at our waters' edge. He stated that it has been and will continue to be the division's goal that "culpable foreign nationals, just like US co-conspirators, serve significant prison sentences for violating the antitrust laws of the United States."¹³

New initiatives

Despite a record on individual enforcement of which the Antitrust Division is evidently proud, Snyder stated that the division has heard the Yates memo's message and is taking steps to do "even better" in pursuing individuals.¹⁴ He laid out two key steps that the division is undertaking on this score

- The division has "adopted new internal procedures to ensure that each of [its] criminal offices systematically identifies all potentially culpable individuals as early in the investigative process as feasible and that [they] bring cases against individuals as quickly as evidentiary sufficiency permits."
- The division is also "undertaking a more comprehensive review of the organizational structure of culpable companies to ensure that [they] are identifying and investigating all senior executives who potentially condoned, directed, or participated in the criminal conduct."¹⁵

These twin efforts appear directed at taking an even more expansive and critical look at individual wrongdoers at firms than the division has in the past. Rather than pinning the primary blame on one or two employees at a company, Snyder seems to be implying that the division will prosecute more individuals with an eye toward targeting all who may have had some role in antitrust violations.

Snyder's statement that the division will pursue those who "condoned" antitrust violations is particularly aggressive. It is also in keeping with the division's recent focus on senior level executives and their capacity

to "incentivize changes in corporate culture."¹⁶ For example, Snyder has stated in the past that compliance programs can only be effective if "senior management" actively supports them and "cultivate[s] a culture of compliance."¹⁷ Otherwise, the firm, according to Snyder, will have a mere "paper compliance program."¹⁸

One can glean from these remarks that the Antitrust Division intends to continue the trend of increasing enforcement for antitrust violations – by corporations and individuals. What may be new is the interest and pursuit of senior executives and officers at firms who have a more distant connection to the underlying offense.

Carrot and stick – fostering cooperation with authorities and deterring violations

The lion's share of Snyder's remarks discussed the Antitrust Division's leniency program and the opportunities for plea bargains and sentencing reductions through corporate and individual cooperation with prosecutors. This part of his remarks was focused on strengthening the carrot in the division's carrot-and-stick approach to enforcement. Indeed, Snyder made explicit at one point the connection between individual prosecutions and opportunities for leniency: "The Department's emphasis on individual accountability enhances the opportunity for offenders to mitigate their criminal penalties by cooperating with the Antitrust Division in its criminal investigations."¹⁹

⁹ See Rainer & Powers, *supra* note 1. Brent Snyder, Deputy Assistant Att'y General, Antitrust Div., Dep't of Justice, Individual Accountability for Antitrust Crimes at 5 (Feb. 19, 2016), <http://www.justice.gov/opa/file/826721/download>.

¹⁰ Brent Snyder, Deputy Assistant Att'y General, Antitrust Div., Dep't of Justice, Individual Accountability for Antitrust Crimes at 5 (Feb. 19, 2016), <http://www.justice.gov/opa/file/826721/download>.

¹¹ *Id.*

¹² *Id.* at 6.

¹³ *Id.* at 8.

¹⁴ *Id.* at 4.

¹⁵ *Id.*

¹⁶ *Id.* at 6.

¹⁷ Brent Snyder, Deputy Assistant Att'y General, Antitrust Div., Dep't of Justice, Compliance is a Culture, Not Just a Policy at 5 (September 9, 2014).

¹⁸ *Id.*

¹⁹ Brent Snyder, Deputy Assistant Att'y General, Antitrust Div., Dep't of Justice, Individual Accountability for Antitrust Crimes at 9 (Feb. 19, 2016), <http://www.justice.gov/opa/file/826721/download>.



