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# William E. Kovacic

## An Antitrust Tribute *Liber Amicorum* - Volume II

Donald I. Baker, Jonathan B. Baker, Caron Beaton-Wells, Margaret Bloom, John DeQ. Briggs, George S. Cary, Andy C.M. Chen, Daniel A. Crane, Elaine Ewing, Eleanor M. Fox, Damien Geradin, Laurie-Anne Grelier, Omar Guerrero Rodríguez, Doris Hildebrand, Merit E. Janow, Joseph Kattan, Molly Kelley, Bruno Lasserre, Robert C. Marshall, Leslie M. Marx, Robert Ian McEwin, Andreas Mundt, Ali Nikpay, Maureen K. Ohlhausen, Julián Peña, Alan Ramírez Casazza, Patrick Rey, Simon Roberts, Jan M. Rybnicek, Jacques Steenbergen, John Terzaken, Thibaud Vergé, Florian Wagner-von Papp, Wouter P.J. Wils, Marc Winerman, Chris Wood, Joshua D. Wright.

# Editors' Note

Nicolas Charbit

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Following the success of William E. Kovacic *Liber Amicorum*—Volume I published in 2012, the Institute of Competition Law is proud to release the second volume of this book within the European tradition of *Liber Amicorum*.

In witnessing the constant growth of antitrust regimes around the world and in recognizing the significant role played by William Kovacic in favoring the antitrust dialogue at the international level, this Volume II pays tribute to Professor Kovacic's outstanding career offering a unique combination of theoretical insights and practical knowledge of competition and antitrust law issues worldwide.

In this Volume II, thirty-seven prominent authors signed twenty-seven contributions that tackle some of the most stimulating and current topics in competition policy and antitrust laws.

**PART I**, entitled “**THE INTERNATIONAL DIMENSION OF COMPETITION POLICY**,” includes twelve articles that offer a dynamic overview of international competition policy. Thus, **Jonathan Baker** reviews Kovacic's work on the design of antitrust enforcement institutions analyzing how antitrust norms exhibit continuity over the time; **Doris Hildebrand**, stemming from Kovacic's advocacy for convergence, discusses how the US/EU divide can be surpassed by superior norms; **Florian Wagner-von Papp** delineates a comparison between the US antitrust laws and EU competition law pointing out some thoughts on the importance of defining the relationship between antitrust law on the federal (or EU) level and antitrust laws on (Member) state level; **Jacques Steenbergen** offers some reflections on legitimacy, accountability and independence of competition authorities; **Maureen Ohlhausen** discusses the recommendations in the “FTC at 100 Report” for improving agency performance; **John Briggs** and **Donald Baker** suggest a critical revision of the US antitrust policy and administration to join the rest of the world; **Marc Winerman** steps into the past discussing the international issues arising when the FTC first opened its doors and even before; **Bruno Lasserre** highlights successes and challenges of the European Competition Network; **Wouter Wils** gives a retrospective

analysis of the EC Regulation 1/2013, after ten years since its enactment; **Ali Nikpay** tries to assess the OFT's performance by reference to the analytical framework set down by Kovacic on agency effectiveness; **Julián Peña** outlines the role of international cooperation in the development of competition law in Latin America; **Ian McEwin** delves into the existing connection between business, politics and competition law in Southeast Asia.

The fifteen articles of **PART II**, entitled “**COMPLEXITIES OF ANTITRUST RULES AROUND THE WORLD**”, guide readers through some of the intricacies in the application of antitrust rules in different countries around the world. In Part II, **John Terzaken** and **Molly Kelley** analyze the expanding role of behavioral remedies in cartel enforcements; **Damien Geradin** and **Laurie-Anne Grelier** offer some critical considerations on the EU Directive on Antitrust Damages Claims; **Omar Guerrero** and **Alan Ramírez** explore how effective criminal cartel provisions could be to deter cartel behavior; **Robert Marshall** and **Leslie Marx** discuss compliance with Section 1 of the Sherman Act from an economic perspective; **Caron Beaton Wells**, drawing on the Australian experience, tests effectiveness of a range of leniency policies; **Eleanor Fox** and **Merit Janow**, by examining the Vitamin C cartel case, set forth the main points at which trade and competition ought to meet; **Andy Chen** analyzes impacts and implications arising from the LCD cartel case for the Taiwanese competition policy; **Simon Roberts** reviews the approach of the South African Competition Commission to uncovering collusion in the construction sector and draws out some lessons for establishing new institutions; **Patrick Rey** and **Thibaud Vergé** outline vertical restraints treatment in the EU; **Andreas Mundt** conducts an insightful digression on some forms of vertical restraints vis-à-vis the rapid development of the Internet economy; **Daniel Crane** provides some analytical clarity on the legal rules governing predatory innovations claims; **Joseph Kattan** and **Chris Wood** explain the standard-essential patents and the related problem of hold-up; **Margaret Bloom** discusses convergence and cooperation in international merger control; **Joshua Wright** and **Jan Rybnicek** advocate for a more committed consideration of the evolution of out-of-market efficiencies in the US and around the world; **George Cary** and **Elaine Ewing** consider what can the US/EU experience in the merger context tell us about convergence with MOFCOM.

Volume II, with its 27 papers, takes readers around the world providing them with provoking reflections, insightful thoughts, and learning experiences on competition policy and antitrust laws. This is the same world that Bill Kovacic has traveled so much to share knowledge and favor dialogue among different players in the international antitrust arena.

The editors would like to give their sincere thanks to the thirty-seven authors for their hours of labor in dedication to the Volume II of this Liber Amicorum and to Anna Pavlik and Jessica Rebarber for their precious editorial assistance.

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# You're Fired! The Expanding Role of Behavioral Remedies in Cartel Enforcement

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## Abstract

The increasing frequency with which the Antitrust Division of the Department of Justice has sought the imposition of compliance monitors, coupled with its recent willingness to enter into deferred prosecution and non-prosecution agreements as means of resolving and modifying corporate behavior, are a clear sign that the Division is changing tact on its use of behavioral remedies in criminal antitrust cases. Where it was previously reluctant to interfere in corporate governance, the Division now appears eager to prevent antitrust violations at their source by assessing companies' controls. In this paper, we explore the evolution of and potential reasons for this seeming policy shift and reflect on what it may mean for individual antitrust offenders going forward. We foresee a harsher enforcement landscape ahead for individuals, with future defendants facing larger fines, longer prison sentences, and new behavioral sanctions, like potential disqualification.



