

Unclassified

English - Or. English

14 September 2020

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Cancels & replaces the same document of 15 May 2020

Working Party No. 3 on Co-operation and Enforcement

Criminalisation of Cartels and the Application of Imprisonment Penalties: Notes on the Challenges for Corporate and Individual Defendants

By Barbara Rosenberg and Marcos Exposto

9 June 2020

This paper by Barbara Rosenberg and Marcos Exposto was submitted by the authors as part of the background material in support of their presentation at Item 1 of the 131st meeting of Working Party 3 on Co-operation and Enforcement on 9 June 2020. This paper was not commissioned nor vetted by the OECD Secretariat; the opinions expressed and arguments employed herein are exclusively those of the author and do not necessarily reflect the official views of the Organisation or of the governments of its member countries.

More documents related to this discussion can be found at
<http://www.oecd.org/daf/competition/criminalisation-of-cartels-and-bid-rigging-conspiracies.htm>

Ms Sabine ZIGELSKI
[Email: Sabine.ZIGELSKI@oecd.org]

JT03465238

Criminalisation of Cartels and the Application of Imprisonment Penalties: Notes on the Challenges for Corporate and Individual Defendants

Barbara Rosenberg¹, Marcos Exposto²

1. The purpose of this note is, taking into account my experience and background as a competition lawyer, to address some of the challenges that corporate and individual defendants face when confronted with criminal charges. Naturally, such challenges vary according to the specific circumstances of the case (whether the concerns relate to a company or an individual, or whether there are both criminal and administrative charges at stake, for example), but the points mentioned below usually apply to all cases related to cartel investigations, including bid rigging ones.

2. In brief, the main challenge is setting out from the start the priorities involved: we need to be conscious of the most important asset to be protected in the case at hand. Often times, when defending companies, the main goal is to ensure the continuity of the business and to limit the negative consequences (fines, reputation losses, other disbursements and debarment, for example) to the extent possible. When defending an individual, if imprisonment is on the table, there is a significant shift in priorities, as the optimum balance in terms of the consequences of an investigation may change, and clients may be willing to pay higher fines, make broader admissions of guilt and make other types of compromises if this is at all helpful in avoiding jail time, taking into account the relevance of criminal punishment as a deterrent for cartel activity³. Naturally, this also has an impact on the work done for companies, as counsels for legal and natural persons need to work in tandem in order to reach an equilibrium that is acceptable to all defendants involved.

3. Another important takeaway is that the experience as an attorney allows us to conclude that the perspective or the possibility of imprisonment is a major element in the decision to apply for immunity in the context of a leniency agreement. The issue of the moral stigma, that is thoroughly addressed in OECD Secretariat's Background Paper⁴, is something that becomes evident in private practice: individual defendants are not always convinced that the violation is morally reprehensible and should be treated as a crime, and dealing with the possibility of imprisonment for something that would otherwise treat as a regular way of doing business is very challenging. As such, in a context where a defendant is possibly surprised by these consequences, the immunity from a possible prison sentence

¹ Barbara Rosenberg heads the Competition practice at Barbosa, Müssnich e Aragão Advogados (Brazil). She was the Director of the Antitrust Division within the Secretariat of Economic Law at the Ministry of Justice (2003-2005). She has a PhD in Economic-Financial Law from the Universidade de São Paulo – USP (2004) and an LL.M. from the University of California, at Berkeley (2001).

² Marcos Exposto is a partner of the Competition practice at Barbosa, Müssnich e Aragão Advogados (Brazil). He holds a graduate law degree from the Universidade de São Paulo – USP and an LL.M. from the New York University.

³ HAMMOND, Scott D., *Ten Strategies for Winning the Fight Against Hardcore Cartels*, (Department of Justice: Antitrust Division, Oct. 18, 2005, Paris Working Party No. 3 Prosecutors Program, available at <https://www.justice.gov/atr/file/517851/download>): “[...] individual accountability through the imposition of jail sentences is the single greatest deterrent [to cartel activity]”

⁴ OECD Directorate for Financial and Enterprise Affairs Competition Committee, Working Party No. 3 on Co-operation and Enforcement, *Criminalisation of cartels and bid rigging conspiracies: a focus on custodial sentences* (April 22, 2020)

becomes a major driver in the decision to apply for leniency and cooperate with investigations. In the absence of such a benefit, there might be situations in which, if only a possible fine were on the table, individuals could be more leaning towards taking the risk that the authority would detect this on its own and refrain from cooperating.