Snyder repeatedly highlighted the strong incentives to cooperate early and actively. He stressed that the leniency program, which allows a corporation and qualifying individuals to receive immunity from prosecution, is only available to the first conspirator to reach the prosecutor's door. Importantly, if the division is already aware of the conspiracy, the protections available to individuals are less assured.²⁰

Snyder also discussed corporate plea bargains and sentencing credits at length, hammering on the point that rapid, extensive, and unmitigated cooperation is essential to receiving these benefits.²¹ He emphasized, however, that individuals are treated separately from corporations in plea negotiations and that "one way or another they will be held accountable."²²

Conclusion

DAAG Snyder's recent and prior remarks cascade and evidence the Antitrust Division's emerging philosophy of antitrust deterrence. This philosophy appears to be rooted

in the view that intense and punitive enforcement coupled with substantial opportunities for absolution from offenses through leniency will increase deterrence.

Along these lines, the division has in recent years pursued extraordinary, unprecedented fines against corporate defendants. It has also touted its long-standing leniency program and its willingness to negotiate plea agreements with cooperating defendants. Finally, it has in limited instances rewarded companies that undertake strong compliance programs after violations have been identified.²³ An increased emphasis on individual enforcement, particularly with respect to those senior executives who merely "condoned" violations, is now added to this list. Snyder noted the philosophical basis for this addition at one point, stating that "holding individuals accountable for corporate wrongdoing" will "promote deterrence and incentivize changes in corporate culture."²⁴

In light of these remarks and the enhanced enforcement environment, firms and the officers and executives who act on their behalf should

heed the call for increased, robust compliance efforts. Adoption of a strong compliance program with effective training, monitoring, and auditing components provides the opportunity to both avoid or mitigate these concerns by preventing violations from occurring, identifying them at the earliest stage possible, and allowing a firm to pursue mitigation when necessary.²⁵

For more information contact:



Carlos R. Rainer
Partner, Houston
carlos.rainer@nortonrosefulbright.com



Jim Powers
Associate, Houston
jim.powers@nortonrosefulbright.com

²⁰ Id. at 10.

²¹ Id. at 11-14.

²² Id. at 13.

²³ Rainer & Powers, *supra* note 1. [24] Id. at 6.

²⁴ Id. at 6.

²⁵ See generally Rainer & Powers, *supra* note 1.

Cartels criminalized in South Africa from May 1, 2016

For the first time in South Africa, directors and managers will face jail time for participation in a cartel. Amendments to the Competition Act which introduce personal criminal liability for cartel conduct came into effect from May 1, 2016.

The amendment introduces criminal liability for directors and individuals with “management authority” who are responsible for – or knowingly acquiesce in – cartel conduct. Cartel conduct includes the direct or indirect fixing of prices (including purchase prices) and trading conditions, market division, and collusive tendering among competitors or potential competitors. All members of the management chain (not only directors) are potentially at risk of prosecution.

An individual can only be charged if the company involved has already been found to have contravened the cartel provisions by the Competition Tribunal, or it has admitted a contravention in a formal consent order. The vast majority of cartel cases investigated by the Competition Commission in South Africa to date have been resolved through consent agreements. This development means that firms accused of engaging in cartel conduct will have to think more carefully before admitting to a contravention to settle a case for commercial reasons.