## You're Fired! The Expanding Role of Behavioral Remedies in Cartel Enforcement

The Antitrust Division of the Department of Justice (the “Division”) has long espoused the view that significant fines and jail terms are the most appropriate punishment for individuals convicted of criminal antitrust violations. In recent years, it has successfully increased penalties against individual offenders. Indeed, the Division reports that the average prison sentence imposed from 2010 to 2013 was almost twenty-five months, more than three times the eight-month average of the 1990s.<sup>1</sup>

While the Division’s seemingly insatiable appetite for greater fines and jail terms continues unabated, recent events suggest a trend toward greater use of behavioral remedies to punish and deter criminal antitrust conduct. Evidence of this trend lies in the growing use of compliance monitors as a requirement of probation in criminal antitrust matters: a move that stands in stark contrast to the Division’s long-standing policy of abstaining from interfering in areas of corporate governance. It is similarly reflected in the Division’s recent willingness to entertain deferred prosecution and non-prosecution agreements as means of resolving and modifying corporate behavior: another significant policy shift for the Division.

In this paper, we explore the evolution of individual accountability and punishment in criminal antitrust prosecutions, and what the recent trend in the use of behavioral remedies may mean for individual defendants going forward. We see a future in which an antitrust offender will not only face the prospect of a lengthy jail sentence and staggering fine, but also a potential employment restriction.

# I. Setting the Course

The Division views individual accountability as the cornerstone of criminal enforcement, a view that is reflected in its recent enforcement record. It charged 63 individuals in fiscal year 2012 alone.<sup>2</sup> These individuals face the possibility of prison for up to ten years, and a fine of up to \$1 million or twice the pecuniary gain/loss to victims.<sup>3</sup>

While the fine levels for individuals may be severe, the Division views fines alone as insufficient to punish defendants and deter similar conduct. As a result, it has developed a firm policy of requesting jail sentences for all defendants.<sup>4</sup> This policy is based on the concern that fines might be reimbursed through bonuses, raises,<sup>5</sup> or indirectly

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1 Antitrust Div., U.S. Dep’t of Justice, 2013 Criminal Enforcement Update, *available at* <http://www.justice.gov/atr/public/criminal/264101.html>.

2 *Id.*

3 Sherman Antitrust Act, 15 U.S.C. § 1; Alternative Fines Act, 18 U.S.C. § 3571.

4 The Division believes that the credible threat of prison makes the US leniency Program more effective at destabilizing cartels than leniency programs in other jurisdictions. Gregory J. Werden, Senior Economic Counsel, Antitrust Div., Sanctioning Cartel Activity: Let the Punishment Fit the Crime (2009), *available at* <http://www.justice.gov/atr/public/articles/240611.htm>.

5 The possibility of reimbursement is supported by a recent survey, which found that individuals who paid a fine resumed employment with the same firm they worked for during the cartel. John M. Conner & Robert H. Lande, *Cartels as Rational Business Strategy: Crime Pays*, 34 CARDOZO L. REV. 427, 441-42 (2012).

through directors and officers insurance.<sup>6</sup> In the Division's view, imprisonment is a better deterrent for companies that may regard criminal fines as a cost of doing business, but are not likely to put a price tag on their executives' freedom.<sup>7</sup>

From an enforcement perspective, the lack of a credible threat of civil liability for individuals may be offset by the very real threat of prison sentences. This view is substantiated by the results of a recent survey of antitrust practitioners indicating that private actions are not a deterrent for individuals.<sup>8</sup> In the few cases in which an individual is named in a follow-on antitrust action, that individual is most likely indemnified by the corporate co-defendant.<sup>9</sup> And although it is also possible that an individual may face a derivative suit brought by shareholders of a corporation that was forced to pay a criminal fine,<sup>10</sup> for various reasons, derivative suits have a low likelihood of success.<sup>11</sup>

The importance of individual accountability to the enforcement of the antitrust laws is rooted in the history of the Sherman Antitrust Act. The original language of the Act made cartel offenses punishable by up to one year in prison, reflecting the surrounding political culture of the time, which emphasized individual accountability as a vital part

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- 6 Willis, D&O FAQ's at 4, [http://www.willis.com/Documents/Services/executive%20risks/Willis\\_DandO\\_FAQ.pdf](http://www.willis.com/Documents/Services/executive%20risks/Willis_DandO_FAQ.pdf).
  - 7 Scott D. Hammond, Director of Criminal Enforcement, Antitrust Div., When Calculating the Costs and Benefits of Applying for Corporate Amnesty, How Do You Put a Price Tag on an Individual's Freedom? (Mar. 8, 2001), [available at http://www.justice.gov/atr/public/speeches/7647.htm](http://www.justice.gov/atr/public/speeches/7647.htm).
  - 8 D. Daniel Sokol, *Cartels, Corporate Compliance, and What Practitioners Really Think about Enforcement*, 78 ANTITRUST L.J. 201, 235 (2012).
  - 9 For example, individual executives who pleaded guilty in the coastal shipping case were named in follow-on private suits brought by the direct purchasers of these services. *In re: Cabotage*, No. 3:08-md-1960 (D.P.R. filed Apr. 22, 2008). The private suit against Horizon and former Senior Vice President and General Manager Gabriel Serra was resolved by a \$20 million settlement with Horizon. Erin Coe, *Horizon Puts Up \$20M to Exit Shipping Antitrust MDL*, LAW360, (Jun. 12, 2009), [available at http://www.law360.com/articles/106193](http://www.law360.com/articles/106193). Suits were similarly resolved against individuals, Peter Baci, Leonard Shapiro, and Alexander Chisolm. Abigail Rubenstein, *Crowley to Pay \$13.8m to Exit Shipping Antitrust MDL*, LAW360, (Jan. 20, 2010), [available at http://www.law360.com/articles/144516](http://www.law360.com/articles/144516); Abigail Rubenstein, *Sea Star Settles Shipping Antitrust Claims for \$18.5m*, LAW360, (Jul. 28, 2010), [available at http://www.law360.com/articles/183731/sea-star-settles-antitrust-claims-for-18-5m](http://www.law360.com/articles/183731/sea-star-settles-antitrust-claims-for-18-5m); Jacqueline Bell, *Judge Grants Preliminary OK to \$18.5m Sea Star Deal*, LAW360, (Aug. 25, 2010) [available at http://www.law360.com/articles/189497/judge-grants-preliminary-ok-to-18-5m-sea-star-deal](http://www.law360.com/articles/189497/judge-grants-preliminary-ok-to-18-5m-sea-star-deal)). While the settlement apparently requires Mr. Serra to provide cooperation, there is nothing to suggest that he will be personally liable for any portion of the payment.
  - 10 *Const. Laborers Pension Trust of Greater St. Louis v. Autoliv, Inc. et al.*, No. 1:13-cv-02546 (S.D.N.Y. 2013 filed Apr. 17, 2013). Case is still in the pleading phase; *Clayton v. Farish*, 73 N.Y.S. 2d 727 (N.Y. Sup. Ct. 1947) (surviving motion to dismiss). For example, after ADM pleaded guilty to criminal antitrust violations, its shareholders brought a derivatives suit against the directors of the corporation, which was apparently resolved by an \$8 million settlement. *Brief for the United States and the Sec. and Exch. Comm'n as Amicus Curiae Supporting Petitioners*, Cal. Pub. Employees' Ret. Sys. v. Felzen, 1998 WL 798872 (US) (No. 97-1732), [available at http://www.justice.gov/osg/briefs/1998/3mer/1ami/97-1732.ami.mer.html](http://www.justice.gov/osg/briefs/1998/3mer/1ami/97-1732.ami.mer.html).
  - 11 In derivatives suits, it is very difficult for shareholders to show antitrust injury. See e.g., *Robert v. Crowley*, 687 F.3d 314, 319 (7th Cir. 2012) (shareholders suffered no antitrust injury under the Clayton Act's prohibition on interlocking directorships.); *Seinfeld v. Austen*, 39 F.3d 761 (7th Cir. 1994) (Abbott Laboratories shareholders failed to allege antitrust injury) (abrogated on other grounds by *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.*, 545 U.S. 308 (2005)). Another hurdle is that shareholders face a "demand requirement" before they may bring an action. That is, shareholders may assert claims on a corporation's behalf only when the board of directors, which normally decides whether to bring lawsuits, has wrongfully rejected the shareholders' demand for permission to pursue litigation, or when such a demand would be futile because the board is incapable of impartially evaluating the demand. *North Miami Beach Gen. Employees' Ret. Fund v. Parkinson*, No. 10-6514, 2012 WL 4180566, at \*1 (N.D.Ill) (Sept. 19, 2012) (granting motion to dismiss antitrust-related derivative suit where plaintiff had failed to show the demand would be futile). *Orrock v. Appleton*, 213 P.3d 398 (Idaho 2009) (Micron Technology shareholders alleged failure to prevent known price-fixing, failure to plead that a demand would be futile).