4. The comments below then pinpoint some specific situations that prove challenging to balance the interests of all stakeholders involved in jurisdictions with criminal enforcement:

1. How cartel investigations come about and the impact on criminal liability

5. As anti-cartel enforcement has been in place in most jurisdictions for at least a couple of decades, it is currently very uncommon for any type of conspiracy with competitors to be exposed upfront by its participants. While from the perspective of government agencies leniency is a very important tool in stimulating parties to come forward, admit to their participation in a cartel and cooperate with authorities in exchange for immunity, if we look at cartels prior to the decision of applying for leniency, detecting this type of behavior within a company is usually not easy, especially if executives are aware of the illegal nature of this type of conspiracy.

6. It is common for companies to learn about their involvement in a cartel under different circumstances, and the way this comes about has an impact on the main asset being protected, and consequently, on how counsel is expected to perform their duties.

7. One relatively common narrative for the discovery of a cartel is the context of due diligence on a target company in a merger transaction. When thoroughly looking into the business of a company in order to conduct valuation efforts and assess possible risks for negotiating representation and warranties, a potential purchaser might find out about the company's business practices, and this might unveil any involvement in anticompetitive practices. In these situations, criminal enforcement might not be a major driver for the decision to apply for leniency, since the company would presumably be trying to, above all, limit its exposure to major liability and salvage a potential transaction. Immunity from fines would therefore be a welcome consequence for both the company and its potential purchaser, making a good case to apply for leniency irrespective of the consequences for individuals.

8. If, however, violations are discovered in the context of routine internal investigations, or internal anonymous reports through compliance hot lines, while leniency is always a good option, a company might be willing to consider possible alternatives before moving forward with a leniency application. If the company has good reason to believe that the chances of detection by the government are low, it might take into account, amongst other factors, (i) the cost of conducting a thorough internal investigation (ii) the legal costs; (iii) the exposure associated with a cartel investigation from a business and commercial perspective, (iv) the consequences of an admission of guilt from the perspective of damages claims and (v) criminal exposure for individuals related to the company⁵, and ultimately decide that ceasing the involvement in the conspiracy and defending this at a later stage if and when the government finds out about it.

9. This alternative, however, may be far less attractive if there are individuals involved and the perspective of imprisonment is plausible. In a purely administrative setting where

⁵ BEATON-WELLS, C. Y., *Sanctions in Antitrust Cases* (Paper for OECD Global Forum on Competition), (November 21, 2016).

finances would be the major sanction, the company might ultimately decide that the fine is the only major difference, as the other costs (legal fees, damages, reputation) are present even if the company successfully applies for leniency. However, the risk that executives or employees might go to prison changes the incentives significantly, and criminal immunity plays a more important role. The same applies to situations where the initiative to apply for leniency and/or cooperate with a cartel investigation parts from an individual (a former disgruntled employee, for example, or an employee directly involved in a conspiracy who might not be aware of the illegal nature of such agreements). If immunity is available and individuals have a guarantee that they will not be sent to prison, they might lean towards cooperation even if this means that the company will face more significant liability from a financial standpoint.

10. Having set the scene, it is worth looking at some of the main challenges that corporate and individual defendants face when navigating in jurisdictions with criminal enforcement.

2. Misalignment of incentives between companies and individuals

11. For companies, if the sanction is either criminal (as in the US) or administrative (as in Australia, Brazil, Canada, Colombia, Japan, Korea and others), the effects are ultimately similar, as a conviction results in a fine. If, however, in jurisdictions with criminal liability for individuals, the perspective of imprisonment changes incentives significantly⁶. This poses a great challenge, to the extent that it is important to balance the different interests and incentives in reaching an outcome that is acceptable to all parties involved.

12. Also, this misalignment is one of the main reasons why in some cases it may not be advisable to have joint counsel for the company and the individual defendants. Even though some countries do not have rules forbidding joint representation of companies and individuals, it is not uncommon that defendants voluntarily retain separate counsel.