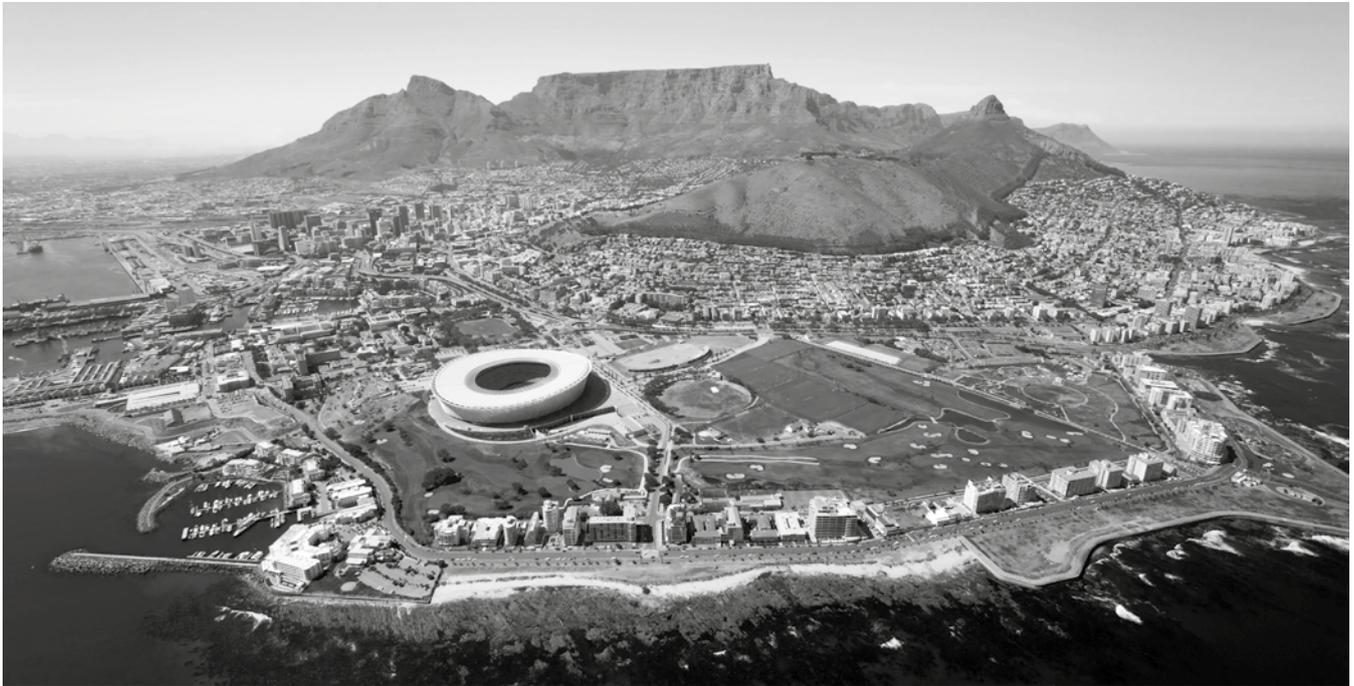
It is intended that individuals will be able to apply for leniency from the

competition authorities the same way that companies currently can. The current policy allows only the firm “first through the door” to be granted immunity from an administrative penalty if it can provide sufficient information to enable the Competition Commission to successfully prosecute other firms for cartel conduct. It is therefore not clear whether an individual can be granted leniency if the firm they work or worked for has not applied for leniency. Amendments are required to the Competition Commission’s Corporate Leniency Policy to cater for this development. Because enforcement of this offence will be handled by the Department of Public Prosecutions and the criminal courts, immunity from the competition authorities may not be enough to shield managers from prosecutions. The amendment does provide that the Competition Commission may make submissions to the National Prosecuting Authority that an individual should not be prosecuted when the Commission views that individual as “deserving of leniency”.

The Competition Commission is in the process of negotiating a memorandum of understanding with the National Prosecuting Authority to determine how the criminal prosecution of these offences will be handled, including the leniency regime. There is some suggestion that the Competition Commission will ramp up its internal capabilities and work collaboratively

with the National Prosecuting Authority on the criminal aspect of cartel investigations as is done in some other jurisdictions with both civil and criminal consequences for collusive conduct. Notably however, the competition authorities are subject to a strict confidentiality regime. In circumstances where individuals are interrogated by the Competition Commission as part of the investigation, nothing they say may be used against them in criminal proceedings. Accordingly the practical implementation of the criminal provisions and the scope of cooperation between the National Prosecuting Authority and the competition authorities will need to be carefully determined.