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of combating antitrust crimes. President Woodrow Wilson captured this sentiment in a 1914 special message on trusts and monopolies, stating “[e]very act of business is done at the command or upon the initiative of some ascertainable person or group of persons. These should be held individually responsible and the punishment should fall upon them, not upon the business organization of which they make illegal use.”<sup>12</sup>

Although individual accountability was heralded as a key objective at the inception of the Sherman Act, it was not until several decades later that this objective began to be realized. The transition began during the housing crisis that followed the First World War, when the Department of Justice pursued four individuals who conspired to fix the prices of essential building materials.<sup>13</sup> Because this conduct directly harmed struggling communities,<sup>14</sup> the court viewed it as particularly “nefarious” and determined that the only effective way to punish and deter the crime would be “to invoke and bring to life those features of this great act which provide for imprisonment in all instances where the facts warrant it.”<sup>15</sup> Thus, the court went on to impose the first antitrust prison sentences for a combined total of ten months.<sup>16</sup>

Criminal cartel enforcement against individuals continued through the 1950s with intermittent success.<sup>17</sup> During this period, judges remained reluctant to impose severe penalties.<sup>18</sup> By 1955, Congress had decided to enhance the maximum fine for both individuals and corporations, but the maximum jail sentence of a year was unchanged.<sup>19</sup> Where prison sentences were imposed, terms fell far short of the one-year maximum. For example, in 1959, four individuals who fixed the price of hand tools were each sentenced to 90-day terms of incarceration.<sup>20</sup>

It was not until the Antitrust Penalties and Procedures Act of 1974 that Congress decided to treat antitrust conspiracies as a felony. The 1974 Act increased the maximum fine for individuals to \$100,000 and the maximum prison sentence to three years.<sup>21</sup> These changes encouraged judges to impose higher fines and longer prison sentences in the following five years than they had in the past.<sup>22</sup> And as time went on, higher individual penalties became increasingly palatable to the judiciary, especially after Congress increased the statutory maximum for individual fines from \$100,000 to \$250,000 in 1984<sup>23</sup> and then to \$350,000 in 1990.<sup>24</sup>

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12 51 Cong. Rec. 1963 (1914).

13 *United States v. Alexander & Reid Co. et al.*, 280 F.924 (S.D.N.Y. 1922).

14 *Id.* at 925.

15 *Id.* at 927.

16 Werden, *supra* note 4 at 2 n.4.

17 Mark A. Cohen, *The Role of Criminal Sanctions in Antitrust Enforcement*, 7 CONTEMP. ECON. POLICY 36 (Oct. 1989).

18 Werden, *supra* note 4 at 2.

19 Cohen, *supra* note 17 at 40.

20 *United States v. McDonough Co.*, 180 F.Supp. 511 (S.D. Ohio 1959).

21 Antitrust Procedures and Penalties Act (Tunney Act), Pub. L. No. 93-528, 88 Stat. 1706 (1974).

22 Cohen, *supra* note 17 at 41.

23 Criminal Fine Enforcement Act of 1984, Pub. L. No. 98-596, 98 Stat. 3134 (1984).

24 Antitrust Amendments Act of 1990, Pub. L. 101-588, 104 Stat. 2879 (1990).

The antitrust risks for executives were further enhanced when the Division introduced the Corporate Leniency Program, which provided immunity for self-reporting cartel violations thereby increasing the likelihood of the crime being detected.<sup>25</sup> In 1993, the Division revised the Program to make self-reporting easier and more transparent.<sup>26</sup> The impact that the modern Leniency Program has had on cartel detection and prosecution cannot be overstated. According to a 2011 report from the Government Accountability Office, between 2004 and 2010 the Division filed a total of 173 criminal cartel cases, 129 of which involved a successful leniency applicant.<sup>27</sup>

Notwithstanding numerous reforms, individuals were rarely sentenced to jail terms through the 1980s and 90s.<sup>28</sup> In 1986, commentators branded jail sentences an “inferior penalty” and observed that they have “little deterrent effect because of their infrequent use.”<sup>29</sup>

In the late 1990s, executive liability for antitrust offenses experienced a turning point with the high-profile prosecution of a global cartel led by Archer-Daniels Midland (“ADM”) in the lysine and citric acid industries. The case received an unprecedented level of media attention, largely due to the FBI’s use of an informant, ADM executive Mark Whitacre, who covertly recorded video tapes of cartel meetings. These tapes showed conspirators casually plotting to fix worldwide markets,<sup>30</sup> and exposed former ADM president James Randall’s now infamous expression: “Our competitors are our friends. Our customers are the enemy.”<sup>31</sup> The Division subsequently used these tapes to galvanize public support for harsher antitrust penalties.<sup>32</sup>

In 1999, the Division brought another landmark prosecution against F. Hoffman-La Roche and BASF executives for their participation in a sophisticated and long-running

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25 Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement, Antitrust Div., *The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades*, (Feb. 25, 2010) at 1, *available at* <http://www.justice.gov/atr/public/speeches/255515.htm>.