13. If the defendants are the first in line for leniency and full immunity is available, this usually makes the decision easier for individuals, as the perspective of being exempt from criminal sanctions altogether makes the decision to cooperate easier. From the perspective of the company, there are also major incentives to cooperate, since fines for cartel behavior are significant and the immunity resulting from leniency allows the company to significantly limit the disbursement resulting from the violation. As mentioned above, a company might not lean towards leniency if they have a reasonable expectation that the cartel will not be detected by the authority. However, my impression as a private practitioner, is that in most mature jurisdictions, fines are set at sufficiently high levels and the perspective of another participant of the cartel applying for leniency to make cooperation the better alternative. In this case, though, it will be key to coordinate this with possibly other authorities implicated by the narrative (in a bid rigging case, for instance), as detailed in section III, below.

⁶ In Brazil, for example, the current Competition Act (Law #12,529/2011) introduced an amendment to the criminal law changing the penalties for cartel behavior from “2 to 5 years of imprisonment **or** a fine” to “2 to 5 years of imprisonment **and** a fine” (our highlights). This ultimately meant that cartels were no longer eligible to the conditional suspension of the proceeding (a benefit which is comparable to a deferred prosecution agreement), because, by law, this type of benefit only applies to offences with a minimum penalty of 1 year of imprisonment, at most. Therefore, this adjustment was made to the law with the intention of making imprisonment more likely, thus stimulating defendants to cooperate.

14. On the other hand, if the defendants are not the first ones in line and criminal immunity is thus no longer available, this could result in a stronger divergence between the interests of companies and individuals. Again, one goes back to the issue of the most important asset to be protected and, from the perspective of individuals, freedom is usually a priority over any monetary consequences.

15. For the company, even if full immunity is no longer available, cooperating with the authorities and settling the case is often a good idea because this allows companies to reduce the disbursement with fines (as there are discounts for settlements) and avoid a lengthy proceeding defending the case. Naturally, these settlements also involve the admission of the wrongdoing, but the consequences for companies are ultimately only financial (an admission might have an immediate effect in terms of reputation or a confession could be used by potential plaintiffs in the context of damages claims), unless the conduct may also raise the risk of debarment by a different authority, case in which coordination between those authorities will be key. In any case, when it comes to individuals, settling the case raises the stakes significantly from a criminal perspective and opens an entirely new dimension of risk. The admission of involvement in a violation could be interpreted by criminal authorities as a confession, which makes the probability of imprisonment much more likely (and, as a result, individuals are often more hesitant to settle in this type of situation).

16. In any event, even though it might be theoretically preferable for an individual not to settle under these circumstances in the first place, if the company is moving forward with a settlement anyway and the government is being provided incriminating evidence that implicates the individual, these incentives might also change. Often times, it is better for the individual to cooperate with the criminal and/or administrative authorities and seek a more lenient treatment as a result of this cooperation (also on the imprisonment side) than it is to defend a case which contains a confession by the company to which the individual is related. However, for this to be the case, the authorities must work in a coordinated manner, to avoid that information provided to one is simply used by the other with no control.

3. Need to coordinate among different agencies

17. Investigations of competition law violations are not always consolidated within a single agency. Especially in countries with criminal enforcement, there is a dual (or bifurcated) system with both administrative and criminal liability. This ultimately means that defendants need to deal with more than one agency when defending or cooperating with the authorities in an investigation, which may in itself be a challenging endeavor depending on the level of interaction and cooperation between these agencies⁷.

18. In addition, when a conduct can be interpreted as potentially breaching different laws (as cartels can also have a corruption, fraud or embezzlement aspect), other agencies are also involved and counsel needs to weigh out the consequences associated with the disclosure of information and the impact for individuals.

⁷ “In civil law systems, for example, implementation usually will require new forms of cooperation between the civil competition agency and executive branch prosecutors. Effective collaboration between distinct public institutions with shared policy making responsibilities seldom emerge smoothly and spontaneously.” (KOVACIC, William, *Criminal Enforcement Norms in Competition Policy: Insights from US Experience* in BEATON-WELLS, C. and EZRACHI, A. (org.), *Criminalising Cartels: Critical Studies of an International Regulatory Movement*, Hart Publishing, 2011)

19. In this context, even though leniency may extend to some cartel-related criminal offences in some jurisdictions, the narrative may uncover other offences not directly related to the cartel with respect to which antitrust authorities may not have authorization to grant a more favorable treatment. Should these circumstances arise, this further deviates the individual's interests from the company's (since imprisonment becomes more likely if authorities are given access to evidence of additional violations). This ultimately plays against the individual's interest to cooperate and becomes a big challenge.