At the time that the amendments were signed, concerns were raised about whether the criminal provisions are in line with the South African Constitution, and particularly whether they uphold an accused’s right to be considered innocent until proven guilty. However, those parts of the amendments which caused the greatest concern have not been brought into effect (including those which state that a finding of the Tribunal of cartel conduct or a consent order constitutes proof for the purposes of the criminal prosecution that the company engaged in cartel conduct). The amendments preventing companies from paying fines or legal fees of their Directors and employees criminally charged



also have not been brought into effect. However, the constitutionality of the criminal provisions may still be raised as a defence by anyone charged under the new law.

The criminal provisions will not have retrospective effect. It remains to be tested whether a cartel initiated before May 1, 2016 but with ongoing effects after that date could land its participants in jail. Anyone engaging in cartel conduct should desist immediately.

The Competition Act applies to any conduct having an economic effect in South Africa, which means that even if collusive arrangements are entered into offshore (if there is an effect in South Africa) foreign individuals who are present in South Africa could also face criminal prosecution.

What should companies and their directors do to protect themselves against these increased risks? Recommendations include

- Take advice on any conduct that may be cartel activity and stop any conduct that is.
- The implementation of a suitable competition law compliance programme.
- Development of robust monitoring and reporting procedures so as to establish an early warning system for leniency applications.
- A regular internal review of all agreements and practices of your business, particularly in the context of industry associations where staff interact with competitors.
- Take advice on any submissions to be made to the Competition Authorities, even in the context of a merger investigation.
- Roll-out of training providing guidance to any South African operations on how to react in the event of a dawn raid – search and

seizure proceedings are increasingly a favorite weapon in the Competition Commission's arsenal.

For more information contact:



Rosaline Lake
Director, Johannesburg
rosaline.lake@nortonrosefulbright.com



Lara Granville
Director, Johannesburg
lara.granville@nortonrosefulbright.com

Are cartel participants rogues?

In September of 2015, Sally Q. Yates, the Deputy Attorney General of the US Department of Justice, gave a speech announcing a “new policy” on individual liability in matters of corporate wrongdoing. It is not enough to pursue corporate entities in economic crime cases, she pointed out. Individuals must also be held liable, both civilly and criminally. This should be done as a matter of fairness—“Americans should never believe, even incorrectly, that one’s criminal activity will go unpunished simply because it was committed on behalf of a corporation”—but also for deterrence: “nothing discourages corporate criminal activity like the prospect of people going to prison.”

For antitrust lawyers, Quinn’s speech struck a familiar note. Prosecutors in the Antitrust Division have long emphasized the importance of holding individual price fixers criminally liable in addition to prosecuting their corporate employers. Jail time, they believe, is the best way to deter price fixing cartels. Indeed, over time the Antitrust Division has ratcheted up its effort to put price fixers from around the world in US jails to serve actual time (the average jail sentence now is about two years). In this effort the US stands virtually alone in the world. Most other jurisdictions rely on civil fines imposed on corporations, not on criminal prosecutions.

Placing more focus on the individual, though, raises some important questions. Who, exactly, are these individuals who engage in price fixing? And why do we think that jail time will deter them (it obviously doesn’t deter them all)?

The idea of rogues

Corporations sometimes have a ready answer to questions of participation and deterrence. Many argue that individuals who engage in cartel behavior are “rogues,” a term often used in two different ways. One is the dictionary sense of a “rascal or scoundrel,” one who “wanders apart from the herd” or varies “markedly from the standard.” The other is a low-level employee who participates in cartel behavior out of view of management. Deterring such people may require an understanding of the psychology of rogue behavior, but it is the rogue who is at fault, not the corporation. Indeed, it is this conclusion that makes “rogues” so attractive an explanation to corporate management.

The argument over rogues is a long-running one. In US law, though, the legal rule is clear: under the New York Central case, decided by the Supreme Court in 1909, if an employee is acting within the scope of his or her authority for the benefit of the principal, the organization can be held criminally

liable.¹ Even the greatest scoundrel, or the lowest-level employee, can bind the corporation criminally if the employee acts, at least in part, to advance the corporation’s interests.