26 Three changes were (1) to make leniency automatic for eligible companies if no investigation was on-going; (2) to make leniency available even if an investigation was on-going, (3) to provide immunity for all officers, directors, and employees who come forward and cooperate. *Id.* at 3.

27 Government Accountability Office, *Report to Congressional Committees, Stakeholder Views on Impact of 2004 Antitrust Reform Are Mixed, but Support Whistle-blower Protection*, (July 2011), *available at* <http://www.gao.gov/new.items/d11619.pdf>.

28 Donald C. Klawiter & Jennifer M. Driscoll, *Sentencing Individuals in Antitrust Cases: The Proper Balance*, 23 *Antitrust* 75 (2006)(stating that “even with the new Guidelines, only 37 percent of antitrust defendants served jail time, for an average of eight months, in the 1990s”), *available at* <http://lawprofessors.typepad.com/files/spring09-klawiterc-1.pdf>.

29 Cohen, *supra* note 17 at 37.

30 *PBS Newshour: Archer Daniels Midland: Who's Next?* (PBS Television Broadcast Oct. 15, 1996), *available at* [http://www.pbs.org/newshour/bb/business/october96/adm\\_10-15.html](http://www.pbs.org/newshour/bb/business/october96/adm_10-15.html).

31 Greg Burns, *Has Success Spoiled ADM? 3 Price-fixing Convictions Add To Image Woes*, CHICAGO TRIBUNE, Sept. 18, 1998.

32 Beyond sharing the lysine tapes with the press, the DOJ also showed the covertly-recorded tapes to foreign competition authorities to spread the enforcement message abroad: “the lysine tapes made foreign governments question, if not rethink, how they investigated and treated cartel offenses.” Scott Hammond, Director of Criminal Enforcement, Antitrust Div., *From Hollywood to Hong Kong—Criminal Antitrust Enforcement Is Coming to a City Near You* (Nov. 9, 2001), *available at* <http://www.justice.gov/atr/public/speeches/9891.htm>.

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Vitamins cartel.<sup>33</sup> This was a pivotal and ground-breaking prosecution for the Division in two respects. First, the Division departed from its usual course of charging only the most culpable individual and, instead, prosecuted eleven executives.<sup>34</sup> Second, six foreign executives were incarcerated as a result of these prosecutions.<sup>35</sup> This marked the end of an era of “no-jail” deals for foreign defendants, which were previously necessary in order for the Division to access key foreign witnesses and documents.<sup>36</sup>

Also in the 1990s, the Division developed yet another tool to facilitate cooperation with its investigations in the form of a Memorandum of Understanding (“MOU”) with the Immigration and Naturalization Service (now part of the Department of Homeland Security).<sup>37</sup> Under this MOU, convicted foreign executives who provide “significant assistance” to an investigation are relieved of otherwise mandatory deportation.<sup>38</sup> The MOU provides foreign defendants with a significant incentive to cooperate because it allows a foreign national, post-conviction, to still pursue careers requiring travel to the US<sup>39</sup>

Another significant trend which gained momentum in the late 1990s was increased public awareness and support for individual accountability. As with the ADM case, the Vitamins prosecution had vast media appeal. The public was especially interested because the conspiracy increased prices for vitamins A, B2, B5, C, E, and Beta Carotene,<sup>40</sup> which average consumers directly purchase.<sup>41</sup> By 2001, the Division observed that “news coverage of antitrust crimes ha[d] become almost sensational.”<sup>42</sup>

By the turn of the millennium, the public’s mistrust of corporate executives was intensifying. Major scandals were uncovered at public companies Enron<sup>43</sup> and

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33 United States v. Kuno Sommer, No. 3:99-cr-201-R (N.D.Tex. May 20, 1999); Hammond, *supra* note 25 at 5.

34 Hammond, *supra* note 25 at 8; Belinda A. Barnett, Senior Counsel to the Deputy Assistant Attorney General for Criminal Enforcement of the Antitrust Div., Criminalization of Cartel Conduct—The Changing Landscape at 3 (Apr. 3, 2009), available at <http://www.justice.gov/atr/public/speeches/247824.htm>.

35 Press Release, Antitrust Div., U.S. Dep’t of Justice, Four Foreign Executives of Leading European Vitamin Firms Agree to Plead Guilty to Participating in International Vitamin Cartel (Apr. 6, 2000), available at [http://www.justice.gov/atr/public/press\\_releases/2000/4494.pdf](http://www.justice.gov/atr/public/press_releases/2000/4494.pdf) (listing 6 executives who have pleaded guilty).

36 Hammond, *supra* note 25 at 6.

37 Barnett, *supra* note 34 at 3.

38 *Id.*

39 A defendant who chooses not to face charges in the US has the option of remaining a fugitive, but runs a substantial risk of arrest on an INTERPOL watch should he/she ever travel outside of his/her home country. INTERPOL’s “red notice” is essentially a request to foreign authorities to provisionally arrest a wanted fugitive for potential extradition. See Interpol Notices, <http://www.interpol.int/INTERPOL-expertise/>.

40 Press Release, Antitrust Div., U.S. Dep’t of Justice, F. Hoffman-La Roche and BASF Agree to Pay Record Criminal Fines for Participating in International Vitamin Cartel [], (May 20, 1999) available at [http://www.justice.gov/atr/public/press\\_releases/1999/2450.htm](http://www.justice.gov/atr/public/press_releases/1999/2450.htm).

41 Hammond, *supra* note 32 at 5.

42 *Id.*

43 See e.g., Kevin McCoy, *Ex-Enron CEO Skilling’s Resentenced to 14 Years*, USA TODAY, Jun. 21, 2013, available at <http://www.usatoday.com/story/money/business/2013/06/21/ex-enron-ceo-skilling-resentenced-to-14-years/2447223/>.