20. Also, if there are multiple agencies and instances where the investigated conduct might be of interest, counsel should be wary of the impact on those other areas. If the proceedings are independent, there might be decisions at separate times which might release certain information that is pertinent to other aspects of the investigation and which could ultimately have an impact on the cooperation with the authorities.

21. Think, for instance, about a bid rigging case that may be subject to investigation by the administrative antitrust, as well as by the criminal authority and by the administrative agency that handles anti-corruptions cases and that may ultimately impose a debarment on the company. Just as an example, the company may uncover and confess a bid rigging scheme to receive amnesty from the competition authority; however, if coordination does not work properly, the administrative agency that handles anti-corruption cases may open its own investigation and potentially even impose a debarment, which may be even more burdensome than the fine that would result from a competition conviction. And individuals would also be part of the equation when defining priorities.

22. As such, making sure that the main goal is defined is key, as well as trying to coordinate as much as possible the steps among the different agencies that may be potentially implicated.

4. Need to coordinate among different jurisdictions

23. In addition to the coordination between different authorities and regimes within a single jurisdiction, if the investigated conduct has taken place or has produced effects in more than one country, it is key to be mindful of the coordination across jurisdictions. Different countries have very different regimes, and when advising a company or an individual, it is key to understand to which extent information provided to authorities in one jurisdiction might set off risks (of either criminal or administrative nature, or even relating to the possibility of damage claims) in other jurisdictions.

24. As such, there are some concerns which often appear early on in this type of investigation. The first applies exclusively to individuals and is related to travel restrictions: if there is an ongoing investigation and there is reason to believe that some level of coordination between agencies in different jurisdictions is involved, defendants should be advised not to travel or at least to be mindful of travel plans, since international prison warrants can and often are used by agencies.

25. Also, when cooperating with authorities in an investigation, counsel needs to be careful about rules on privilege and confidentiality (towards either other defendants or the public in general). Laws in different countries allow for different levels of transparency and the disclosure of information in the context of cooperation with the authority could have an impact in other jurisdictions. Other competition agencies or potential plaintiffs in damages claims might become aware of this information and this could expose both companies and individuals to additional risk. For this reason, cooperation should ideally be simultaneously coordinated with all jurisdictions in which the conduct has had any effects.

26. Another point that derives from this is that counsel needs to be mindful of consistency across jurisdictions, since authorities cooperate actively and, as such, the narrative provided by a defendant (whether in the context of defending or cooperating with an investigation) needs to be consistent. Also, parties are advised to take care and make their narrative of the facts as jurisdiction-specific as possible, as this ultimately mitigates the risk that information provided in one jurisdiction could have any impact in other places where leniency might not be available in comparable terms.

5. Conclusion

27. While countries with criminal liability for cartel cases poses specific challenges for defendants, it is key to acknowledge that this can be an important tool in ensuring compliance with competition laws. The perspective of imprisonment adds a dimension of risk to individuals that is unfathomable for companies and which provides great incentive for decisionmakers in the business community to put in additional efforts towards compliance. There is, of course, merit to jurisdictions that are able to effectively enforce competition laws in a purely administrative setting without individual liability, but our perception from law practice shows that individual liability is a great incentive for business leaders to comply with the law.

28. Irrespective of these challenges, it is important that laws and policies be designed to reduce uncertainties and make sure criminal enforcement, if existent, works according to expectations (ensuring immunity or more favorable treatment to cooperating defendants and actually following through with imprisonment where applicable). This serves the dual purpose of making businesses and executives avoid illegal conduct in the first place and, should a violation arise, a transparent and predictable system is key in fostering cooperation through leniency applications and settlements. Coordination between authorities (whether in different jurisdictions or responsible for different aspects of the same conduct in administrative and criminal levels) is also fundamental to make sure that defendants feel safe cooperating with investigations and ultimately contributing to rid markets of anticompetitive practices.