The issue of rogues, though, extends beyond the legal rule for corporate criminal liability. Corporate compliance officers, anxious to put in place programs that will get employees to comply, might want to know whether they should be worrying about deviants and low-level minor employees. And prosecutors might be convinced to exercise prosecutorial discretion with regard to charging corporations if the criminal conduct was done by rogues, whatever the legal rule might be.

Do rogues exist?

The first question is whether rogues really exist. The conventional wisdom is to be skeptical of the rogue explanation. Brent Snyder, the current Deputy Assistant Attorney General in charge of criminal enforcement in the Antitrust Division, has likened the rogue to the mythical “Yeti.” Experienced defense counsel seem to share that view. One defense lawyer to whom I spoke could recall only one case in which an obscure employee managed to hide his participation in a cartel. Another defense lawyer, who

¹ *New York Central and Hudson River Railroad Co. v United States*, 212 US 481 (1909).



represents non-US employees in US criminal investigations, dismissed the idea that cartelists are deviants. In that lawyer's experience cartel participants are more likely to be normal business people who find themselves in a job where their predecessor had participated in a cartel and where they believe that their actions, like their predecessor's, advance their employer's interests.

Interestingly, there are not much hard data about those who, in fact, participate in cartels or what motivates them or whether these people might be rogues. In an initial effort to remedy this deficiency, I turned to US Justice Department Antitrust Division press releases issued between March 2014 and March 2016 that mentioned individuals.² Press releases provide

a different cut of information than indictments because they include case dispositions (pleas and sentences) as well as charges, meaning that they cover cartel participation that goes back over a more extended period (individuals who showed up twice were not double-counted). My goal was to get an initial impression of the characteristics of cartel participants and to see what observations might come from this rough-cut of data.

My first finding is the heterogeneity of the cartels and the participants. During this period ninety-eight individuals were mentioned. Of these, approximately half were involved in major international cartels (twenty-seven in auto parts, seven in Libor, seven in ocean shipping, five in cathode display tubes, one in marine hose) and half in relatively smaller domestic cartels (thirty-six in public home

foreclosure auctions, five in school bus transportation in Puerto Rico, three in heir location services, two in water treatment chemicals, one each in tax liens, hazardous waste, wall posters, oil and gas leases, and municipal bonds). The nationalities of the participants reflected this spread. Forty-eight appear to be US citizens (this includes five from Puerto Rico), thirty-nine appear to be Japanese nationals. There was far less representation from other countries (five from the UK, three from Germany, and one each from Australia, Canada, Italy, and Taiwan).

My second finding is the consistency of corporate position. Taking out the home foreclosure auctions, which appear to be the activity of non-corporate actors, not one person mentioned during this time period was in a low-level corporate position. Their described positions varied—

² US Justice Department press releases are available at <https://www.justice.gov/atr/press-releases>.

executive, general manager, group and department manager, high-level manager, director of sales and marketing—and thirteen of them were identified either as president, CEO, owner, or chairman. These are not line-level employees.

The finding of heterogeneity of cartel type and nationality should give pause to those who think that we could easily generalize about who joins cartels and why. This heterogeneity may indicate that compliance efforts in multinational corporations may need to pay more attention to varying national business cultures. It may be that the deterrent message of individual prosecutions is more difficult to transmit across countries than the Justice Department assumes.

The second finding gives some support to the argument that cartel participants are not likely to be rogues, in either sense. The employees mentioned in these press releases were high-level corporate actors, not the sort of people whose conduct is “markedly different from the standard” or who are operating in obscure low-level positions.