WorldCom,<sup>44</sup> and Congress responded by enhancing executive accountability for violations of the securities laws with Sarbanes-Oxley.<sup>45</sup> Two years later, Congress acted again to bring antitrust penalties more in line with other white collar criminal penalties with the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (“ACPERA”). ACPERA increased the maximum individual fine from \$350,000 to \$1 million, and raised the maximum prison sentence from three years to ten years.<sup>46</sup> The next year, the Division argued to the US Sentencing Commission that, in light of ACPERA, it should increase the base offense level and volume of commerce table for antitrust crimes. The Division cited the notable defendants and large volume of commerce involved in the lysine/citric acid and vitamins cartels to support this contention.<sup>47</sup>

The public’s appetite for white collar prosecutions resurged after the global financial crisis of 2008. Many viewed the corporate culture of the time as more prone to crime, greed and irresponsibility than in any other era.<sup>48</sup> The Division rode this wave of mistrust, doubling the previous incarceration rate for antitrust defendants from 2000-2009.<sup>49</sup> Indeed, enforcement statistics for the period 2010-2012 indicate that individuals are now going to jail more often and for longer terms.<sup>50</sup>

In the last decade, the movement towards individual accountability has also gained traction outside of the US<sup>51</sup> Today, most regimes provide for individual fines, and a growing number have the ability to impose jail sentences.<sup>52</sup> Most EU member states<sup>53</sup> now criminalize cartel offenses, as do Canada, Japan, Korea, Mexico, and Russia.<sup>54</sup> But while many regimes now provide for jail sentences for individuals, few have yet to impose them in practice.

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44 See e.g., Krysten Crawford, *Ebbers Gets 25 Years*, CNN MONEY, Sept. 23, 2005 available at [http://money.cnn.com/2005/07/13/news/newsmakers/ebbers\\_sentence](http://money.cnn.com/2005/07/13/news/newsmakers/ebbers_sentence).

45 U.S. Dep’t of Justice & Sec. and Exch. Comm’n, A Resource Guide to the US Foreign Corrupt Practices Act at 42 (2010) available at <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf>.

46 ACPERA, Pub. L. No. 108-237, tit. 11, 118 Stat. 661, 665 (2004).

47 Scott D. Hammond, Deputy Assistant Att’y Gen. for Criminal Enforcement, Antitrust Div., Testimony Before the U.S. Sentencing Comm’n at 3 (Apr. 12, 2005), available at <http://www.justice.gov/atr/public/testimony/208546.htm>.

48 Henry N. Pontell & William K. Black, *White-Collar Criminology and the Occupy Wall Street Movement*, 37 THE CRIMINOLOGIST 1 (The American Society of Criminology, Columbus, OH), Jan. 2012.

49 “During fiscal years 1990-99, 27 individuals with a cartel conviction were sentenced to prison terms of at least one year, but during fiscal years 2000-09, that number nearly doubled to 50.” Gregory J. Werden, et al., Antitrust Div., Recidivism Eliminated: Cartel Enforcement in the United States Since 1999 at 4, (Sept. 22, 2011), available at <http://www.justice.gov/atr/public/speeches/275388.pdf>.

50 2013 Criminal Enforcement Update, *supra* note 1.

51 Werden, *supra* note 4 at 5 (citing Organization for Economic Co-Operation and Development (OECD), Recommendation of Council Concerning Effective Action Against Hard Core Cartels, adopted Mar. 25, 1998).

52 Hon. Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Sanctions*, 6 COMPETITION POLICY INT’L 3 (Autumn 2010).

53 These Member States include Austria, the Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Ireland, Malta, Poland, Romania, Slovakia, Slovenia, and the UK. See *Cartel Regulation 2013*, GETTING THE DEAL THROUGH (Nov. 27, 2012).

54 ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS at 1033 (7th ed. 2012).

## You're Fired! The Expanding Role of Behavioral Remedies in Cartel Enforcement

Although antitrust prison sentences are at varying stages of development in different jurisdictions, increased criminalization of the antitrust laws around the world has raised the risk of detection and extradition<sup>55</sup> for individuals. A telling example of the advancements in international coordination of individual prosecutions is the Division's and UK Office of Fair Trade's ("OFT") pursuit of "The UK3." The UK3, three UK nationals, were prosecuted by both the US and UK for their participation in a price fixing and big rigging conspiracy targeting the market for marine hose products. Through unprecedented cooperation, the Division and OFT worked out an arrangement allowing the defendants to be deported and sentenced by an English court and then to receive time served against their agreed-upon US prison terms for every day of incarceration ordered in the UK.<sup>56</sup> The executives ultimately received prison sentences ranging from 30 to 36 months.<sup>57</sup>

At the risk of over-simplifying the current antitrust enforcement environment, it is fair to say that more eyes are watching for cartel offenses, more jurisdictions are eager to prosecute cartel offenders, and cartel offenders risk being punished more harshly than ever before.

## II. Shifting Winds

The evolution of the Division's pursuit and punishment of criminal antitrust offenders reveals a hyper-focus on encouraging compliance with the antitrust laws through ever-larger fines and longer jail terms. This singular focus on punitive measures has been accompanied by an express reluctance by the Division to utilize behavioral remedies as an alternative or additional method of encouraging deterrence. But the winds are shifting.

The reluctance to utilize behavioral remedies is rooted in the Division's long-standing practice of abstaining from matters of corporate governance. Time and again, the Division has declined to attempt to influence corporate behavior by, for example, opining on whether individual defendants should continue their employment after a conviction,<sup>58</sup> or by forcing a corporate defendant to develop more effective compliance

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55 Extradition is determined by the terms of the treaty between the two countries involved. Most bilateral treaties only allow for extradition when the defendant is charged with conduct that violates the laws of both countries. CHRISTINE A. VARNEY & JOHN F. TERZAKEN, *THE CARTELS AND LENIENCY REVIEW* 346-47 (Christine A. Varney ed., Law Business Research Ltd. 2013).

56 Plea Agreement at ¶¶10,16, *United States v. Bryan Allison*, No. 07-487-01 (S.D.Tex. Dec. 12, 2007); Plea Agreement at ¶¶10,16, *United States v. David Brammar*, No. 07-487-02 (S.D.Tex. Dec.12, 2007); Plea Agreement at ¶¶10,16, *United States v. Peter Whittle*, No. 7-487-03 (S.D.Tex. Dec. 12, 2007), available at <http://www.justice.gov/atr/cases/allison.htm>.

57 Werden, *supra* note 4 at 4.

58 Tefft Smith, Kirkland & Ellis, Comments for the Antitrust Modernization Commission Hearing on Criminal Antitrust Remedies (Nov. 3, 2005)(stating "In my experience, the Division appears indifferent as to what the companies do with even the carved-out individuals let alone the other executives who may have been identified as having been directly involved in the price-fixing. They need not be fired, disciplined or even re-assigned to non-sales and marketing-oriented jobs."), available at [http://govinfo.library.unt.edu/amc/commission\\_hearings/pdf/Smith\\_Statement.pdf](http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Smith_Statement.pdf).

processes.<sup>59</sup> Best summarizing the Division’s rationale for employing this “hands off” approach, former Deputy Assistant Attorney General Gary Spratling once explained that “if the board of directors and shareholders can’t figure out what the risks are of having a person with a criminal conviction at the head of their company, it seems out of DOJ’s sphere.”<sup>60</sup>

In stark contrast to past practice and policy, the Division has recently shown a willingness to utilize behavioral remedies to discipline corporate defendants. The most notable example of this shift is the Division’s approach to the sentencing of AU Optronics (“AUO”) for its involvement in a five-year conspiracy to fix the prices of LCD-TFT screens used in computers and televisions.<sup>61</sup> Following conviction of AUO at trial, the Division not only sought to punish AUO with one of the largest corporate fines ever, but also, recommended that the court impose an external compliance monitor on the company. Accepting the Division’s recommendation for the hybrid punishment, the court imposed both the lengthy fine and compliance monitor.

The AUO case marked the first time ever that the Division sought the imposition of a compliance monitor as a condition of probation for a criminal antitrust violation. The Division justified this break from past practice by acknowledging that a criminal fine, regardless of how large, was not enough to promote appropriate punishment and deterrence for what the Division characterized as an organization wrapped in a “culture of criminal collusion.”<sup>62</sup> Notably, the Division highlighted as a chief concern for imposing the compliance monitor that a criminal fine would not prevent AUO from continuing to employ “convicted price fixers and indicted fugitives” as leaders of the company after the trial.<sup>63</sup>

Since the AUO sentencing, the Division has sought and obtained the remedy of an external compliance monitor for Apple for its role in the scheme to manipulate the price of e-books.<sup>64</sup> Assistant Attorney General Bill Baer has also formally cautioned the business community to expect the trend of requesting external compliance monitors to continue: “Consistent with the Division’s willingness to request external monitors in the civil context, the Division will consider seeking conditions of criminal probation

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59 Gregory J. Werden, et al, *Antitrust Div., Deterrence and Detection of Cartels: Using All the Tools and Sanctions*, at 7 n.30 (Mar. 1, 2012), available at <http://www.justice.gov/atr/public/speeches/283738.pdf>.

60 Dan Levine, *Antitrust Convictions Don't Mean End of Job for Some Executives*, LAW.COM (April 12, 2010), available at [http://www.law.com/jsp/article.jsp?id=1202447903832&Antitrust\\_Convictions\\_Dont\\_Mean\\_End\\_of\\_Job\\_for\\_Some\\_Executives](http://www.law.com/jsp/article.jsp?id=1202447903832&Antitrust_Convictions_Dont_Mean_End_of_Job_for_Some_Executives).

61 Press Release, Antitrust Div., U.S. Dep’t of Justice, Taiwan-Based AU Optronics Corporation, Its Houston-Based Subsidiary and Former Top Executives Convicted for Role in LCD Price-Fixing Conspiracy (Mar. 13, 2012), available at [http://www.justice.gov/atr/public/press\\_releases/2012/281032.htm](http://www.justice.gov/atr/public/press_releases/2012/281032.htm).

62 Sentencing Memorandum for the Unites States of America at 2, *Unites States v. AU Optronics Corporation*, No. 9-00110, (N.D.Cal. Sept. 11, 2012), available at [http://www.justice.gov/atr/cases/f286900/286934\\_1.pdf](http://www.justice.gov/atr/cases/f286900/286934_1.pdf).

63 *Id.* at 52.

64 Press Release, Antitrust Div., U.S. Dep’t of Justice, Statement by Assistant Attorney General Bill Baer on Remedy to Address Apple’s Price Fixing of E-Books, (September 6, 2013), available at [http://www.justice.gov/atr/public/press\\_releases/2013/300512.htm](http://www.justice.gov/atr/public/press_releases/2013/300512.htm).



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that include independent monitors when faced with circumstances in which the Division is not persuaded that penalties alone will deter the unlawful conduct.”<sup>65</sup>

The move away from purely punitive measures is also evident in the Division’s recent departure from its policy of disfavoring non-prosecution and deferred-prosecution agreements for corporate defendants. Non-prosecution and deferred-prosecution agreements conflict with the Division’s view that effective deterrence requires a criminal sanction.<sup>66</sup> Accordingly, until recently, the Division was steadfast in upholding its policy against use of these types of agreements: a 2009 Government Accountability Office study reported only three instances of the Division’s use of such agreements in the thirteen years between 1993 and 2009.<sup>67</sup>

The Division broke with this tradition in 2011, when it entered into a non-prosecution agreement with defendant UBS for its involvement in a conspiracy to manipulate the price of municipal bonds.<sup>68</sup> Pursuant to the non-prosecution agreement with UBS, the company took on a number of behavioral obligations. For example, it is required to self-report any criminal violation or investigation, as well as any administrative proceeding or civil action related to anti-competitive activity.<sup>69</sup> The UBS non-prosecution agreement was one of many the Division later utilized to resolve corporate liability in the municipal bonds investigation.

The Division broke with tradition in yet another investigation in 2013, when it entered into a deferred prosecution agreement with the Royal Bank of Scotland for its role in an international conspiracy to manipulate LIBOR.<sup>70</sup> This was the Division’s first ever use of a deferred-prosecution agreement to resolve antitrust conduct. As part of the RBS deferred prosecution agreement, the Division required RBS not only to pay a \$50 million fine for its involvement in a conspiracy to manipulate LIBOR, but also to institute a compliance program tailored to preventing further benchmark manipulation.<sup>71</sup>

While the turn toward use of behavioral remedies has thus far been limited to resolutions with corporate defendants, it is likely only a matter of time before the Division expands its use of these remedies to cases against individual defendants. In particular, there is a high likelihood that the Division may soon seek to disqualify individuals

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65 Leah Nylen, *DOJ Will Continue to Seek Compliance Monitors to Police Company Conduct, Baer Says*, MLEX (Sept. 25, 2013).

66 Varney & Terzaken, *supra* note 55 at 349.

67 Government Accountability Office, *Corporate Crime: DOJ Has Taken Steps to Better Track Its Use of Deferred and Non-Prosecuting Agreements, but Should Evaluate Effectiveness*, December 2009, at 15 n. 20, *available at* <http://www.gao.gov/products/GAO-10-110>.