Nevertheless, the data also suggest that the rogue idea shouldn’t be dismissed completely. It may be that the most likely rogues are those who are at the top of the corporate structure and who operate in a way that seems to pay little attention to legality. For example, included within this group is at least one CEO of a major corporation (Aubrey McClendon of Chesapeake Energy) who was charged with rigging bids on oil and natural gas leases, conduct in which he had reportedly engaged before. Such corporate actors would present particular problems both for deterrence theory and compliance, although their corporations would be unlikely to escape prosecution unless they were in a position to cooperate in the CEO’s prosecution

(which presumably was the case for McClendon’s company, which apparently cooperated and has not been charged).

Should antitrust compliance efforts be directed at rogues?

Based both on conventional wisdom and these impressionistic data, I think that the search for rogues is not a useful one for a compliance effort in the antitrust area. There are not likely to be many true rogues participating in cartels and the ones that exist are unlikely to be deterred by a compliance program.

Economic theory gives better guidance for compliance. If corporate executives are just trying to help their companies, then it might be useful to pay particular attention in times when companies need particular help and the incentives to engage in cartel behavior might be particularly strong. Behavioral economists talk about the “endowment effect,” that is, the desire of people to keep what they have as opposed to getting something they don’t, even if both have equal value. This might indicate that compliance should be particularly strong when an industry faces downward pressure on prices, for example, during periods of excess capacity or a downturn in the economy.

Of course, social factors are not irrelevant. The broad heterogeneity in cartel behavior indicates that there are likely many different factors that influence individuals to participate in cartels. Industries changing from a highly regulated environment to a free-market environment may just continue in their former “way of life.” There may be more examples of new employees coming into a job and being taught by their predecessors than we might otherwise have thought (one such case turned up in this sample). And if we assume that different corporate

cultures can affect compliance, then we might need to pay attention to whether different business cultures in different countries might have similar effect. The desire to participate in cartel behavior may not be culture specific, but the willingness to participate in such behavior might be.

Conclusion

The focus on prosecuting the individuals who participate in cartel behavior reminds us that we don’t know enough about the identities of those individuals and why they engage in this behavior. An initial cut at the data on individual participation indicates that “roguishness” is not an adequate description of cartel participants, but that does not leave us with a good description. If prosecutors are really serious about going after individuals, and corporations are really serious about compliance, though, both will need to do a better job of understanding who participates in cartels so that they can use tools that will be appropriate for deterring them.

For more information contact:

Harry First
New York University School of Law
hf3@nyu.edu

Contacts

If you would like further information please contact:

Martin Coleman

**Global head of antitrust and competition
Head of antitrust and competition –
Brussels
London
Tel +44 20 7444 3347
martin.coleman@nortonrosefulbright.com**

Peter Scott

**Head of antitrust and competition –
London
London
Tel +44 20 7444 3834
peter.scott@nortonrosefulbright.com**

Marianne Wagener

**Head of antitrust and competition –
Africa
Johannesburg
Tel +27 11 685 8653
marianne.wagener@nortonrosefulbright.com**

Layne E. Kruse

**Head of antitrust and competition –
United States
Houston
Tel +1 713 651 5194
layne.kruse@nortonrosefulbright.com**

Kevin Ackhurst

**Head of antitrust and competition –
Canada
Toronto
Tel +1 416 216 3993
kevin.ackhurst@nortonrosefulbright.com**

Marc Waha

**Head of antitrust and competition – Asia
Hong Kong
Tel +852 3405 2508
marc.waha@nortonrosefulbright.com**

Nick McHugh

**Head of antitrust and competition –
Australia
Sydney
Tel +61 2 9330 8028
nick.mchugh@nortonrosefulbright.com**

Luis Ernesto Andueza

**Head of antitrust and competition –
South America
Caracas
Tel +58 212 276 0007
luis.andueza@nortonrosefulbright.com**

Marta Giner Asins

**Head of antitrust and competition –
France
Paris
Tel +33 1 56 59 52 72
marta.ginerasins@nortonrosefulbright.com**

Maxim Kleine

**Head of antitrust and competition –
Germany
Hamburg
Tel +49 40 970799 180
maxim.kleine@nortonrosefulbright.com**

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