68 Letter from Christine Varney to Kenneth Gallo at ¶5, Re: In Re: UBS AG, (May 4, 2011), *available at* [http://www.justice.gov/atr/public/press\\_releases/2011/270720a.htm](http://www.justice.gov/atr/public/press_releases/2011/270720a.htm).

69 *Id.* at ¶6(b).

70 Deferred Prosecution Agreement, *United States v. Royal Bank of Scotland*, No. 3:13-cr-00074 (D.Conn. Apr. 6, 2013).

71 Press Release, Antitrust Div., U.S. Dep’t of Justice, *RBS Securities Japan Limited Agrees to Plead Guilty in Connection with Long-Running Manipulation of LIBOR Benchmark Interest Rates*, (Feb. 6, 2013), *available at* <http://www.justice.gov/opa/pr/2013/February/13-crm-161.html>.

from engaging in certain types of business,<sup>72</sup> either as a condition of probation<sup>73</sup> or supervised release.<sup>74</sup>

Consistent with its use of compliance monitors to modify corporate behavior, disqualification would provide the Division with a more direct way to remove individuals responsible for price-fixing from a position that could lead to repeat offenses or impede a corporation's development of a true compliance culture.<sup>75</sup> Some have argued that disqualification could also achieve a deterrent effect similar to prison sentences, but without the societal cost of housing inmates.<sup>76</sup> It has also been suggested that disqualification could be used to punish negligent compliance professionals who fail to detect the cartel violation.<sup>77</sup>

That disqualification is already in use by other antitrust enforcement agencies further increases the likelihood that the Division may explore its use as well. The Federal Trade Commission has fashioned similar remedies in consent decrees, barring individuals from doing certain types of business.<sup>78</sup> Additionally, several of the Division's counterparts abroad have the ability to disqualify individuals, including antitrust authorities in Australia,<sup>79</sup> Ireland,<sup>80</sup> Korea,<sup>81</sup> and the UK.<sup>82</sup> In fact, an OFT survey found that disqualification ranked second behind criminal sanctions as a key motivation for antitrust compliance.<sup>83</sup> The report further found that many thought that a greater use of this sanction would improve deterrence.<sup>84</sup> Given these findings, it is unsurprising that the OFT has been active in utilizing this tool, including most recently

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72 Ginsburg & Wright, *supra* note 52 at 22 (finding that there is no statutory or constitutional impediment to the Division seeking this remedy immediately).

73 18 U.S.C. §3563; *See also*, Martin F. McDermott, "Occupational Disqualification of Corporate Executives: An Innovative Condition of Probation", 73 J. CRIM. L. & CRIMINOLOGY 604, 628 (1982)(proposing disqualification as a condition of probation).

74 18 U.S.C. §3583; *See also*, Werden, *supra* note 59 at 7 n.30 (stating that "under U.S. law, a sentencing court could prohibit an individual "from engaging in a specified occupation, business, or profession," after service of a prison sentence, as a condition of supervised release").

75 *See* Ginsburg & Wright, *supra* note 52 at 6.

76 *Id.* at 19.

77 *Id.*

78 *Id.* at 38 n.73 (citing *FTC v. Your Money Access LLC*, No. 7-cv-05147 (E.D.Pa. 2009)(debaring an individual from payment processing)).

79 *See* Cartel Regulation 2013, GETTING THE DEAL THROUGH (Nov. 27, 2012)(civil and administrative sanctions for individuals in Australia include disqualification).

80 *See* Cartel Regulation 2013, GETTING THE DEAL THROUGH (Nov. 27, 2012)(in Ireland, as of October 2011 "the courts can now disqualify a person from being a director of a company in summary criminal and in civil proceedings").

81 *See* Cartel Regulation 2013, GETTING THE DEAL THROUGH (Nov. 27, 2012)(in Korea, "disqualification as directors/officers, and disqualification for bidding for public or semi-public procurement" is a possible sanction).

82 Office of Fair Trading, Company Directors and Competition Law: OFT Guidance (Jun. 2011), *available at* [http://www.offt.gov.uk/shared\\_offt/ca-and-cartels/competition-awareness-compliance/offt1340.pdf](http://www.offt.gov.uk/shared_offt/ca-and-cartels/competition-awareness-compliance/offt1340.pdf).

83 Ginsburg & Wright, *supra* note 52 at 20; UK Office of Fair Trading, The Deterrent Effect of Competition Enforcement by the OFT at 10 n.3 (November 2007)(hereinafter "OFT Survey"), *available at* [http://www.offt.gov.uk/shared\\_offt/reports/Evaluating-OFTs-work/offt962.pdf](http://www.offt.gov.uk/shared_offt/reports/Evaluating-OFTs-work/offt962.pdf).

84 OFT Survey, *supra* note 84 at 86.

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in the marine hose investigation to disqualify convicted defendants from acting as company directors for between five and seven years.<sup>85</sup>

Moreover, it would seem that disqualification would not be uncharted territory for the Division. Employment-related consequences are already a part of the current enforcement reality. As convicted felons, individuals may already be denied certain privileges such as voting, holding public office, or practicing a licensed profession.<sup>86</sup> For foreign nationals, an antitrust conviction limits the ability to travel to and from the US<sup>87</sup> Also, individuals convicted of antitrust offenses related to government contracts, and even leniency applicants,<sup>88</sup> may be barred from participating in future government transactions.<sup>89</sup>

The Division's recent turn toward use of behavioral remedies may present a sobering prospect for individual defendants. Not only will the Division continue to be prepared to curtail defendants' personal wealth and liberty; it may be increasingly willing to limit their job prospects too. The days when convicted executives could walk out of prison and back into their old (or even new) jobs appear to be numbered.

### III. A New Direction?

It appears we are on the cusp of a significant policy shift by the Division toward an increased use of behavioral remedies in criminal antitrust cases. In part, this shift may reflect an acknowledgement by the Division that its strategy of seeking ever-increasing punitive penalties has not had the desired effect on general deterrence.<sup>90</sup> In fact, some have argued that cartel conduct remains under-deterred, and even that recidivism by antitrust offenders is "not infrequent."<sup>91</sup>

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85 Press Release, Office of Fair Trading, Three Imprisoned in First OFT Criminal Prosecution for Bid Rigging (Jun. 11, 2008), available at <http://www.of.gov.uk/news-and-updates/press/2008/72-08>.

86 ANTITRUST LAW DEVELOPMENTS, *supra* note 54 at 993.

87 For example, Belgian national, Peter Ghavami, who was recently convicted in the municipal bonds case, will be deported after serving his prison sentence. Reuters, *3 Former UBS Bankers Sentenced for Bid-Rigging*, THE NEW YORK TIMES (Jul. 24, 2013), available at [http://www.nytimes.com/2013/07/25/business/3-former-ubs-bankers-sentenced-for-bid-rigging.html?\\_r=0](http://www.nytimes.com/2013/07/25/business/3-former-ubs-bankers-sentenced-for-bid-rigging.html?_r=0).

88 This is because certain agencies debar individuals based on any evidence of wrongdoing, regardless of whether it resulted in a conviction. However, in these cases, the Division may inform the agency considering debarment of the defendants' efforts to cooperate. Varney & Terzaken, *supra* note 55 at 348-49; Scott Hammond, Antitrust Div., Deputy Assistant Attorney General, The US Model of Negotiated Plea Agreements: A Good Deal with Benefits for All at 17 (Oct. 17, 2006), available at <http://www.justice.gov/atr/public/speeches/219332.pdf>.

89 Varney & Terzaken, *supra* note 55 at 348-49; *see e.g.*, Brief for Appellee United States of America, United States v. Roland Pugh Constr., Inc., No. 10-15888 at 11 (11th Cir. Apr. 6, 2011) (citing witness testimony that post-conviction debarment from federal contracting led to this construction company's collapse), available at <http://www.justice.gov/atr/cases/t269500/269514.pdf>.

90 Conner & Lande, *supra* note 5 at 436-37.

91 Ginsburg & Wright, *supra* note 52 at 4. *See also*, John Connor, *Recidivism Revealed: Private International Cartels 1990-2009*, 6 COMPETITION POLICY INTERNATIONAL 101 (Autumn 2010). The Antitrust Division has challenged the notion that recidivism is an issue in the current enforcement environment. Werden, *et al.*, *supra* note 49 at 1.

Although there are no examples of individual recidivists,<sup>92</sup> a recent survey by Allen & Overly tends to support the notion that general deterrence remains an aspirational objective for criminal antitrust enforcement.<sup>93</sup> The survey, conducted in partnership with insurance broker Willis, asked 130 senior directors, non-executive directors, in-house counsel, risk experts, and compliance professionals (at public and private companies) for their views on the risk of personal liability.<sup>94</sup> Alarming, over one third of these respondents were unaware of the personal risks they face through antitrust enforcement. It follows that these respondents are among those who are under-deterred by current enforcement efforts.<sup>95</sup>

The Division's confidence in its strategy may also have been shaken over the last several years by the underwhelming support it has received from the judiciary in its quest to increase penalties against cartel defendants, particularly individual defendants.<sup>96</sup> Indeed, aggressive sentencing recommendations have frequently conflicted with the judiciary's willingness to impose such harsh penalties,<sup>97</sup> a reality that serves to undermine a deterrence strategy built solely on rising sentences.

The reason for the shift may also be more practical in nature, reflecting the Division's appreciation for the new enforcement reality of having to do more with less in an increasingly crowded enforcement environment. The pursuit of excessively high penalties can drive defendants away from the plea bargaining table toward trial, which may prove to be a troubling fact for a resource-constrained Division.<sup>98</sup> Further, with cartel defendants now often facing incarceration and fines in multiple jurisdictions, the Division has already begun to rethink the appropriateness of seeking excessive jail sentences and fines in circumstances where stiff penalties have or will be imposed on the same defendant by other authorities.<sup>99</sup>

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92 Werden, *et al.*, *supra* note 49 at 6.

93 Willis Group Holdings, Plc., *Directors, Officers Face Increased Scrutiny: Willis/Allen & Overly Survey*, INSURANCE JOURNAL, (Apr. 23, 2013), available at <http://www.insurancejournal.com/news/national/2013/04/23/289409.htm>.

94 *Id.*

95 *Id.*

96 See e.g., Nicholas Rummell, *Three Former UBS Employees Given Fines, Jail Terms in Muni-Bonds Case*, MLEX (Jul. 24, 2013)(reporting that the jail sentences imposed—ranging from 16 to 27 months—“were a fraction of the penalties originally sought by prosecutors.”); see also, Pamela MacLean & Karen Gullo, *AU Optronics Fined \$500 Million in US for Price-Fixing*, BLOOMBERG (Sept. 21, 2012)(reporting that Judge Illston believed the Division's \$1 billion fine recommendation was “excessive”), available at <http://www.bloomberg.com/news/2012-09-20/au-optronics-fined-500-million-in-u-s-for-price-fixing.html>; see also, Julie McEvoy & Ryan C. Thomas, *US Justice Department Obtains Record Jail Sentence for Antitrust Conspiracy: the Value of Cooperation and Judicial Discretion*, JONES DAY COMMENTARY (April 2009)(observing that by imposing a sentence against a coastal shipping defendant that was lower than the Division's recommendation, the court signaled to the government that “courts retain considerable discretion in meting out punishment – and not always in the manner the prosecutor desires”), available at <http://www.jonesday.com/files/Publication/ea368eb2-ab2c-4bd6-abbe-8e19c162af25/Presentation/PublicationAttachment/ee35981b-6586-4770-a809-228e2d767e2b/US%20Justice%20Department.pdf>.

97 Maurice E. Stucke, *Morality and Antitrust*, 2006 COLUMB. BUS. L. REV. 443,487 (2006)(finding that judges often reject optimal deterrence theory when sentencing).

98 Hammond, *supra* note 47 at 1-2.

99 John Terzaken & Pieter Huizing, *How Much Is Too Much? A Call for Global Principles to Guide the Punishment of International Cartels*, 27 ANTITRUST 53 (Spring 2013).

You're Fired!  
The Expanding Role of Behavioral Remedies in Cartel Enforcement

Whatever the reason for the Division's expanded use of behavioral remedies, defendants should expect the trend to continue. The pursuit of these remedies is a current reality for corporate defendants and all indications suggest it is only a matter of time until the Division begins incorporating them into punishments for individual defendants as well. But while these remedies no doubt serve as yet another arrow in the Division's quiver, their emergence in the conversation about what constitutes appropriate punishment and deterrence has a potential bright side for defendants. Prior discussions with the Division about resolving criminal antitrust violations were exclusively limited by policy and practice to the contours of a guilty plea and the size and severity of the resulting sentence. As this next enforcement era emerges, the Division's willingness to consider behavioral remedies may open the door for defendants to pursue more creative resolutions with the Division (or the courts where the Division is not persuaded), where jail sentences and fines are reduced, or forced to yield, in favor of more targeted, behavioral relief.

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# William E. Kovacic

## An Antitrust Tribute *Liber Amicorum* - Volume II

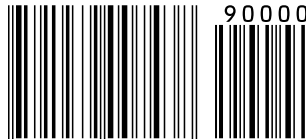
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